Kansas Attorney General's Guidelines for Evaluating Proposed Governmental Actions to Identify Potential Takings of Private Property--1999 Update

The following United States Supreme Court, Kansas Supreme Court, and United States District Court for the District of Kansas cases, rendered after the completion of the Attorney General's 1998 update to the Takings Guidelines, contain private property takings analysis as well as analysis of some tangential issues. Pursuant to K.S.A. 77-704 of the Private Property Protection Act, this summary of decisions constitutes the 1999 update to the Attorney General's Guidelines. The original Guidelines may be found in Volume 14, Number 51 of the Kansas Register, published on December 15, 1995. The 1996 Update may be found in Volume 16, Number 1 of the Kansas Register, published January 2, 1997. The 1997 Update may be found in Volume16, Number 52 of the Kansas Register, published December 25, 1997. The 1998 Update is located in Volume 17, Number 53 of the Kansas Register, published December 31, 1998.

City of Monterey v. Del Monte Dunes at Monterey, Ltd., __ U.S. __, 119 S.Ct. 1624, L.Ed.2d __ (1998).

Property owner brought a § 1983 action against the city, alleging that the city's repeated rejections of owner's proposals for development of property had effected a regulatory taking. Trial was held in which taking claim was submitted to a jury.

In a unanimous decision, the United States Supreme Court held that the "rough proportionality" test of *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304, 320 (1994) (the degree of exaction demanded by a land use regulation must be roughly proportional to the impact of the use to which the property is being put), is limited in application to situations involving exactions, where land use decisions condition approval of development on dedication of property to a public use. This case involved a landowner's challenge to a denial of development approval, and thus the rough proportionality analysis was not applicable. *See also*, *Clajon Production Corp. v. Petera*, 70 F.3d 1566 (10th Cir. 1995). The Court also held, in a 5-4 decision, that a takings claim brought under 42 U.S.C. § 1983 is an "action at law" within the meaning of the Seventh Amendment right to jury trial, and that under the circumstances of this case, the issues of whether the landowner has been deprived of all economically viable use of his property and whether the city's decision to reject the development plan bore a reasonable relationship to its proffered justifications for the decision were issues properly before the jury. The Court's conclusions regarding the role of a jury in takings cases were specifically limited to § 1983 actions and the specific circumstances of this case. 119 S.Ct. at 1644.

Eberth v. Carlson, 266 Kan. 726, 971 P.2d 1182 (1999) and
McDonald's Corp., 266 Kan. 708, 971 P.2d 1189 (1999).

These cases serve to limit *Garrett v. City of Topeka*, 259 Kan. 896 (1996), to its specific facts. Thus, with regard to police power takings affecting traffic flow (as opposed to denying "right of access"), a compensable taking occurs only if the police power regulation is unreasonable; the economic impact analysis espoused by *Garrett* is not applicable in such cases.

Outdoor Systems, Inc. v. City of Merriam, __ F.2d __, 1999 WL 760656 (D.Kan. Aug. 30, 1999).

Plaintiff's takings claim dismissed as unripe because plaintiff failed to show it had unsuccessfully sought compensation under the inverse condemnation procedures available under state law, or that such procedures would be futile. "Even if the Court assumes that the City ordinance has rendered plaintiff's billboards worthless, no taking for constitutional purposes has occurred 'unless or until the State fails to provide an adequate post-deprivation remedy for the property loss.'" *Id*. at 15. *See also Froelich v. City of Newton*, 1999 WL 640042 (D.Kan. June 17, 1999).

Keys Youth Services, Inc. v. City of Olathe, 52 F.Supp.2d 1284 (D.Kan. 1999).

A city's denial of a nonprofit corporation's request for a special use permit to operate a group home on the corporation's property did not constitute a taking under the Fifth Amendment, absent a showing that denial of the permit lowered the value of the property or denied the corporation an economically viable use of its property.

Green v. City of Wichita, 47 F.Supp.2d 1273 (D.Kan. 1999).

Takings of private property for public use are allowed when a state is exercising its inherent police powers to promote health, morals or safety of the community. Issuance of citations for violations of the housing code and placarding lessors' properties did not result in a taking prohibited by the Fifth Amendment.