

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

AMENDMENTS

2011 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Jerry W. Stevenson

House Sponsor: _____

LONG TITLE

General Description:

This bill amends provisions relating to the Office of the Property Rights Ombudsman.

Highlighted Provisions:

This bill:

- ▶ provides that additional appraisals authorized by a mediator or arbitrator are exempt from a provision making specified items inadmissible in court and provides that an additional appraisal is not inadmissible because of another statutory provision making information generated in a mediation or arbitration confidential or inadmissible;
- ▶ modifies mediation and arbitration duties of the Office of the Private Property Ombudsman;
- ▶ clarifies the scope of the de novo district court review of an arbitrator's decision;
- ▶ modifies the time for requesting an advisory opinion from a neutral third party;
- ▶ specifies that certain attorney fee and other provisions do not apply in the setting of a district court review by trial de novo following an advisory opinion; and
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:



28 None

29 **Utah Code Sections Affected:**

30 AMENDS:

31 **13-43-203**, as last amended by Laws of Utah 2008, Chapters 3, 84, and 382

32 **13-43-204**, as last amended by Laws of Utah 2008, Chapters 3 and 382

33 **13-43-205**, as enacted by Laws of Utah 2006, Chapter 258

34 **13-43-206**, as last amended by Laws of Utah 2010, Chapter 203

35 **78B-6-522**, as renumbered and amended by Laws of Utah 2008, Chapter 3

36 **78B-10-102**, as renumbered and amended by Laws of Utah 2008, Chapter 3



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

39 Section 1. Section **13-43-203** is amended to read:

40 **13-43-203. Office of the Property Rights Ombudsman -- Duties.**

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

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

44 (b) assist state agencies and local governments in developing the guidelines required by
45 Title 63L, Chapter 4, Constitutional [~~Taking~~] Takings Issues;

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

48 (d) advise real property owners who:

49 (i) have a legitimate potential or actual takings claim against a state or local
50 government entity or have questions about takings, eminent domain, and land use law; or

51 (ii) own a parcel of property that is landlocked, as to the owner's rights and options
52 with respect to obtaining access to a public street;

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

56 (f) provide information to private citizens, civic groups, government entities, and other
57 interested parties about takings, eminent domain, and land use law and their rights and
58 responsibilities under the takings, eminent domain, or land use laws through seminars and

59 publications, and by other appropriate means.

60 (2) The Office of the Property Rights Ombudsman may not represent private property
61 owners, state agencies, or local governments in court or in adjudicative proceedings under Title
62 63G, Chapter 4, Administrative Procedures Act.

63 (3) No member of the Office of the Property Rights Ombudsman nor a neutral third
64 party rendering an advisory opinion under Section 13-43-205 or 13-43-206, may be compelled
65 to testify in a civil action filed concerning the subject matter of any review, mediation, or
66 arbitration by, or arranged through, the office.

67 (4) (a) Except as provided in Subsection (4)(b), evidence of a review by the Office of
68 the Property Rights Ombudsman and the opinions, writings, findings, and determinations of the
69 Office of the Property Rights Ombudsman are not admissible as evidence in a judicial action.

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

71 (i) ~~[actions]~~ an action brought under authority of Title 78A, Chapter 8, Small Claims
72 Courts;

73 (ii) a judicial confirmation or review of the arbitration itself as authorized in Title 78B,
74 Chapter 11, Utah Uniform Arbitration Act;

75 (iii) an additional appraisal authorized by a mediator or arbitrator under Subsection
76 78B-6-522(4);

77 ~~[(iii) actions]~~ (iv) an action for de novo review of an arbitration award or issue brought
78 under the authority of Subsection 13-43-204(3)(a)(i); or

79 ~~[(iv) advisory opinions]~~ (v) an advisory opinion provided for in Sections 13-43-205
80 and 13-43-206.

81 Section 2. Section **13-43-204** is amended to read:

82 **13-43-204. Office of the Property Rights Ombudsman -- Arbitration or mediation**
83 **of takings or eminent domain disputes.**

84 (1) If requested by the owner or purported owner of private property ~~[owner]~~ and if
85 otherwise appropriate, the Office of the Property Rights Ombudsman shall mediate, or conduct
86 or arrange arbitration for, ~~[disputes between private property owners and government entities~~
87 ~~that involve]~~ a dispute between the owner or purported owner and a government entity:

88 (a) ~~[takings]~~ involving taking or eminent domain issues, including the existence and
89 extent of a purported owner's ownership of the property at issue;

90 (b) [~~actions~~] involved in an action for eminent domain under Title 78B, Chapter 6, Part
91 5, Eminent Domain; or

92 (c) [~~disputes about~~] involving relocation assistance under Title 57, Chapter 12, Utah
93 Relocation Assistance Act.

94 (2) If arbitration or mediation is requested by a private property owner under this
95 section, Section 57-12-14 or 78B-6-522, and arranged by the Office of the Property Rights
96 Ombudsman, the government entity or condemning entity shall participate in the mediation or
97 arbitration as if the matter were ordered to mediation or arbitration by a court.

98 (3) (a) (i) In conducting or arranging for arbitration under Subsection (1), the Office of
99 the Property Rights Ombudsman shall follow the procedures and requirements of Title 78B,
100 Chapter 11, Utah Uniform Arbitration Act.

101 (ii) In applying Title 78B, Chapter 11, Utah Uniform Arbitration Act, the arbitrator and
102 parties shall treat the matter as if:

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

104 (B) the Office of the Property Rights Ombudsman or other arbitrator chosen as
105 provided for in this section was appointed as arbitrator by the court.

106 (iii) For the purpose of an arbitration conducted under this section, if the dispute to be
107 arbitrated is not already the subject of legal action, the district court having jurisdiction over
108 the county where the private property involved in the dispute is located is the court referred to
109 in Title 78B, Chapter 11, Utah Uniform Arbitration Act.

110 (iv) An arbitration award under this chapter may not be vacated under the provisions of
111 Subsection 78B-11-124(1)(e) because of the lack of an arbitration agreement between the
112 parties.

113 (b) The Office of the Property Rights Ombudsman shall issue a written statement
114 declining to arbitrate or to appoint an arbitrator when, in the opinion of the Office of the
115 Property Rights Ombudsman:

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

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

119 (iii) all issues raised are beyond the scope of the Office of the Property Rights
120 Ombudsman's statutory duty to review; or

121 (iv) the arbitration is otherwise not appropriate.

122 (c) (i) The Office of the Property Rights Ombudsman shall appoint another person to
123 arbitrate a dispute when:

124 (A) either party objects to the Office of the Property Rights Ombudsman serving as the
125 arbitrator and agrees to pay for the services of another arbitrator;

126 (B) the Office of the Property Rights Ombudsman declines to arbitrate the dispute for a
127 reason other than those stated in Subsection (3)(b) and one or both parties are willing to pay for
128 the services of another arbitrator; or

129 (C) the Office of the Property Rights Ombudsman determines that it is appropriate to
130 appoint another person to arbitrate the dispute with no charge to the parties for the services of
131 the appointed arbitrator.

132 (ii) In appointing another person to arbitrate a dispute, the Office of the Property Rights
133 Ombudsman shall appoint an arbitrator who is agreeable to:

134 (A) both parties; or

135 (B) the Office of the Property Rights Ombudsman and the party paying for the
136 arbitrator.

137 (iii) The Office of the Property Rights Ombudsman may, on its own initiative or upon
138 agreement of both parties, appoint a panel of arbitrators to conduct the arbitration.

139 (iv) The Department of Commerce may pay an arbitrator per diem and reimburse
140 expenses incurred in the performance of the arbitrator's duties at the rates established by the
141 Division of Finance under Sections 63A-3-106 and 63A-3-107.

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

145 (e) The property owner and government entity may agree in advance of arbitration that
146 the arbitration is binding and that no de novo review may occur.

147 (f) Arbitration by or through the Office of the Property Rights Ombudsman is not
148 necessary before bringing legal action to adjudicate any claim.

149 (g) The lack of arbitration by or through the Office of the Property Rights Ombudsman
150 does not constitute, and may not be interpreted as constituting, a failure to exhaust available
151 administrative remedies or as a bar to bringing legal action.

152 (h) Arbitration under this section is not subject to Title 63G, Chapter 4, Administrative
153 Procedures Act, or Title 78B, Chapter 6, Part 2, Alternative Dispute Resolution Act.

154 (i) Within 30 days after an arbitrator issues a final award, and except as provided in
155 Subsection (3)(e), any party may submit the dispute, the award, or any issue upon which the
156 award is based, to the district court for [~~de novo~~] review by trial de novo.

157 (4) The filing with the Office of the Property Rights Ombudsman of a request for
158 mediation or arbitration of a constitutional taking issue does not stay any county or municipal
159 land use decision, including the decision of a board of adjustment.

160 (5) Members of the Office of the Property Rights Ombudsman may not be compelled
161 to testify in a civil action filed concerning the subject matter of any review, mediation, or
162 arbitration by the Office of the Property Rights Ombudsman.

163 Section 3. Section **13-43-205** is amended to read:

164 **13-43-205. Advisory opinion.**

165 [~~At any time before a final decision on a land use application by a local appeal authority~~
166 ~~under Section 10-9a-708 or 17-27a-708, a]~~

167 A local government or a potentially aggrieved person may, in accordance with Section
168 13-43-206, request a written advisory opinion:

169 (1) from a neutral third party to determine compliance with:

170 [(+) (a) Sections 10-9a-507 through 10-9a-511;

171 [(2) (b) Sections 17-27a-506 through 17-27a-510; and

172 [(3) (c) Title 11, Chapter 36, Impact Fees Act[-]; and

173 (2) (a) at any time before a final decision on a land use application by a local appeal
174 authority under Section 10-9a-708 or 17-27a-708; or

175 (b) at any time before the deadline for filing an appeal with the district court under
176 Section 10-9a-801 or 17-27a-801, if no local appeal authority is designated to hear the issue
177 that is the subject of the request for an advisory opinion.

178 Section 4. Section **13-43-206** is amended to read:

179 **13-43-206. Advisory opinion -- Process.**

180 (1) A request for an advisory opinion under Section 13-43-205 shall be:

181 (a) filed with the Office of the Property Rights Ombudsman; and

182 (b) accompanied by a filing fee of \$150.

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

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

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

189 (a) deliver notice of the request to opposing parties indicated in the request;

190 (b) inquire of all parties if there are other necessary parties to the dispute; and

191 (c) deliver notice to all necessary parties.

192 (5) If a governmental entity is an opposing party, the Office of the Property Rights
193 Ombudsman shall deliver the request in the manner provided for in Section 63G-7-401.

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

196 (b) If no agreement can be reached within four business days after notice is delivered
197 pursuant to Subsections (4) and (5), the Office of the Property Rights Ombudsman shall
198 appoint a neutral third party to issue an advisory opinion.

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

200 (a) share equally in the cost of the advisory opinion; and

201 (b) provide financial assurance for payment that the neutral third party requires.

202 (8) The neutral third party shall comply with the provisions of Section 78B-11-109,
203 and shall promptly:

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

206 (b) investigate and consider all responses; and

207 (c) issue a written advisory opinion within 15 business days after the appointment of
208 the neutral third party under Subsection (6)(b), unless:

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

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

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

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

216 (b) A copy of the advisory opinion shall be delivered to the government entity in the
217 manner provided for in Section 63G-7-401.

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

221 (12) (a) Subject to Subsection (12)(d), if the same issue that is the subject of an
222 advisory opinion is listed as a cause of action in litigation, and that cause of action is litigated
223 on the same facts and circumstances and is resolved consistent with the advisory opinion:

224 (i) the substantially prevailing party on that cause of action:

225 (A) may collect reasonable attorney fees and court costs pertaining to the development
226 of that cause of action from the date of the delivery of the advisory opinion to the date of the
227 court's resolution; and

228 (B) shall be refunded an impact fee held to be in violation of Title 11, Chapter 36,
229 Impact Fees Act, based on the difference between the impact fee paid and what the impact fee
230 should have been if the government entity had correctly calculated the impact fee; and

231 (ii) in accordance with Subsection (12)(b), a government entity shall refund an impact
232 fee held to be in violation of Title 11, Chapter 36, Impact Fees Act, to the person who was in
233 record title of the property on the day on which the impact fee for the property was paid if:

234 (A) the impact fee was paid on or after the day on which the advisory opinion on the
235 impact fee was issued but before the day on which the final court ruling on the impact fee is
236 issued; and

237 (B) the person described in Subsection (12)(a)(ii) requests the impact fee refund from
238 the government entity within 30 days after the day on which the court issued the final ruling on
239 the impact fee.

240 (b) A government entity subject to Subsection (12)(a)(ii) shall refund the impact fee
241 based on the difference between the impact fee paid and what the impact fee should have been
242 if the government entity had correctly calculated the impact fee.

243 (c) Nothing in this Subsection (12) is intended to create any new cause of action under
244 land use law.

245 (d) Subsection (12)(a) does not apply unless the resolution described in Subsection
246 (12)(a) is final.

247 (e) Subsection (12)(a) does not apply to a district court review by trial de novo under
248 Subsection 13-43-204(3)(i).

249 (13) Unless filed by the local government, a request for an advisory opinion under
250 Section 13-43-205 does not stay the progress of a land use application, or the effect of a land
251 use decision.

252 Section 5. Section **78B-6-522** is amended to read:

253 **78B-6-522. Dispute resolution.**

254 (1) In any dispute between a condemner and a private property owner arising out of this
255 chapter, the private property owner may submit the dispute for mediation or arbitration to the
256 [~~private property ombudsman~~] Office of the Property Rights Ombudsman under Section
257 13-43-204.

258 (2) An action submitted to the [~~private property ombudsman~~] Office of the Property
259 Rights Ombudsman under authority of this section does not bar or stay any action for
260 occupancy of premises authorized by Section 78B-6-510.

261 (3) (a) (i) A mediator or arbitrator, acting at the request of the property owner under
262 Section 13-43-204, has standing in an action brought in district court under this chapter to file
263 with the court a motion to stay the action during the pendency of the mediation or arbitration.

264 (ii) A mediator or arbitrator may not file a motion to stay under Subsection (3)(a)(i)
265 unless the mediator or arbitrator certifies at the time of filing the motion that a stay is
266 reasonably necessary to reach a resolution of the case through mediation or arbitration.

267 (b) If a stay is granted pursuant to a motion under Subsection (3)(a) and the order
268 granting the stay does not specify when the stay terminates, the mediator or arbitrator shall file
269 with the district court a motion to terminate the stay within 30 days after:

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

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

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

274 (4) (a) The private property owner or displaced person may request that the mediator or
275 arbitrator authorize an additional appraisal.

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

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

280 (ii) require the condemnor to pay the costs of the first additional appraisal.

281 (c) An additional appraisal authorized by a mediator or arbitrator under this section
282 may not be determined to be inadmissible in a judicial, administrative, or other proceeding on
283 the basis of a statutory provision declaring information generated in connection with a
284 mediation or arbitration to be confidential or inadmissible.

285 Section 6. Section **78B-10-102** is amended to read:

286 **78B-10-102. Definitions.**

287 As used in this chapter:

288 (1) "Mediation" means a process in which a mediator facilitates communication and
289 negotiation between parties to assist them in reaching a voluntary agreement regarding their
290 dispute.

291 (2) "Mediation communication":

292 (a) means conduct or a statement, whether oral, in a record, verbal, or nonverbal, that
293 occurs during a mediation or is made for purposes of considering, conducting, participating in,
294 initiating, continuing, or reconvening a mediation or retaining a mediator[-]; and

295 (b) does not include an additional appraisal authorized by a mediator under Subsection
296 78B-6-522(4).

297 (3) "Mediation party" means a person that participates in a mediation and whose
298 agreement is necessary to resolve the dispute.

299 (4) "Mediator" means an individual who is neutral and conducts a mediation.

300 (5) "Nonparty participant" means a person, other than a party or mediator, that
301 participates in a mediation.

302 (6) "Person" means an individual, corporation, estate, trust, business trust, partnership,
303 limited liability company, association, joint venture, government, governmental subdivision,
304 agency, or instrumentality, public corporation, or any other legal or commercial entity.

305 (7) "Proceeding" means:

306 (a) a judicial, administrative, arbitral, or other adjudicative process, including related

307 prehearing and posthearing motions, conferences, and discovery; or

308 (b) a legislative hearing or similar process.

309 (8) "Record" means information that is inscribed on a tangible medium or that is stored
310 in an electronic or other medium and is retrievable in perceivable form.

311 (9) "Sign" means:

312 (a) to execute or adopt a tangible symbol with the present intent to authenticate a
313 record; or

314 (b) to attach or logically associate an electronic symbol, sound, or process to or with a
315 record with the present intent to authenticate a record.

Legislative Review Note

as of 1-31-11 11:02 AM

Office of Legislative Research and General Counsel

FISCAL NOTE

S.B. 56

SHORT TITLE: Office of the Property Rights Ombudsman Amendments

SPONSOR: **Stevenson, J.**

2011 GENERAL SESSION, STATE OF UTAH

STATE GOVERNMENT (UCA 36-12-13(2)(b))

Enactment of this bill likely will not materially impact the state budget.

LOCAL GOVERNMENTS (UCA 36-12-13(2)(c))

Enactment of this bill likely will not result in direct, measurable costs and/or benefits for local governments.

DIRECT EXPENDITURES BY UTAH RESIDENTS AND BUSINESSES (UCA 36-12-13(2)(d))

Property owners could incur additional costs, depending upon decisions rendered by the Office of the Property Rights Ombudsman.