

PROPERTY RIGHTS OMBUDSMAN

2006 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: L. Alma Mansell

House Sponsor: _____

LONG TITLE

General Description:

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

Highlighted Provisions:

This bill:

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

Monies Appropriated in this Bill:

None

Other Special Clauses:

None



28 **Utah Code Sections Affected:**

29 ENACTS:

30 **13-42-101**, Utah Code Annotated 1953

31 **13-42-102**, Utah Code Annotated 1953

32 **13-42-201**, Utah Code Annotated 1953

33 **13-42-202**, Utah Code Annotated 1953

34 **13-42-203**, Utah Code Annotated 1953

35 **13-42-204**, Utah Code Annotated 1953

36 **13-42-205**, Utah Code Annotated 1953



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

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

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

41 **Part 1. General Provisions**

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

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

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

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

46 As used in this chapter:

47 (1) "Constitutional taking" or "taking" means a governmental action resulting in a
48 taking of private property that:

49 (a) requires compensation to the owner of the property under:

50 (i) the Fifth or Fourteenth Amendment of the Constitution of the United States; or

51 (ii) Utah Constitution Article I, Section 22; or

52 (b) violates constitutional due process protections of private real property.

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

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

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

61 **13-42-201. Office of the Property Rights Ombudsman.**

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

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

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

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

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

72 **13-42-202. Land Use and Eminent Domain Advisory Board -- Appointment --**
73 **Compensation -- Duties.**

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

76 (a) one individual nominated by the executive director of the Department of
77 Transportation;

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

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

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

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

86 (f) one individual representing the agricultural industry, nominated by Utah farm
87 organizations; and

88 (g) one individual who:

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

90 (ii) does not hold public office; and
91 (iii) is not currently employed, nor has been employed in the previous twelve months,
92 by any of the entities or industries listed in Subsections (1)(a) through (f).

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

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

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

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

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

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

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

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

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

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

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

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

117 (c) The Office of the Property Rights Ombudsman and attorneys working in the Office
118 of the Property Rights Ombudsman may not be removed without the concurrence of the board.

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

120 **13-42-203. Office of the Property Rights Ombudsman -- Duties.**

- 121 (1) The Office of the Property Rights Ombudsman shall:
122 (a) develop and maintain expertise in and understanding of takings, eminent domain,
123 and land use law;
124 (b) assist state agencies and local governments in developing the guidelines required by
125 Title 63, Chapter 90a, Constitutional Taking Issues;
126 (c) at the request of a state agency or local government, assist the state agency or local
127 government, in analyzing actions with potential takings implications or other land use issues;
128 (d) advise private property owners who have a legitimate potential or actual takings
129 claim against a state or local government entity or have questions about takings, eminent
130 domain, and land use law;
131 (e) identify state or local government actions that have potential takings implications
132 and, if appropriate, advise those state or local government entities about those implications;
133 and
134 (f) provide information to private citizens, civic groups, government entities, and other
135 interested parties about takings, eminent domain, and land use law and their rights and
136 responsibilities under the takings, eminent domain, or land use laws through seminars and
137 publications, and by other appropriate means.
138 (2) The Office of the Property Rights Ombudsman may not represent private property
139 owners, state agencies, or local governments in court or in adjudicative proceedings under Title
140 63, Chapter 46b, Administrative Procedures Act.
141 (3) No member of the Office of the Property Rights Ombudsman may be compelled to
142 testify in a civil action filed concerning the subject matter of any review, mediation, or
143 arbitration by the office.
144 (4) (a) Except as provided in Subsection (4)(b), evidence of a review by the Office of
145 the Property Rights Ombudsman and the opinions, writings, findings, and determinations of the
146 Office of the Property Rights Ombudsman are not admissible as evidence in a judicial action.
147 (b) Subsection (4)(a) does not apply to:
148 (i) actions brought under authority of Title 78, Chapter 6, Small Claims Courts;
149 (ii) a judicial confirmation or review of the arbitration itself as authorized in Title 78,
150 Chapter 31a, Utah Uniform Arbitration Act;
151 (iii) actions for de novo review of an arbitration award or issue brought under the

152 authority of Subsection 13-42-204(3)(i); or

153 (iv) advisory opinions provided for in Section 13-42-205.

154 (5) The Office of the Property Rights Ombudsman may not represent private property
155 owners, state agencies, or local governments in court or in adjudicative proceedings under Title
156 63, Chapter 46b, Administrative Procedures Act.

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

158 **13-42-204. Office of Property Rights Ombudsman -- Arbitration or mediation of**
159 **takings or eminent domain disputes.**

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

163 (i) takings or eminent domain issues;

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

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

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

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

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

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

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

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

183 (iv) An arbitration award under this chapter may not be vacated under the provisions of
184 Subsection 78-31a-124(1)(e) because of the lack of an arbitration agreement between the
185 parties.

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

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

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

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

194 (iv) the arbitration is otherwise not appropriate.

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

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

199 (B) the Office of the Property Rights Ombudsman declines to arbitrate the dispute for a
200 reason other than those stated in Subsection (4)(b) and one or both parties are willing to pay for
201 the services of another arbitrator; or

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

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

207 (A) both parties; or

208 (B) the Office of the Property Rights Ombudsman and the party paying for the
209 arbitrator.

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

212 (iv) The Department of Commerce may pay an arbitrator per diem and reimburse
213 expenses incurred in the performance of the arbitrator's duties at the rates established by the

214 Division of Finance under Sections 63A-3-106 and 63A-3-107.

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

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

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

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

225 (h) Arbitration under this section is not subject to Title 63, Chapter 46b,
226 Administrative Procedures Act, or Title 78, Chapter 31b, Alternative Dispute Resolution Act.

227 (i) Within 30 days after an arbitrator issues a final award, and except as provided in
228 Subsection (3)(e), any party may submit the award, or any issue upon which the award is based,
229 to the district court for de novo review.

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

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

236 Section 7. Section **13-42-205** is enacted to read:

237 **13-42-205. Advisory opinion -- Timing -- Effect.**

238 (1) The property rights ombudsman may issue an advisory opinion in response to a
239 request by:

240 (a) a property owner who will have standing to challenge a pending administrative land
241 use decision;

242 (b) an applicant who submitted an administrative land use application as defined and
243 provided for in Title 10, Chapter 9a, Municipal Land Use, Development, and Management Act,
244 or Title 17, Chapter 27a, County Land Use, Development, and Management Act;

245 (c) a person who is required to pay an impact fee under Title 11, Chapter 36, Impact
246 Fees Act; or

247 (d) a local government entity.

248 (2) An advisory opinion may:

249 (a) be requested at any time in the process of review of an administrative land use
250 application by a municipality, county, or other local governmental entity; and

251 (b) consider whether the administrative land use application and the response of the
252 local governmental entity to the administrative land use application complies with the
253 requirements of:

254 (i) Title 10, Chapter 9a, Municipal Land Use, Development, and Management Act;

255 (ii) Title 17, Chapter 27a, County Land Use, Development, and Management Act;

256 (iii) Title 11, Chapter 36, Impact Fees Act; or

257 (iv) other relevant law.

258 (3) (a) A request for an advisory opinion shall be accompanied by a filing fee of \$150.

259 (b) The Office of the Property Rights Ombudsman may establish policies providing for
260 partial fee waivers for a person who is not financially able to pay the entire fee.

261 (4) A person requesting an advisory opinion need not exhaust administrative remedies,
262 including remedies described under Section 10-9a-801 or 17-27a-801, before requesting an
263 advisory opinion.

264 (5) (a) The Office of the Property Rights Ombudsman shall, within 15 business days
265 after a request for an advisory opinion, unless otherwise agreed to by the person making the
266 request and the Office of the Property Rights Ombudsman, investigate the request and make a
267 preliminary determination about whether the governmental entity's administrative decision or
268 action concerning the administrative land use application conforms with relevant law.

269 (b) If the Office of the Property Rights Ombudsman determines that the matter is
270 complex or that there are other circumstances that make the issuance of the advisory review
271 extraordinarily burdensome on the Office of the Property Rights Ombudsman or any of the
272 entities involved in responding to the request, the Office of the Property Rights Ombudsman
273 shall, after notice within the 15-day period provided in Subsection (5)(a), advise the person
274 making the request that the advisory opinion will be issued within 30 calendar days after
275 receipt of the request.

276 (6) (a) The Office of the Property Rights Ombudsman shall make reasonable efforts to
277 contact, and advise that a request for an advisory opinion has been received:

278 (i) an applicant who submits an administrative land use application that is the subject
279 of the request; and

280 (ii) the local government entity involved.

281 (b) The Office of the Property Rights Ombudsman shall, within the time limits
282 provided in this section:

283 (i) seek a response from the applicant for the advisory opinion and the local
284 government entity; and

285 (ii) consider all responses before issuing the advisory opinion.

286 (7) An advisory opinion shall include a statement of the facts and law supporting the
287 opinion's conclusions.

288 (8) (a) Copies of any advisory opinion issued by the Office of the Property Rights
289 Ombudsman shall be delivered as soon as practicable to the:

290 (i) person requesting the advisory opinion;

291 (ii) applicant who submitted a land use application; and

292 (iii) governmental entity involved.

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

295 (9) An advisory opinion issued by the Office of the Property Rights Ombudsman is not
296 binding on any party to a dispute involving land use law except as provided in Subsection (10).

297 (10) (a) If the subject of an advisory opinion is listed as a cause of action in litigation
298 or arbitration under Section 13-42-204, and the cause of action is resolved consistent with the
299 advisory opinion, the substantially prevailing party is entitled to reasonable attorney fees and
300 court costs related to that cause of action from the date of the delivery of the advisory opinion
301 to the date of the court's resolution.

302 (b) Nothing in this Subsection (10) is intended to create any new cause of action under
303 land use law.

Legislative Review Note

as of 2-7-06 10:24 AM

Based on a limited legal review, this legislation has not been determined to have a high probability of being held unconstitutional.

Office of Legislative Research and General Counsel

State Impact

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

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

Individual and Business Impact

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