

Resolving Land Use and Impact Fee Disputes: Utah's Innovative Ombudsman Program

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THIS ARTICLE DESCRIBES A UNIQUE PROCESS for resolving property rights disputes in Utah. While the process may seem unrealistic and unlikely to succeed in the real world of land use practice, it has been proven effective over a thirteen-year experience. What began as a successful eminent domain dispute resolution process has now proven to be effective in a four-year effort to tackle other land use disputes and keep both citizens and local governments out of court.

I. Creation of the Office of Property Rights Ombudsman

The Utah Legislature created the Office of the Property Rights Ombudsman (OPRO) in 1997. The original mission of the OPRO was to resolve complaints related to regulatory takings and the use of eminent domain. By any measure, the office achieved that goal. According to officials of the Utah Department of Transportation, the percentage of its negotiations for the acquisition of property for public projects that fail and result in litigation against property owners has dropped by more than seventy-five percent as a result of the use of the OPRO and other new negotiation techniques.¹

After seven years of evolving experience, the 2004 legislature codified the practices that had evolved over time for resolving eminent

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1. Lyle McMillan, Director of Property and Right of Way, Utah Department of Transportation, Comments at the Utah Land Use Institute Seminars on Eminent Domain in Salt Lake City (Feb. 7, 2008).

domain issues with property owners.² As an indication of the eminent domain dispute resolution system's success, the legislation mandating the refined process passed both houses of the Utah Legislature *without a single negative vote* from either side of the aisle.³ This set the stage for use of the OPRO to resolve land use disputes as well.

II. Land Use Advisory Opinions

In 2006, the then president of the National Association of Realtors, also a Utah State Senator, proposed a dramatic restructuring of planning and zoning law in the form of Senate Bill 170.⁴ The draft legislation sent shockwaves through the municipal government association because it would have dismantled the deference granted to local land use decisions by the courts, created broad entitlement to the approval of land use applications, and even imposed misdemeanor penalties on planners who crossed the line and improperly applied land use rules.

Senate Bill 170 failed, but as a compromise effort, the Utah Legislature morphed the state's successful eminent domain mediation/arbitration program into alternative dispute resolution for land use conflicts and impact fees. Until 2006, there was only one attorney in the office. That year the Utah legislature tripled the budget of the office, quadrupled the staff to four, and expanded its mission to involve a comprehensive responsibility to resolve planning and zoning issues statewide.

The first role of the OPRO is to respond to concerns and requests for advice; consequently, the staff spends much of its time in email and telephone conversations that are offered free of charge to those seeking information. The centerpiece of the more formal OPRO land use dispute resolution program, however, is the advisory opinion. Basically, the idea is that any party to a dispute involving local land use regulations or impact fees can request that the OPRO investigate an issue and provide a written opinion outlining how the law would be applied to the matter if it went to court and why.

A request for an advisory opinion is accompanied by an outline of the issue, names and addresses of essential parties, and a check for \$150.00. Issues are limited to the process of reviewing land use applications,

2. S.B. 9, 55th Leg., Gen. Sess. (Utah 2004), available at <http://www.le.state.ut.us/-2004/bills/sbillenr/sb0009.pdf>; see 2004 Utah Laws ch. 233, § 10.

3. See S.B. 9 Bill Status, available at <http://le.utah.gov/-2004/status/sbillsta/sb0009.htm> (providing voting history).

4. S.B. 170, 56th Leg., Gen. Sess. (Utah 2006), available at <http://www.le.state.ut.us/-2006/bills/sbillint/sb0170.pdf>.

impact fees, nonconforming uses, exactions on development, and fees.⁵ The opinion is to be written quickly and includes a summary of the authority upon which it is based.⁶ After four years of experience, the OPRO has issued eighty-six advisory opinions and has had a significant effect on land use law and practice statewide.

III. The Ombudsman as a Neutral Third Party

The OPRO is part of an Alternative Dispute Resolution (ADR) program. For an ADR program to be viable, it is essential that a fulltime neutral be appointed whose sole job is to facilitate the resolution of disputes. In Utah, those persons work in the OPRO. There are several essential characteristics of the office found in the Utah model. First, the OPRO is a gatekeeper to dispute resolution, staffed with attorneys with extensive experience in eminent domain, land use, and impact fee law. The OPRO is independent of the attorney general and other agency attorneys. Although housed in the Department of Commerce, the office is separately funded in the budget, approved as a line item by the legislature. The OPRO assists with property rights disputes between property owners and any state or local government entity.⁷ Its services are not limited to state agencies and the actions of state agencies. The statute gives the OPRO the opportunity to assist with disputes involving cities, counties, school districts, utilities, and other entities that have the power to regulate land use, impose impact fees, or use eminent domain.⁸ The office can deal with issues involving eminent domain, just compensation, regulatory takings, impact fees, and a variety of statutory land use issues.

The OPRO spends significant time training and writing materials to inform citizens and municipalities of the law. It maintains a website,⁹ cosponsors an annual conference and periodic seminars with the Utah Land Use Institute,¹⁰ and uses other public outreach efforts. Information is also disseminated through informal channels and publications. One constant challenge is making the public aware that this free service exists. There is no charge for consultation, mediation, or arbitration

5. UTAH CODE ANN. § 13-43-205 (2010).

6. *Id.* § 13-43-206.

7. *Id.* § 13-43-203(1)(d).

8. *Id.* § 13-43-205 (authorizing land use advisory opinions), § 13-43-202.

9. Office of the Property Rights Ombudsman, <http://www.propertyrights.utah.gov> (last visited Oct. 31, 2010).

10. See Utah Land Use Institute, <http://www.utahlanduse.org/> (last visited Oct. 31, 2010).

services of the OPRO. An advisory opinion related to land use or impact fee issues may be requested for a fee of \$150.00.¹¹

The office is important as a flexible and open resource. Any party to a dispute can request that the OPRO be involved. Any party, especially the municipality involved, can veto the use of the OPRO as a neutral however and insist that another neutral be appointed to resolve the dispute.¹² This preserves credibility with the municipalities involved. The party demanding another neutral pays for the cost of the neutral or, in the preparation of an advisory opinion, shares the cost.¹³ The OPRO has the power to decline to pursue ADR if it determines that the request is inappropriate. This may be because the matter is not ripe for resolution or does not involve an issue within the jurisdiction of the OPRO, or utilizing ADR would otherwise be unfair or counterproductive to either party.¹⁴ If the OPRO determines that an issue is appropriate for ADR, the local government entity involved must participate in the process ordered by the OPRO.¹⁵

IV. The First Alternative to Negotiation

ADR is the first alternative to failed negotiation in Utah eminent domain and land use procedures. Litigation is not to be used to resolve a property rights dispute over the objection of property owners unless absolutely necessary. The approach has many benefits. For example, it helps expedite the process. A municipality or the applicant in a land use process (or even a third-party neighbor or activist group) can request the assistance of the OPRO and/or an advisory opinion at any time, even before an application is filed.¹⁶

The goal of ADR and the OPRO is *not* to achieve a different result than litigation would achieve, but to do so in a manner that is faster, friendlier, fairer, less expensive, and which results in a permanent settlement that stays in place without appeals. Because the rules tend to favor government entities anyway, delegating the dispute resolution to

11. UTAH CODE ANN. § 13-43-205(1).

12. *Id.* § 13-43-204(3)(c).

13. *Id.* §§ 13-43-205 to -207.

14. *Id.* § 13-43-204(3)(b).

15. The statute clearly provides that if arbitration is ordered by the OPRO for eminent domain or regulatory takings issues, the parties shall treat the matter as if it had been ordered to arbitration by the court. *Id.* § 13-43-204(3)(a)(ii)(A). The language of the advisory opinion portion of the statute is less specific, but section 13-43-205 clearly anticipates that local government entities will not only participate, but pay part of the costs of preparing the advisory opinion if an outside neutral is chosen to prepare it.

16. UTAH CODE ANN. § 13-43-205.

the OPRO, which respects and follows the rules, should not be difficult for a municipality. As a safeguard against abuse by the OPRO, both sides have some veto power over who the neutral is and either may opt not to use the OPRO if another neutral is preferred.¹⁷ The writings of the OPRO are inadmissible in subsequent legal proceedings and those who serve in the OPRO may not be subpoenaed to testify in subsequent civil actions related to cases handled by the OPRO.¹⁸

The OPRO seeks to conciliate between the parties before a three-way meeting is held or an advisory opinion is requested. Where possible, a conference call is used rather than a face to face meeting. If mediation will solve the problem, a land use advisory opinion may not be necessary. The quickest, least intrusive, and most economical method of resolving a concern is used so that both parties save time, hassle, and cost.

Also, ADR provides land use disputants with another option. In the land use context, issues can be brought to the OPRO without any duty to exhaust administrative remedies, which might be required before an issue could be litigated. The OPRO can prepare an advisory opinion on an appropriate issue without waiting for local appeals; in fact, an advisory opinion cannot be requested after the appeals process has finished and a matter is ripe for litigation.¹⁹

Further, the ADR process need not be binding to be effective. Although the OPRO will prepare an advisory opinion if requested, the opinion is not binding on the parties. The only incentive to comply with the opinion rests in the provision that if a court later agrees with the opinion, the nonprevailing party must pay attorney fees for the other side.²⁰

V. Easy Access for Property Owners and Municipalities Alike

Municipalities must treat property owners with dignity as equal partners in using the resources of the OPRO. Many characteristics help to ensure success. Importantly, property owners must understand their rights. A simple outline of property rights is provided by the OPRO and the office consults extensively with the parties, answering questions and sending information to make sure all involved make informed decisions.

17. *Id.* § 13-43-204(3)(c).

18. *Id.* § 13-43-203(3)-(4).

19. *Id.* § 13-43-205.

20. *Id.* § 13-43-206(12)(a)(i).

Municipalities must be transparent. They must comply scrupulously with the relevant open meetings and open records act and do nothing that would give anyone the impression that as a municipality it has anything to hide.²¹ The OPRO distributes a handbook on Utah's open meetings and records laws to better inform all involved about the need for disclosures.

The OPRO is useful in neutralizing power differences. In resolving planning and zoning disputes, the OPRO approaches all parties in an evenhanded manner and attempts to equalize power, share information freely, and allow the property owner involved to choose an appropriate dispute resolution forum, whether mediation or through the issuance of an advisory opinion. If the OPRO cannot broker a solution, it will work to develop a road map to a solution. The OPRO can break the problem into bite size pieces and even mediate the mediation process.

The OPRO process is not conducted in a legal vacuum. The process is not meant to suggest that property owners must avoid lawyers. The OPRO allows full participation by counsel for either party. Experience has shown that much of the value of the OPRO is that it is available to advise counsel for a property owner when that counsel is unfamiliar with the specifics of the law of property rights. With more information, attorneys for property owners are not as likely to make unfounded claims or form unreasonable expectations.

The advisory process assists all parties involved. In the land use context, advisory opinions are prepared only after all involved have had a fair chance to explain their points of view. An extraordinary effort is made to communicate with all involved about the relevant law and how such issues will be resolved if a matter proceeds to court.

In the advisory opinion process, email is the preferred method of communication as an informal, efficient, and transparent way to share information with all involved in the preparation of the opinion. Everyone must include all other concerned parties in all email communications. An extended analysis can be conducted and resolution achieved at times without the parties ever meeting face to face.

Additionally, the OPRO staff internalizes, applies, and preaches the principles of good negotiation:

1. Separate the People from the Problem.
2. Focus on Interests, Not Positions.

21. *Id.* §§ 63-2-101 to -107 (covering government records), §§ 52-4-101 to -208 (covering open meetings).

3. Invent Options for Mutual Gain.
4. Insist in Using Objective Criteria.²²

VI. Results

Indicative of the success of the OPRO's efforts to resolve land use and impact fee disputes, a survey was made of the eighty-six advisory opinions issued since the process was authorized in 2006. What began as a slow trickle of requests has now become a steady flow, and the office is providing an average of two or three advisory opinions each month. A summary of all the advisory opinions published is available on the internet.²³

A review of the 86 published opinions indicates that in 40 of the opinions (47%) a property owner/applicant would be considered as the prevailing party and obtained a result he or she sought. In 46 of the opinions (53%), a municipality prevailed. This is so despite the fact that 95% of the requests came from property owners, indicating that the OPRO has a moderating effect on the claims and expectations of citizens.

The OPRO appears to provide a valuable service to municipalities that are following the rules even when not perceived by applicants as doing so. A significant advantage is also offered to property owners (and, of course, municipalities that are not following the rules) as well, as they may have predictably unrealistic expectations of what their rights and entitlements are. It would seem far better to find out about how the law applies to a situation in a quick and efficient ADR process than through expensive litigation.

Overall, the person requesting the opinion prevailed in approximately half the cases (48%), indicating again that the OPRO is gaining a reputation that belies its name as only advocating for property owners' rights. That statistic would reflect well on the efforts of the office to be unbiased and objective in its determinations.²⁴ Among the issues considered by the 86 opinions issued to date, approximately 30% relate to exactions and impact fees on development and 20% involve

22. ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 15 (2d ed., Penguin Books 1991) (1981) (emphasis omitted).

23. Office of the Property Rights Ombudsman, Advisory Opinions Abstract Database, <http://propertyrights.utah.gov/opinions/index.html> (last visited Oct. 31, 2010).

24. It is to be noted that the advisory opinion process was enacted during the last year of the author's ten-year service in the OPRO. He was involved in the preparation of only seventeen of the eighty-six advisory opinions that the office has issued.

the processing of subdivision approvals which bring up other issues than exactions. The balance of the opinions cover a number of topics including vested development rights, entitlement to building permits, nonconforming uses and structures, conditional use permits, and a half dozen other areas of concern.

A recently published opinion concerning an impact fee issue indicates the credibility of the program. The template provided in the opinion for the review of impact fee enactments and the imposition of fees on development is becoming accepted in Utah as a standard format.²⁵ Brent Bateman, currently the lead attorney in the OPRO, is aware of only one dispute where an advisory opinion was provided and the subject matter of the opinion was later litigated. Because the process is only four years old, however, this encouraging news may still be insufficient to conclude that the advisory opinion process will forestall almost all litigation.

VII. Conclusion

Utah's land use dispute resolution process has led to dramatic reductions in the necessity for condemnation actions and other litigation and significant improvements in the ongoing relationships between property owners and government officials. The use of the OPRO and ADR is not necessary for every property owner who is affected by regulation, or even for most property owners. Most applications for the use of land do not result in extended disputes. The Utah model is not used to interfere with the normal process of land use regulation. Most of the time, property owners resolve any questions they have about land use and impact fee regulations with the municipal officials involved and never call the OPRO.

But the OPRO and ADR holds great promise for those property owners who are unsure of themselves, skeptical about the information given to them, so naturally eager to wheel and deal that they need some formality to bring the process to conclusion, or hostile to the process entirely but rational once a credible system is in place to resolve the dispute on the merits through a third party. Great opportunities exist to resolve disputes through ADR. If negotiation is not working, the OPRO

25. See Utah Land Use Institute, Updates to the Utah Impact Fee Handbook and Checklists: August 27, 2009, <http://www.utahlanduse.org/pages/ImpactFeeUpdates.html> (last visited Oct. 31, 2010).

can solve disputes before a government entity goes to court. In America, where this corner of the relationship between citizens and government involves basic constitutional rights, it is appropriate to proceed with courtesy and respect. Experience has shown that the returns on these practices and philosophies can be significant, saving time, money, and hassle for all involved.

