

Property Rights Ombudsman

CHAPTER 13

Alternative Dispute Resolution: Mediation, Arbitration, and the Ombudsman

Utah is unique because we have a provision in state law that provides that any property owner who wishes to mediate or arbitrate some land use disputes may ask the office of the property rights ombudsman (the “OPRO”) to arrange alternative dispute resolution.

An “ombudsman” is someone whose salary is paid by government or business, but whose job it is to resolve disputes. The OPRO mediates issues involving local and state government, property owners, and other citizens. Utah’s property ombudsman is charged to:

1. advise property owners and government entities about property rights;
2. provide information through seminars and publications about property rights; and
3. help resolve disputes fairly, in accordance with existing law, and without expensive and time-consuming legal action.¹

There are several options available to local government entities, citizens, and property owners to resolve disputes:

1. **Negotiation**—when the parties attempt to work things out between themselves;
2. **Conciliation**—when either party contacts an outside person such as the OPRO for help. The ombudsman or other neutral may contact the other parties and attempt “shuttle diplomacy” to resolve matters. There is no face-to-face meeting;
3. **Mediation**—As part of this option for dispute resolution, all the parties meet together with a neutral third party and attempt to resolve matters

with the third party acting as a facilitator and as a sounding board for ideas. The mediator may then meet separately with each party in a “caucus” and attempt to reach a compromise solution to which all can agree. If all do not agree, there is no mediated solution. The mediator does not impose a solution but is just there to help grease the skids for resolution. If both parties do not agree to settle the matter, it remains unresolved. While the parties do not need to use someone from the OPRO to mediate, they will typically use the ombudsman’s office because the attorneys are informed and serve without charge.

4. **Advisory opinion** – if any party to an issue involving a land use application² or impact fee desires an official review by the ombudsman, an advisory opinion may be requested. The request for a land use opinion may be filed at any time before a final decision is made by an appeal authority or, if the matter does not involve an appeal authority, before the deadline passes to file an action in the district court. An impact fee opinion can be issued at any time.³ The fee to file the request is \$150.

Upon receiving a request for an advisory opinion, the ombudsman will review the matter, check with other parties, and do some fact-finding and legal analysis. In the meantime, the ombudsman will also work with the parties to attempt to resolve the dispute in negotiation or mediation. When that proves of no avail, the ombudsman’s office will review the issues raised in a formal written opinion which is part of the public record.

In the fifteen years since the advisory opinion process was initiated in 2006, about 235 opinions have been published. An analysis of those opinions as well as an index to the topics and parties is available in the Land Use Library at utahlanduse.org/library/. The text of each opinion is also found at propertyrights.utah.gov.

While the advisory opinions are non-binding, if the matter continues to litigation and a court makes a decision that is consistent with the opinion, the substantially prevailing party may collect reasonable attorney fees and court costs. The fees collected would be those which accrued regarding that particular cause of action from the date of the opinion until the date of the court’s ruling.⁴

5. Arbitration—Unlike mediation, arbitration involves a neutral third party who does express an opinion on the matter before him. If the parties have chosen binding arbitration, the decision by the arbitrator resolves the issues. Arbitration can be advisory, non-binding, or binding unless appealed. An arbitration hearing can be like a court almost, though it need not be so formal. It can be very flexible and adjust to meet the needs of the parties and the facts of a case.

The property rights ombudsman can arrange arbitration at the request of a property owner in any case where all the parties agree to use arbitration to resolve the matter.

In cases involving constitutional property rights, eminent domain, or relocation assistance for those who must move under the threat of eminent domain, the property owner in such a case can request that the OPRO order arbitration. If the ombudsman deems it appropriate, the government entity must participate as if the matter were ordered to arbitration by a court.⁵

The result of this type of arbitration through the ombudsman can be appealed to the district court within 30 days. If it is not, the resulting arbitration award is binding on the parties. If it is appealed, all legal rights remain, including the right to trial by jury.⁶

Tips for participants

As the first Utah Property Rights Ombudsman, I assisted more than 4,000 property owners, professionals, and government officials in ten years. As a general rule, I have found that earlier is better in terms of when outside information is helpful and when attempts should be made to head off looming disputes.

The more information that all involved have available to them and the earlier the parties can consider options, the less likely it is that someone will dig into a hard position that makes the process of dispute resolution harder.

If you have questions that the ombudsman can assist with, please feel free to call early. Most of the time, the knowledgeable individuals who work there can give a perspective and outline some options, sometimes acting as a “coach” for the parties as they work through the local exhaustion of remedies process. The OPRO does not go to planning commission meetings and pretend to tell local officials what do to.

But if anyone involved wants to bounce some ideas off them or ask about procedures in general, they are happy to help. Call the numbers found at the end of this book and they will assist as much as they can.

There are only three attorneys at the OPRO plus one staff person, and they cover the entire state. But with the wonders of modern technology, they cover a lot of ground. By means of voicemail and e-mail, as well as telephone conversations, there is a wealth of expertise to be shared at no cost to citizens or local government officials.

The goal of the dispute resolution process through the property rights ombudsman is not to ignore the law and merits of the matter. Most importantly, the process is designed to arrive at a solution that both parties agree is better than the other options available. If that consensus is not possible, the process should result in the same conclusion that a court would reach, but without all the delay, cost, and hassle of litigation.

The full services of the OPRO are outlined in more detail at *propertyrights.utah.gov*.

1 Utah Code Ann. §13-43-203.

2 Utah Code Ann. §13-43-205(1) limits advisory opinions to issues arising from Sections 10-9a-505.5 and 10-9a-507 through 10-9a-511 as well as Sections 17-27a-505.5 and 17-27a-506 through 510. These sections include limits on the number of residents in a single-family home; exactions and conditions on development; an applicant's entitlement to approval of a land use application; the completeness of a land use application; transferable development rights; limits on fees charged for land use approvals and utility hook-ups; nonconforming uses as well as noncomplying structures; and impact fees. For exact details of what qualifies one should contact the ombudsman.

3 Utah Code Ann. §13-43-205(1)(b).

4 Utah Code Ann. §13-43-206(12).

5 Utah Code Ann. §13-43-204(2).

6 Utah Code Ann. §13-43-204(3)(i).