Property Rights Amendments – Senate Bill 9: Commentary

This summary contains a statement of each issue treated in SB9 with a summary of the proposed changes in the bill. Relevant references to the lines in the bill that effect the change are made, and then a commentary is offered by Craig Call, Utah's Private Property Ombudsman, on the background of that item – why it is in the bill and how it came to be treated as it is.

Notice of Entry onto Private Property. The bill provides that where condemnation may be used, those surveying for projects may only enter upon private property at reasonable times and upon reasonable notice to complete their surveys. *Line 641.*

Commentary: This corrects a lapse in state law that I have not found anyone who defends. Under current state laws, notice must be given by food inspectors, building officials, planning commissioners, health department, labor officials, sanitary enforcement personnel, business license enforcers and others before they enter private property. Why should not those who are surveying property to be physically taken for public use also provide notice before coming on the property to prepare their plans?

Occupancy of Private Property. Under SB 9, unless the court rules otherwise, a property owner will not have to respond to a motion for immediate occupancy of land that is condemned any sooner than the deadline to answer the complaint. *Lines 656-658.*

Commentary: Because of the rules of civil procedure, which are somewhat difficult to understand and located in a completely separate part of the code books, it is understood by attorneys that they have only ten days to file a response to motions made before the court after a complaint is served on them. Utah statute also allows government entities which condemn private property to make a motion that the court allow a "Quick Take" of the property and grant physical possession of the premises to the government. It is not uncommon for a property owner to be served a bundle of papers that, on the summons, demands a response within 20 days of service. What the property owners miss is that there is also buried in the packet a motion for immediate occupancy, and no notice is included that the rules of civil procedure grant the court the right to grant the motion in ten business days if the property owner does not respond. I have seen cases where possession of the property was granted 9 business days after the summons was served. The property owner still thought she had another week to respond, but it was already too late. SB 9 fixes this.

Duty to Relocate Occupants. If SB 9 passes, all condemnors (those private or public entities using the power of condemnation) must comply with the requirements of the Utah Relocation Act, not just government agencies. Today's law does not require private utilities and others to relocate displaced homeowners. *Lines 239-240.*

Commentary: This provision corrects the definition of "agency" that is in the Utah Relocation Act. That definition before this change assumes that all who condemn private property for public use are state or local government entities. This is not so. Utah Power, Union Pacific, Questar, Qwest, the oil and gas pipeline companies and others all have the power of eminent domain. Under this change, if they move residents off private property, relocation assistance and moving costs must be paid. I am not aware of any abuse of this issue – I do not know of situations where a utility has not relocated homeowners, so this change is philosophical and preventative, not remedial.

Relocation Rules. SB 9 provides that if condemnors don't adopt rules related to relocation benefits, they must follow the rules that UDOT follows. *Lines 284-286.*

Commentary. This triggers the federal rules if no other rules are adopted by an entity using eminent domain, since UDOT uses the federal rules and has adopted them verbatim. These rules protect displaced homeowners, farmers and business people as well as any others I am aware of. I do not pretend that they are even fair, much less perfect. I have seen them abused by condemnors and by property owners. These rules are just better than the other choices around and adopting them saves us having to debate new statewide relocation rules in a legislative committee, where there may never be a consensus reached. There is also some simplicity in using the federal rules so that those using federal money for projects don't have to

follow a completely different set of rules than those involved in state funded projects.

Disclosure - Ombudsman and Mediation. Under SB 9, condemning agencies must disclose to property owners the existence of the private property ombudsman and explain opportunities to mediate and arbitrate disputes. This must be done as early as it is practical to do so during negotiations and no less than 14 days before filing a condemnation lawsuit. *Lines 220-222 (Redevelopment Agenices) and Lines 622-630.*

Commentary: Right now there is no duty to tell property owners that my office exists before they are condemned. This change requires the disclosure before suit is filed, although it does not require it at the beginning of negotiations. UDOT discloses my office at their first meetings with property owners. Some others never do. One government entity whose literature I obtained recommends that if property owners have any questions about the process they should call the government entity's attorney. Some who worked on the bill do not like the 14 day provision, preferring that if disclosure is not provided at the beginning of negotiations, that condemnation cannot be filed in court and the land cannot be taken. I could not get consensus on that issue and this is the compromise.

Disclosure - Promises Not Binding. Those negotiating for condemnation will have to disclose that they cannot make binding promises on behalf of the agency. Only the governing body of the agency can usually bind the agency. *Lines 631-633.*

Commentary. This is a very important part of this bill. I originally proposed that the statute be amended so that government entities are bound by the promises made by their negotiators, but it would not fly before the legislative committee we met with. Local government officials raised the specter of property owners making outlandish claims and telling lies in order to get unfair settlements from government. I certainly would not rule out that possibility for abuse.

My concern has been for property owners who believe what they are told – that certain improvements will be made for them, that they will have the right to repurchase at the price the government paid if the land is not needed, that the project will be built one way or another or that certain land uses will be allowed for the remainder of their property or that certain costs for road improvements will be paid for them in the future, for example. Sometimes the property owner believes what she is told, only to find out later that the agent did not know what he was talking about or that his superiors have decided to ignore his statements.

Under historic government common law, government agents do not bind the government. Only the legislative body of the government entity can do that. If the promise is not approved by the right authority and reduced to writing, anyone who believes that promise does so at his own peril. This duty to disclose attempts to make that more clear to property owners.

Disclosure – Basis of Offer. SB 9 provides that appraisals and other information about the value of property that the agency has in its possession must be shared with the owners of single family residential property if they ask to see them. *Lines 328-330.*

Commentary: It is common for government officials to refuse to disclose the basis of their appraised value, even though the Government Records Access and Management Act does not allow them to keep appraisals secret once an offer is made and the amount of the appraisal is known by the property owner. This change makes the duty to disclose more clear and understandable to the average person who may be reading the law.

Government Immunity Act. Governmental Immunity Act provisions related to notices of claim, filing of a bond, time limits on actions, and other such procedural limitations do not apply to constitutional property rights claims if SB 9 passes. *Lines 492-494.*

Commentary: This provision attempts to put constitutional claims for the taking or damaging of private property on the same basis as other constitutional claims, such as for equal protection or due process. The Utah Governmental Immunity Act is an attempt by state government to insulate itself from tort claims and other suits for negligence, malfeasance, and such matters. The Utah Supreme Court dismissed the constitutional takings claims of several property owners in 2002 because the property owners did not put their names

on a "notice of claim" 90 days before filing suit to protect their property rights. A notice of claim is a technical document that is required by the Act prior to filing a tort action.

In 1990, the Utah Supreme Court held that a claim for just compensation for an unconstitutional taking or damaging of private property for a public use could have been brought without complying with technicalities of the Utah Governmental Immunity Act, but their decision only applied to claims that were brought before 1987. I am not sure why it should be any different today.
These technicalities require that a citizen with a claim against the government must file a notice 90 days before filing suit; must file that notice within a year of the date the claim arose; may only wait a year after the government's response to file a legal claim; and may only file suit if he posts an "under taking" of $300 so that if his suit is not successful or he abandons the action the government can retain the bond if fails to pursue the matter.

These annual "drop dead" dates and procedures that apply to tort claims against government have, since 1987, been applied at times to constitutional claims and made it so many property owners never are heard on the merits of their cases. They are simply dismissed from court because of technicalities. Even lawyers have been caught short by the complexities of the rules.

The United States Supreme Court has held that these procedural technicalities must not be used to avoid claims under the U.S. Constitution. Utah courts, however, have sometimes held that Utah citizens are bound by the technical requirements when they seek to enforce their state constitutional rights. The U.S. and Utah Courts have also held that a property owner cannot bring a claim for a property rights violation in federal court, so he must seek any recovery in state courts where these limits are said to apply. The property owner gets caught coming and going here.

This provision of Senate Bill 9 is meant to allow property owners to seek just compensation on the same basis that they could pursue other constitutional claims – at least to the extent that they need not file a notice of claim, post a bond, file within a year, and comply with the other technicalities of the Governmental Immunity Act. This amendment is supported by the League of Cities and Towns, the Association of Counties, and others that met to prepare Senate Bill 9.

Property Rights Ombudsman. The Private Property Ombudsman's title is changed to Property Rights Ombudsman. This clarifies that he does not help with issues involving disputes between private property owners, but only disputes involving the government or utility as one party. *Various lines throughout the bill.*

Commentary: This is just a personal preference that the title of my office be clarified. I have found the existing name to be misleading. Experience has shown that the new title would be a little more clear than the current title in explaining what I do, since I deal with government interference with property rights, not with disputes between two property owners.

Land Use Issues. As ombudsman, I am limited to helping property owners with constitutional property rights. The Utah Supreme Court held in March of 2003 that land use issues rarely involve constitutional property rights. SB 9 provides that as Ombudsman I can assist property owners and citizens with land use issues without calling every land use issue a constitutional issue. Without this change, I would be exceeding my present authority almost every time I am asked to assist a property owner with a land use issue. *Lines 535-537.*

Commentary: The Utah Supreme Court decided a case in March of 2003 where a prominent developer had claimed that he was not treated fairly by a Utah city when his developments were reviewed and permitted. He claimed delays, unequal requirements, excessive fees, breach of promises made, demands for public improvements that did not benefit his projects or which were out of proportion to the impact his development would have on the community.

The Court held that none of his claims were constitutional in nature. This is really not new or radical, because the courts have long held that if there is a statute that would accomplish the same protection as the Constitution, then those making claims must use the statute as the basis for their claim, not the Constitution. In the 2003 case, the Court said that the Utah statutes require that local decisions not be "arbitrary capricious or illegal." This property owner should have used the statute, not the Constitution, as the basis for his claim. "absent invidious discrimination, such as proof of

racial animus, the conventional planning dispute . . . is a matter primarily of concern to the state and does not implicate the Constitution," wrote the Court. "This would be true even were planning officials to clearly violate, much less distort the state scheme under which they operate."

Whatever the other ramifications of this decision may be, the Court pretty well held that as the private property ombudsman, I can rarely help property owners with land use disputes if I am only hired to help with constitutional issues. Since I get a lot of calls about planning and zoning and such matters, I asked the legislature to allow me to help property owners and citizens with land use issues without calling every problems a constitutional issue. The provisions in the bill have been worded to gain the support of the cities and the counties, although many would have preferred that I pull in my horns a little and stay out of local land use concerns. The legislative committee that reviewed our bill was very supportive, so the local government officials also agreed what they allege to be a "massive expansion of my powers."

Land Use Mediation. The bill also provides that while I can act as an ombudsman on land use issues and answer questions and assist the parties, I cannot require local government entities to participate in mediation or arbitration of land use disputes. The property owner can only trigger mandatory mediation or arbitration if the issue is a constitutional taking issue or involves condemnation. *Lines 538-540.*

Commentary: I had asked for the opportunity to bring the parties to the table if the property owner asked me to, but the local government representatives dug in and said that would be too much of an expansion of my power. The concern is that I would arbitrarily intervene and slow down the process of approvals or denials and leave projects in limbo without a final approval or denial until my process is finished. While it is true that I would have had the power to call a "time out" while the concerns of citizens or land owners are addressed, that power seemed to me to be pretty modest compared to the power that local government has to control the use of land and process of getting permits by property owners. In the end, those involved agreed to leave things as the bill now reads and not press any harder on the issue. As we left it, there will be times when property owners or citizens will have to file in court to preserve their rights to challenge local decisions so that the decision does not go unchallenged for thirty days and then we can mediate once they have filed in court to protect their right to appeal.

Issues that I raised but which were not included in the final version of SB 9 that is before the legislature:

Business Reestablishment Expenses: When a government entity uses eminent domain to move a business off its property, there is no duty to pay for the loss of goodwill, profits during the move, or the owners' time. Government must pay some toward the increased cost of a new location, the process of planning and zoning review, refixturing, code compliance and new letterhead, stationary, phone, and advertising, etc, but only up to a maximum of $10,000.00. This limit was set in 1987 by the U.S. Congress and is unrealistically low. We held off changing this (although UDOT agreed that they would support doubling the amount to $20,000) because we think Congress may change it to as much as $50,000. We may need to revisit this issue if Congress fails to act. There are some very poignant and compelling stories I have been involved in where this low limit has worked severe injustice in Utah, particularly where business people have had to move because a redevelopment agency is threatening to condemn their property for another business to use.

Legal Fees: Representative Ure introduced a bill in 1999, I believe, that would have allowed the courts to award attorney fees if property owners had to go to court to challenge condemnation actions and they succeeded in getting more compensation than the government's offer. UDOT agreed to work on the issue and the legislature did not take any action at the time, but we cannot get consensus yet and if we had put this issue into SB 9 it would have been severely burdened. I believe that a lot of the good things in this bill would have been much longer in coming if I had insisted that legal fees be addressed. This issue has been put off to another day.

The problems with the state or other condemnor having to pay legal fees are pretty easy to figure out. Those who oppose it have two big hammers to hit the legislature with: 1) it will cost money in an era where money is hard to come by and there are many public works (particularly roads) projects that

the legislators favor. 2) the money will go to trial lawyers, and they are not a favored group on the hill.

To be honest, another tempering factor that keeps the legal fees issue from proceeding is that my office has been quite successful in reducing the need for long drawn out legal battles. I offer voluntary mediation and arbitration to property owners and can even order the government entity to pay for a second appraisal for a property owner, using an appraiser the property owner chooses, if I consider it appropriate. Property owners in many cases have been able to avoid court and excessive fees by using my services, though I always urge property owners to contact an attorney and review everything we discuss so that they are not dependant on me alone for advice and perspective.

It is worth noting, of course, that Utah already allows legal fees when the condemning entity is a redevelopment agency. The court involved may award legal fees if the property owner recovers more than the agency's offer and if, in the opinion of the court, the fees are justified. I have not heard that this has broken the back of any redevelopment agencies so far.

Statute of Limitations: Right now there is not a clear court ruling on how long a property owner has to file a claim for just compensation over a constitutional property rights issue if the Governmental Immunity Act does not apply to these claims. Some have preferred that we fix a period of four years as the cut off date to file a lawsuit, which is probably where the courts would set it if the right case came before them. I could not get consensus on this and had to pass on this relatively complicated issue for now.

Other Issues:

This coming year there are more issues to chew on as the legislature moves into its interim study items again. I would be very pleased to hear from anyone who has specific proposals for land use reform, condemnation issues, arbitration and mediation, or other matters related to my job. I appreciate the time that anyone may have taken to read through this entire commentary. This is not a topic that many people consider engaging and interesting, but I have been pretty much immersed in it full time since I assumed my position as ombudsman in 1997. My job in state government is to assist property owners in understanding their rights when government actions may illegally affect the use and value of land. I can arrange to contact the government folks for more information and arrange mediation and arbitration when requested by the property owner, at no cost to the parties. Please feel free to call to discuss the issues I have raised above or any other relevant matters I can help with.

This summary was prepared by Craig M. Call, Utah's Private Property Ombudsman. He can be reached at craigcall@utah.gov or toll free at 1-877-UTAH OMB. (1-877-882-4662).

Notice of Claim - Requirements Must Be Strictly Followed:

Wills v. Heber Valley Historic R.R. 2003 UT 45. *Shafer v. Utah.* 2003 UT 44. Notice of claim was mailed to offices of the attorney general, but not to the Capitol where his desk and chair are located. The Attorney General argued that the claims should be disregarded since they were not delivered to the Capitol. The Supreme Court disagreed and allowed the claims.

Gurule v. Salt Lake County, 2003 UT 25. Notice of claim sent to a county commissioner, not to the county clerk. The Governmental Immunity Act says it must be delivered to the clerk. Court dismissed claims.

Wheeler v. Kane County, 2002 UT 44. Notice of claim sent to each commissioner, by certified mail. Clerk signed for the letters, but they were not addressed to the clerk. Court dismissed claims.

Pigs Gun Club v. Garfield County, 2002 UT 17. Notice by the club and one other property owner was not sufficient for the other property owners who joined in the suit. Property owners claimed "the county knew who we were." Court dismissed the claims of all those not listed on the notice of claim.

Brown v. UTA, 2002 UT 15. Notice of claim sent to the Attorney General and to "Claims Department" at the UTA. The UTA acknowledged to Brown's attorney that the claim was received. The UTA officials say they regularly get notices of claim and do not forward them to the Board of Directors. Since the Board of Directors did not get the notice, the Court dismissed the claim.

Wheeler v. McPherson, 2002 UT 16. Notice of claim served on county commissioners. County attorney, in writing, directed that all communications about the claim should go through claims adjuster. Adjuster acknowledged that claim had been received and discussed issues. At court, county moved for dismissal because claim had not been filed with clerk. Court dismissed the claims.

Green v. UTA, 2001 UT 109. Attorney for claimant contacted UTA's sole claims officer. Attorney says claims officer told attorney to send notice of claim to claims officer, but officer denies this. Officer says he gets about 40% of claims that are sent to UTA but does not forward them to the board of directors so that they would be properly filed. 49 days later claims officer denied claim because notice insufficient. Court dismissed claims, but advised UTA that it should revise its policy and encourage its staff to forward notices to the board of directors.

Rushton v. Salt Lake County. 1999 UT 36. Property owner typed his name at the bottom of the letter and did not sign it. Letter did not threaten to take legal action, but only set forth the facts of the dispute. Letter and claim also too late. Court dismissed claims.

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