Attorney General

2017 Update to Guidelines for Takings of Private Property

The Private Property Protection Act, K.S.A. 77-701 *et seq*., requires the Attorney General to compile and annually update guidelines to be used by state agencies in determining whether proposed government actions may constitute a taking of private property. These guidelines are to be based on cases decided by the United States Supreme Court and the Kansas Supreme Court.[1] Government action is defined as legislation, regulations or directives, or agency guidelines and procedures for the issuing of licenses or permits.[2] The Act expressly excludes other types of activity, such as the formal exercise of eminent domain.[3]

Under the criteria of the Act, there are two cases to include in the 2017 update to the Attorney General's Guidelines[4]:

Murr v. Wisconsin, 137 S. Ct. 1933 (2017). Petitioners owned two adjacent lots along the St. Croix River, which is known for its "picturesque grandeur." In response to federal law designating the river for protection, the Wisconsin Department of Natural Resources promulgated regulations limiting development along the river, including rules that prevent the use of lots as separate building sites unless they have at least one acre of land suitable for development, and another rule that merges adjacent lots under common ownership. When combined, the petitioners' lots only had 0.98 acres of buildable land. Petitioners sought a variance, which was denied.

The Wisconsin Court of Appeals ruled that the petitioners could not challenge the regulations only as to one of the lots that they tried to sell separately to fund development on the other lot, because it would not be reasonable under state law to ignore the merger provision defining the nature of their interest in the land. The Wisconsin Supreme Court declined review.

Writing for the United States Supreme Court, Justice Kennedy provided an overview of Takings Clause jurisprudence and synthesized a new test for determining the relevant parcel for a regulatory taking inquiry, requiring the consideration of: (1) the treatment of the land under state and local law; (2) the physical characteristics of the land; and (3) the prospective value of the regulated land, in order to "determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts." The Court affirmed the judgment of the Wisconsin Court of Appeals. Chief Justice Roberts, joined by Justices Thomas and Alito, filed a dissenting opinion in which he agreed with the outcome but argued that state law "should, in all but the most exceptional

[1] K.S.A. 77-704.
[2] K.S.A. 77-703(b)(1).
[3] K.S.A. 77-703(b)(2).
[4] The original guidelines are published at 14 Kan. Reg. 1690-92 (Dec. 21, 1995).

circumstances, determine the parcel at issue" because the "parcel as a whole" language from *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) should prevent property owners from "strategically pluck[ing] one strand from their bundle of property rights . . . and claim[ing] a complete taking based on that strand alone."

Creegan v. State, 305 Kan. 1156 (2017). The Kansas Department of Transportation (KDOT) acquired several parcels of real property in the Grande Oaks subdivision in Overland Park in 1999. The plots were made subject to a Declaration of Restrictions that stated the property within the subdivision should be occupied and used for single-family residence purposes only. Beginning in 2005, KDOT placed trailers on the lots and, in subsequent years, used the lots for construction-related activities before eventually building permanent bridges and roads on the lots to carry highway traffic. Plaintiffs, who owned other real property within the subdivision, filed an inverse condemnation lawsuit against KDOT.

In its motion for summary judgment, KDOT argued a violation of a restrictive covenant was not a compensable taking under Kansas law. The district court granted the motion, ruling that a "violation of the restrictive covenants is not a physical taking. Some physical taking or substantial inevitable damage resulting in a taking must be alleged and produced in evidence to support a claim for inverse condemnation. The 'taking' alleged in this case is not a compensable taking at all."

The Kansas Court of Appeals reversed. A majority of the panel ruled that restrictive covenants are real property interests and that KDOT's violation of the covenants damaged the interests sufficiently to require just compensation. Judge Atcheson concurred in the result, but would have treated restrictive covenants as a hybrid of real property interests and contract interests, whereby "[a] government entity takes the property interests embodied in a restrictive covenant to the extent the nonconforming use to which it puts restricted land creates or causes conditions that intrude upon privately owned land subject to that same restriction."

On appeal, the Kansas Supreme Court clarified the question before it not as whether "the right held by plaintiffs under the restrictive covenant is further identified as a real property interest or a contract right," since each right is property requiring just compensation if taken by the state, rejecting both an under- and an over-reading of the Court's treatment of the Eminent Domain Procedure Act (EDPA), K.S.A. 26-501 *et seq.*, in *Estate of Kirkpatrick v. City of Olathe*, 289 Kan. 554 (2009). The Court noted that "plaintiffs' interests in real property were destroyed" because "KDOT's nonconforming use of its subdivision parcels extinguished plaintiffs' restrictive covenant as to those parcels," highlighting the typical requirement for a taking that real property interests have been transferred to an entity having the power of eminent domain.