

## Newsletter from the Ombudsman for Property Rights

June 12, 2008

### Ombudsman's Annual Review

One year has passed since Governor Rell appointed me to the position of Ombudsman and the House of Representatives confirmed the appointment. In those twelve months much has been accomplished.

**Organization of the Office of Ombudsman.** The concept I began with was to make the Office of Ombudsman for Property Rights a place where individuals as well as state and local government officials would be able to call, have their issues receive serious attention and get answers to their questions quickly. Because the legislature authorized the Ombudsman to act as a mediator, I wrote rules to allow for requests for mediation as well as an explanation of the mediation process in the period between confirmation and opening of the office. Requests from several attorneys for information concerning mediation were received within days of the commencement of my employment as Ombudsman and fortunately I was able to provide them with a set of procedures.

By mid July I had produced an extensive frequently asked questions fact sheet in plain language. By the end of August proposed regulations setting forth the method for property owners and public agency officials to request mediation to resolve disputes arising out of eminent domain and related relocation assistance matters were published in the Connecticut Law Journal.

**CT DOT.** Because most takings are the result of CT DOT projects, I met several times during the summer with members of the Rights of Way Division and US Highway Administration to work out how our offices would interact, especially with answering questions of affected property owners and mediation. These discussions led to changes in the letters and brochures mailed and presented to property owners by CT DOT. Most importantly, in every letter there is a recitation of the Ombudsman's name, address and telephone number, a statement that the Ombudsman's office is independent of DOT and a suggestion to call the Ombudsman with questions.

Property owners who call seem to have as many questions concerning design and construction of road improvements and how that affects their properties as they do about compensation amounts. Some require my active assistance to get appropriate personnel to respond to their needs. Others need to understand the process and what rights they have. Some just need to vent. I do make a point of suggesting that they sign only those forms and agreements that they fully understand and that they should, if uncertain about any facet of the process, consult with their own professionals, including lawyers. In some instances I notify their legislators to make them aware of DOT activities in their districts.

A pressing need is to address the issue of the taking of property unrelated to a specific road project to mitigate environmental impacts on a project site. Under the Inland Wetlands statutes DOT must obtain permits from DEP to fill wetlands and sometimes from EPA and the Army Corps of Engineers. Too often, in order to obtain a permit, DOT has taken private property located miles away from the construction site, sometimes in neighboring towns or more distant locations. DOT puts up too little resistance to DEP officials who have interest in pieces of privately owned land uninvolved with the construction area. Recently, a meeting was held between the Army Corps, EPA, DEP, DOT and the Ombudsman for Property Rights. The Army Corps and EPA proposed entering into an agreement with DEP that would set up a system allowing for banking of credits and in lieu dollar payments to be made by DOT or other state agencies that would be the source of funding for major environmental remedial work. The Corps has similar agreements with Maine and New Hampshire state environmental agencies. Hopefully, the practice of taking property unconnected to the construction site as a means of satisfying permit request requirements under the Inland Wetlands Act will end soon. The statutory authority for such takings is at best an implied authority. There is no controlling Connecticut case law that I'm aware of dealing with this kind of a taking.

**Municipalities.** I began communicating with chief elected and administrative municipal public officials in July. The purpose of these communications has been to introduce the municipal leaders and agency officials to the Office of Ombudsman and to offer assistance. I have visited several cities and met with representatives of redevelopment and economic development agencies. Several cities that have engaged in acquisition of property by eminent domain for those purposes are experiencing problems with their preferred developers. Some municipalities are planning projects and I have been told eminent domain may be used if negotiations fail.

Some inquiries, but not as many as arising out of DOT takings, are made to the Office of Ombudsman from private property owners affected by municipal development activity. Nonetheless, progress has been made in certain municipalities finding property within or close to the area of development for existing businesses to move and in other communities avoiding the use of eminent domain when alternatives exist.

The message that I have been giving to officials of both state and municipal agencies regardless of the intended public use is to try their best to make acquisitions of property through negotiated settlement and only as a last resort utilize the power of eminent domain.

Recently, I mailed a questionnaire to all cities and towns requesting information concerning use of eminent domain in the last ten years and other general issues concerning local ordinances and charters. I should have answers back by summer's end. I intend to prepare a summary of the information for use by the legislature, executive departments and municipalities.

**Legislature.** Legislation enacted in the 2007 session required the Ombudsman to perform a study to determine the feasibility of calculating gain or loss of goodwill associated with businesses displaced by eminent domain.

**Goodwill Study.** I assembled a panel of experts including business and real estate appraisers, lawyers and urban redevelopment, relocation and transportation officials. Over the period August through November we met and received testimony from interested persons and groups concerning the topic and other subjects. It led us to agree to recommend to the legislature that loss of goodwill become an eligible moving expense under the Uniform Relocation Act and that increases in payments for search and reestablishment expenses and in lieu of moving expense payments be considered. The published report was distributed to every member of the legislature. The full report can be read on line at [www.ct.gov/pro](http://www.ct.gov/pro).

**2008 Session.** The 2008 session ended disappointingly with no changes made to eminent domain or associated relocation assistance statutes. The Planning and Development Committee raised a bill that would have provided payment for loss of goodwill for retail businesses forced to move as a result of eminent domain. The committee voted a joint and favorable resolution and forwarded it to the Judiciary Committee where it and another bill raised by the Judiciary Committee concerning threatening use of eminent domain during negotiations died. Other recommendations made in the Goodwill Study and by the Ombudsman including shifting the burden of proof to municipalities and raising the level of proof to a standard of clear and convincing evidence with respect to takings made pursuant to Chapters 130, 132 and 588l were not acted upon. All of these recommendations will be presented again for consideration in the 2009 session. Communications with the Judiciary Committee co-chairs and members as well as other legislators will continue over the summer and fall. Letters to the Judiciary Committee can be read on line at [www.ct.gov/pro](http://www.ct.gov/pro).

**Newsletters.** Since September, I have written a monthly newsletter and forwarded a copy to every member of the legislature and the governor. The principal reason for doing so is to keep them informed of what is happening in the world of eminent domain in and out of Connecticut and to make recommendations for changes to our general statutes. The monthly newsletters are posted on the website.

**Mediation.** There have been several requests made for mediation. There have been more matters where early intervention by the Ombudsman has led to resolving issues without the necessity of formal mediation proceedings. In those matters where mediation has been requested, all requests have been accepted. At least two mediation matters have involved relocation assistance issues involving small businesses. One of these matters involved substantial amounts of money and concluded in a settlement. I have found that the parties to mediation have acted honorably and have made best efforts to cooperate with the Office of Ombudsman and to reach fair settlements.

In addition to mediation the legislature authorized the Ombudsman to hear and decide compensation disputes in the Superior Court. The statutory reference is CGS Section 8-132. Although this statute is found in the chapter dealing with municipal redevelopment, Section 8-132 is referred to in many statutes authorizing takings for other public uses by state and municipal agencies. I have met with the chief administrators of the Superior Court and worked out the arrangements for use of court facilities and personnel when referrals to hear reviews of contested statements of compensation are made.

**Educational Outreach.** I have presented educational and informational programs to lawyer and lay groups concerning the Office of Ombudsman for Property Rights. I have made two presentations to members of the real estate section of the Connecticut Bar Association. I will be a presenter in a national teleconference sponsored by the American Bar Association in July.

The website is an informational and educational tool. The site is linked to relevant statutes and regulations and to both Kelo decisions, Connecticut and the U.S. Supreme Court. The court opinions, statutes, regulations, answers to frequently asked questions as well as a brief history of the constitutional guarantee of ownership of property and payment of just compensation are all meant to inform citizens of the process and procedures utilized when government exercises its power of eminent domain.

**Staff.** In late July 2007, Maryann Boord, formerly Governor Rell's Director of Boards and Commissions, joined me as the second member of the Office of Ombudsman staff. Since then, she and I have managed the operations of the office. With her on board we have been able to create the website at [www.ct.gov/pro](http://www.ct.gov/pro) which I am happy to report has been positively received. Her many contributions to the Office have allowed much of what I envisioned doing to be accomplished. Her involvement with the Goodwill Study Committee, in particular, preparing the report for printing, publication and distribution was invaluable.