

PRIVATE PROPERTY OMBUDSMAN

1998 GENERAL SESSION

STATE OF UTAH

Sponsor: Evan L. Olsen

AN ACT RELATING TO PRIVATE PROPERTY RIGHTS; PROVIDING THAT POLITICAL SUBDIVISIONS USING EMINENT DOMAIN ARE SUBJECT TO THE UTAH RELOCATION ASSISTANCE ACT; PROVIDING FOR MEDIATION OR 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) "Agency" means a department, division, agency, commission, board, council, committee, authority, political subdivision, or other instrumentality of the state or of a political subdivision of the state whether one or more.

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

primarily:

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

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

(c) by a nonprofit organization; or

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

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

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

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

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

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

57-12-14. Dispute resolution.

If the agency and the private property owner or displaced person disagree on any issue arising out of this chapter, the private property owner may submit the dispute for arbitration according to

the procedures and requirements of Section 63-34-13.

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

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

(1) As used in this section:

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

- (i) the Fifth or Fourteenth Amendment of the Constitution of the United States; or
- (ii) Utah Constitution Article I, Section 22.

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

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

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

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

(3) The private property ombudsman shall:

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

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

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

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

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

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

(g) if appropriate and requested to do so by [~~one of the parties, mediate~~] the private property owner, mediate or conduct or arrange arbitration for disputes between private property owners and government entities that involve:

(i) takings issues law;

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

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

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

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

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

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

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

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

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

(i) the issues are not ripe for review;

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

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

(iv) the arbitration is otherwise not appropriate.

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

when:

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

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

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

(A) agreeable to both parties; or

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

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

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

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

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

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

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

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

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

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

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

(ii) a judicial confirmation or review of the arbitration itself as authorized in Title 78,

Chapter 31a, the Utah Arbitration Act; or

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

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

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

63-90a-4. Appeals of decisions.

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

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

and

(b) meets the requirements of this section.

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

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

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

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

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

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

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

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

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

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

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

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

(a) take proof by affidavit or otherwise of:

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

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

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

(b) grant or refuse the motion according to the equity of the case and the relative damages [which] that may accrue to the parties.

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

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

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

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

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

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

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

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

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

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

(c) If the compensation finally awarded [~~in respect of such lands, or any parcel thereof, shall exceed~~] exceeds the [~~amount of the money so received~~] advance, the court shall enter judgment against the plaintiff for the amount of the deficiency.

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

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

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

78-34-21. Dispute resolution.

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

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

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

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

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

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