

ADVENTURES IN LAND USE DISPUTE RESOLUTION – UTAH’S INNOVATIVE PROGRAM TO PROVIDE “FREE” LEGAL ADVICE TO LOCAL GOVERNMENT, NEIGHBORS, AND PROPERTY OWNERS*

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OVERVIEW

Utah may have the nation’s most robust process allowing citizens to question local government land use decisions. This exists in the Office of the Property Rights Ombudsman (OPRO), created in 1997 and charged to assist in land use disputes in 2006. In three parts, this article divides an overview of the history of that office into two eras, evaluates one of the key functions of the current era—the preparation of advisory opinions (AOs), and suggests that Utah’s OPRO is a useful model for other states to consider. Most of this article focuses on the debates leading to the second era and the role of AOs in resolving disputes.

PART 1: INITIATION AND THE PIONEERING ERA, 1997-2006

The story of the OPRO begins and turns on legislative angst. In the second half of the 1990’s Utah’s legislature imposed heightened vigilance requirements on state agencies and local governments to avoid unconstitutional takings of private property without the payment of just compensation. Part of the impetus for the movement was generated by property owner complaints about the acquisition of right of way for the expansion of Utah’s freeways to accommodate the then-anticipated 2002 Olympic Winter Games, set to occur in Utah in 2002.

This “takings” statute did not apply just to eminent domain issues, but also where regulatory takings were alleged. It required state agencies to prepare “takings impact statements” or “takings assessments” if a taking was claimed by a private

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property owner. It also required those agencies to adopt takings guidelines that could be used to hedge against potential takings.²

Local governments were not spared. Cities, Towns, and Counties were required to adopt guidelines that would assist local bodies to identify potential takings issues. They also were obligated to provide formal review and appeal procedures under which alleged takings could be avoided or otherwise resolved but were spared the duty to prepare “takings assessments”.³

In 1997, the Utah legislature considered extending the state agency takings assessment requirements to cities and counties. This would have mandated that a municipality or county prepare a written statement analyzing whether a local government action constituted an unconstitutional taking in each and every situation where a taking was alleged, much along the lines of what we commonly think of as an environmental impact statement. Those who represented cities on Capitol Hill opposed the measure, arguing vehemently that whole forests might need to be sacrificed to supply the paper needed to respond to every concern a citizen expressed about private property rights.

As an alternative to an avalanche of paperwork, the Utah League of Cities and Towns (ULCT) suggested that an official in state government be appointed to hear complaints about property rights and enacted legislation that created the Office of the Property Rights Ombudsman (OPRO) in the Department of Natural Resources⁴. As will be noted below, it was moved to the Department of Commerce in 2006. The office started as a one-person office but is now comprised of three attorneys and support staff.

The Ombudsman’s role continues to be to assist state agencies and local governments in developing guidelines and analyzing actions involving property rights issues. The Ombudsman also advises private property owners on takings claims against government entities and provides dispute resolution services, as

² The requirements remain in the code but are rarely utilized. To the author’s knowledge, only two state agencies ever adopted “takings guidelines” and only one ever updated them. None do so on an annual basis, as required by the statute. See Utah Code Ann. §§ 63L-3-101 through 202.

³ Municipal and county requirements are found at Utah Code Ann. §§ 63L-4-101 through 301. Many cities adopted the formal takings appeal procedure, but not all. It is estimated that the procedure has been used in just a handful of cases over more than 25 years.

⁴ Enacted as HB 64 in the 1997 General Session. The office was originally known as the “Private Property Ombudsman” but the title was amended to clarify that the purpose was to assist property owners in dealing with government actions, and not disputes between neighboring landowners. The relevant statute as amended over time is now found at Utah Code Ann. §§ 13-43-101 through 206.

appropriate, for disagreements over regulatory takings, eminent domain, impact fees and land use applications.

The OPRO encourages citizens, including developers, nonprofit groups, and others to contact it when they think that there might be a dispute over a property rights or land use issue. The Ombudsman researches the issue and the law surrounding the issue and offers nonbinding advice to the parties. This generally involves clarifying points of confusion and informally evaluating the merits on either side of a dispute under existing law. Cases that require additional consideration can lead to extended conversations, meetings, and correspondence to reach a solution through mediation. A few cases even lead to non-binding arbitration, which is provided for in the statute. Government agencies may also contact the Ombudsman to request advice on a land and property use. Although the OPRO can be engaged at any stage of the planning decision making process, it tends to be engaged early.

The OPRO receives more than 1,000 inquiries each year, most of which involve issues at the local level. The process is flexible and informal and has a low threshold to entry: citizens, often property owners, can obtain advice for no charge or attend one of the Office's many low-cost/free workshops on land use issues. An estimated two-thirds of inquiries result in no contact being made with any government entity because the property owner's claim has no merit under existing law, the matter was otherwise not worth pursuing, or the caller simply wanted information and did not wish to press the matter further. About one-third of the cases proceed to an often very informal three-way mediation process, where the property owner, government entity representatives, and ombudsman work together for an optimal resolution. Here the ombudsman acts as mediator and the result is voluntarily agreed to by the parties. A mediation may involve a meeting or "shuttle diplomacy" as the OPRO staff member works with each side to a fair and wise solution. Very few cases move to non-binding arbitration.⁵

The Office of the Ombudsman also proposes policy changes and guidelines to state and local governments on property issues; organizes conferences and workshops for land use professionals, property owners, attorneys, and civic leaders on relevant topics; presents at conferences and seminars in land use and property issues; and

⁵ Technically, the arbitration process is non-binding, but with a unique characteristic that heightens its significance. While neither party is bound by the result, if the matter is taken to court and the court enters a formal decision consistent with the arbitration, then legal fees can be imposed on the party which refused to follow the arbitrator's direction. The arbitrator may be from the OPRO staff, or the parties may choose a private neutral to hear the matter. *Id.* at § 13-43-204.

publishes materials for government officials and citizens on land use policies in the state of Utah.⁶

PART 2: THE CURRENT ERA AND ITS ASSESSMENT

Nine years after the OPRO was created, in 2006, the lines were again drawn between local government and property owners on Utah's Capitol Hill in Salt Lake City. Various stakeholders, including the real estate community, local governments, planners, and land use attorneys were embroiled in a battle with very high stakes indeed. The proposed Senate Bill 170⁷ included some radical changes to land use regulation in the state. This section explores how, as a result of the 2006 SB170 confrontation, the OPRO was tasked to assist property owners, local governments, and citizens with almost free legal advice to attempt to resolve land use disputes. Fifteen years of land use dispute resolution process by that office and 235 formal advisory opinions are considered here.

As the battle unfolded on SB170, the nine-year-old OPRO became involved, and the office came out of the 2006 Utah Legislature with a new mission. Its jurisdiction was expanded to include the resolution of non-constitutional disputes, but only if they involved impact fees or land use applications. Part of that charge was novel: at the request of any party to a dispute, and for the nominal charge of \$150.00, the OPRO was to prepare a formal advisory opinion on the merits of each side of the dispute to guide the disputants going forward.

Dramatic (Some Would Say Draconian) Changes Proposed in 2006. To demonstrate the significance of the issues in 2006 that spawned this program, consider these changes that would have been imposed had SB170 passed as written:

- Misdemeanor criminal sanctions could be filed against a planner or civic leader who violates the state land use statute or local ordinances or imposes excessive exactions and impact fees⁸.

⁶ The OPRO maintains a website with more information at www.propertyrights.utah.gov.

⁷ The full text of SB170 can be found on the Utah Legislative Web Site – [le.utah.gov](https://le.utah.gov/~2006/bills/static/SB0170.html). NOTE: The bill was intended to amend both Utah's Municipal Land Use, Development, and Administration Act and its County Land Use, Development, and Administration Act. The text amending the municipal statutes and the text amending the counties statutes, both of which were enacted by the same bill in the 2005 legislature, is almost identical. Every reference in these footnotes to a provision in SB170 amending the municipal act appears to be replicated by an identical amendment to the county act. Citations to these duplicate amendments in the bill are not included here.

⁸ Lines 1054-1055, 1414-1416.

- Any zoning designation that would “materially diminish the reasonable investment-backed expectations of the property’s owner” would be prohibited.⁹
- General plan goals dealing with sprawl, congestion and aesthetics would be eliminated from the state code.¹⁰
- The preservation of private property rights would be emphasized.¹¹
- Any change in zoning designations shall conform “as reasonably as practicable” to the request of the property owner.¹²
- The time to review an application for a subdivision or other land use permit would be limited. If no decision is made after a certain number of days, the application would be deemed approved.¹³
- Mandatory attorney fees must be assessed against cities and counties and paid to applicants who successfully challenge local land use decisions in court. There would be no provision for attorney fees to be paid to a municipality by those who argue against local decisions.¹⁴
- An illegal use of property that continues for seven years without action to terminate it would be deemed legal from the time it was initiated.¹⁵

While these changes appear radical, the original bill as proposed was perhaps drafted with the “shock and awe” posture that was in vogue just after the turn of the 21st century. It must be noted, however, that its sponsor was the Senate President at the time and thus had enormous influence in the Legislature. He was serving concurrently as the President of the National Association of Realtors®, so he also had national influence and knew what he was proposing. Even if the bill was drafted as a laundry list of grievances by the development community and had no chance of passing in the form it was introduced, it had to be taken seriously. The Utah Constitution provides that the legislature is to meet only 45 calendar days each year¹⁶, so this was a lot to chew in just a few weeks.

⁹ Lines 616-617.

¹⁰ Lines 485-486.

¹¹ Lines 168, 501-502.

¹² Lines 661-662,

¹³ Lines 766-769, 772-77.

¹⁴ Lines 1004-1006, 1040-1042.

¹⁵ Lines 838-842.

¹⁶ Utah Constitution, Article VI, Section 16.

The Utah Land Use Task Force. In the face of very real and credible threats from those pushing for the adoption of SB170, leaders of the “Utah Land Use Task Force” (LUTF) mobilized. This task force had been created informally in 2004 as a consortium of representatives from the Utah League of Cities and Towns (ULCT), the Utah Association of Counties (UAC), the Utah Association of Realtors, the OPRO, the Utah Chapter of the American Planning Association (UTAPA), and others¹⁷. The genesis of the LUTF was a call from then Senator Greg Bell (later Utah’s Lt. Governor) for assistance in crafting what eventually became the 2005 Legislature’s sweeping recodification of Utah’s land use enabling statutes¹⁸. To loosely paraphrase Senator Bell’s clarion call “I’m going to run a bill. Whether it is the bill you would like me to run or some other is entirely up to you.”

Rather than allow Senator Bell and other legislators to craft the reforms without assistance from those who had to live with the results, the land use professionals met repeatedly to draft consensus legislation, which, based on that unanimity, passed both houses of the legislature with overwhelming majorities.¹⁹ Having proved its worth, the LUTF has continued to meet and craft consensus legislation to this day. LUTF bills invariably pass into law by overwhelming majorities. Other land use amendments not crafted with the agreement of the LUTF face grim prospects.

This consensus among land use professionals was the lay of the land when SB170 hit the fan. However, having been involved in the 2005 reforms and having been part of the LUTF consensus building during that 2005 session, a few individuals from the development side of the conversation decided to “go rogue” with the non-consensus property rights laundry list that became SB170. They did not choose to have it vetted by the LUTF. It appears that while they appreciated and endorsed the former “kumbaya”²⁰ land use consensus they had concluded that some

¹⁷ Although the author was one of these individuals, modesty and lapses of memory require that the following narration be in the third person.

¹⁸ Senate Bill 60, 2005 General Session. <https://le.utah.gov/~2005/bills/sbillint/SB0060.htm>.

¹⁹ The Senate vote on SB60 was unanimous in support in three separate votes. Senate Journal of Proceedings, February 22 and 23, March 2, 2005. In the House, the floor vote was 59 in favor and 15 opposed, with one absent. House Journal of Proceedings, March 1, 2005.

²⁰ The reference to this term for consensus was indeed made in the process of crafting the 2005 reforms. The author does not, however, remember the song being sung at any point in time. There was no circular hand holding and no campfire, but the discussions were well oiled by what seemed like a bottomless pit of luncheon offerings, funded by the ULCT, over the years of LUTF meetings. As with so many of our treasured traditions, it appears that Covid 19 has killed that perk for land use professionals as well.

additional ground could be gained by throwing some spaghetti against the wall to see what would stick.

A handful of leaders from the LUTF then mobilized, including some “cooler heads” from the private sector side of the issues. In order to boil down the developer concerns to their essence, it seemed the problem behind the SB170 “nuclear option” was that many property owners had become convinced that local officials would continue to overreach, ignore the limits of the state statutes and constitutional property rights, and succumb to the pressure of public clamor and “no growthers” despite the statutory reforms from 2005. Development applications that complied in every way with the applicable law would continue to be stalled and sometimes even illegally denied unless the laws further restricted local discretion and included sanctions (misdemeanors, in fact) against government officials and staff who failed to follow the rules.

Could the LUTF leaders craft an alternative solution to SB170? Was there a way to more reasonably deal with land use disputes when they arise, on the merits, without the time, expense, and hassle of litigation? A significant factor in these discussions was a shared apprehension of how the courts would interpret the 2005 recodification of the land use enabling acts. The new laws were, in 2006, being implemented without a body of case law to guide the interpretation and application of the law to actual situations.

Advisory Opinions. The concept of advisory opinions then arose. The OPRO already had power to resolve disputes between government entities such as the Utah Department of Transportation (UDOT), local governments and utilities, and property owners. The jurisdiction of the OPRO was limited to issues of eminent domain and unconstitutional takings without the payment of just compensation, although many did involve local entities which manage land use regulations. The saga of the evolution of that office and its profound impact on eminent domain procedures in Utah will need to be the subject of another article²¹.

But in 2006 the consensus was that the OPRO had proven its worth and thus became a credible entity to consider or facilitate advisory opinions on land use issues. The proposal, which eventually became law as SB268²² (also sponsored by President Mansell), provided:

²¹ See Craig M Call, *Resolving Land Use and Eminent Domain Disputes: Utah's Innovative Ombudsman Program*, 42 THE URBAN LAWYER 4, 375 (2011)

²² The Office of the Property Rights Ombudsman is provided for in Utah Code Ann. 13-43-101 et. seq.

- Any party to a dispute related to the state land use enabling acts or impact fees²³ could request an advisory opinion;
- The fee for the opinion would be \$150.00;
- A new Land Use and Eminent Domain Advisory Board would influence the process and work for neutrality²⁴;
- The OPRO could prepare the opinion or facilitate the appointment of a neutral independent land use attorney to prepare it.²⁵
- The opinion would basically go through the kind of legal analysis we would expect that a court or appellate court would utilize to come to a conclusion.
- As an incentive to promote the resolution of the dispute, if the matter later goes to court and the prevailing party in the courtroom is the same as prevailed in the opinion, legal fees could be charged against the losing party²⁶.

With additional budget, the OPRO staff expanded from one to four, including two additional attorneys and a staffer to handle the added work.

Fifteen years have now passed since the advent of the advisory opinion process at the OPRO. As of December 31, 2020, 235 advisory opinions have been published by the office. To mark the fifteen-year anniversary, it is both logical and instructive to review the results of that innovative procedure to date.

In preparing this review, the author has reviewed all 235 opinions²⁷ and found the following:

²³ SB170 also proposed amendments to the impact fee act, found at Utah Code Ann. 11-63a-101 et seq.

²⁴ The board includes appointed representatives from cities, counties, home builders, and the real estate industry.

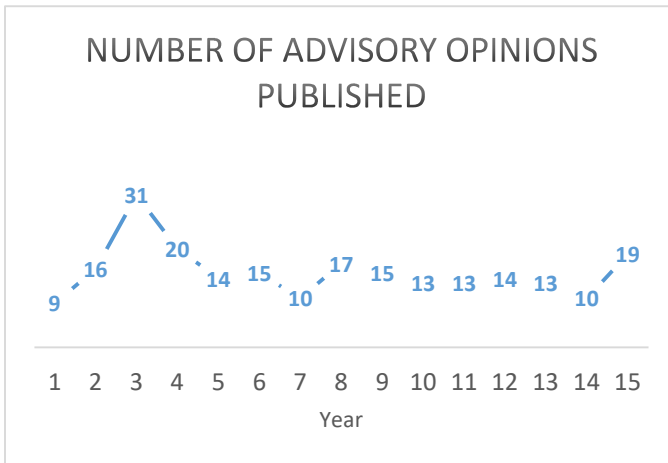
²⁵ It is of note that of the 235 opinions published, only five were written by private attorneys.

²⁶ Utah Code Ann. 13-43-205,206. The penalties for disagreeing with an advisory opinion which is later deemed correct in the district court were supplanted with liquidated damages of \$250 per day by the 2020 Legislature.

²⁷The opinions are available online at www.propertyrights.utah.gov/advisory-opinions/.

Volume. From a gentle beginning in 2006, where 9 advisory opinions were issued by the OPRO, the number doubled the next year to 18, then rose to an all-time high of 31 in 2008. In 2009, 22 were issued. Since then, the average number of opinions is 14 per year, with an uptick in 2020 where nineteen were written. See Figure 1.

Figure 1. Number of Advisory Opinions Published



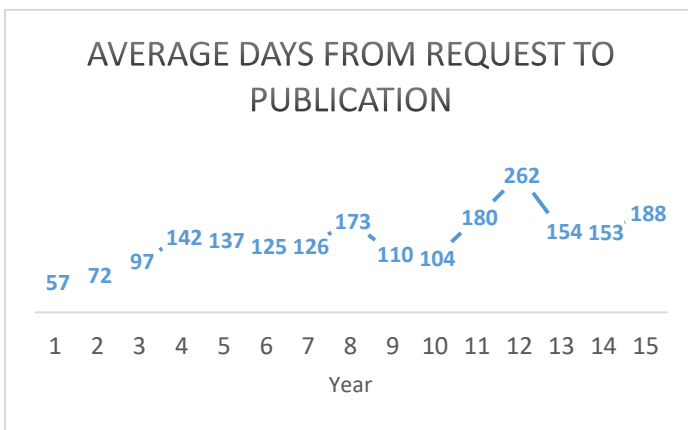
Source: Data from Office of Property Rights Ombudsman

It is of note that the staff reports that perhaps only one of every four extended discussions of land use issues involving the OPRO results in the issuance of an advisory opinion. The other three disputes are resolved without this more formal response by the OPRO.²⁸

²⁸ The current lead attorney in the OPRO, Jordan Cullimore, joined his immediate predecessor, Brent Bateman and the author, who was the first attorney in that office, in a review of this experience in an electronic conference on February 19, 2021. This conclusion is based on that conversation.

Time Required. In the beginning, opinions were issued by the office within a couple of months, on average. Over the last ten years, the average has been 4-5 months between the date the request was made, and a decision was published²⁹. It is important to note that the OPRO likely has a number of factors to deal with in regard to the timing involved with any dispute, including the dynamics of a given case and the time required to pursue other efforts at resolution. See Figure 2.

Figure 2. Average Days from Request to Publication

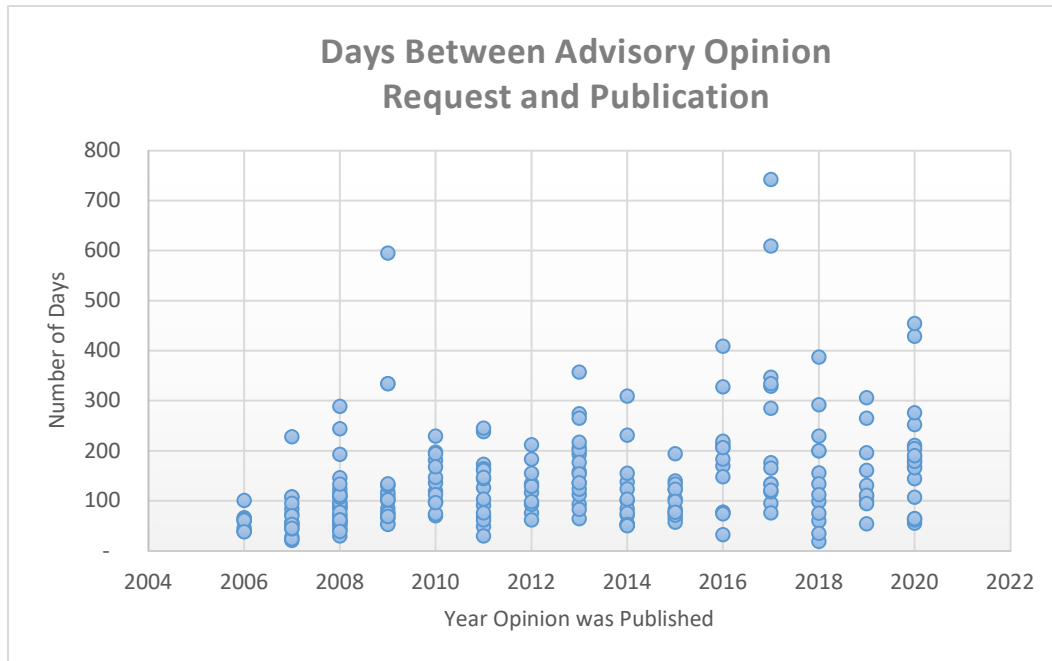


Source: Data from the Office of the Property Rights Ombudsman.

²⁹ This analysis of days between request and publication is based on the 229 opinions authored by the OPRO staff and not by private attorneys. It excludes one opinion which was withdrawn after publication.

It is clear that most of the opinions were issued within six months of receiving the request. Throughout the timeframe reviewed, many were issued within three months. The average overall is four and a half months. See Figure 3.

Figure 3. Days Between Advisory Opinion Request and Publication



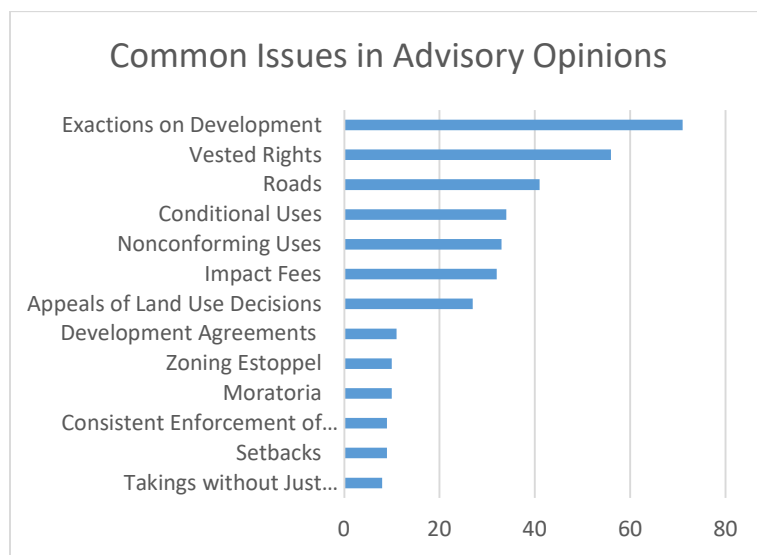
Source: Data from the Office of the Property Rights Ombudsman.

Properties Involved. It should be no surprise that the most common type of property involved in an advisory opinion would be proposed subdivisions, but what might be somewhat interesting to note is that only about twenty-five percent of the opinions are related to them and the subdivision approval process. The others run the gauntlet, from single family homes, single family lots, schools, power plants, home auto repair facilities and even a pet crematorium.

Subject Matter. One would expect that a wide range of topics would be involved in requests for advisory opinions and that has proven to be true. There are some issues that come up repeatedly with exactions imposed on development leading the pack. Exactions were a topic (but not the only topic) in seventy-one opinions or about thirty percent.

The next most popular specific topic (other than the general interpretation of land use ordinances) involves Utah’s unique laws relating to “early vesting” which provide that once an application is filed, any subsequent amendments to the regulations that will apply to the review of that application will not be considered in that review. If the application conforms to the ordinances in place when it is filed, says the code, it must be approved.³⁰ What is referred to in Utah as “vested rights” came up in fifty-six advisory opinions – or about 24%. See Figure 4.

Figure 4. Common Issues in Advisory Opinions



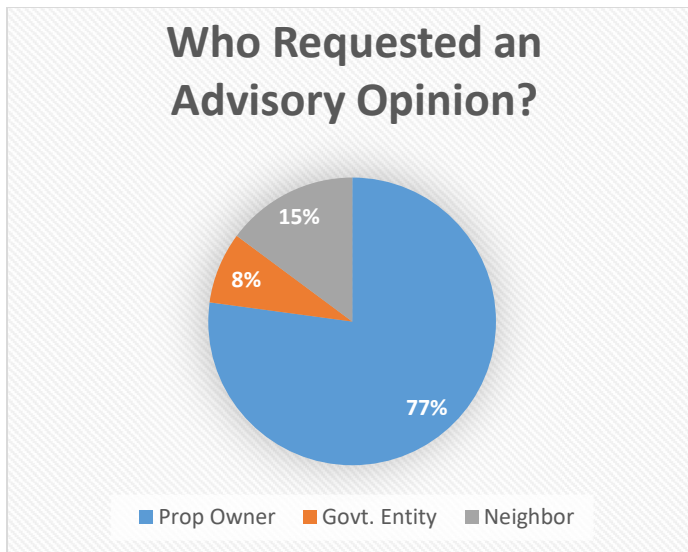
Source: Data from the Office of the Property Rights Ombudsman.

³⁰ Utah Code Ann. 10-9a-509 (municipalities); 17-27a-508 (counties).

Who is the Author? Of the 235 opinions published only five were written by private attorneys. The other 230 were written by staff or the interns who worked with staff at the OPRO.³¹

Who is Asking? By a wide percentage, more property owners asked for formal legal advice from the OPRO than local governments or third parties. More than three quarters of the requests submitted were by landowners and/or developers. See Figure 5.

Figure 5. Who Requested an Advisory Opinion?

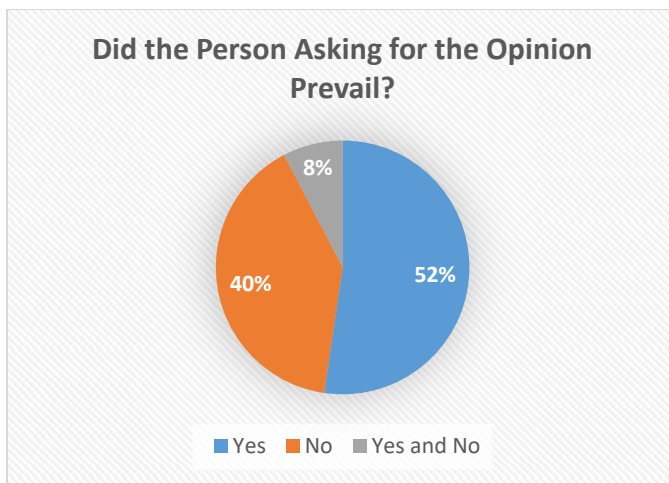


Source: Data from Office of Property Rights Ombudsman

³¹ One person, Elliot Lawrence, who served in the office from 2006 until 2015, wrote almost half of them. In every case, the lead attorney reviewed each opinion, and each opinion was published over his signature. Well over two hundred were published during the thirteen-year term of Brent Bateman, the second attorney to lead the office.

Did the Person Requesting the Opinion Prevail? In only a slight majority of the opinions did the person requesting the opinion prevail outright in the result. Fifty-two percent of those requesting were vindicated in their point of view while another eight percent had some, but not all, of their views validated. Forty percent were probably sorry they asked (unless they consider how much better it was to have the OPRO decide against them than it would have been if the decision was by a district court judge). See Figure 6.

Figure 6. Did the Person Requesting the Opinion Prevail?

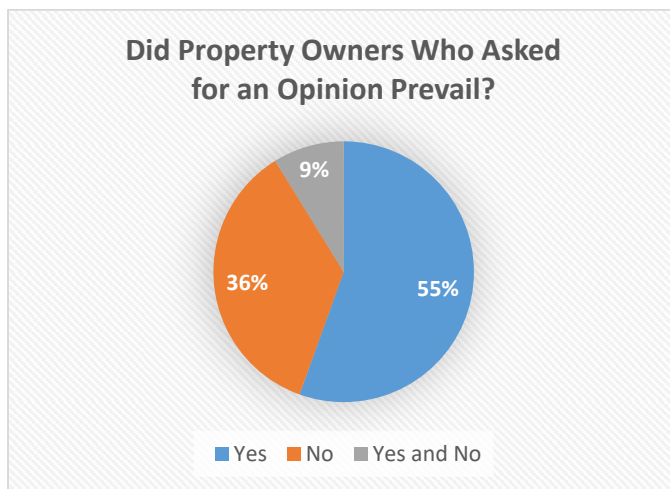


Source: Data from Office of Property Rights Ombudsman

It is interesting to note the dramatically different batting averages of the type of person or entity making the request. Property owners, in the main, got mixed results:

Property Owners. Altogether, sixty-four percent of property owners gained some ground by asking for an advisory opinion, with fifty-five percent successfully showing their position was correct and additional nine percent getting a mixed result. They fared far differently than governmental entities or the neighbors who requested a review. See Figure 7.

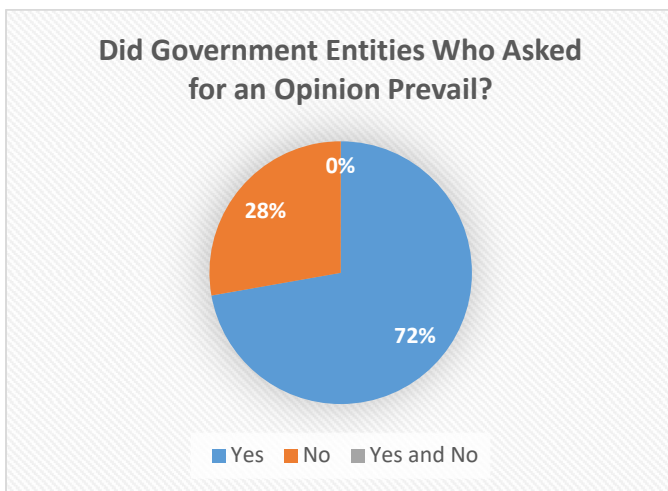
Figure 7. Did Property Owners Who Asked for an Opinion Prevail?



Source: Data from Office of Property Rights Ombudsman

Local Government. Of those requesting opinions, governmental entities came out far ahead. Seventy two percent of the opinions requested by cities, counties and service districts found their positions supported by the opinion. This would seem to indicate, as one might predict, that local government officials (usually their attorneys) understand the law better than the average property owner or neighbor does. The ability to seek an advisory opinion has apparently been a benefit to local government in resolving disputes over the law, although only 19 such entities asked for an opinion over 15 years. See Figure 8.

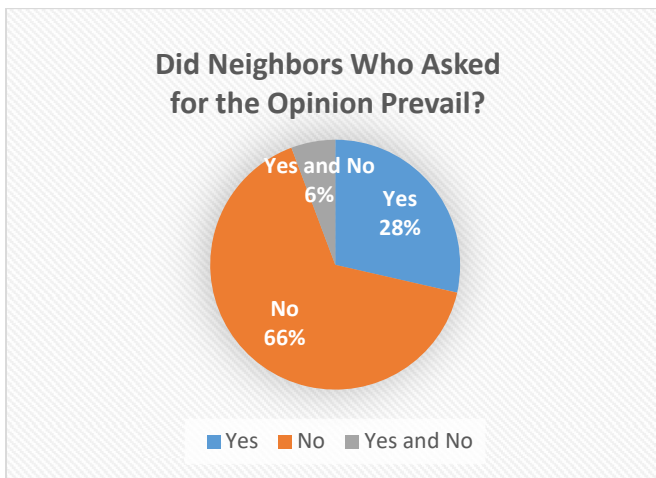
Figure 8. Did Government Entities Who Asked for an Opinion Prevail?



Source: Data from Office of Property Rights Ombudsman

Neighbors/Third Parties. Those who fared worst under the process were those who were least informed and, in this author's opinion, would benefit the most from an independent professional review. By far, third parties who were worked up about a land use issue and wanted someone to ride in on a white charger and correct the errors of both those in power and the development community were disappointed. See Figure 9.

Figure 9. Did Neighbors Who Asked for the Opinion Prevail?



OPRO Bias? In more than passing interest is the characterization by some involved in the land use community, particularly private citizens, to perceived biases among the OPRO staff. The statistics do not support any conclusion that those preparing the opinions hold undue bias³².

The discrepancies between the success of local government, property owners, and neighbors as they participated in the advisory opinion process is most easily explained by the relative sophistication of each of these groups with regard to land use law. Before a local government seeks an advisory opinion, its officials have probably already obtained some legal advice from their city or county attorney. Property owners requesting opinions would be the second most likely to have had previous legal advice, and neighbors the least likely to seek legal counsel first.

This is, of course, one reason that the almost free legal advice of the OPRO is made available to those individuals. They are the ones who most need it and can most benefit from it.

Assessment of Political Acceptance:

After a quarter century, the OPRO has gained broad political acceptance but not without perhaps some dustups with the courts as well as continued legislative tinkering.

Clamor for Change Abates. First, and perhaps foremost, there has been no effort similar to SB170 introduced since 2006. The consensus has held. The LUTF still continues after 17 years of building pre-session unity on the majority of land use amendments proposed on Capitol Hill. Changes to the land use statutes have thus been methodical and evolutionary rather than earth-shattering.

Some of the minor issues raised in SB170 have indeed become law, but the most strident or controversial amendments have not been adopted. If this is the symptom of success envisioned by the LUTF fifteen years ago, then the advisory opinion idea was a resounding success.

³² It is to be noted again that the author of this article was the Property Rights Ombudsman for the first twelve months that advisory opinions were written and authored 12 of the first AO's. He has had virtually no role in the preparation of any of the other 223 with the exception that he assisted some parties in either requesting some of those opinions or responding to requests by others. There are no statistics to prove that he was any more successful in persuading the OPRO to agree with his clients in this handful of cases than others who commented to the office on behalf of local government or property owners.

The Court of Appeals Resists. In 2018 the Utah Court of Appeals handed down a decision that limited the scope of the OPRO's review and blunted the attorney fees provision in the state statute dealing with advisory opinions on land use issues.³³

The Legislature Restores and Reinforces. In response to the Court of Appeals, the LUTF proposed legislative clarification of the statute and restoration of the language that provided for the assessment of attorney fees against those who dispute the result of an advisory opinion. When it came before the legislature at its next general session, the measure passed both houses with overwhelming margins.³⁴ Those on Capitol Hill thus showed continued support for the OPRO and the advisory opinion process.

The 2020 Legislature went even further and amended the Ombudsman statute by almost unanimous votes in both chambers.³⁵ It now provides that if an applicant for a land use permit or decision or a local government entity disregarded an advisory opinion, and in doing so knowingly and intentionally continues to commit illegal acts, then daily fines would be assessed against them. In these limited circumstances the court is to award the prevailing party ongoing fines of \$250 per day against the person or entity who flagrantly disregarded the opinion³⁶.

The Legislature has thus confirmed the value of the advisory opinion process twice in two recent sessions.

³³ In *Checketts v. Providence*, 2018 UT App 48, the Court ruled that attorney fees based on an advisory opinion could not be recovered in land use cases. This is the second time the Court of Appeals has attempted to limit the work of the OPRO. In *Selman v. Box Elder County*, 2009 UT App 99, the Court of Appeals ruled that before the OPRO could arbitrate a takings issue, a local government entity could force the property owner go to court to determine whether the property owner possessed a property interest that could be taken. This ironic holding that one could not arbitrate an issue until it was litigated was overturned by the Utah Supreme Court two years later in *Selman v. Box Elder County*, 2011 UT 18.

³⁴ House Bill 122, 2019 General Session.

³⁵ The 2020 amendments were adopted in HB 273. <https://le.utah.gov/~2020/bills/static/HB0273.html>. The bill passed the House. 68-3-0; Senate 24-0.

³⁶ *Id.*

Overall Assessments

The advisory opinions reviewed are valuable. It is hoped that this worthwhile resource for Utah citizens and land use professionals is here to stay.

Bias. There is no evidence of any significant bias by those who prepared the advisory opinions. While there can certainly be differences in opinion on how the facts and law should be reviewed and applied in any given case, the statistical records of who prevails in these opinions do not demonstrate a bias on the part of the OPRO toward property owners, government, or neighbors.

The differences in outcome for each of these groups is easily explained by the relative sophistication that each group brings to the discussion. Since city officials often seek legal advice before involving the OPRO, the opinions they request are predictably more likely to be validated by an independent review. Indeed, the least sophisticated parties to a dispute are often third parties (often neighbors) who, while sincere and often properly concerned, do not have the background to understand the nuances of Utah land use law. It is no surprise that they are less successful in having an advisory opinion coincide with their view of a matter.

It is of no small significance that, given the choice, those seeking an advisory opinion only chose to have someone other than the OPRO staff attorneys prepare the opinion in five cases out of two hundred thirty-five.

Dispute Resolution. Any who have been involved as professional mediators can vouch for the efficiency and quality of the process that the use of a third-party neutral affords. The advisory opinion is simply an option for the parties who involve the OPRO, and the fact that one is available can bring the parties together in a manner that other options cannot.

When an opinion is requested, all involved must respond with their contribution to the discussion or be left out when the opinion is written. Since the process is managed by a state agency, local government officials must respond and cannot ignore the protestations of property owners or other citizens over a given issue. In the 235 opinions, it has been very rare that a party to the opinion stonewalled the process and refused to participate. When the essentially voluntary process of mediation fails, the advisory opinion process offers an opportunity for a citizen, in particular, to engage with local civic leaders and sometimes other property owners in an earnest discussion. It is not arbitration, but perhaps “arbitration lite”. An advisory opinion is not binding but does have a downside to not persuading the neutral to take your side. This can be a very healthy experience for land use disputants when managed by skilled professionals from the OPRO.

The advisory opinion process affords parties, particularly landowners and neighbors, the opportunity to “say their piece” and present views and opinions which they do not feel have been heard through the normal review process. Through an advisory opinion, these parties can present their arguments coherently to a neutral third-party opinion-writer, who can “flesh out” the concerns without emotional baggage. The neutral author can also filter out extraneous facts.

Education. The process of getting input from the parties and preparing an advisory opinion provides the opportunity for all involved to be educated. Even a skilled land use attorney should be much better prepared if forced to litigate after an opinion is prepared. So should the parties and attorneys on the other side of the matter. The opinions are written in a conversational style that is not as formal or structured as an appellate court decision and provide a substantial library of information for citizens and professionals alike.

Cost Savings. A great benefit of the advisory opinion process is that disputes are resolved, and litigation avoided. While it is difficult to quantify, those associated with the OPRO report dramatic benefits in getting the parties to a dispute into a process where a neutral and knowledgeable third party reviews the facts and law on the merits. The intent of the legislation creating the advisory opinion process was to discourage litigation. It has indeed done that.

A Jump Start to Legal Analysis. While they cannot provide precedent for later decisions, the analysis used by the OPRO attorneys who craft the opinions contains references to the relevant cases and statutes in a manner that can easily “jump start” further analysis when any Utah land use attorney comes across a similar issue. The opinions also illustrate the approach that Utah land use practitioners take when they analyze the relevant law, giving a perspective of the consensus among attorneys and judges on all sides of a land use dispute as to which issues must be considered, and how those issues are to be reviewed and resolved.

Body of Legal Research. One solid byproduct of the advisory opinion process is that they comprise a body of legal research and analysis which has been made available to the public. Although one must be careful to note that an advisory opinion cannot be considered as setting legal precedent, the opinions are thorough and cite both statutes and case law in the resolution of disputes. The quality of the analysis and writing continues to improve from the initial work initiated fifteen years ago.

Recommendations Going Forward

Index and Searchable Record. Based on the quality of the review, each new advisory opinion should be included in a searchable record of all opinions. The OPRO currently maintains a broad overview of the topics of the opinions³⁷, which could be appropriately supplemented by an even more detailed annotated database. As a result of this review, the author and the Utah Land Use Institute have now published an annotated index to the 235 opinions prepared as of 12/31/2020 in a searchable pdf matrix. This has made the valuable analysis and research in those opinions more available to the land use community³⁸.

Broadcast Availability. Entities such as the Utah Land Use Institute, the Real Property Section of the Utah State Bar, the Utah League of Cities and Towns, and the Utah Association of Counties should broadcast that advisory opinions are available and easily accessible. More citizens should be aware of the wealth of legal knowledge that they include and taught how to utilize the opinions database. Regular presentations on the process and its merits should be made by knowledgeable individuals in seminars to civic leaders, planners, land use attorneys, and property owners.

Improve Timing. One focus of the OPRO should be to shorten the time between the request for an opinion and its publication where that time can be more compressed. It is noted that the most important factor in the current procedure is that the OPRO will attempt to work with the disputants to resolve the issues short of preparing an opinion. If current protocols and policies of the OPRO do, however, result in any delays in publication of an opinion, they should be reviewed with the goal to shorten the process to prepare opinions. There may be practical ways to tighten the 4–5-month process for the benefit of all concerned. In any event, even under the current schedule, the process has many advantages, including the time required, over taking a dispute directly to court.

Encourage Local Governments to Seek Opinions. Local governments, especially in rural areas now experiencing unprecedented growth, should be encouraged to seek advisory opinions to provide expert guidance on land use issues. The individuals leading and working for these entities are dedicated and sincere, but they often lack the knowledge needed to make

³⁷ <https://propertyrights.utah.gov/advisory-opinion-topics-explained/>

³⁸ www.utahlanduse.org/land-use-library/

important land use decisions. The advisory opinion process can be a means to assist these communities.

Expand or Specialize Advisory Opinions. An advisory opinion can be a useful dispute resolution tool. The advisory opinion model could be adopted in other areas, such as business regulation, nuisance abatement, utility regulation, etc. In addition, this valuable tool could be applied in a "proactive" application to assist in preparation of general plans, zoning amendments, and especially impact fee studies. This would place the expertise of the OPRO at the beginning of the process, providing guidance to help avoid potential problems. Another specialty area where an advisory opinion model could greatly help is in dispute resolution for landlord-tenant, mobile home park, and homeowner associations disputes. While these issues do not involve government bodies, an advisory opinion type of dispute resolution model could prove useful and improve the housing experience for all parties.

Lessons for other states along with overarching reflections of Utah's OPRO concludes this article.

PART 3: LESSONS FOR OTHER STATES

Is Utah's Office of Property Rights Ombudsman a model for other states to consider?³⁹ In a word, yes, although not before determining whether a state actually wants to provide comprehensive, free legal services to parties perceived to be aggrieved by local government land use decisions. Indeed, it is possible that public agencies such as counties and municipalities, and attorneys representing them as well as aggrieved citizens, would oppose the effort. The courts may also weigh in as they have in Utah. Nonetheless, assuming a state might be willing to consider the option, a few *factors may weigh into that consideration*:

Human Dignity. The OPRO enhances the ability of a citizen to cope with the complexity of government processes and rules. The word "ombudsman" can be defined as "citizen's advocate". Ombudsmen, or "ombuds" or "ombudspersons" have long succeeded in assisting citizens, particularly seniors, in dealing with state agencies charged with their long-term care.

Equality. While all government officials are charged with fairly and justly dealing with citizens, only an ombudsman has that as his or her prime responsibility. Over time, the value and power of involving a third-party neutral in resolving emotional disputes has been long established.

Dispute Deterrence. Regular conversations involving the OPRO staff appear to bear out the conclusion that the simple existence of the OPRO, in some cases, incentivizes the parties to be more cooperative in resolving their

³⁹ It is to be noted that Arizona created a private property ombudsman in the 1990's, but that office was not at all similar to Utah's OPRO. The Arizona ombudsman dealt with sovereign land issues rather than eminent domain or land use concerns. In the wake of the national controversy that arose after the widely unpopular decision by the United States Supreme Court in *Kelo v. City of New London, Connecticut*, 545 U.S. 469 (2005), the State of Connecticut created a property rights ombudsman which functioned for a couple of years. After the controversy ebbed, the office was allowed to expire. It is worth noting that the Institute for Justice, a public interest law firm that argued on behalf of Suzette Kelo before the Court, appeared to oppose the creation of an ombudsman office in Connecticut, arguing that creating such an office would be a distraction from needed reforms to the underlying eminent domain statutes. Neither Arizona nor Connecticut charged their short-lived ombudsman offices with resolving land use disputes. Missouri assigns the work of the "Office of Ombudsman for Property Rights" to the Missouri Office of the Public Counsel and limits its work to issues involving eminent domain. The board of the prominent conservative American Legislative Exchange Council (ALEC) drafted a model property rights "Ombudsman Act" in 2004 and proposed it again in 2017 but limited the ombudsman office in this model statute to constitutional takings issues and eminent domain. <https://www.alec.org/model-policy/ombudsman-act/>. Utah remains alone in offering ombudsman assistance on land use issues to property owners, neighbors, and government entities.

disputes. Knowing that there is a forum short of litigation which either party could employ to resolve the matter can sometimes short-circuit the posturing that otherwise would occur. Thus, the OPRO, without even being involved, can serve as a reality check on development negotiations.

Efficiency. Also, over time, the process of litigation as a means of resolving disputes has become more expensive, more complicated, and less responsive to citizen needs. Alternative Dispute Resolution (ADR) has been validated repeatedly as a more practical, efficient, and respectful way to manage conflict.

Cost. It has been our experience in Utah that the cost savings by the OPRO has been dramatic. The Utah Department of Transportation has achieved a dramatic reduction in litigation costs in the acquisition of right of way for its projects by utilizing the OPRO mediation and arbitration services. The investment by the state in funding the OPRO has paid off in the long run.

Public Acceptance. Those who have labored at the OPRO over time would share a consensus that their efforts can have a calming, perhaps even therapeutic, effect on citizen concerns. It makes sense that the frustrations expressed by all players in the land use arena – whether elected officials, appointed board members, professional planners, applicants, or citizens are all heightened by lack of trust and, sometimes, of transparency. A skilled neutral with a certain amount of “swagger” can often build confidence and trust by all involved in the land use process.

Public Confidence. One major philosophy undergirding the OPRO success is the commitment to the process, and not to a given result. Those working there have believed that the rules and procedures are fundamentally fair and will work toward an equitable and logical result if all involved develop trust in the process. Critical to that resulting confidence is a sense by each party that they have access to critical information and a fair opportunity to participate. Having a neutral source of independent review and comment promotes that. When the public or applicant for a land use approval shows up at a hearing with the understanding that a decision affecting their interests will be settled finally during their first encounter with the issues, emotions can flare, and trust is destroyed.

Advance Training. The OPRO has promoted seminars, conferences, publications, and internet resources available to all participants so that land use rules and procedures are more understandable. Thus, when the collision of ideas occurs, the parties can be more prepared to deal with practical and legal options to resolve competing concerns.

Value to Citizens. The annual budget for the OPRO this fiscal year is \$488,300⁴⁰. This includes three attorneys and one other staffer. As a fraction of the budgets for projects and development that the office is concerned with, the OPRO budget is barely statistically relevant. The Utah legislature's budget for infrastructure this year is \$2.02 billion.⁴¹ Total private investment in Utah development projects for the twelve months ending December 2020 was \$7.288 billion.⁴² Total development for Utah, not counting the funds that cities, counties, towns, utility districts and others will spend on projects will thus exceed \$9.3 billion.

The entire OPRO budget, designed to help citizens cope with Utah's exploding development and keep everyone on track with basic rights and accountability, is about five thousandths of one percent of that dollar amount. Over time the OPRO has proven itself to have an incredible cost/benefit effect in protecting citizens, even without considering the millions saved from litigation which was not pursued.

Utah is wise to continue to support the OPRO both financially and philosophically. Our experience in resolving land use disputes is well worth the consideration of other states and governmental entities.

⁴⁰ Internal email communication, Utah Department of Commerce Accounting. The original 1997 budget was \$90,000. By 2005 it had grown to \$150,000. The cost of the office, without accounting for inflation, has barely tripled, while the staffing has grown from one employee to four.

⁴¹ Senate Bill 6, Infrastructure and General Government Base Budget, 2020 General Session, Utah State Legislature. <https://le.utah.gov/~2020/bills/static/SB0006.html>.

⁴² Economic Report to the Governor, Utah Economic Council. <https://gardner.utah.edu/wp-content/uploads/ERG2021.pdf>.