

**PRIVATE PROPERTY OMBUDSMAN**

1998 GENERAL SESSION

STATE OF UTAH

**Sponsor: Evan L. Olsen**

AN ACT RELATING TO PRIVATE PROPERTY RIGHTS; PROVIDING THAT POLITICAL  
SUBDIVISIONS AND PRIVATE ENTITIES USING EMINENT DOMAIN ARE SUBJECT  
TO THE UTAH RELOCATION ASSISTANCE ACT; PROVIDING FOR ARBITRATION  
OF PRIVATE PROPERTY ISSUES; PROVIDING THAT THE PRIVATE PROPERTY  
OMBUDSMAN SHALL NOT BE COMPELLED TO TESTIFY IN COURT AND THAT HIS  
CONCLUSIONS ARE INADMISSABLE IN CERTAIN CIVIL ACTIONS; PROVIDING  
THAT APPEALS OF CONSTITUTIONAL TAKINGS ISSUES UNDER LOCAL  
ORDINANCES ARE OPTIONAL; AND MAKING TECHNICAL CORRECTIONS.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

**57-12-3**, as enacted by Chapter 24, Laws of Utah 1972

**63-34-13**, as enacted by Chapter 293, Laws of Utah 1997

**63-90a-4**, as enacted by Chapter 91, Laws of Utah 1994

**78-34-9**, as last amended by Chapter 220, Laws of Utah 1967

ENACTS:

**57-12-14**, Utah Code Annotated 1953

**78-34-21**, Utah Code Annotated 1953

*Be it enacted by the Legislature of the state of Utah:*

Section 1. Section **57-12-3** is amended to read:

**57-12-3. Definitions.**

As used in this [act] chapter:

(1) § [(a)] § "Agency" means a department, division, agency, commission, board, council,  
committee, authority, political subdivision, or other instrumentality of the state or of a political

1 subdivision of the state whether one or more.

2       § ~~[(b)]~~ **"Agency" includes any private entity acting or threatening to acquire private**  
 3 **property**

4 **under the power of eminent domain.** §

5       ~~[(5)]~~ (2) "Business" means any lawful activity, excepting a farm operation, conducted  
 6 primarily:

7       (a) for the purchase, sale, lease, or rental of personal or real property, and for the  
 8 manufacture, processing, or marketing of products, commodities, or any other personal property;

9       (b) for the sale of services to the public;

10       (c) by a nonprofit organization; or

11       (d) for assisting in the purchase, sale, resale, manufacture, processing, or marketing of  
 12 products, commodities, personal property, or services by the erection and maintenance of an  
 13 outdoor advertising display or displays, whether or not such display or displays are located on the  
 14 premises on which any of the above activities are conducted.

15       (3) "Displaced person" means any person who, after the effective date of this [act] chapter,  
 16 moves from real property, or who moves his personal property from real property, or moves or  
 17 discontinues his business or moves his dwelling as a result of the acquisition of the real property,  
 18 in whole or in part, or as a result of a written order of the acquiring agency to vacate real property  
 19 for a program of purchase undertaken by an agency or as a direct result of code enforcement  
 20 activities or a program of rehabilitation of buildings conducted pursuant to a federal or state  
 21 assisted program.

22       ~~[(6)]~~ (4) "Farm operation" means any activity conducted solely or primarily for the  
 23 production of one or more agricultural products or commodities, including timber, for sale or home  
 24 use, and customarily producing such products or commodities in sufficient quantity to be capable  
 25 of contributing materially to the operator's support.

26       ~~[(4)]~~ (5) "Nonprofit organization" means all corporations, societies, and associations  
 27 whose object is not pecuniary profit, but is to promote the general interest and welfare of the  
 28 members, whether temporal, social, or spiritual.

29       ~~[(2)]~~ (6) "Person" means any individual, partnership, corporation, or association.

30       Section 2. Section **57-12-14** is enacted to read:

31       **57-12-14. Dispute resolution.**

If the agency and the private property owner or displaced person disagree on any issue



1 arising out of this chapter, the private property owner may submit the dispute for arbitration  
 2 according to the procedures and requirements of Section 63-34-13.

3 Section 3. Section **63-34-13** is amended to read:

4 **63-34-13. Private property ombudsman.**

5 (1) As used in this section:

6 (a) "Constitutional taking" or "taking" means a governmental action that results in a taking  
 7 of private property so that compensation to the owner of the property is required by:

8 (i) the Fifth or Fourteenth Amendment of the Constitution of the United States; or

9 (ii) Utah Constitution Article I, Section 22.

10 (b) "Takings law" means the provisions of the federal and state constitutions, the case law  
 11 interpreting those provisions, and any relevant statutory provisions that require a governmental  
 12 unit to compensate a private property owner for a constitutional taking.

13 (2) (a) There is created a private property ombudsman in the Department of Natural  
 14 Resources.

15 (b) The executive director of the Department of Natural Resources shall hire a person with  
 16 background or expertise in takings law to fill the position.

17 (c) The person hired to fill the position is an exempt employee.

18 (3) The private property ombudsman shall:

19 (a) develop and maintain expertise in and understanding of takings law;

20 (b) assist state agencies and local governments in developing the guidelines required by  
 21 this chapter and Title 63, Chapter 90a, Constitutional Takings Issues[-];

22 (c) at the request of a state agency or local government, assist the state agency or local  
 23 government in analyzing actions with potential takings implications;

24 (d) advise private property owners who have a legitimate potential or actual takings claim  
 25 against a state or local government entity;

26 (e) identify state or local government actions that have potential takings implications and,  
 27 if appropriate, advise those state or local government entities about those implications;

28 (f) provide information to private citizens, civic groups, government entities, and other  
 29 interested parties about takings law and their rights and responsibilities under it; and

30 (g) if appropriate and requested to do so by [~~one of the parties, mediate~~] the private  
 31 property owner, § **MEDIATE OR** § conduct or arrange arbitration for disputes between private  
 31a property owners and

1 government entities that involve:

2 (i) takings issues law;

3 (ii) actions for eminent domain under Title 78, Chapter 34, Eminent Domain; or

4 (iii) disputes about relocation assistance under Title 57, Chapter 12, Relocation Assistance.

5 (4) (a) (i) In conducting or arranging for arbitration, the private property ombudsman shall  
6 follow the procedures and requirements of Title 78, Chapter 31a, Utah Arbitration Act.

7 (ii) In applying the Utah Arbitration Act the arbitrator and parties shall treat the matter as  
8 if:

9 (A) it were ordered to arbitration by a court; and

10 (B) the private property ombudsman or other arbitrator chosen as provided for in this  
11 section was appointed as arbitrator by the court.

12 (iii) For the purpose of arbitrations conducted under this section, if the dispute to be  
13 arbitrated is not already the subject of legal action, the district court having jurisdiction over the  
14 county where the private property involved in the dispute is located shall act as the court referred  
15 to in Title 78, Chapter 31a, Utah Arbitration Act.

15a **h (iv) THE AWARD FROM AN ARBITRATION CONDUCTED UNDER THIS CHAPTER MAY NOT BE**  
15b **VACATED UNDER THE PROVISIONS OF TITLE 78, CHAPTER § [36, SECTION] 31a, SUBSECTION § 14 (1) (e), UTAH**  
15c **ARBITRATION ACT, BECAUSE OF THE LACK OF AN ARBITRATION AGREEMENT BETWEEN THE**  
15d **PARTIES. h**

16 (b) The private property ombudsman shall decline to arbitrate or to appoint an arbitrator  
17 when, in the opinion of the private property ombudsman:

18 (i) the issues are not ripe for review;

19 (ii) assuming the alleged facts are true, no cause of action exists under United States or  
20 Utah law;

21 (iii) all issues raised are beyond the scope of the ombudsman's statutory duty to review;  
22 or

23 (iv) the arbitration is otherwise not appropriate.

24 (c) (i) The private property ombudsman shall appoint another person to arbitrate the  
25 dispute when:

26 (A) either party objects to the private property ombudsman serving as the arbitrator and

27 agrees to pay for the services of another arbitrator; or

28 (B) the private property ombudsman declines to arbitrate the dispute and one or both

29 parties are willing to pay for the services of another arbitrator.

30 (ii) In appointing a person other than himself to arbitrate a dispute, the private property

31 ombudsman shall appoint an arbitrator who is:

1 (A) agreeable to both parties; or

2 (B) agreeable to the party paying for the arbitrator and the private property ombudsman.

3 (iii) The private property ombudsman may, on his own initiative or upon agreement of  
4 both parties, appoint a panel of arbitrators to conduct the arbitration.

5 (d) In arbitrating a dispute, the arbitrator shall apply the relevant statutes, case law,  
6 regulations, and rules of Utah and the United States in conducting the arbitration and in  
7 determining the award.

8 (e) Arbitration by or through the private property ombudsman is not necessary before  
9 bringing legal action to adjudicate any claim.

10 (f) The lack of arbitration by or through the private property ombudsman does not  
11 constitute, and may not be interpreted as constituting, a failure to exhaust available administrative  
12 remedies or as a bar to bringing legal action.

13 (g) Arbitration under this section is not subject to Title 63, Chapter 46b, Administrative  
14 Procedures Act, nor Title 78, Chapter 31b, Alternative Dispute Resolution.

14a **h (h) WITHIN 30 DAYS AFTER THE ARBITRATOR ISSUES THE FINAL AWARD, ANY PARTY MAY**  
14b **SUBMIT THE AWARD OR ANY ISSUE UPON WHICH THE AWARD IS BASED TO THE DISTRICT COURT FOR**  
14c **DE NOVO REVIEW. h**

15 (5) The private property ombudsman may not be compelled to testify in a civil action filed  
16 with regard to the subject matter of any review or arbitration by the ombudsman.

17 (6) (a) Except as provided in Subsection (6)(b), evidence of a review by the private  
18 property ombudsman and his opinions, writings, findings, and determinations are not admissible  
19 as evidence in an action subsequently brought in court and dealing with the same dispute.

20 (b) Subsection (6)(a) does not apply to:

21 (i) actions brought under authority of Title 78, Chapter 6, Small Claims Court; h [or] h

22 (ii) a judicial confirmation or review of the arbitration itself as authorized in Title 78,  
23 Chapter 31a, the Utah Arbitration Act h ; OR

23a **(iii) ACTIONS FOR DE NOVO REVIEW OF AN ARBITRATION AWARD OR ISSUE BROUGHT UNDER**  
23b **THE AUTHORITY OF SUBSECTION (4)(h) h .**

24 [(4)] (7) The private property ombudsman may not represent private property owners, state  
25 agencies, or local governments in court or in adjudicative proceedings under Title 63, Chapter 46b,

26 Administrative Procedures Act.

27 Section 4. Section **63-90a-4** is amended to read:

28           **63-90a-4. Appeals of decisions.**

29           (1) Each political subdivision shall enact an ordinance that:

30           (a) establishes a procedure for review of actions that may have constitutional taking issues;

31    and

1 (b) meets the requirements of this section.

2 (2) (a) (i) Any owner of private property whose interest in the property is subject to a  
3 physical taking or exaction by a political subdivision may appeal the political subdivision's  
4 decision within 30 days after the decision is made.

5 ~~[(3)]~~ (ii) The legislative body of the political subdivision, or an individual or body  
6 designated by them, shall hear and approve or reject the appeal within 14 days after it is submitted.

7 ~~[(4)]~~ (iii) If the legislative body of the political subdivision fails to hear and decide the  
8 appeal within 14 days, the decision is presumed to be approved.

9 (b) The private property owner need not file the appeal authorized by this section before  
10 bringing an action in any court to adjudicate claims that are eligible for appeal.

11 (c) A property owner's failure to appeal the action of a political subdivision does not  
12 constitute, and may not be interpreted as constituting, a failure to exhaust available administrative  
13 remedies or as a bar to bringing legal action.

14 Section 5. Section **78-34-9** is amended to read:

15 **78-34-9. Occupancy of premises pending action -- Deposit paid into court --**  
16 **Procedure for payment of compensation.**

17 [~~The plaintiff may move the court or a judge thereof, at]~~

18 (1) At any time after the commencement of suit, [on notice to the defendant, if he is a  
19 resident of the state, or has appeared by attorney in the action, otherwise by serving a notice  
20 directed to him on the clerk of the court, for] and after giving notice to the defendant as provided  
21 in the Utah Rules of Civil Procedure, the plaintiff may file a motion with the court requesting an  
22 order permitting the plaintiff to:

23 (a) occupy the premises sought to be condemned pending the action, including appeal[;];  
24 and

25 (b) to do [such] whatever work [thereon as may be] on the premises that is required.

26 (2) The court [~~or a judge thereof~~] shall:

27 (a) take proof by affidavit or otherwise of:

28 (i) the value of the premises sought to be condemned [~~and of~~];

29 (ii) the damages [~~which~~] that will accrue from the condemnation[;]; and [of]

30 (iii) the reasons for requiring a speedy occupation[~~, and shall~~]; and

31 (b) grant or refuse the motion according to the equity of the case and the relative damages

1 [which] that may accrue to the parties.

2 (3) (a) If the motion is granted, the court [or judge] shall enter its order requiring that the  
3 plaintiff, as a condition precedent to occupancy [to], file with the clerk of the court a sum  
4 [equivalent to at least 75% of] equal to the condemning authority's appraised valuation of the  
5 property sought to be condemned. [The]

6 (b) That amount [thus fixed] shall be for the purposes of the motion only[;] and [shall] is  
7 not [be] admissible in evidence on final hearing.

8 (4) (a) Upon the filing of the petition for immediate occupancy, the court shall fix the time  
9 within which, and the terms upon which, the parties in possession are required to surrender  
10 possession to the plaintiff.

11 (b) The court may issue orders governing encumbrances, liens, rents, assessments,  
12 insurance, and other charges, if any, as required.

13 (5) (a) The rights of just compensation for the land [so] taken as authorized by this section  
14 or damaged [shall vest] as a result of that taking vests in the parties entitled [thereto, and said] to  
15 it.

16 (b) That compensation shall be ascertained and awarded as provided in Section 78-34-10  
17 [and established by judgment therein, and the said].

18 (c) (i) Except as provided in Subsection (5)(c)(ii), judgment shall include, as part of the  
19 just compensation awarded, interest at the rate of 8% per annum on the amount finally awarded  
20 as the value of the property and damages, from the date of taking actual possession [thereof] of the  
21 property by the plaintiff or from the date of the order of occupancy, whichever is earlier, to the  
22 date of judgment[; but].

23 (ii) The court may not award interest [shall not be allowed on so much thereof as shall  
24 have been] on the amount of the judgment that was paid into court.

25 (6) (a) Upon the application of the parties in interest, the court shall order that the money  
26 deposited in the court be paid [forthwith for or on account of] before judgment as an advance on  
27 the just compensation to be awarded in the proceeding. [A]

28 (b) This advance payment to a defendant [as aforesaid] shall be [held] considered to be an  
29 abandonment by [such] the defendant of all defenses [excepting his] except a claim for greater  
30 compensation.

31 (c) If the compensation finally awarded [in respect of such lands, or any parcel thereof,

1 shall exceed] exceeds the [amount of the money so received] advance, the court shall enter  
2 judgment against the plaintiff for the amount of the deficiency.

3 (d) If the [amount of money so] advance received by the defendant is greater than the  
4 amount finally awarded, the court shall enter judgment against the defendant for the amount of the  
5 excess. [Upon the filing of the petition for immediate occupancy the court shall fix the time within  
6 which, and the terms upon which, the parties in possession shall be required to surrender  
7 possession to the plaintiff. The court shall make such orders in respect to encumbrances, liens,  
8 rents, assessments, insurance and other charges, if any, as shall be just and equitable.]

9 (7) Arbitration of a dispute under Section 78-34-21 or Section 63-34-13 is not a bar or  
10 cause to stay the action for occupancy of premises authorized by this section.

11 Section 6. Section **78-34-21** is enacted to read:

12 **78-34-21. Dispute resolution.**

13 (1) In any dispute between a condemner and a private property owner arising out of this  
14 chapter, the private property owner may submit the dispute for arbitration to the private property  
15 ombudsman under Section 63-34-13.

16 (2) An action submitted to the private property ombudsman under authority of this section  
17 does not bar or stay any action for occupancy of premises authorized by Section 78-34-9.

17a **h (3) (a) THE PRIVATE PROPERTY OWNER OR DISPLACED PERSON MAY**  
17b **REQUEST THAT THE MEDIATOR OR ARBITRATOR AUTHORIZE AN ADDITIONAL APPRAISAL.**

17c **(b) IF THE MEDIATOR OR ARBITRATOR DETERMINES THAT AN ADDITIONAL APPRAISAL**  
17d **IS REASONABLY NECESSARY TO REACH A RESOLUTION OF THE CASE, THE MEDIATOR**  
17e **OR ARBITRATOR MAY:**

17f **(i) HAVE AN ADDITIONAL APPRAISAL OF THE PROPERTY PREPARED BY AN INDEPENDENT**  
17g **APPRAISER; AND**

17h **(ii) REQUIRE THE AGENCY TO PAY THE COSTS OF THE FIRST ADDITIONAL APPRAISAL. h**

**Legislative Review Note**  
**as of 2-5-98 12:10 PM**

A limited legal review of this bill raises no obvious constitutional or statutory concerns.

**Office of Legislative Research and General Counsel**  
lilac-February 26, 1998