

## SB0056S01 compared with SB0056

~~{deleted text}~~ shows text that was in SB0056 but was deleted in SB0056S01.

inserted text shows text that was not in SB0056 but was inserted into SB0056S01.

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Senator Jerry W. Stevenson proposes the following substitute bill:

### OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

#### AMENDMENTS

2011 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Jerry W. Stevenson**

House Sponsor: \_\_\_\_\_

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#### LONG TITLE

##### General Description:

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

##### Highlighted Provisions:

This bill:

- ~~{~~ → provides that additional appraisals authorized by a mediator or arbitrator are exempt from a provision making specified items inadmissible in court and provides that an additional appraisal is not inadmissible because of another statutory provision making information generated in a mediation or arbitration confidential or inadmissible;
- modifies mediation and arbitration duties of the Office of the Private Property

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### ~~Ombudsman;~~

- ~~‡~~ ▶ clarifies the scope of the de novo district court review of an arbitrator's decision;
- ~~‡~~ ▶ modifies the time for requesting an advisory opinion from a neutral third party;
- ~~→~~ ~~specifies that certain attorney fee and other provisions do not apply in the setting of a district court review by trial de novo following an advisory opinion;~~ and
- ▶ makes technical changes.

### Money Appropriated in this Bill:

None

### Other Special Clauses:

None

### Utah Code Sections Affected:

AMENDS:

- ~~{~~ ~~13-43-203~~, as last amended by Laws of Utah 2008, Chapters 3, 84, and 382
- ~~‡~~ 13-43-204, as last amended by Laws of Utah 2008, Chapters 3 and 382
- 13-43-205, as enacted by Laws of Utah 2006, Chapter 258
- ~~{~~ ~~13-43-206~~, as last amended by Laws of Utah 2010, Chapter 203
- ~~‡~~ 78B-6-522, as renumbered and amended by Laws of Utah 2008, Chapter 3
- ~~{~~ ~~78B-10-102~~, as renumbered and amended by Laws of Utah 2008, Chapter 3

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

Section 1. Section ~~{13-43-203}~~13-43-204 is amended to read:

~~{~~ ~~13-43-203. Office of the Property Rights Ombudsman -- Duties:~~

- ~~——~~ (1) ~~The Office of the Property Rights Ombudsman shall:~~
- ~~——~~ (a) ~~develop and maintain expertise in and understanding of takings, eminent domain, and land use law;~~
- ~~——~~ (b) ~~assist state agencies and local governments in developing the guidelines required by Title 63L, Chapter 4, Constitutional [Taking] 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 or other land use issues;~~
- ~~——~~ (d) ~~advise real property owners who:~~
- ~~——~~ (i) ~~have a legitimate potential or actual takings claim against a state or local~~

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~~government entity or have questions about takings, eminent domain, and land use law; or~~

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

~~—— (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; and~~

~~—— (f) provide information to private citizens, civic groups, government entities, and other interested parties about takings, eminent domain, and land use law and their rights and responsibilities under the takings, eminent domain, or land use laws through seminars and publications, and by other appropriate means:~~

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

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

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

~~—— (b) Subsection (4)(a) does not apply to:~~

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

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

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

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

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

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

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

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

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

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

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

(2) If arbitration or mediation is requested by a private property owner under this section, Section 57-12-14 or 78B-6-522, and arranged by the Office of the 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.

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

(ii) In applying Title 78B, Chapter 11, 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 Office of the 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 an arbitration 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 is the court referred to in Title 78B, Chapter 11, Utah Uniform Arbitration Act.

(iv) An arbitration award under this chapter may not be vacated under the provisions of

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Subsection 78B-11-124(1)(e) because of the lack of an arbitration agreement between the parties.

(b) The Office of the Property Rights Ombudsman shall issue a written statement declining to arbitrate or to appoint an arbitrator when, in the opinion of the Office of the 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 Office of the Property Rights Ombudsman's statutory duty to review; or

(iv) the arbitration is otherwise not appropriate.

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

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

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

(C) the Office of the 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 Office of the Property Rights Ombudsman shall appoint an arbitrator who is agreeable to:

(A) both parties; or

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

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

(iv) The Department of Commerce may pay 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.

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(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 is binding and that no de novo review may occur.

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

(g) The lack of arbitration by or through the Office of the 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 Title 63G, Chapter 4, Administrative Procedures Act, or Title 78B, Chapter 6, Part 2, Alternative Dispute Resolution Act.

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

(4) The filing with the Office of the 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.

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

Section ~~(3)~~2. Section **13-43-205** is amended to read:

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

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

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

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

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

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

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

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

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

Section ~~{4}~~3. Section ~~{13-43-206}~~78B-6-522 is amended to read:

~~{~~ ~~13-43-206. Advisory opinion -- Process.~~

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

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

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

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

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

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

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

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

~~———— (c) deliver notice to all necessary parties.~~

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

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

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

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

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

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

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

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- ~~—— (a) seek a response from all necessary parties to the issues raised in the request for advisory opinion;~~
- ~~—— (b) investigate and consider all responses; and~~
- ~~—— (c) issue a written advisory opinion within 15 business days after the appointment of the neutral third party under Subsection (6)(b), unless:~~
  - ~~—— (i) the parties agree to extend the deadline; or~~
  - ~~—— (ii) the neutral third party determines that the matter is complex and requires additional time to render an opinion, which may not exceed 30 calendar days.~~
- ~~—— (9) An advisory opinion shall include a statement of the facts and law supporting the opinion's conclusions.~~
- ~~—— (10) (a) Copies of any advisory opinion issued by the Office of the Property Rights Ombudsman shall be delivered as soon as practicable to all necessary parties.~~
- ~~—— (b) A copy of the advisory opinion shall be delivered to the government entity in the manner provided for in Section 63G-7-401.~~
- ~~—— (11) An advisory opinion issued by the Office of the Property Rights Ombudsman is not binding on any party to, nor admissible as evidence in, a dispute involving land use law except as provided in Subsection (12).~~
- ~~—— (12) (a) Subject to Subsection (12)(d), if the same issue that is the subject of an advisory opinion is listed as a cause of action in litigation, and that cause of action is litigated on the same facts and circumstances and is resolved consistent with the advisory opinion:~~
  - ~~—— (i) the substantially prevailing party on that cause of action:~~
    - ~~—— (A) may collect reasonable attorney fees and court costs pertaining to the development of that cause of action from the date of the delivery of the advisory opinion to the date of the court's resolution; and~~
    - ~~—— (B) shall be refunded an impact fee held to be in violation of Title 11, Chapter 36, Impact Fees Act, based on the difference between the impact fee paid and what the impact fee should have been if the government entity had correctly calculated the impact fee; and~~
  - ~~—— (ii) in accordance with Subsection (12)(b), a government entity shall refund an impact fee held to be in violation of Title 11, Chapter 36, Impact Fees Act, to the person who was in record title of the property on the day on which the impact fee for the property was paid if:~~
    - ~~—— (A) the impact fee was paid on or after the day on which the advisory opinion on the~~



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~~impact fee was issued but before the day on which the final court ruling on the impact fee is issued; and~~

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

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

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

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

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

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

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

‡ **78B-6-522. 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~~] Office of the Property Rights Ombudsman under Section 13-43-204.

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

(3) (a) (i) A mediator or arbitrator, acting at the request of the property owner under Section 13-43-204, 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

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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 condemnor to pay the costs of the first additional appraisal.

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

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

~~78B-10-102. Definitions.~~

~~As used in this chapter:~~

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

~~(2) "Mediation communication":~~

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

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

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

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

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

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

~~—— (7) "Proceeding" means:~~

~~—— (a) a judicial, administrative, arbitral, or other adjudicative process, including related prehearing and posthearing motions, conferences, and discovery; or~~

~~—— (b) a legislative hearing or similar process.~~

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

~~—— (9) "Sign" means:~~

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

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

### **Legislative Review Note**

~~—— as of 1-31-11 11:02 AM~~

~~————— Office of Legislative Research and General Counsel}~~