

**Kansas Attorney General Phill Kline's
2005 Update of
Guidelines for Evaluating Proposed Governmental Actions
to Identify Potential Takings of Private Property**

Pursuant to K.S.A. 77-704 of the Private Property Protection Act, the following summary of decisions and pending cases constitutes the 2005 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, Volume 21, No. 52, published December 26, 2002, Volume 23, No.1, published January 1, 2004 and Volume 24, No. 1, published January 6, 2005.

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

Kelo v. City of New London, Conn., 545 U.S. ___, 125 S.Ct. 2655, 162 L.Ed.2d 439, 73 USLW 4552 (U.S. Jun 23, 2005) (No. 04-108).

The United States Supreme Court held that the proposed disposition of petitioners' property for economic development under the circumstances of this case qualifies as a "public use" within the meaning of the Takings Clause, giving deference to legislative determinations that these takings would advance the public purpose of economically rejuvenating a community. However, the Court made clear that its decision was based on the facts of this case, where the development plan was comprehensive and thoroughly vetted, and there was no evidence of a motive to take property from one private person or entity solely for the purpose of giving it to or benefitting another private person or entity without there being an underlying "public purpose."

At the trial court, petitioners sought to enjoin the City of New London and the New London Development Corporation from exercising eminent domain powers to condemn petitioners' developed property (their homes and rental properties) "in furtherance of an economic development plan that was projected to create in excess of 1,000 jobs, to increase tax and other revenues to the city, and to revitalize an economically distressed city, including its downtown and waterfront areas." *Kelo v. New London*, 268 Conn. 1, 843 A.2d 500 (March 9, 2004). The trial court denied the petitioners' request for injunction on one parcel involved, finding that economic development is a valid public use under the Takings Clause, that these takings would sufficiently benefit the public and bear reasonable assurances of future public use and that the taking of the property was reasonably necessary to the development plan; it granted petitioners' request for injunction on another parcel finding that the condemnation of that parcel was not reasonably

necessary to accomplish the development plan. The Supreme Court of Connecticut affirmed the trial court's ruling on the first parcel, and reversed the decision on the second parcel, finding that there was no violation of the Takings Clause for any of the condemned property.

The United States Supreme Court upheld the Connecticut Supreme Court's decision, finding that although "the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private entity" or "under the mere pretext of a public purpose," there was no evidence in this case of such an illegitimate purpose. To the contrary, the Court found persuasive evidence of "public use" in these factors: The takings at issue here were to be executed pursuant to a carefully considered and publicly debated development plan that was not adopted to benefit a particular class of identifiable individuals; expected appreciable benefits included over 1,000 new jobs, increased tax and other revenues and revitalization of an economically distressed city, including public areas; and that the city was attempting to coordinate a variety of land uses, with the "big picture" in mind. The Court also placed great emphasis on the fact that the city was relying on a state statute that expressed a legislative determination that the taking of even developed land as part of an economic development project is a "public use" and in the "public interest."

"Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment." *Kelo*, 545 U.S. ____, at slip opinion page 13.

The Court declined to narrow or retract its prior rulings that land does not have to be put to a public use for a taking to be appropriate, instead embracing the broader interpretation of public use as "public purpose" and placing great deference in legislative determinations of what is a "public purpose." The Court emphasized that state legislatures are free to impose "public use" requirements that are more stringent than the Takings Clause. The Court also declined to adopt a bright-line rule that economic development never qualifies as a public use, and declined to apply a "reasonable certainty" test that the expected public benefits will actually accrue.

In her dissent, Justice O'Connor asserts that the rule in *Berman* and *Midkiff* eschewed by the Court in this decision is that the purpose for the condemnation must be because the property or its current use is somehow harmful to the public (*e.g.* blighted, creating an oligopoly); in Justice O'Connor's judgment, that is the public purpose that the Court has recognized in the past, not the economic incidental benefits to the public once the property is transferred to another private owner.

San Remo Hotel v. San Francisco, California, 545 U.S. ____, 125 S.Ct. 2491, 162 L.Ed.2d 315, 73 USLW 4507, (U.S. Jun 20, 2005) (No. 04-030).

After petitioners' state court takings challenge of a municipal fee for converting residential rooms to tourist rooms failed, petitioners advanced in federal court a series of federal takings claims that depended on issues identical to those previously resolved in the state court. The United States Supreme Court affirmed the Ninth Circuit Court of Appeals

decision, declined to create an exception to the full faith and credit statute, 28 U.S.C. § 1738, so as to guarantee a federal forum for litigants seeking to advance federal takings claims after "ripening" them in state court, and found issue preclusion even though petitioners had reserved the federal court takings claim for adjudication pursuant to *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411 (1964).

Lingle v. Chevron, 545 U.S. ___, 125 S.Ct. 2074, 161 L.Ed.2d 876, 73 USLW 4343 (U.S. May 23, 2005)
No. 04-163.

In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the United States Supreme Court states that a government regulation of private property constitutes a taking if the regulation "does not substantially advance a legitimate governmental interest." In the instant case, the Court unanimously disavowed that statement, holding that the "substantially advances" formula is not "an appropriate test for determining whether a regulation effects a Fifth Amendment taking."

The Hawaii Legislature, concerned about the effects of market concentration on retail gasoline prices, passed a statute limiting the rent oil companies could charge dealers leasing company-owned service stations. Respondent Chevron brought this suit seeking a declaration that the rent cap effected an unconstitutional taking of its property. Applying *Agins v. City of Tiburon*, the federal district court held that the rent cap was an uncompensated taking in violation of the Takings Clause because it did not substantially advance Hawaii's interest in controlling retail gas prices. The Ninth Circuit Court of Appeals affirmed.

In holding that the "substantially advances" formula is not an appropriate test for determining whether a regulation effects a Fifth Amendment taking, the Court reasoned that the Takings Clause is concerned with direct appropriation or physical invasion of private property and with regulations that are the functional equivalent. The "substantially advance" formula, by contrast, looks to the effectiveness of a regulation, not to magnitude or character of the burden imposed on the property owner. The Court therefore reversed lower court rulings that a Hawaii statute capping the rent an oil company can charge dealers who lease its service stations violates the Takings Clause because it does not substantially advance the state's interest in controlling retail gas prices.

The Court clarified that its decision in this case does not disturb any of its prior holdings, that it has never found a compensable taking based on a "substantially advances" inquiry. "Although *Nollan v. California Coastal Commission*, 483 U.S. 825, 834, and *Dolan v. City of Tigard*, 512 U.S. 374, 385, quoted *Agins'* language, the rule those decisions established is entirely distinct from the 'substantially advances' test we address today." 125 S.Ct. at 2086. They involved a special application of the "doctrine of unconstitutional conditions," which provides that the government may not require a person to give up the constitutional right to receive just compensation when property is taken for a public use in exchange for a discretionary benefit that has little or no relationship to the property. A plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed by alleging a "physical" taking, a *Lucas*-type total regulatory taking, a *Penn Central* taking, or a land-use exaction violating the *Nollan* and *Dolan* standards. Because Chevron argued only a "substantially advances" theory, it was

not entitled to summary judgment on its takings claim.

It appears that bills will be filed in the 2006 Legislative Session taking up the Court's invitation to restrict "public use" for eminent domain purposes further than the Court agreed to do so in *Kelo*, or changing the mechanics for exercising eminent domain when the purpose is economic development, *see, e.g.*, 2005 House Bill No. 2030.