

PRIVATE PROPERTY OMBUDSMAN

AMENDMENT

1999 GENERAL SESSION

STATE OF UTAH

Sponsor: Evan L. Olsen

AN ACT RELATING TO CITIES AND TOWNS, COUNTIES, STATE AFFAIRS IN GENERAL, AND THE JUDICIAL CODE; PROVIDING FOR A TOLLING OF THE TIME TO FILE A PETITION FOR COURT REVIEW UPON THE FILING OF A REQUEST FOR ARBITRATION WITH THE PRIVATE PROPERTY OMBUDSMAN; PROVIDING FOR A STAY OF AN EMINENT DOMAIN ACTION; AND MAKING TECHNICAL CORRECTIONS.

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

AMENDS:

10-9-708, as enacted by Chapter 235, Laws of Utah 1991

10-9-1001, as last amended by Chapter 30, Laws of Utah 1992

17-27-708, as enacted by Chapter 235, Laws of Utah 1991

17-27-1001, as last amended by Chapter 79, Laws of Utah 1996

63-34-13, as last amended by Chapter 295, Laws of Utah 1998

78-34-21, as enacted by Chapter 295, Laws of Utah 1998

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

Section 1. Section **10-9-708** is amended to read:

10-9-708. District court review of board of adjustment decision.

(1) Any person adversely affected by any decision of a board of adjustment may petition the district court for a review of the decision.

(2) In the petition, the plaintiff may only allege that the board of adjustment's decision was arbitrary, capricious, or illegal.

(3) (a) The petition is barred unless it is filed within 30 days after the board of adjustment's

28 decision is final.

29 (b) (i) The time under Subsection (3)(a) to file a petition is tolled from the date a request
30 for arbitration is filed with the private property ombudsman under Section 63-34-13 until 30 days
31 after:

32 (A) the arbitrator issues a final award; or

33 (B) the private property ombudsman issues a written statement under Subsection
34 63-34-13(4)(b) declining to arbitrate or to appoint an arbitrator.

35 (ii) A tolling under Subsection (3)(b)(i) operates only as to the specific issues that are the
36 subject of the request for arbitration filed with the private property ombudsman.

37 (iii) A request for arbitration filed with the private property ombudsman after the time
38 under Subsection (3)(a) to file a petition has expired does not affect the time to file a petition.

39 (4) (a) The board of adjustment shall transmit to the reviewing court the record of its
40 proceedings including its minutes, findings, orders and, if available, a true and correct transcript
41 of its proceedings.

42 (b) If the proceeding was tape recorded, a transcript of that tape recording is a true and
43 correct transcript for purposes of this subsection.

44 (5) (a) (i) If there is a record, the district court's review is limited to the record provided
45 by the board of adjustment.

46 (ii) The court may not accept or consider any evidence outside the board of adjustment's
47 record unless that evidence was offered to the board of adjustment and the court determines that
48 it was improperly excluded by the board of adjustment.

49 (b) If there is no record, the court may call witnesses and take evidence.

50 (6) The court shall affirm the decision of the board of adjustment if the decision is
51 supported by substantial evidence in the record.

52 (7) (a) The filing of a petition does not stay the decision of the board of adjustment.

53 (b) (i) Before filing the petition, the aggrieved party may petition the board of adjustment
54 to stay its decision.

55 (ii) Upon receipt of a petition to stay, the board of adjustment may order its decision stayed
56 pending district court review if the board of adjustment finds it to be in the best interest of the
57 municipality.

58 (iii) After the petition is filed the petitioner may seek an injunction staying the board of

59 adjustment's decision.

60 Section 2. Section **10-9-1001** is amended to read:

61 **10-9-1001. Appeals.**

62 (1) No person may challenge in district court a municipality's land use decisions made
63 under this chapter or under the regulation made under authority of this chapter until that person
64 has exhausted his administrative remedies.

65 (2) (a) Any person adversely affected by any decision made in the exercise of the
66 provisions of this chapter may file a petition for review of the decision with the district court
67 within 30 days after the local decision is rendered.

68 (b) (i) The time under Subsection (2)(a) to file a petition is tolled from the date a request
69 for arbitration is filed with the private property ombudsman under Section 63-34-13 until 30 days
70 after:

71 (A) the arbitrator issues a final award; or

72 (B) the private property ombudsman issues a written statement under Subsection
73 63-34-13(4)(b) declining to arbitrate or to appoint an arbitrator.

74 (ii) A tolling under Subsection (2)(b)(i) operates only as to the specific issues that are the
75 subject of the request for arbitration filed with the private property ombudsman.

76 (iii) A request for arbitration filed with the private property ombudsman after the time
77 under Subsection (2)(a) to file a petition has expired does not affect the time to file a petition.

78 (3) The courts shall:

79 (a) presume that land use decisions and regulations are valid; and

80 (b) determine only whether or not the decision is arbitrary, capricious, or illegal.

81 Section 3. Section **17-27-708** is amended to read:

82 **17-27-708. District court review of board of adjustment decision.**

83 (1) Any person adversely affected by any decision of a board of adjustment may petition
84 the district court for a review of the decision.

85 (2) In the petition, the plaintiff may only allege that the board of adjustment's decision was
86 arbitrary, capricious, or illegal.

87 (3) (a) The petition is barred unless it is filed within 30 days after the board of adjustment's
88 decision is final.

89 (b) (i) The time under Subsection (3)(a) to file a petition is tolled from the date a request

90 for arbitration is filed with the private property ombudsman under Section 63-34-13 until 30 days
91 after:

92 (A) the arbitrator issues a final award; or

93 (B) the private property ombudsman issues a written statement under Subsection

94 63-34-13(4)(b) declining to arbitrate or to appoint an arbitrator.

95 (ii) A tolling under Subsection (3)(b)(i) operates only as to the specific issues that are the
96 subject of the request for arbitration filed with the private property ombudsman.

97 (iii) A request for arbitration filed with the private property ombudsman after the time
98 under Subsection (3)(a) to file a petition has expired does not affect the time to file a petition.

99 (4) (a) The board of adjustment shall transmit to the reviewing court the record of its
100 proceedings including its minutes, findings, orders and, if available, a true and correct transcript
101 of its proceedings.

102 (b) If the proceeding was tape recorded, a transcript of that tape recording is a true and
103 correct transcript for purposes of this subsection.

104 (5) (a) (i) If there is a record, the district court's review is limited to the record provided
105 by the board of adjustment.

106 (ii) The court may not accept or consider any evidence outside the board of adjustment's
107 record unless that evidence was offered to the board of adjustment and the court determines that
108 it was improperly excluded by the board of adjustment.

109 (b) If there is no record, the court may call witnesses and take evidence.

110 (6) The court shall affirm the decision of the board of adjustment if the decision is
111 supported by substantial evidence in the record.

112 (7) (a) The filing of a petition does not stay the decision of the board of adjustment.

113 (b) (i) Before filing the petition, the aggrieved party may petition the board of adjustment
114 to stay its decision.

115 (ii) Upon receipt of a petition to stay, the board of adjustment may order its decision stayed
116 pending district court review if the board of adjustment finds it to be in the best interest of the
117 county.

118 (iii) After the petition is filed the petitioner may seek an injunction staying the board of
119 adjustment's decision.

120 Section 4. Section **17-27-1001** is amended to read:

121 **17-27-1001. Appeals.**

122 (1) No person may challenge in district court a county's land use decisions made under this
123 chapter or under the regulation made under authority of this chapter until that person has exhausted
124 all administrative remedies.

125 (2) (a) Any person adversely affected by any decision made in the exercise of the
126 provisions of this chapter may file a petition for review of the decision with the district court
127 within 30 days after the local decision is rendered.

128 (b) (i) The time under Subsection (2)(a) to file a petition is tolled from the date a request
129 for arbitration is filed with the private property ombudsman under Section 63-34-13 until 30 days
130 after:

131 (A) the arbitrator issues a final award; or

132 (B) the private property ombudsman issues a written statement under Subsection
133 63-34-13(4)(b) declining to arbitrate or to appoint an arbitrator.

134 (ii) A tolling under Subsection (2)(b)(i) operates only as to the specific issues that are the
135 subject of the request for arbitration filed with the private property ombudsman.

136 (iii) A request for arbitration filed with the private property ombudsman after the time
137 under Subsection (2)(a) to file a petition has expired does not affect the time to file a petition.

138 (3) The courts shall:

139 (a) presume that land use decisions and regulations are valid; and

140 (b) determine only whether or not the decision is arbitrary, capricious, or illegal.

141 Section 5. Section **63-34-13** is amended to read:

142 **63-34-13. Private property ombudsman -- Powers -- Arbitration procedures.**

143 (1) As used in this section:

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

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

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

148 (b) "Takings law" means the provisions of the federal and state constitutions, the case law

149 interpreting those provisions, and any relevant statutory provisions that require a governmental unit
150 to compensate a private property owner for a constitutional taking.

151 (2) (a) There is created a private property ombudsman in the Department of Natural

152 Resources.

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

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

156 (3) The private property ombudsman shall:

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

158 (b) assist state agencies and local governments in developing the guidelines required by
159 this chapter and Title 63, Chapter 90a, Constitutional Takings Issues;

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

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

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

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

168 (g) if appropriate and requested to do so by the private property owner, mediate or conduct
169 or arrange arbitration for disputes between private property owners and government entities that
170 involve:

171 (i) takings issues law;

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

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

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

176 (ii) In applying the Utah Arbitration Act, the arbitrator and parties shall treat the matter
177 as if:

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

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

181 (iii) For the purpose of arbitrations conducted under this section, if the dispute to be
182 arbitrated is not already the subject of legal action, the district court having jurisdiction over the

183 county where the private property involved in the dispute is located shall act as the court referred
184 to in Title 78, Chapter 31a, Utah Arbitration Act.

185 (iv) The award from an arbitration conducted under this chapter may not be vacated under
186 the provisions of Title 78, Chapter 31a, Subsection 14(1)(e), Utah Arbitration Act, because of the
187 lack of an arbitration agreement between the parties.

188 (b) The private property ombudsman shall [~~decline~~] issue a written statement declining
189 to arbitrate or to appoint an arbitrator when, in the opinion of the private property ombudsman:

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

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

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

194 or

195 (iv) the arbitration is otherwise not appropriate.

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

198 (A) either party objects to the private property ombudsman serving as the arbitrator and
199 agrees to pay for the services of another arbitrator; or

200 (B) the private property ombudsman declines to arbitrate the dispute and one or both
201 parties are willing to pay for the services of another arbitrator.

202 (ii) In appointing a person other than himself to arbitrate a dispute, the private property
203 ombudsman shall appoint an arbitrator who is:

204 (A) agreeable to both parties; or

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

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

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

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

213 (f) The lack of arbitration by or through the private property ombudsman does not

214 constitute, and may not be interpreted as constituting, a failure to exhaust available administrative
215 remedies or as a bar to bringing legal action.

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

218 (h) Within 30 days after the arbitrator issues the final award, any party may submit the
219 award or any issue upon which the award is based to the district court for de novo review.

220 (i) The filing with the private property ombudsman of a request for arbitration does not
221 stay any county or municipal land use decision, including the decision of a board of adjustment.

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

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

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

228 (i) actions brought under authority of Title 78, Chapter 6, Small Claims Court;

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

231 (iii) actions for de novo review of an arbitration award or issue brought under the authority
232 of Subsection (4)(h).

233 (7) The private property ombudsman may not represent private property owners, state
234 agencies, or local governments in court or in adjudicative proceedings under Title 63, Chapter 46b,
235 Administrative Procedures Act.

236 Section 6. Section **78-34-21** is amended to read:

237 **78-34-21. Dispute resolution.**

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

241 [~~2) An action submitted to the private property ombudsman under authority of this section~~
242 ~~does]~~

243 (2) (a) (i) Except as provided in Subsection (2)(a)(ii), a mediator or arbitrator may stay an
244 action brought in district court under this chapter by filing with the court a notice of mediation or

245 arbitration if the mediator or arbitrator determines that a stay is reasonably necessary to reach a
246 resolution of the case through mediation or arbitration.

247 (ii) A mediator or arbitrator may not bar or stay any action for occupancy of premises
248 authorized by Section 78-34-9.

249 (b) The mediator or arbitrator shall file with the district court a request to terminate the
250 stay within 30 days after:

251 (i) the resolution of the dispute through mediation;

252 (ii) the issuance of a final arbitration award; or

253 (iii) a determination by the mediator or arbitrator that mediation or arbitration is not
254 appropriate.

255 (3) (a) The private property owner or displaced person may request that the mediator or
256 arbitrator authorize an additional appraisal.

257 (b) If the mediator or arbitrator determines that an additional appraisal is reasonably
258 necessary to reach a resolution of the case, the mediator or arbitrator may:

259 (i) have an additional appraisal of the property prepared by an independent appraiser; and

260 (ii) require the agency to pay the costs of the first additional appraisal.

Legislative Review Note
as of 10-27-98 10:19 AM

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

Office of Legislative Research and General Counsel

Committee Note

The Political Subdivisions Interim Committee recommended this bill.