

KANSAS ATTORNEY GENERAL'S TAKINGS GUIDELINES
EVALUATING PROPOSED GOVERNMENTAL ACTIONS AND IDENTIFYING
POTENTIAL TAKINGS OF PRIVATE PROPERTY

2008 Update

The information below sets forth issues that were examined in decisions decided by the United States Supreme Court, Tenth Circuit, and Kansas Supreme Court relating to government takings of privately owned real property.

Pursuant to K.S.A. 77-704 of the Private Property Protection Act, the following summary of decisions constitutes the 2008 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, Volume 24, No. 1, published January 6, 2005, Volume 24, No. 47, published November 24, 2005, Volume 25, No. 52, published December 28, 2006, Volume 27, No. 1, published January 3, 2008, and published December 18, 2008, Volume 27, No. 51.

Schuck v. Rural Telephone Service Co., Inc., 286 Kan. 19, 180 P.3d 571 (2008).

Landowner used the property at issue for crop-land and pasture. Rural Telephone and Landowner negotiated an easement whereby the telephone company could bury cables across Landowner's property. Rural Telephone installed cable in early 2003. In January 2006, Landowner discovered that the cable was not buried within the 40-foot-wide negotiated easement. Upon discovering the cable's location, the landowner contacted an attorney who notified Rural Telephone that it had placed the cable outside the easement.

Rural Telephone figured that approximately 2,430 feet of cable had been placed outside the negotiated easement. The parties entered into negotiations. The landowner requested \$40,000 in damages, and in return, would allow Rural Telephone to keep its cable in the current location and outside the negotiated easement.

After negotiations failed, Landowner filed an action for ejectment and trespass against the telephone company. Rural Telephone Company filed petition for eminent domain, seeking an additional, permanent easement that would allow it to keep the cable buried in the mistaken location. Landowner then filed a petition for a temporary and permanent injunction to prevent Telephone Company from proceeding with the eminent domain action.

Rural Telephone admitted that the cable was outside the easement but maintained that relocating the cable would interrupt service and degrade the system. Rural Telephone asserted that the taking was necessary in order for the telephone company to maintain, inspect, and repair its cable. Landowner maintained that cable's location negatively affected his property because it presented an obstacle to laying water lines or making other improvements to the property.

The district court concluded that Rural Telephone, as a Kansas telephone public utility, has the power of eminent domain under K.S.A. 17-618 and K.S.A. 17-1903. In this instance, the taking of the property for public use was necessary to carry out the lawful corporate purposes of Rural Telephone (i.e. providing telephone service, toll service, video service, wireless service, and internet service to the public of northwest Kansas).

The district court ruled that Landowner failed to prove that Rural Telephone acted fraudulently, in bad faith, or abused its discretion when it buried its cable in 2003. Thus, the district court denied Landowner's request for an injunction. The court concluded that the violation of the negotiated easement was the result of a good-faith mistake and opined that relocation of the cable would ultimately cause lower quality of services to the subscribers. Landowner appealed the district court's denial of his action seeking to enjoin the telephone company from proceeding with its eminent domain action.

The Kansas Supreme Court affirmed the district court but noted that its holding is limited to the facts. The Court indicated that it did not condone Rural Telephone's failure to conform with the easement.

Landowner also unsuccessfully argued that Rural Telephone had essentially filed an "impermissible inverse condemnation action." An inverse condemnation proceeding is initiated by the party having a property interest and is available when the government has taken private property for public use without the initiation of formal condemnation proceedings. The court held that Rural Telephone could not have initiated an inverse condemnation action because it was not the interest-holder in the property.

Isely v. City of Wichita, 38 Kan. App. 2d 1022, 174 P.3d 919 (2008).

Lessors granted a 99 year lease to Lessee development company. Unbeknownst to Lessors, Lessee granted a roadway and utility easement to the City of Wichita. Lessor filed an inverse condemnation action against the City. The district court ruled against Lessors on the basis that Lessors weren't entitled to possession of the property until 2058 and, therefore, there was no "taking." The Kansas Court of Appeals reversed the district court after concluding that City's physical occupation of Lessors' land constituted a compensable taking even though the Lessors were not in current possession. The City had argued that it didn't owe compensation because its easement was limited to the duration of the lease. The appellate court was not swayed - holding that the limited duration of the easement did not change the fact that the City's road occupied a portion of the Lessors' land by virtue of the permanent nature of the roadway.

Estate of Kirkpatrick v. City of Olathe, 39 Kan. App.2d 162, 178 P.3d 667 (2008).

City condemned Kirkpatrick's land to construct a traffic roundabout. After completion of construction, Kirkpatrick experienced water in his basement which he contended was caused by the roundabout construction. He [and later his estate] filed a Tort Claims action contending that the City "had damaged or taken his property" as a result of the construction. The district court, in analyzing the inverse condemnation claim, concluded that the City had "taken" Kirkpatrick's property by virtue of its failure to pay for the damages caused by the construction. The Kansas Court of Appeals reversed the district court - agreeing with the City's position that its actions did not constitute a compensable "taking."

The Court noted that attempts to harmonize Kansas law on inverse condemnation have not been easy because the statutory language provides that a taking includes "property damaged." However, case law appears to require that property rights be taken to the exclusion of the owner, not just that the property be damaged in some way.

In contrast to other jurisdictions, the definition of "taking," in Kansas, is narrow. Inverse condemnation will not lie unless the government has acquired possession as well as the right of possession and control to the exclusion of the former owner. Mere damage to an adjoining property is not a compensable taking unless the damage was necessary to the completion of the public use project.

In this case, the city did not need to divert water in order to complete its construction project. The court explained that the city excavated adjacent land and changed the grade during construction, but this did not mean that any property or property right was taken. The city may have also caused more water to invade Kirkpatrick's property than before the construction, but any such invasion or diversion of water was not necessary to the public improvement.

Finally, the court concluded that the Kirkpatrick estate did not allege or present any authority supporting an argument for a common law *property* right that was taken by the City. The right to quiet enjoyment is not a recognized property right but a personal right that can be harmed by a nuisance, or as a promise from a seller to a buyer that no other person has a superior title that could force the buyer from the purchased land.