

PROPERTY RIGHTS AMENDMENTS

2004 GENERAL SESSION

STATE OF UTAH

Sponsor: Carlene M. Walker

LONG TITLE

General Description:

This bill modifies provisions relating to rights and procedures in eminent domain proceedings and other disputes between a property owner and a governmental entity.

Highlighted Provisions:

This bill:

- ▶ requires those intending to acquire property by eminent domain to negotiate with and provide a specified written explanation to the property owner beforehand;
- ▶ imposes relocation assistance requirements on nongovernmental persons and entities acquiring property by eminent domain;
- ▶ changes a requirement that displacing agencies enact relocation assistance rules to an authorization to do so and requires those that do not enact rules to comply with Department of Transportation rules on relocation assistance;
- ▶ modifies notice requirements for redevelopment agencies intending to exercise eminent domain;
- ▶ provides that an appraisal obtained by a governmental entity is not a protected record if the governmental entity has initiated negotiations to acquire a single family residence before using eminent domain;
- ▶ exempts takings law actions from specified governmental immunity procedural requirements;
- ▶ changes the title of the private property ombudsman to the property rights ombudsman;
- ▶ imposes reasonable time and reasonable notice requirements on those entering land for examination, survey, and other purposes when the land is subject to being acquired by

eminent domain; and

▶ prohibits a defendant in an eminent domain action from having to respond to a motion for immediate occupancy before the time for answering the complaint expires, unless the court so orders.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

10-9-708, as last amended by Chapter 291, Laws of Utah 1999

10-9-1001, as last amended by Chapter 124, Laws of Utah 2003

17-27-708, as last amended by Chapter 241, Laws of Utah 2001

17-27-1001, as last amended by Chapter 124, Laws of Utah 2003

17B-4-1102, as enacted by Chapter 133, Laws of Utah 2001

57-12-3, as last amended by Chapters 295 and 321, Laws of Utah 1998

57-12-9, as last amended by Chapter 161, Laws of Utah 1987

63-2-304, as last amended by Chapters 60 and 131, Laws of Utah 2003

63-30-10.5, as last amended by Chapter 76, Laws of Utah 1991

63-34-13, as last amended by Chapter 214, Laws of Utah 2003

78-34-5, as last amended by Chapter 220, Laws of Utah 1967

78-34-9, as last amended by Chapters 295 and 321, Laws of Utah 1998

ENACTS:

78-34-4.5, Utah Code Annotated 1953

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 decision is final.

(b) (i) The time under Subsection (3)(a) to file a petition is tolled from the date a property owner files a request for arbitration of a constitutional taking issue with the [private] property rights ombudsman under Section 63-34-13 until 30 days after:

(A) the arbitrator issues a final award; or

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

(ii) A tolling under Subsection (3)(b)(i) operates only as to the specific constitutional taking issues that are the subject of the request for arbitration filed with the [private] property rights ombudsman by a property owner.

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

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

(b) If the proceeding was tape recorded, a transcript of that tape recording is a true and correct transcript for purposes of this Subsection (4).

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

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

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

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

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

(b) (i) Before filing a petition under this section or a request for mediation or arbitration of a constitutional taking issue under Section 63-34-13, the aggrieved party may petition the board of adjustment to stay its decision.

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

(iii) After a petition is filed under this section or a request for mediation or arbitration of a constitutional taking issue is filed under Section 63-34-13, the petitioner may seek an injunction staying the board of adjustment's decision.

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

10-9-1001. Appeals.

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

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

(b) (i) The time under Subsection (2)(a) to file a petition is tolled from the date a property owner files a request for arbitration of a constitutional taking issue with the [private] property rights ombudsman under Section 63-34-13 until 30 days after:

(A) the arbitrator issues a final award; or

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

(ii) A tolling under Subsection (2)(b)(i) operates only as to the specific constitutional

taking [issues] issue that [are] is the subject of the request for arbitration filed with the [private] property rights ombudsman by a property owner.

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

(3) The courts shall:

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

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

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

17-27-708. 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) (a) The district court's review is limited to a determination of whether the board of adjustment's decision is arbitrary, capricious, or illegal.

(b) A determination of illegality requires a determination that the board of adjustment's decision violates a statute, ordinance, or existing law.

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

(b) (i) The time under Subsection (3)(a) to file a petition is tolled from the date a property owner files a request for arbitration of a constitutional taking issue with the [private] property rights ombudsman under Section 63-34-13 until 30 days after:

(A) the arbitrator issues a final award; or

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

(ii) A tolling under Subsection (3)(b)(i) operates only as to the specific constitutional taking [issues] issue that [are] is the subject of the request for arbitration filed with the [private] property rights ombudsman by a property owner.

(iii) A request for arbitration filed with the [private] property rights ombudsman after the

time under Subsection (3)(a) to file a petition has expired does not affect the time to file a petition.

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

(b) If the proceeding was tape recorded, a transcript of that tape recording is a true and correct transcript for purposes of this Subsection (4).

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

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

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

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

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

(b) (i) Before filing a petition under this section or a request for mediation or arbitration of a constitutional taking issue under Section 63-34-13, the aggrieved party may petition the board of adjustment to stay its decision.

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

(iii) After a petition is filed under this section or a request for mediation or arbitration of a constitutional taking issue is filed under Section 63-34-13, the petitioner may seek an injunction staying the board of adjustment's decision.

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

17-27-1001. Appeals.

(1) No person may challenge in district court a county's land use decisions made under

this chapter or under the regulation made under authority of this chapter until that person has exhausted all administrative remedies.

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

(b) (i) The time under Subsection (2)(a) to file a petition is tolled from the date a property owner files a request for arbitration of a constitutional taking issue with the [private] property rights ombudsman under Section 63-34-13 until 30 days after:

(A) the arbitrator issues a final award; or

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

(ii) A tolling under Subsection (2)(b)(i) operates only as to the specific constitutional taking [issues] issue that [are] is the subject of the request for arbitration filed with the [private] property rights ombudsman by a property owner.

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

(3) (a) The courts shall:

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

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

(b) A determination of illegality requires a determination that the decision violates a statute, ordinance, or existing law.

Section 5. Section **17B-4-1102** is amended to read:

17B-4-1102. Prerequisites to exercise of eminent domain -- Civil action authorized -- Record of good faith negotiations to be retained.

(1) Before an agency may exercise the power of eminent domain, the agency shall:

(a) negotiate in good faith with the affected record property owner;

(b) provide to each affected record property owner a written declaration that includes:

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- (i) an explanation of the eminent domain process and the reasons for using it including:
 - (A) the need for the agency to obtain an independent appraisal that indicates the fair market value of the property and how the fair market value was determined;
 - (B) a statement explaining agency compliance with the owner participation guidelines;
 - (C) a statement that the agency may adopt a resolution authorizing the agency to make an offer to the record property owner to purchase the property for the fair market value amount determined by the appraiser and that, if the offer is rejected, the agency has the right to acquire the property through a condemnation proceeding; and
 - (D) a statement that the agency will prepare an offer that will include the price the agency is offering for the property, an explanation of how the agency determined the price being offered, the legal description of the property, conditions of the offer, and the time at which the offer will expire;
- (ii) an explanation of the record property owner's relocation rights under Title 57, Chapter 12, Utah Relocation Assistance Act, and how to receive relocation assistance; and
- (iii) a statement that the owner has the right to receive just compensation and an explanation of how to obtain it; and
- (c) provide to the affected record property owner or the owner's designated representative a notice that is printed in a type size of at least ten-point type that contains:
 - (i) a description of the property to be acquired;
 - (ii) the name of the agency acquiring the property and the agency's contact person and telephone number; ~~and~~
 - (iii) a copy of Title 57, Chapter 12, Utah Relocation Assistance Act[-]; and
 - (iv) a summary of the dispute resolution rights under Section 78-34-21, including the name and current telephone number of the property rights ombudsman established under Section 63-34-13.
- (2) A person may bring a civil suit against an agency for a violation of Subsection (1)(b) that results in damage to that person.
- (3) Each agency shall keep a record and evidence of the good faith negotiations required

under Subsection (1)(a) and retain the record and evidence as provided in:

(a) Title 63, Chapter 2, Government Records Access and Management Act; or

(b) an ordinance or policy that the agency has adopted under Section 63-2-701.

(4) A record property owner whose property is being taken by an agency through the exercise of eminent domain may elect to receive for the real property being taken either fair market value or replacement property under Section 57-12-7.

Section 6. Section **57-12-3** is amended to read:

57-12-3. Definitions.

As used in this chapter:

(1) "Agency" means:

(a) 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[-]; and

(b) any other person whose use of the power of eminent domain results in a person becoming a displaced person.

(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 chapter, moves from real property, or who moves ~~[his]~~ the person's personal property from real property, or moves or discontinues ~~[his]~~ the person's business or moves ~~[his]~~ the person's 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.

(4) "Family farm" means a farm operation which is conducted:

(a) on two sections (1280 acres) or less; or

(b) as a sole proprietorship or through an entity which is wholly owned by members of the same immediate family.

(5) "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.

(6) "Non-profit 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.

(7) "Person" means any individual, partnership, corporation, or association.

(8) "Small business" means a business which has a gross annual income of less than \$1,500,000.

Section 7. Section **57-12-9** is amended to read:

57-12-9. Rules of displacing agency.

(1) (a) ~~[The]~~ A displacing agency ~~[shall]~~ may enact rules to assure that:

~~[(a)]~~ (i) the payments and assistance authorized by this chapter are administered in a manner that is fair, reasonable, and as uniform as practicable;

~~[(b)]~~ (ii) a displaced person who makes proper application for a payment authorized ~~[for him]~~ by this chapter is paid promptly after a move or, in hardship cases, is paid in advance; and

~~[(c)]~~ (iii) any person aggrieved by a determination as to eligibility for a payment authorized by this chapter, or the amount of a payment, may have ~~[his]~~ the person's application reviewed by the head of the displacing agency.

(b) Each displacing agency that has not adopted rules under Subsection (1)(a) shall comply with the rules promulgated by the Utah Department of Transportation relating to displaced persons in right-of-way acquisitions.

(2) [~~The~~] Each displacing agency shall comply with the procedures and requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its adjudicative proceedings.

Section 8. Section **63-2-304** is amended to read:

63-2-304. Protected records.

The following records are protected if properly classified by a governmental entity:

(1) trade secrets as defined in Section 13-24-2 if the person submitting the trade secret has provided the governmental entity with the information specified in Section 63-2-308;

(2) commercial information or nonindividual financial information obtained from a person if:

(a) disclosure of the information could reasonably be expected to result in unfair competitive injury to the person submitting the information or would impair the ability of the governmental entity to obtain necessary information in the future;

(b) the person submitting the information has a greater interest in prohibiting access than the public in obtaining access; and

(c) the person submitting the information has provided the governmental entity with the information specified in Section 63-2-308;

(3) commercial or financial information acquired or prepared by a governmental entity to the extent that disclosure would lead to financial speculations in currencies, securities, or commodities that will interfere with a planned transaction by the governmental entity or cause substantial financial injury to the governmental entity or state economy;

(4) records the disclosure of which could cause commercial injury to, or confer a competitive advantage upon a potential or actual competitor of, a commercial project entity as defined in Subsection 11-13-103 (4);

(5) test questions and answers to be used in future license, certification, registration, employment, or academic examinations;

(6) records the disclosure of which would impair governmental procurement proceedings or give an unfair advantage to any person proposing to enter into a contract or agreement with a governmental entity, except that this Subsection (6) does not restrict the right of a person to see bids submitted to or by a governmental entity after bidding has closed;

(7) records that would identify real property or the appraisal or estimated value of real or personal property, including intellectual property, under consideration for public acquisition before any rights to the property are acquired unless:

(a) public interest in obtaining access to the information outweighs the governmental entity's need to acquire the property on the best terms possible;

(b) the information has already been disclosed to persons not employed by or under a duty of confidentiality to the entity;

(c) in the case of records that would identify property, potential sellers of the described property have already learned of the governmental entity's plans to acquire the property; ~~or~~

(d) in the case of records that would identify the appraisal or estimated value of property, the potential sellers have already learned of the governmental entity's estimated value of the property; or

(e) the property under consideration for public acquisition is a single family residence and the governmental entity seeking to acquire the property has initiated negotiations to acquire the property as required under Section 78-34-4.5;

(8) records prepared in contemplation of sale, exchange, lease, rental, or other compensated transaction of real or personal property including intellectual property, which, if disclosed prior to completion of the transaction, would reveal the appraisal or estimated value of the subject property, unless:

(a) the public interest in access outweighs the interests in restricting access, including the governmental entity's interest in maximizing the financial benefit of the transaction; or

(b) when prepared by or on behalf of a governmental entity, appraisals or estimates of the value of the subject property have already been disclosed to persons not employed by or under a duty of confidentiality to the entity;

(9) records created or maintained for civil, criminal, or administrative enforcement purposes or audit purposes, or for discipline, licensing, certification, or registration purposes, if release of the records:

(a) reasonably could be expected to interfere with investigations undertaken for enforcement, discipline, licensing, certification, or registration purposes;

(b) reasonably could be expected to interfere with audits, disciplinary, or enforcement proceedings;

(c) would create a danger of depriving a person of a right to a fair trial or impartial hearing;

(d) reasonably could be expected to disclose the identity of a source who is not generally known outside of government and, in the case of a record compiled in the course of an investigation, disclose information furnished by a source not generally known outside of government if disclosure would compromise the source; or

(e) reasonably could be expected to disclose investigative or audit techniques, procedures, policies, or orders not generally known outside of government if disclosure would interfere with enforcement or audit efforts;

(10) records the disclosure of which would jeopardize the life or safety of an individual;

(11) records the disclosure of which would jeopardize the security of governmental property, governmental programs, or governmental recordkeeping systems from damage, theft, or other appropriation or use contrary to law or public policy;

(12) records that, if disclosed, would jeopardize the security or safety of a correctional facility, or records relating to incarceration, treatment, probation, or parole, that would interfere with the control and supervision of an offender's incarceration, treatment, probation, or parole;

(13) records that, if disclosed, would reveal recommendations made to the Board of Pardons and Parole by an employee of or contractor for the Department of Corrections, the Board of Pardons and Parole, or the Department of Human Services that are based on the employee's or contractor's supervision, diagnosis, or treatment of any person within the board's jurisdiction;

(14) records and audit workpapers that identify audit, collection, and operational procedures and methods used by the State Tax Commission, if disclosure would interfere with audits or collections;

(15) records of a governmental audit agency relating to an ongoing or planned audit until the final audit is released;

(16) records prepared by or on behalf of a governmental entity solely in anticipation of litigation that are not available under the rules of discovery;

(17) records disclosing an attorney's work product, including the mental impressions or legal theories of an attorney or other representative of a governmental entity concerning litigation;

(18) records of communications between a governmental entity and an attorney representing, retained, or employed by the governmental entity if the communications would be privileged as provided in Section 78-24-8;

(19) personal files of a legislator, including personal correspondence to or from a member of the Legislature, provided that correspondence that gives notice of legislative action or policy may not be classified as protected under this section;

(20) (a) records in the custody or control of the Office of Legislative Research and General Counsel, that, if disclosed, would reveal a particular legislator's contemplated legislation or contemplated course of action before the legislator has elected to support the legislation or course of action, or made the legislation or course of action public; and

(b) notwithstanding Subsection (20)(a), the form to request legislation submitted to the Office of Legislative Research and General Counsel is a public document unless a legislator asks that the records requesting the legislation be maintained as protected records until such time as the legislator elects to make the legislation or course of action public;

(21) research requests from legislators to the Office of Legislative Research and General Counsel or the Office of the Legislative Fiscal Analyst and research findings prepared in response to these requests;

(22) drafts, unless otherwise classified as public;

(23) records concerning a governmental entity's strategy about collective bargaining or

pending litigation;

(24) records of investigations of loss occurrences and analyses of loss occurrences that may be covered by the Risk Management Fund, the Employers' Reinsurance Fund, the Uninsured Employers' Fund, or similar divisions in other governmental entities;

(25) records, other than personnel evaluations, that contain a personal recommendation concerning an individual if disclosure would constitute a clearly unwarranted invasion of personal privacy, or disclosure is not in the public interest;

(26) records that reveal the location of historic, prehistoric, paleontological, or biological resources that if known would jeopardize the security of those resources or of valuable historic, scientific, educational, or cultural information;

(27) records of independent state agencies if the disclosure of the records would conflict with the fiduciary obligations of the agency;

(28) records of a public institution of higher education regarding tenure evaluations, appointments, applications for admissions, retention decisions, and promotions, which could be properly discussed in a meeting closed in accordance with Title 52, Chapter 4, Open and Public Meetings, provided that records of the final decisions about tenure, appointments, retention, promotions, or those students admitted, may not be classified as protected under this section;

(29) records of the governor's office, including budget recommendations, legislative proposals, and policy statements, that if disclosed would reveal the governor's contemplated policies or contemplated courses of action before the governor has implemented or rejected those policies or courses of action or made them public;

(30) records of the Office of the Legislative Fiscal Analyst relating to budget analysis, revenue estimates, and fiscal notes of proposed legislation before issuance of the final recommendations in these areas;

(31) records provided by the United States or by a government entity outside the state that are given to the governmental entity with a requirement that they be managed as protected records if the providing entity certifies that the record would not be subject to public disclosure if retained by it;

(32) transcripts, minutes, or reports of the closed portion of a meeting of a public body except as provided in Section 52-4-7;

(33) records that would reveal the contents of settlement negotiations but not including final settlements or empirical data to the extent that they are not otherwise exempt from disclosure;

(34) memoranda prepared by staff and used in the decision-making process by an administrative law judge, a member of the Board of Pardons and Parole, or a member of any other body charged by law with performing a quasi-judicial function;

(35) records that would reveal negotiations regarding assistance or incentives offered by or requested from a governmental entity for the purpose of encouraging a person to expand or locate a business in Utah, but only if disclosure would result in actual economic harm to the person or place the governmental entity at a competitive disadvantage, but this section may not be used to restrict access to a record evidencing a final contract;

(36) materials to which access must be limited for purposes of securing or maintaining the governmental entity's proprietary protection of intellectual property rights including patents, copyrights, and trade secrets;

(37) the name of a donor or a prospective donor to a governmental entity, including a public institution of higher education, and other information concerning the donation that could reasonably be expected to reveal the identity of the donor, provided that:

(a) the donor requests anonymity in writing;

(b) any terms, conditions, restrictions, or privileges relating to the donation may not be classified protected by the governmental entity under this Subsection (37); and

(c) except for public institutions of higher education, the governmental unit to which the donation is made is primarily engaged in educational, charitable, or artistic endeavors, and has no regulatory or legislative authority over the donor, a member of his immediate family, or any entity owned or controlled by the donor or his immediate family;

(38) accident reports, except as provided in Sections 41-6-40, 41-12a-202, and 73-18-13;

(39) a notification of workers' compensation insurance coverage described in Section

34A-2-205;

(40) (a) the following records of a public institution of education, which have been developed, discovered, or received by or on behalf of faculty, staff, employees, or students of the institution:

- (i) unpublished lecture notes;
 - (ii) unpublished research notes and data;
 - (iii) unpublished manuscripts;
 - (iv) creative works in process;
 - (v) scholarly correspondence; and
 - (vi) confidential information contained in research proposals; and
- (b) Subsection (40)(a) may not be construed to affect the ownership of a record;

(41) (a) records in the custody or control of the Office of Legislative Auditor General that would reveal the name of a particular legislator who requests a legislative audit prior to the date that audit is completed and made public; and

(b) notwithstanding Subsection (41)(a), a request for a legislative audit submitted to the Office of the Legislative Auditor General is a public document unless the legislator asks that the records in the custody or control of the Office of Legislative Auditor General that would reveal the name of a particular legislator who requests a legislative audit be maintained as protected records until the audit is completed and made public;

(42) records that provide detail as to the location of an explosive, including a map or other document that indicates the location of:

- (a) a production facility; or
- (b) a magazine;

(43) information contained in the database described in Section 62A-3-311.1;

(44) information contained in the Management Information System and Licensing Information System described in Title 62A, Chapter 4a, Child and Family Services; and

(45) information regarding National Guard operations or activities in support of the National Guard's federal mission.

Section 9. Section **63-30-10.5** is amended to read:

63-30-10.5. Waiver of immunity for taking private property without compensation.

(1) As provided by Article I, Section 22 of the Utah Constitution, immunity from suit of all governmental entities is waived for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property for public uses without just compensation.

(2) Compensation and damages shall be assessed according to the requirements of Title 78, Chapter 34, Eminent Domain.

(3) An action that involves takings law, as defined in Section 63-34-13, is not subject to the requirements of Sections 63-30-11, 63-30-12, 63-30-13, 63-30-14, 63-30-15, and 63-30-19.

Section 10. Section **63-34-13** is amended to read:

63-34-13. Property rights 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 rights 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 rights 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;
 - (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 Section 57-12-14, and arranged by the [private] property rights ombudsman, the government entity or condemning entity shall participate in the mediation or arbitration as if the matter were ordered to mediation or arbitration by a court.
- (4) (a) The property rights ombudsman may assist a private property owner with respect to a dispute involving the effect of local government regulation on the use and occupancy of real property.
- (b) In assisting a private property owner with a dispute under Subsection (4)(a), the property rights ombudsman may not require mediation or arbitration of a dispute except as provided in Subsection (3)(g).

~~[(4)]~~ (5) (a) (i) In conducting or arranging for arbitration under Subsection (3), the [private] property rights ombudsman shall follow the procedures and requirements of Title 78, Chapter 31a, Utah Uniform Arbitration Act.

(ii) In applying the Utah Uniform 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 rights 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 Uniform Arbitration Act.

(iv) The award from an arbitration conducted under this chapter may not be vacated under the provisions of Subsection ~~[78-31a-14(1)(e), Utah Arbitration Act,]~~ 78-31a-124(1)(e) because of the lack of an arbitration agreement between the parties.

(b) The [private] property rights ombudsman shall issue a written statement declining to arbitrate or to appoint an arbitrator when, in the opinion of the [private] property rights 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 rights ombudsman shall appoint another person to arbitrate a dispute when:

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

(B) the [private] property rights 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 rights 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 rights 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 rights ombudsman.

(iii) The [private] property rights ombudsman may, on the initiative of the [private] property rights 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 rights ombudsman is not necessary before bringing legal action to adjudicate any claim.

(g) The lack of arbitration by or through the [private] property rights 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)]~~ (6) The filing with the ~~[private]~~ property rights 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)]~~ (7) The ~~[private]~~ property rights 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)]~~ (8) (a) Except as provided in Subsection ~~[(7)]~~ (8)(b), evidence of a review by the ~~[private]~~ property rights ombudsman and ~~[his]~~ the opinions, writings, findings, and determinations of the property rights ombudsman are not admissible as evidence in an action subsequently brought in court and dealing with the same dispute.

(b) Subsection ~~[(7)]~~ (8)(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 Uniform Arbitration Act; or
- (iii) actions for de novo review of an arbitration award or issue brought under the authority of Subsection ~~[(4)]~~ (5)(i).

~~[(8)]~~ (9) The ~~[private]~~ property rights 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 11. Section **78-34-4.5** is enacted to read:

78-34-4.5. Negotiation and disclosure required before eminent domain action.

Each person who seeks to acquire property by eminent domain shall:

(1) before initiating an eminent domain action, make a reasonable effort to negotiate with the property owner for the purchase of the property; and

(2) as early in the negotiation process under Subsection (1) as practicable but no later than 14 days before the filing of an eminent domain action, unless the court for good cause allows

a shorter period before filing:

(a) advise the property owner of the owner's rights to mediation and arbitration under Section 78-34-21, including the name and current telephone number of the property rights ombudsman, established in Section 63-34-13; and

(b) provide the property owner a written statement explaining that oral representations or promises made during the negotiation process are not binding upon the person seeking to acquire the property by eminent domain.

Section 12. Section **78-34-5** is amended to read:

78-34-5. Right of entry for survey and location.

~~[In all cases where]~~ (1) If land is required for public use, the person[;] or [his] the person's agent[;] in charge of [such] the use may survey and locate the same; but it must be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of this chapter.

(2) (a) The person[;] or [his] the person's agent[;] in charge of [such] the public use may, at reasonable times and upon reasonable notice, enter upon the land and make examinations, surveys, and maps [thereof, and such entry shall] of the land.

(b) Entry upon land as authorized under Subsection (2)(a) does not constitute [no] a cause of action in favor of the owners of the lands, except for actual damage to the land and improvements [thereon] on the land caused by such entry, which is not repaired on or before the date the examinations and surveys are completed.

Section 13. 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.

(1) (a) At any time after the commencement of suit, 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)]~~ (i) occupy the premises sought to be condemned pending the action, including appeal; and

~~[(b)]~~ (ii) to do whatever work on the premises that is required.

(b) Except as ordered by the court for good cause shown, a defendant may not be required to reply to a motion for immediate occupancy before expiration of the time to answer the complaint.

(2) The court shall:

(a) take proof by affidavit or otherwise of:

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

(ii) the damages that will accrue from the condemnation; and

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

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

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

(b) That amount shall be for the purposes of the motion only and is not 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 taken as authorized by this section or damaged as a result of that taking vests in the parties entitled to it.

(b) That compensation shall be ascertained and awarded as provided in Section 78-34-10.

(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 of the property by the plaintiff or from the date of the order of occupancy, whichever is earlier, to the date of

judgment.

(ii) The court may not award interest 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 before judgment as an advance on the just compensation to be awarded in the proceeding.

(b) This advance payment to a defendant shall be considered to be an abandonment by the defendant of all defenses except a claim for greater compensation.

(c) If the compensation finally awarded exceeds the advance, the court shall enter judgment against the plaintiff for the amount of the deficiency.

(d) If the 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.

(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.