

EMINENT DOMAIN AMENDMENTS

2003 GENERAL SESSION

STATE OF UTAH

Sponsor: Parley G. Hellewell

This act clarifies a property owner's right to mediate or arbitrate disputes arising from eminent domain actions.

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

AMENDS:

63-34-13, as last amended by Chapters 291 and 349, Laws of Utah 1999

78-34-21, as last amended by Chapter 291, Laws of Utah 1999

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

Section 1. 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.

(d) The executive director of the Department of Natural Resources may hire clerks, interns, or other personnel to assist the private property ombudsman.

(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, Chapter 90a, Constitutional Taking 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 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, Utah Relocation Assistance Act[-]; and
- (h) if arbitration or mediation is requested by the private property owner under this section, Section 78-34-21 or 57-12-14, and arranged by the private property ombudsman, the government entity or condemning entity shall participate in the mediation or arbitration as if the matter were ordered to arbitration by a court.

(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)~~] 78-31a-14(1)(e), Utah Arbitration Act, because of the lack of an arbitration agreement between the parties.

(b) The private property ombudsman shall issue a written statement declining 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 a 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;

(B) the private property ombudsman declines to arbitrate the dispute for a reason other than those stated in Subsection (4)(b) and one or both parties are willing to pay for the services of another arbitrator; or

(C) the private property ombudsman determines that it is appropriate to appoint another person to arbitrate the dispute with no charge to the parties for the services of the appointed arbitrator.

(ii) In appointing another person 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 the initiative of the private property ombudsman or upon agreement of both parties, appoint a panel of arbitrators to conduct the arbitration.

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

(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) The property owner and government entity may agree in advance of arbitration that the arbitration shall be binding and that no de novo review may occur.

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

(g) 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.

(h) Arbitration under this section is not subject to Chapter 46b, Administrative Procedures Act, or Title 78, Chapter 31b, Alternative Dispute Resolution Act.

(i) Within 30 days after the arbitrator issues the final award and except as provided in Subsection (4)(e), 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 filing with the private property ombudsman of a request for mediation or arbitration of a constitutional taking issue does not stay any county or municipal land use decision, including the decision of a board of adjustment.

(6) 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.

(7) (a) Except as provided in Subsection (7)(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 (7)(a) does not apply to:

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

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

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

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

Section 2. Section **78-34-21** is amended 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 mediation or 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) (i) A mediator or arbitrator, acting at the request of the property owner under Section 63-34-13, has standing in an action brought in district court under this chapter to file with the court a motion to stay the action during the pendency of the mediation or arbitration.

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

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

(i) the resolution of the dispute through mediation;
(ii) the issuance of a final arbitration award; or
(iii) a determination by the mediator or arbitrator that mediation or arbitration is not appropriate.

(4) (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~~] condemnor to pay the costs of the first additional appraisal.