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ATTORNEY GENERAL OPINION NO. 88- 73

The Honorable Betty Jo Charlton  
State Representative, Forty-Sixth District  
1624 Indiana  
Lawrence, Kansas 66044

Re: Eminent Domain -- Procedure Act -- Compensation

Synopsis: 1988 House Bill No. 2704, places restraints on the "property rights" of individuals in order to promote and protect the well established public welfare interest of insuring that human remains are treated properly. In our opinion it clearly represents a valid exercise of the state's inherent police power. Therefore, any private individual claiming ownership of human skeletal remains would not be entitled to compensation simply because the state regulation requires relinquishment of the remains. However, if a claimant convinced the court that 1988 House Bill No. 2704 operated as an eminent domain taking of an identifiable property interest, rather than a valid exercise of police power, the court could require compensation for any legally held property interest taken by the regulation. Valuation of such a property interest would require consideration of factors set forth in K.S.A. 26-513(d) and evidence of (1) the fair market value and condition of the portion of property at the time of the taking, and (2) the loss of that value to the legal owner. Cited herein: K.S.A. 7-103; 12-707; 12-1401; 13-14c01; 14-1007; 15-1001; 15-1014; 17-1302; 19-1015; 19-2901; 19-3106; 21-3512; 21-4112; 21-4115; 21-4214; 22-3902; 26-513; 41-101; 58-2501; 65-901; 65-1701; 65-4127; 73-301; and 80-916.

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Dear Representative Charlton:

As Representative for the Forty-Sixth District, you request our opinion regarding certain legal issues connected with 1988 House Bill No. 2704, known as the Kansas unmarked human burial and skeletal remains protection act. You specifically ask:

"(I) whether the proposed bill will operate as a use of police power or eminent domain as it affects any existing privately operated public display of human skeletal remains, and (II) if the bill operates as use of legislative eminent domain condemnation, what types or amounts of compensation might be available to private citizens operating a public display of human skeletal remains."

I. No bright line test exists for determining whether a legislative action constitutes police power or eminent domain. Goldblatt v. Town of Hempstead, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed. 2d 130 (1962). Police power is defined generally as "an authority conferred by the American constitutional system in the Tenth Amendment, U.S. Const., upon the individual states . . . to place restraints on the personal freedom and property rights of persons for the protection of the public safety, health, and morals or the promotion of the public convenience and general prosperity. . . ." Blacks Law Dictionary 1041 (5th ed. 1979). See also Small v. Kemp, 240 Kan. 113 (1986). Eminent domain is "the power to take private property for public use. . . ." Blacks Law Dictionary 470 (5th ed. 1979). See also, Lone Star Industries, Inc. v. Secretary of Kansas Department of Transportation, 234 Kan. 121 (1983). The distinction between eminent domain and police power may be stated as follows:

"Eminent domain takes property because it is useful to the public, while the police power regulates the use of property or impairs rights in property because the free exercise of these rights is detrimental to public interest; and the police power, although it may take property, does not, as a general rule, appropriate it to another use, but

destroys the property, while by eminent domain property is taken from the owner and transferred to a public agency to be enjoyed by the latter as its own. Many statements of the distinction agree to the effect that in the exercise of eminent domain private property is taken for public use and the owner is invariably entitled to compensation, while the police power is usually exerted merely to regulate the use and enjoyment of property by the owner, or, if he is deprived of his property outright, it is not taken for public use, but rather destroyed in order to promote the general welfare, and in neither case is the owner entitled to any compensation for any injury which he may sustain, for the law considers that either the injury is *damnum absque injuria* or the owner is sufficiently compensated by sharing in the general benefits resulting from the exercise of the police power."

29A C.J.S. Eminent Domain § 6 (1965).

The state's "police power" is a flexible, broad, variable process of a government intent upon keeping up to date with all of the public and social needs; thus, what may have once been allowed by the law may become unlawful. New York State Thruway Authority v. Ashley Motor Court, Inc., 210 N.Y.S. 2d 193, 196, 12 A.D.2d 223 (1961). See also Abie State Bank v. Bryon, 282 U.S. 765, 51 S.Ct. 252, 75 L.Ed. 690 (1930). A state may exercise police power by totally prohibiting persons within its jurisdiction from engaging in occupations or businesses that are detrimental to the public welfare. 16B C.J.S. Constitutional Law, §857 (1985).

Kansas laws exercise state police power in many areas. See landlord tenant laws (K.S.A. 58-2501 et seq.); liquor laws (K.S.A. 41-101 et seq.); drug laws (e.g. K.S.A. 65-4127(a) and (b), K.S.A. 21-4214); pornography laws (K.S.A. 22-3902 et seq.); prostitution laws (K.S.A. 21-3512 et seq.); zoning laws (e.g. K.S.A. 19-2901 et seq. and 12-707 et seq.); licensing and standards pertaining to certain professions (e.g. attorneys, K.S.A. 7-103 et seq. and funeral directors, K.S.A. 65-1701 et seq.); and cemetery laws (K.S.A. 12-1401 et seq., 17-1302 et seq., 15-1014 et seq. and 73-301 et seq.). These statutes represent only a sampling of behaviors that Kansas regulates, restricts,

or prohibits pursuant to the state's police power. Many of these statutes deny possession of certain property or forbid certain business activities, just as the bill in question proposes to do. These statutes do not take private property for public use, nor must the state pay compensation to every citizen regulated or effected by these laws.

Case law in which state action was held not to rise to the level of an eminent domain taking requiring compensation includes: Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. \_\_\_\_\_, 108 S.Ct. \_\_\_\_\_, 94 L.Ed.2d 472 (1987), Penn. statute requiring coal mine operators to leave in certain amounts of coal; Griffeth v. Pence, 9 Kan. App. 253 (1900), assessments made to pay for drainage districts; Kimberlin v. City of Topeka, 238 Kan. 299 (1985), zoning laws restricting building heights and land use; Small v. Kemp, 240 Kan. 113 (1986), relocation of a frontage road resulting in less business; Busch v. City of Augusta, 9 Kan. App. 2d 119 (1983), demolition of partially burned out privately owned building because it represented a public safety hazard; and Kirksey v. Wichita, 103 Kan. 761 (1918), city ordinance providing that the city could give an exclusive contract to one garbage collector even though another collector therefore lost use of and business connected with the garbage. See also 29A C.J.S. Eminent Domain § 1 (1965). Though property may have been taken and destroyed or its use strictly regulated in these cases, the governmental action did not rise to the level of an eminent domain taking, and thus compensation was unavailable.

Constitutional provisions against taking private property for public use without just compensation impose no barrier to the proper exercise of police power. KCPL Co. v. State Corp. Comm., 238 Kan. 842, appeal dismissed 107 S.Ct. 41, 93 L.Ed.2d 4 (1986). Thus, when a regulation represents a valid exercise of police power, private individuals who are affected by the regulation are not entitled to compensation.

The Supreme Court allows police power regulation that adversely affects the entire value of legally owned private property. For example, in Mugler v. Kansas, supra, the Court approved a prohibition on the manufacture and sale of liquor that made the distiller's brewery of little value, but did not completely extinguish the value of the building. In Miller v. Schone, 276 U.S. 272, 72 L.Ed 568 (1927) the Court upheld a regulation that required an individual to cut down his cedar trees but allowed the owner to use the felled

trees. The Court held that these state actions constituted the use of police power for which no compensation was forthcoming even though a particular private use of legally owned property was restricted or denied.

In 1987 a divided Supreme Court upheld a judgment in favor of a Pennsylvania statute that required coal mine operators to leave a certain amount of coal in the ground for support. Keystone Bituminous Coal Co. Assoc. v. DeBenedictus, 480 U.S. \_\_\_\_\_, 108 S.Ct. \_\_\_\_\_, 94 L.Ed.2d 472 (1987). The Court stated that the statute did not effectuate a taking but was rather a proper exercise of state police power. Therefore, the Court required no compensation payment for the coal the owners could never remove and sell. The Court based its conclusion on the strong public purpose and character of the statute and characterized the owner's possession as a full "bundle of property rights." "The destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety." Id., 94 L.Ed.2d at 498. See also Andrus v. Allard, 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979); Armstrong v. U.S., 364 U.S. 40, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960); Penn. Central v. New York, 438 U.S. 104, 99 S.Ct. 226, 57 L.Ed.2d 631 (1978). A spirited dissent, written by Chief Justice Rehnquist, focused on previous case law in which imposition of societal burdens on individual landowners was allowed only when the regulation did not entirely destroy essential legal uses of private property. Keystone 94 L.Ed.2d at 508; See also Curtin v. Benson, 222 U.S. 78, 56 L.Ed. 102 (1911). In the dissent Justice Rehnquist stated that under the statute in question, the coal operator's interest in particular identifiable segment of property, the coal deposits, had been completely destroyed. Thus, the dissent thought that compensation should be required. Note that neither the dissent nor the majority questioned the ownership of the coal as such ownership is a legally recognized and permissible property interest. The ability to own human skeletal remains does not enjoy such clearly established recognition.

Kansas case law recognizes that "the subject of burial grounds in general is a legitimate subject of the state's police power." State ex rel. Stephan v. Lane, 228 Kan. 379, 388 (1980). See also 14 Am. Jur. 2d Cemeteries, § 6 (1964). The plethora of legislation concerning such matters evidences attempts by the Kansas legislature to regulate matters affecting the treatment and disposal of human remains. Existing Kansas laws that regulate, restrict and prohibit certain behaviors connected with graves and human

remains include: K.S.A. 19-1015 (disposition of the deceased); K.S.A. 65-901 (disposition of unclaimed dead bodies); K.S.A. 12-1401 et seq., 17-1302 et seq., 19-3106 et seq., 80-916 et seq., 13-14c01 et seq., 14-1007 et seq. and 15-1001 et seq. (cemetery regulations), and K.S.A. 21-4112 and 21-4115 (criminal penalties for desecrating remains or cemeteries). Common law universally and historically recognizes a duty and right to care for and dispose of human remains. See 22 Am. Jur. 2d Dead Bodies, § 6 (1965). Disturbance of a final resting place and removal of remains therefrom are behaviors subject to the control and direction of the law. 25A C.J.S. Dead Bodies, § 4 (1966).

House Bill No. 2704 attempts to extend state protections to all human skeletal remains including those resting in unmarked graves. The stated purpose of 1988 House Bill No. 2704 is to:

- "(1) Provide adequate protection for unmarked human burial sites and human remains located on all private or public lands within the state of Kansas;
- (2) prohibit disturbance of unmarked human burial sites; and
- (3) provide procedures for the proper care and protection of unmarked human burial sites and skeletal remains found in the state of Kansas."

Thus, if 1988 House Bill No. 2704 is enacted, all human skeletal remains will in some way be protected by the state, not just those remains fortunate enough to be buried under a marker or in a recognized cemetery.

Although widely divergent in scope and approach, other states currently use police power to legislate on how human skeletal remains should be treated: N.C. Gen. Stat. § 70-26 et seq. (1981) (exhibit or sale of human skeletal remains prohibited unless connected with biology or medical studies); Fla. Stat. § 872.05 (1976) (public display of human remains allowed only if no objection is made by identifiable descendants or tribe); Mass. Ann. Laws ch. 713 § 38 (1984) (human remains discovered on private property to be reinterred); Okla. Stat. tit. 21, § 1167, § 1168.1, 1987 Supp. C. 204 § 13 (1987) (a felony to "knowingly buy, sell or barter for profit human skeletal remains or associated

burial furniture previously buried within the state of Oklahoma"); and OR. Rev. Stat. §97.740 et seq. (1981) (persons prohibited from taking, displaying or possessing native Indian remains or artifacts, unless supervised by the Indian tribe.) See also Ga. Code Ann. § 305.A 7 (1976); N.Y. Indian Law § 12a (McKinney Supp. 1973-74); Alaska Stat. § 41.35.200(c) (1976); Delaware Code Ann. tit. 7, § 5301 (1975); and Hawaii Rev. Stat. § 6-12 (1975).

If enacted, House Bill No. 2704 would require relinquishment and subsequent reinterment of human skeletal remains taken from unmarked graves. The remains may be studied for a brief time, in order to determine their origin, if possible, to return the remains to any identifiable decedents. Reinterment is the ultimate goal. Individuals discovering human skeletal remains do not lose any real property interest; they still own and may use their land. Moreover, any business connected with a burial site may still be conducted. The only possessory "right" that is possibly affected or taken by this bill is the possession of the human skeletal remains.

In keeping with the language and considerations expressed by the dissent in Keystone, the remains may arguably represent an identifiable segment, and thus relinquishment is arguably compensable. Ownership of dead bodies, however, is not a universally recognized property interest. See 14 Am. Jur. 2d Cemeteries § 6 (1964). In fact, most legal systems recognize that the person having charge of a body cannot be considered the owner of it; he holds it only as a trust for the benefit of those who may have a family relationship or friendship have an interest in it. 22 Am. Jur. 2d Dead Bodies § 4 (1965). It may be argued that the antiquity of some human remains gives rise to an increased public interest in them, and thus a claim that ownership rights may accrue. The definition of dead body is "a corpse . . . the body of a human being, deprived of life." Black's Law Dictionary 358 (5th ed. 1979). In one criminal grave desecration case, a state court absolved the defendant of criminal liability for opening a grave and stated that "a cadaver is not an everlasting thing, and after it has undergone an undefined degree of decomposition, it ceases to be a dead body in the eyes of the law." State v. Glass, 273 N.E. 2d 893 Ohio, 1971. See also Town of Sudbury v. Department of Public Utilities, 218 N.E. 2d 415 (Mass. 1966). However, a recent decision by a Louisiana court of appeals held that because such things were not owned by a mere "discoverer", an amateur archeologist, who had uncovered human remains and burial artifacts, had no claim to either. Charrier v. Bell, No.

85-0867, State of Louisiana Court of Appeals First Circuit (Oct. 15, 1986). Thus, the questionable ability of individuals to own human remains, combined with the well-established public welfare purpose served by protecting all human remains and burial sites, makes it doubtful that a court would allow a claimant to recover compensation based upon a claim that a regulation amounted to an eminent domain taking of the human remains. Moreover, it is interesting to note that compensation to those who discover such remains in the future has not been contemplated. If discovery of human remains on private property gives the land owner or discoverer ownership rights and remedies as to the remains, compensation would be contemplated for all such future "takings," not just to those who have previously discovered such remains.

Any challenge to the act will most likely be an attempt to characterize the regulation as an eminent domain taking. Generally, three requirements must be met before eminent domain powers can be exercised to take private property: (1) the property taken must be devoted to a public use; (2) there must be a public need for such a use; and (3) there must be just compensation paid to the legal owner of the property thus taken. Mid America Pipe Line Co. v. Missouri Pacific Railroad Co., 298 F. Supp. 1112 (Kan. 1969). See also 27 Am. Jur. 2d Eminent Domain, § 1 (1966), and 29A C.J.S. Eminent Domain, § 1 (1965).

Particular governmental actions that have been judicially recognized as exercises of eminent domain taking requiring compensation include: urban renewal projects, State v. Kansas City, 179 Kan. 435 (1956); taking water owned by one citizen to be used by many citizens, Wallace v. Winfield, 98 Kan. 651 (1916); taking privately owned property to be used as public duck hunting grounds, Ottawa Hunting Assoc. v. State; 178 Kan. 460, appeal dismissed 352 U.S. 804 77 S.Ct. 31, 1 L.Ed. 2d 38 (1955); taking privately owned property for the establishment of public streets and highways, Rindge Co. v. Los Angeles County, Cal., 262 U.S. 700 (1922); taking land for public parks, U.S. ex rel. Tenn. Val. Authority v. Welch, N.C., 327 U.S. 546 (1945); taking or using private land for flood control and soil conservation purposes, U.S. v. 21,250 Acres of Land, More or Less, Situated in Catvaraugus County, 161 F. Supp. 376 (N.Y. 1957); and temporarily using cemetery land in order to make bore tests on the feasibility of a tunnel under the cemetery, Washington Metropolitan Area Transit Authority v. One Parcel of Land, 514 F.2d 1350 (1975). Note that these cases all represent takings of one particular or certain

single piece of private property for public use and enjoyment. They do not regulate or affect all of a similarly situated type of property in the state. Additionally, the governmental action in these cases resulted in the public using the confiscated property. House Bill No. 2704 seeks to reinter the human remains, not let the general public or a public agency use them. This type of protective regulation a fortiori represents a classic use of police power.

Eminent domain takes private property for public use. Police power exerts control over the use and enjoyment of private property. Even assuming arguendo that a private landowner can establish a claim of legal ownership of human bones discovered buried on his land, police power allows the state to regulate or even forbid certain uses of privately owned property in order to promote the general welfare of the public (e.g. once enacted, gun laws prohibiting private possession of certain weapons often require the forbidden guns to be turned over or destroyed). No one individual will be affected differently by the proposed law; all human remains buried in unmarked graves would henceforth be treated in the same manner without regard to who discovers them or where they are buried. The state will not appropriate the remains to be publicly used in a manner that a private individual is forbidden to engage in. Furthermore, the property owner may still use his land for every other legal purpose.

Human remains buried in a known cemetery or under a marker are already protected. See K.S.A. 21-4112 and 21-4115. In order to promote uniformity of respect given to all human remains, House Bill No. 2704 merely extends state regulations to provide similar protections to human remains resting in unmarked graves. Therefore, it is our opinion House Bill No. 2704 obviously represents a valid exercise of the state's inherent police power to place restraints on the behavior and property of persons in order to promote and protect the well established public welfare interest served by insuring that all human remains are treated properly. Thus, any private individual affected by such regulation because they currently possess human remains, or may find such remains in the future, would not be entitled to compensation.

II. When a state regulation operates as a use of legislative eminent domain, the valuation of the property "taken" or "used" depends upon many factors. See K.S.A. 26-513(d). If a private claimant convinces a court that there has been an eminent domain taking of a possessory interest, the state must generally pay the legal property owner the fair

market value of the property taken. United States v. 100 Acres of Land, 468 F. 2d 1261 (9th Cir. 1972), cert. denied, 414 U.S. 822, 94 S.Ct. 119, 38 L.Ed. 54, (1973); U.S. v. Osborne County, Kansas, 478 F. 2d 484 (10th Cir. 1973), appeal after remand, 527 F. 2d 1000 (10th Cir. 1976). See also Comment, 27 WLJ 82, "Constitutional Law: Fifth Amendment Just Compensation Clause Supports Damage Award for Temporary Regulatory Taking." (1987). The owner is entitled to the fair market value of his property at the time of taking. This value is normally ascertained from what a willing buyer would pay in cash to a willing seller. Almota Farmers Elevator & Warehouse Co. v. U.S., 409 U.S. 470, 474, 43 S.Ct. 791, 35 L.Ed.2d 1 (1973). In fixing market values, courts and juries may also consider the highest and best use to which the property may be put. United States v. Weyerhaeuser Co., 538 F. 2d 1363 (9th Cir. 1976). When there are no known sales of comparable property it is difficult to arrive at a true valuation.

The value of land taken by eminent domain is always a matter of opinion and may be proved by opinion evidence. Mai v. City of Garden City, 177 Kan. 179 (1954). A property owner may put before a court all evidence necessary to determine the value of property. Board of park Commissioners v. Fitch, 184 Kan. 508 (1959); Eisenring v. Kansas Turnpike Authority, 183 Kan. 774 (1958). As a general rule, proof must be limited to showing the present condition of the property and uses to which it is naturally adapted. 27 Am. Jur. 2d Eminent Domain, § 435 (1966). In appraising appropriated land, the fundamental question asks what the owner has lost, not what the taker has gained. St. Agnes Cemetery v. N.Y., 163 NYS 2d 655 (1957).

In the case of House Bill No. 2704, the state does not propose a taking of real property. The only physical taking would be of the skeletal remains. An individual is not required to give up anything else. Before compensation becomes available the party seeking it must establish that they have a legally held property interest or right that has been impaired or destroyed. Riddle v. State Highway Commission, 184 Kan. 603 (1959); see also Small v. Kemp, 240 Kan. 113 (1986). As previously discussed, some question exists as to the ability of an individual to own human remains. If no possessory interest in the skeletal remains can be established, compensation will not be required to be paid for those remains.

Some individuals may claim that the required relinquishment of the remains adversely affects the value of their burial site business and real property.

The Supreme Court has repeatedly recognized that the government has considerable latitude in regulating property rights in ways that may adversely affect the owners. Hodel v. Irving, 481 U.S. \_\_\_\_\_, 107 S.Ct. \_\_\_\_\_, 95 L.Ed.2d, 668, 678 (1987). Pursuant to enactment of House Bill No. 2704 an individual may claim a loss of an economic benefit or a diminished property value because of the loss of the remains. Lost economic business benefits would be those that would have otherwise vested in the future. Damage measurement rules state that in order for future profits to be recoverable there must be reasonable proof of their amount. Future profit cannot be awarded when it is speculative, contingent or uncertain. 25 C.J.S. Damages, § 90 (1966). If the proposed regulation is passed, private displays of human remains would be illegal in the future. If compensation for lost revenue was available every time a government prohibited certain business activities, it could give rise to suits by every individual who might have otherwise chosen to go into such professions as prostitution or pornography. Additionally, this bill does not prohibit the business in toto; merely the display of human remains, thus mitigating any loss of business. This possible adverse affect on business profits can be analogized to claims by bookstore owners that a loss of forbidden pornographic materials adversely affects their business. Loss of revenue due to police power regulation or action is not compensable. See Small v. Kemp, 240 Kan. 113 (1986).

Diminution in real property value caused by forfeiture of the human remains could be another impact for which compensation might be claimed. A claim that the real property value is adversely affected by requiring relinquishment of the human skeletal remains would require evidence of the fair market value of the land with and without the remains. Pursuant to the regulation in question, the individual property owner may continue all legal uses of his property, including any business connected with the fact that the property once contained human remains. Furthermore, the property without the remains could be used for other purposes, such as farming, which would cause the fair market value to actually increase. Language contained in many Supreme Court decisions, such as Musler, Keystone and Pennsylvania Central, also makes it questionable whether potential loss of business or potential diminution of property value is a sufficiently

distinguishable "identifiable segment" of the bundle of property rights. Thus, even assuming an individual could convince a court that this regulation constituted an eminent domain taking, valuation of interests arguably taken would be very difficult to establish and possibly too speculative or nondistinct to award.

In summary, the state has considerable latitude in regulating property rights in ways that adversely affect the owners. As stated in issue I, we believe that 1988 House Bill No. 2704 clearly operates as a valid exercise of police power, for which no compensation is necessary or available. However, if a claimant could convince the court that a regulation amounts to a taking, just compensation would be required. When an eminent domain taking has been established by the individual claiming compensation, the state must generally pay the owner the fair market value of any legally held property interest that has been taken. That value may be established by offering evidence as to factors set forth in K.S.A. 26-513(d) which can be summarized as proof of (1) the value and condition of the interest at the time of the taking and (2) the loss of that value to the owner.

Very truly yours,



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