

Senator L. Alma Mansell proposes the following substitute bill:

PROPERTY RIGHTS OMBUDSMAN

2006 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: L. Alma Mansell

House Sponsor: Gordon E. Snow

LONG TITLE

General Description:

This bill makes changes to the Office of the Property Rights Ombudsman.

Highlighted Provisions:

This bill:

- ▶ defines terms;
- ▶ moves the Office of the Property Rights Ombudsman to the Department of Commerce;
- ▶ creates the Land Use and Eminent Domain Advisory Board;
- ▶ outlines the board's appointment, expenses, and duties;
- ▶ outlines the Office of the Property Rights Ombudsman's duties;
- ▶ provides for arbitration of matters brought to the Office of the Property Rights Ombudsman;
- ▶ describes the effect of an arbitration;
- ▶ allows for the issuance of advisory opinions; and
- ▶ describes the effect of an advisory opinion.

Monies Appropriated in this Bill:

None

Other Special Clauses:



26 None

27 **Utah Code Sections Affected:**

28 ENACTS:

29 **13-42-101**, Utah Code Annotated 1953

30 **13-42-102**, Utah Code Annotated 1953

31 **13-42-201**, Utah Code Annotated 1953

32 **13-42-202**, Utah Code Annotated 1953

33 **13-42-203**, Utah Code Annotated 1953

34 **13-42-204**, Utah Code Annotated 1953

35 **13-42-205**, Utah Code Annotated 1953

36 **13-42-206**, Utah Code Annotated 1953



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

39 Section 1. Section **13-42-101** is enacted to read:

40 **CHAPTER 42. PROPERTY RIGHTS OMBUDSMAN ACT**

41 **Part 1. General Provisions**

42 **13-42-101. Title.**

43 This chapter is known as the "Property Rights Ombudsman Act."

44 Section 2. Section **13-42-102** is enacted to read:

45 **13-42-102. Definitions.**

46 As used in this chapter:

47 (1) "Constitutional taking" or "taking" means a governmental action resulting in a
48 taking of real property that requires compensation to the owner of the property under:

49 (a) the Fifth or Fourteenth Amendment of the Constitution of the United States; or

50 (b) Utah Constitution Article I, Section 22.

51 (2) "Takings and eminent domain law" means the provisions of the federal and state
52 constitutions, the case law interpreting those provisions, and any relevant statutory provisions
53 that involve constitutional issues arising from the use or ownership of real property or require a
54 governmental unit to compensate a real property owner for a constitutional taking or provide
55 for relocation assistance to those persons who are displaced by the use of eminent domain.

56 Section 3. Section **13-42-201** is enacted to read:

57 **Part 2. Office of the Property Rights Ombudsman**

58 **13-42-201. Office of the Property Rights Ombudsman.**

59 (1) There is created an Office of the Property Rights Ombudsman in the Department of
60 Commerce.

61 (2) The executive director of the Department of Commerce, with the concurrence of
62 the Land Use and Eminent Domain Advisory Board created in Section 13-42-202, shall appoint
63 an attorney with background or expertise in takings, eminent domain, and land use law to fill
64 the position.

65 (3) The person appointed under this section is an exempt employee.

66 (4) Subject to Subsection 13-42-202(8), the executive director of the Department of
67 Commerce may hire attorneys, clerks, interns, or other personnel to assist the appointee.

68 Section 4. Section **13-42-202** is enacted to read:

69 **13-42-202. Land Use and Eminent Domain Advisory Board -- Appointment --**
70 **Compensation -- Duties.**

71 (1) There is created the Land Use and Eminent Domain Advisory Board, within the
72 Office of the Property Rights Ombudsman, consisting of:

73 (a) one individual representing professional planners, nominated by the Utah Chapter
74 of the American Planning Association;

75 (b) one individual representing municipal government, nominated by the Utah League
76 of Cities and Towns;

77 (c) one individual representing county government, nominated by the Utah Association
78 of Counties;

79 (d) one individual representing the residential construction industry, nominated by the
80 Utah Home Builders Association;

81 (e) one individual representing the real estate industry, nominated by the Utah
82 Association of Realtors;

83 (f) one individual representing the land development community, nominated by Utah
84 farm organizations; and

85 (g) one individual who:

86 (i) is a citizen with experience in land use issues;

87 (ii) does not hold public office; and

88 (iii) is not currently employed, nor has been employed in the previous twelve months,
89 by any of the entities or industries listed in Subsections (1)(a) through (f).

90 (2) After receiving nominations, the governor shall appoint members to the board.

91 (3) The term of office of each member is four years, except that the governor shall
92 appoint three of the members of the board to an initial two-year term.

93 (4) Each mid-term vacancy shall be filled for the unexpired term in the same manner as
94 an appointment under Subsections (1) and (2).

95 (5) (a) Board members shall elect a chair from their number and establish rules for the
96 organization and operation of the board.

97 (b) Five members of the board constitute a quorum for the conduct of the board's
98 business.

99 (c) The affirmative vote of five members is required to constitute the decision of the
100 board on any matter.

101 (6) (a) No member may receive compensation or benefits for the member's service on
102 the board.

103 (b) (i) A member who is not a government officer or employee may be reimbursed for
104 reasonable expenses incurred in the performance of the member's official duties at the rates
105 established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.

106 (ii) A member who is a government officer or employee and who does not receive
107 expenses from the member's agency may be reimbursed for reasonable expenses incurred in the
108 performance of the member's official duties at the rates established by the Division of Finance
109 under Sections 63A-3-106 and 63A-3-107.

110 (c) A member may decline to be reimbursed for reasonable expenses incurred in the
111 performance of the member's official duties.

112 (d) A member need not give a bond for the performance of official duties.

113 (7) The Office of the Property Rights Ombudsman shall provide staff to the board.

114 (8) (a) The board shall advise the Office of the Property Rights Ombudsman on the
115 conduct of his office and the performance of its duties.

116 (b) The Office of the Property Rights Ombudsman and attorneys working in the Office
117 of the Property Rights Ombudsman serve at the pleasure of the board.

118 (c) The Office of the Property Rights Ombudsman and attorneys working in the Office

119 of the Property Rights Ombudsman may not be removed without the concurrence of the board.

120 (9) The board shall maintain a resource list of qualified arbitrators and mediators who
121 may be appointed under Section 13-42-204 and qualified persons who may be appointed to
122 render advisory opinions under Section 12-42-205.

123 Section 5. Section **13-42-203** is enacted to read:

124 **13-42-203. Office of the Property Rights Ombudsman -- Duties.**

125 (1) The Office of the Property Rights Ombudsman shall:

126 (a) develop and maintain expertise in and understanding of takings, eminent domain,
127 and land use law;

128 (b) assist state agencies and local governments in developing the guidelines required by
129 Title 63, Chapter 90a, Constitutional Taking Issues;

130 (c) at the request of a state agency or local government, assist the state agency or local
131 government, in analyzing actions with potential takings implications or other land use issues;

132 (d) advise real property owners who have a legitimate potential or actual takings claim
133 against a state or local government entity or have questions about takings, eminent domain, and
134 land use law;

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

138 (f) provide information to private citizens, civic groups, government entities, and other
139 interested parties about takings, eminent domain, and land use law and their rights and
140 responsibilities under the takings, eminent domain, or land use laws through seminars and
141 publications, and by other appropriate means.

142 (2) The Office of the Property Rights Ombudsman may not represent private property
143 owners, state agencies, or local governments in court or in adjudicative proceedings under Title
144 63, Chapter 46b, Administrative Procedures Act.

145 (3) No member of the Office of the Property Rights Ombudsman nor a neutral
146 third-party rendering an advisory opinion under Section 13-42-205 or 13-42-206, may be
147 compelled to testify in a civil action filed concerning the subject matter of any review,
148 mediation, or arbitration by, or arranged through, the office.

149 (4) (a) Except as provided in Subsection (4)(b), evidence of a review by the Office of

150 the Property Rights Ombudsman and the opinions, writings, findings, and determinations of the
151 Office of the Property Rights Ombudsman are not admissible as evidence in a judicial action.

152 (b) Subsection (4)(a) does not apply to:

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

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

156 (iii) actions for de novo review of an arbitration award or issue brought under the
157 authority of Subsection 13-42-204(3)(i); or

158 (iv) advisory opinions provided for in Sections 13-42-205 and 13-42-206.

159 (5) The Office of the Property Rights Ombudsman may not represent private property
160 owners, state agencies, or local governments in court or in adjudicative proceedings under Title
161 63, Chapter 46b, Administrative Procedures Act.

162 Section 6. Section **13-42-204** is enacted to read:

163 **13-42-204. Office of Property Rights Ombudsman -- Arbitration or mediation of**
164 **takings or eminent domain disputes.**

165 (1) If requested by the private property owner and otherwise appropriate, the Office of
166 the Property Rights Ombudsman shall mediate, or conduct or arrange arbitration for, disputes
167 between private property owners and government entities that involve:

168 (i) takings or eminent domain issues;

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

170 (iii) disputes about relocation assistance under Title 57, Chapter 12, Utah Relocation
171 Assistance Act.

172 (2) If arbitration or mediation is requested by a private property owner under this
173 section, Section 57-12-14 or 78-34-21, and arranged by the Office of the Property Rights
174 Ombudsman, the government entity or condemning entity shall participate in the mediation or
175 arbitration as if the matter were ordered to mediation or arbitration by a court.

176 (3) (a) (i) In conducting or arranging for arbitration under Subsection (1), the Office of
177 the Property Rights Ombudsman shall follow the procedures and requirements of Title 78,
178 Chapter 31a, Utah Uniform Arbitration Act.

179 (ii) In applying Title 78, Chapter 31a, Utah Uniform Arbitration Act, the arbitrator and
180 parties shall treat the matter as if:

181 (A) it were ordered to arbitration by a court; and
182 (B) the Office of the Property Rights Ombudsman or other arbitrator chosen as
183 provided for in this section was appointed as arbitrator by the court.
184 (iii) For the purpose of an arbitration conducted under this section, if the dispute to be
185 arbitrated is not already the subject of legal action, the district court having jurisdiction over
186 the county where the private property involved in the dispute is located is the court referred to
187 in Title 78, Chapter 31a, Utah Uniform Arbitration Act.
188 (iv) An arbitration award under this chapter may not be vacated under the provisions of
189 Subsection 78-31a-124(1)(e) because of the lack of an arbitration agreement between the
190 parties.
191 (b) The Office of the Property Rights Ombudsman shall issue a written statement
192 declining to arbitrate or to appoint an arbitrator when, in the opinion of the Office of the
193 Property Rights Ombudsman:
194 (i) the issues are not ripe for review;
195 (ii) assuming the alleged facts are true, no cause of action exists under United States or
196 Utah law;
197 (iii) all issues raised are beyond the scope of the Office of the Property Rights
198 Ombudsman's statutory duty to review; or
199 (iv) the arbitration is otherwise not appropriate.
200 (c) (i) The Office of the Property Rights Ombudsman shall appoint another person to
201 arbitrate a dispute when:
202 (A) either party objects to the Office of the Property Rights Ombudsman serving as the
203 arbitrator and agrees to pay for the services of another arbitrator;
204 (B) the Office of the Property Rights Ombudsman declines to arbitrate the dispute for a
205 reason other than those stated in Subsection (4)(b) and one or both parties are willing to pay for
206 the services of another arbitrator; or
207 (C) the Office of the Property Rights Ombudsman determines that it is appropriate to
208 appoint another person to arbitrate the dispute with no charge to the parties for the services of
209 the appointed arbitrator.
210 (ii) In appointing another person to arbitrate a dispute, the Office of the Property Rights
211 Ombudsman shall appoint an arbitrator who is agreeable to:

212 (A) both parties; or
213 (B) the Office of the Property Rights Ombudsman and the party paying for the
214 arbitrator.
215 (iii) The Office of the Property Rights Ombudsman may, on its own initiative or upon
216 agreement of both parties, appoint a panel of arbitrators to conduct the arbitration.
217 (iv) The Department of Commerce may pay an arbitrator per diem and reimburse
218 expenses incurred in the performance of the arbitrator's duties at the rates established by the
219 Division of Finance under Sections 63A-3-106 and 63A-3-107.
220 (d) In arbitrating a dispute, the arbitrator shall apply the relevant statutes, case law,
221 regulations, and rules of Utah and the United States in conducting the arbitration and in
222 determining the award.
223 (e) The property owner and government entity may agree in advance of arbitration that
224 the arbitration is binding and that no de novo review may occur.
225 (f) Arbitration by or through the Office of the Property Rights Ombudsman is not
226 necessary before bringing legal action to adjudicate any claim.
227 (g) The lack of arbitration by or through the Office of the Property Rights Ombudsman
228 does not constitute, and may not be interpreted as constituting, a failure to exhaust available
229 administrative remedies or as a bar to bringing legal action.
230 (h) Arbitration under this section is not subject to Title 63, Chapter 46b,
231 Administrative Procedures Act, or Title 78, Chapter 31b, Alternative Dispute Resolution Act.
232 (i) Within 30 days after an arbitrator issues a final award, and except as provided in
233 Subsection (3)(e), any party may submit the award, or any issue upon which the award is based,
234 to the district court for de novo review.
235 (4) The filing with the Office of the Property Rights Ombudsman of a request for
236 mediation or arbitration of a constitutional taking issue does not stay any county or municipal
237 land use decision, including the decision of a board of adjustment.
238 (5) Members of the Office of the Property Rights Ombudsman may not be compelled
239 to testify in a civil action filed concerning the subject matter of any review, mediation, or
240 arbitration by the Office of the Property Rights Ombudsman.
241 Section 7. Section **13-42-205** is enacted to read:
242 **13-42-205. Advisory opinion.**

243 At any time before a final decision on a land use application by a local appeal authority
244 under Section 10-9a-708 or 17-27a-708, a local government or a potentially aggrieved person
245 may, in accordance with Section 13-42-206, request a written advisory opinion from a neutral
246 third party to determine compliance with:

- 247 (1) Sections 10-9a-507 through 10-9a-511;
248 (2) Sections 17-27a-506 through 17-27a-510; and
249 (3) Title 11, Chapter 36, Impact Fees Act.

250 Section 8. Section **13-42-206** is enacted to read:

251 **13-42-206. Advisory Opinion -- Process.**

252 (1) A request for an advisory opinion under 13-42-205 shall be:

- 253 (a) filed with the Office of the Property Rights Ombudsman; and
254 (b) accompanied by a filing fee of \$150.00.

255 (2) The Office of the Property Rights Ombudsman may establish policies providing for
256 partial fee waivers for a person who is financially unable to pay the entire fee.

257 (3) A person requesting an advisory opinion need not exhaust administrative remedies,
258 including remedies described under Section 10-9a-801 or 17-27a-801, before requesting an
259 advisory opinion.

260 (4) The Office of the Property Rights Ombudsman shall:

- 261 (a) deliver notice of the request to opposing parties indicated in the request;
262 (b) inquire of all parties if there are other necessary parties to the dispute; and
263 (c) deliver notice to all necessary parties.

264 (5) If a governmental entity is an opposing party, the Office of the Property Rights
265 Ombudsman shall deliver the request in the manner provided for in Section 63-30d-301.

266 (6) (a) The Office of the Property Rights Ombudsman shall promptly determine if the
267 parties can agree to a neutral third party to issue an advisory opinion.

268 (b) If no agreement can be reached within three business days after notice is delivered
269 pursuant to subsections (4) and (5), the Office of the Property Rights Ombudsman shall appoint
270 a neutral third party to issue an advisory opinion.

271 (7) All parties that are the subject of the request for advisory opinion shall:

- 272 (a) share equally in the cost of the advisory opinion; and
273 (b) provide financial assurance for payment that the neutral third party requires.

274 (8) The neutral third party shall comply with the provisions of Section 78-31c-109, and
275 shall promptly:

276 (a) seek a response from all necessary parties to the issues raised in the request for
277 advisory opinion;

278 (b) investigate and consider all responses; and

279 (c) issue a written advisory opinion within 15 business days after the appointment,
280 unless:

281 (i) the parties agree to extend the deadline; or

282 (ii) the neutral third party determines that the matter is complex and requires additional
283 time to render an opinion, which may not exceed 30 calendar days.

284 (9) An advisory opinion shall include a statement of the facts and law supporting the
285 opinion's conclusions.

286 (10) (a) Copies of any advisory opinion issued by the Office of the Property Rights
287 Ombudsman shall be delivered as soon as practicable to all necessary parties.

288 (b) A copy of the advisory opinion shall be delivered to the government entity in the
289 manner provided for in Section 63-30d-401.

290 (11) An advisory opinion issued by the Office of the Property Rights Ombudsman is
291 not binding on any party to, nor admissible as evidence in, a dispute involving land use law
292 except as provided in Subsection (12).

293 (12) (a) If the same issue that is the subject of an advisory opinion is listed as a cause
294 of action in litigation, and that cause of action is litigated on the same facts and circumstances
295 and is resolved consistent with the advisory opinion, the substantially prevailing party on that
296 cause of action may collect reasonable attorney fees and court costs pertaining to the
297 development of that cause of action from the date of the delivery of the advisory opinion to the
298 date of the court's resolution.

299 (b) Nothing in this Subsection (12) is intended to create any new cause of action under
300 land use law.

301 (13) Unless filed by the local government, a request for an advisory opinion under
302 Section 13-42-205 does not stay the progress of a land use application, or the effect of a land
303 use decision.

State Impact

Implementation of this bill would require the services of one Property Rights Ombudsman, one Legal Counsel IV, one Legal Counsel III, and one Budget/Accounting Officer II. Total costs are estimated at \$455,400 from the Commerce Service Fund. Spending from the Commerce Service Fund could affect revenue available to the General Fund. Ongoing funding to Natural Resources from the General Fund totaling \$150,800 for their Ombudsman would be discontinued.

	<u>FY 2007</u> <u>Approp.</u>	<u>FY 2008</u> <u>Approp.</u>	<u>FY 2007</u> <u>Revenue</u>	<u>FY 2008</u> <u>Revenue</u>
General Fund	(\$150,800)	(\$150,800)	\$0	\$0
Commerce Service Fund	\$455,400	\$455,400	\$0	\$0
TOTAL	\$304,600	\$304,600	\$0	\$0

Individual and Business Impact

Individual and business savings would depend on circumstances and the extent to which the services are used.
