

## **Kansas Attorney General's Guidelines for Evaluating Proposed Governmental Actions to Identify Potential Takings of Private Property—2003 Update**

The following cases contain analysis of issues relating to government takings of privately owned property. Pursuant to K.S.A. 77-704 of the Private Property Protection Act, this summary of decisions constitutes the 2003 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, Volume 16, Number 52, published December 25, 1997, Volume 17, Number 53, published December 31, Volume 18, Number 52, published December 30, 1999, Volume 20, No. 1, published January 4, 2001, Volume 21, No. 1, published January 3, 2002 and Volume 21, No. 52, published December 26, 2002.

The Guidelines and annual updates may also be found on Attorney General Kline's website at <http://www.ksag.org/contents/opinions/main.htm#takings> .

***Brown et al. v. Legal Foundation of Washington***, 538 U.S. 216, 123 S.Ct. 1406, 155 L.Ed.2d 376 (March 26, 2003)

The United States Supreme Court a state supreme court's program for using interest earned on IOLTA accounts to pay for legal services for the needy. The Court held:

"A state law requiring that client funds that could not otherwise generate net earnings for the client be deposited in an IOLTA account is not a 'regulatory taking,' but a law requiring that the interest on those funds be transferred to a different owner for a legitimate public use could be a *per se* taking requiring the payment of 'just compensation' to the client." (Syllabus, citation omitted.)

The Court found that providing legal services to the needy under these circumstances met the "public use" requirement of the Fifth Amendment and then went on to address whether "just compensation" was required.

"The Court first addresses the type of taking that this case involves. The Court's jurisprudence concerning condemnations and physical takings involves the straightforward application of *per se* rules, while its regulatory takings jurisprudence is characterized by essentially ad hoc, factual inquiries designed to allow careful examination and weighing of all relevant circumstances. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322." (Syllabus.)

The Court determined that there was no compensable taking in this case because the

program called only for deposit of clients' funds in IOLTA accounts when they could generate no net income for the client. "Because 'just compensation' is measured by the owner's pecuniary loss—which is zero whenever the Washington law is obeyed—there has been no violation of the Just Compensation Clause." (Syllabus.)

***Gordon v. Norton***, 322 F.3d 1213 (10<sup>th</sup> Cir. 2003).

Takings claims that arise under the Endangered Species Act must be processed in accordance with the Tucker Act, which confers jurisdiction on the United States Court of Claims. The Court, therefore, held that it lacked substantive jurisdiction to hear the takings claims in this case.

***Pittsburg County Rural Water District No. 7 v. City of McAlester***, 346 F.3d 1260 (10<sup>th</sup> Cir. 2003).

The Court determined that application of 7 U.S.C. § 1926 under the circumstances did not constitute a taking under the Fifth Amendment to the United States Constitution.

***Microtronics, Inc. v. City of Iola***, 2003 WL 22149671 (D.Kan. Sept. 9, 2003).

Harm to plaintiffs held not to constitute a "taking" because no allegation that property was taken for public use. Cites *Brown v. Legal Foundation of Washington, supra*, for two conditions required under the Fifth Amendment: Public use; and just compensation.

***General Building Contractors, L.L.C. v. Board of Shawnee County Commissioners***, 275 Kan. 575, 66 P.3d 873 (2003).

The Court upheld the eminent domain taking of private property for industrial or economic development as a valid public purpose and within the home rule powers granted to counties.

***Esplanade Properties, L.L.C. v. City of Seattle***, 123 S.Ct. 2574, 156 L.Ed.2d 603 (June 16, 2003).

The United States Supreme Court denied certiorari in this appeal of the Ninth Circuit Court of Appeals ruling that the City's denial of a landowner's application to develop property did not rise to the level of an unconstitutional taking.