Kansas Attorney General's Guidelines for Evaluating Proposed Governmental Actions to Identify Potential Takings of Private Property–2001 Update

The following cases contain analysis of issues relating to government takings of privately owned real property. Pursuant to K.S.A. 77-704 of the Private Property Protection Act, this summary of decisions constitutes the 2001 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. Annual updates may be found in the Kansas Register at Volume 16, Number 1, published January 2, 1997, Volume16, Number 52, published December 25, 1997, Volume 17, Number 53, published December 31, Volume 18, Number 52, published December 30, 1999 and Volume 20, No. 1, published January 4, 2001.

Palazzolo v. State of Rhode Island, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001).

The issues in this case include whether a landowner's claim is ripe if he has not exhausted his state or local remedies. The plaintiff landowner sought permission from the state's Coastal Resources Management Council to utilize his land along the Atlantic seaboard in Westerly, Rhode Island. Upon denial of his requests, he sued for compensation in a takings action. The Rhode Island Supreme Court affirmed the lower court's decision that compensation was not due because the government's action did not deny the owner of all economic use of the property, and that he had no reasonable investment-backed expectations that were affected by the government's regulations because he acquired title to the property subsequent to enactment of those regulations. The Rhode Island Court also determined that the plaintiff's claim was not ripe because he had not applied for approval of less intrusive development plans.

While much of this case deals with the procedural issues of ripeness and whether acquiring title to the property subsequent to enactment of the pertinent regulations barred the claim, the Court offered a helpful summary of the takings analysis:

> "The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, prohibits the government from taking private property for public use without just compensation. The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use. Our cases establish that even a minimal 'permanent physical occupation of real property' requires compensation under the Clause. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), the Court recognized that there will be instances when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs. In Justice Holmes' well-known, if less than self-defining, formulation, 'while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking.' *Id*., at 415, 43 S.Ct. 158.

> "Since *Mahon*, we have given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking. First, we have observed, with certain qualifications, that a regulation which 'denies all economically beneficial or productive use of land' will require compensation under the Taking Clause. Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. These inquiries are informed by the purpose of the Takings Clause, which is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Palazzolo*, 121 S.Ct. at 2457-2458 (internal citations omitted).

The majority held: 1) The claims in this case were ripe because the state agency's denial of the landowners application for development approval was a final decision making clear the extent of development permitted, and there was no contention that the landowner failed to comply with reasonable state law exhaustion or pre-permit processes; 2) acquisition of title to the property after the enactment of the land use restrictions is not *ipso facto* fatal to a regulatory takings challenge of those restrictions (direct condemnation, or physical invasion of property without first filing suit, present different considerations, 121 S.Ct. at 2463); but that 3) all economically beneficial use of the property was not deprived because a portion of the property was eligible for improvement. The court remanded the case for further analysis of whether the land use restrictions interfere with reasonable investment-backed expectations.

Tahoe-Sierra Preservation Council, Inc., v. Tahoe Regional Planning Agency, No. 00-1167.

The United States Supreme Court has granted certiorari, limited to the following question: "Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?" 121 S.Ct. 2589, 150 L.Ed.2d 749 (2001).

Creason v. The Unified Government of Wyandotte County, Kansas, No. 85,469 (Nov. 2, 2001).

This case involves the method for determining just compensation for the taking of private real property.

M.S.W., Inc. v. Board of Zoning Appeals of Marion County, __ Kan.App.2d, __, 24 P.3d 175 (May 11, 2001).

The Kansas Court of Appeals held that issuance of a conditional use permit in lieu of creating a nonconforming use when enacting zoning regulations did not constitute an unconstitutional taking of property.