Advisory Opinion #217

Parties: Stockton Town; Kilgore Companies
Issued: February 24, 2020

TOPIC CATEGORIES:

Compliance with Land Use Ordinances
Nonconforming Uses & Structures

The property owner typically has the burden of establishing the legal existence of a nonconforming use. To establish a legal nonconforming use, the property owner must establish that the use (1) was legal when it began, (2) has been continuously operated since the time the land use ordinance changed, and (3) because of a subsequent land use ordinance change, the use does not conform to the regulations that now govern the use of the land.

In this case, the property owner has not provided evidence which establishes that gravel mining is a legal nonconforming use on the property they own in Stockton Town, and gravel mining is not a permitted use in the zone. Therefore, Stockton Town has the legal authority to prohibit mining operations on the subject property within Town limits.

DISCLAIMER

The Office of the Property Rights Ombudsman makes every effort to ensure that the legal analysis of each Advisory Opinion is based on a correct application of statutes and cases in existence when the Opinion was prepared. Over time, however, the analysis of an Advisory Opinion may be altered because of statutory changes or new interpretations issued by appellate courts. Readers should be advised that Advisory Opinions provide general guidance and information on legal protections afforded to private property, but an Opinion should not be considered legal advice. Specific questions should be directed to an attorney to be analyzed according to current laws.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

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ADVISORY OPINION

Advisory Opinion Requested By:	Thomas Karjola, Mayor of Stockton Town
Local Government Entity:	Stockton Town
Property Owner:	Kilgore Companies
Applicant for Land Use Approval:	Kilgore Companies
Type of Property:	A2 Agricultural
Date of this Advisory Opinion:	February 24, 2020
Opinion Authored By:	Marcie M. Jones, Attorney Office of the Property Rights Ombudsman

ISSUE

Does Stockton Town have the legal authority to prohibit the commencement of mining operations on property owned by Kilgore Companies within Stockton Town?

SUMMARY OF ADVISORY OPINION

The property owned by Kilgore Companies within Stockton Town is zoned A2 within the Town's agricultural zoning district. Mining is not a permitted use within this zone. Kilgore has not provided evidence which establishes that gravel mining is nonetheless legal. Based on information presented in the record, mining is not a legal non-conforming use based on either historic use or the Settlement Agreement between Tooele County and Kilgore's predecessor in interest. Therefore, Stockton City has the legal authority to prohibit mining operations on Kilgore's property within Stockton Town limits.

REVIEW

A Request for an Advisory Opinion may be filed at any time prior to the rendering of a final decision by a local land use appeal authority under the provisions of UTAH CODE § 13-43-205. An advisory opinion is meant to provide an early review, before any duty to exhaust administrative remedies, of significant land use questions so that those involved in a land use

application or other specific land use disputes can have an independent review of an issue. It is hoped that such a review can help the parties avoid litigation, resolve differences in a fair and neutral forum, and understand the relevant law. The decision is not binding, but, as explained at the end of this opinion, may have some effect on the long-term cost of resolving such issues in the courts.

A Request for an Advisory Opinion was received from Thomas Karjola, Mayor of Stockton Town, on June 17, 2019. A copy of that request was sent via certified mail to Kilgore Companies, 15 West South Temple, Suite 1701, Salt Lake City, Utah 84101 on July 1, 2019.

EVIDENCE

The Ombudsman's Office reviewed the following relevant documents and information prior to completing this Advisory Opinion:

1. Request for an Advisory Opinion, submitted by Thomas Karjola, Mayor of Stockton Town, on June 17, 2019.
2. Letter, with attachments, submitted by Bruce R. Baird, as counsel for Kilgore Companies, received on August 7, 2019.
3. Letter submitted by Thomas Karjola, Mayor of Stockton Town, received on August 15, 2019.
4. Email, with attachments, submitted by Bruce R. Baird, as counsel for Kilgore Companies, received on November 19, 2019.
5. Email submitted by Thomas Karjola, Mayor of Stockton Town, received on November 20, 2019.

BACKGROUND

The record includes only the following abbreviated timeline of relevant events. Note that key information is missing and some facts are in dispute.

- **Kilgore owns 128.15 acres in Tooele County**
  Kilgore Companies owns approximately 128.15 acres of property in Tooele County which it purchased in 2007 from Diamond B-Y Ranches, Inc. A portion of this property is located in unincorporated Tooele County (the "County Property") and a portion is located within the boundaries of Stockton Town (the "Stockton Property", and together with the County Property, the "Property").

- **Property was historically used to operate a gravel pit**
  According to the court opinion for *Diamond B-Y Ranches v. Tooele County* mentioned below, portions of the property then owned by Diamond were historically used to operate a gravel pit.[1] The opinion does not distinguish which portion of the Property was mined, when the gravel mining began, when operations ceased, or whether such operation was

[1] *See* Diamond B-Y Ranches v. Tooele County, 91 P.3d 841, 2004 ¶ 2 which states "Diamond owns over 190 acres of land in Tooele County, approximately one third of which is within the northern boundary of the town of Stockton. The property has historically been used to operate a gravel pit . . ."

legal at the time.[2] Further, as the property described in the court opinion was 190 acres and the property now owned by Kilgore is 128.15 acres, it is not clear whether Kilgore now owns that portion of property where the historic gravel pit was located.

Kilgore has submitted historic aerial photos which purportedly depict mining activities on portions of the Property. Photos for the following years have been provided: 1959, 1966, 1978, 1985, 1987, 2004, 2006, 2009, 2011, 2013, 2014, 2016, 2017, and 2018. However, the photos do not include parcel boundaries or other identifying information so it is not clear which property is depicted. Further, it is not obvious which ground disturbances may be related to mining activity.

No additional evidence that mining legally occurred on either the Town Property, or the County Property prior to annexation into Stockton, has been provided.

Stockton has asserted that "no such Mining use has ever legally existed or been conducted on the [Stockton Property]."

- **Stockton Property annexed into Stockton Town**
  Neither party has presented any direct evidence establishing when the Stockton Property was annexed. Based on the court opinion for *Diamond B-Y Ranches*, annexation had apparently occurred by 2004.[3]

- **Parcel originally not split along jurisdictional boundaries**
  Assessor's parcel boundaries typically do not cross jurisdictional boundaries but in this case, for reasons not explored in the record, the Property remained as a single assessor's parcel after the annexation.

  In or about 2019, the Tooele County Assessor's office apparently split the Property along the jurisdictional boundary between the Town and the County. In the record, Kilgore represents that this split was done "without notice or approval of Kilgore" and "in violation of subdivision provisions of state law." Both parties state that they did not instigate or participate in actions resulting in the lot split.

  No further information on the parcel split is available.

- **Application for Conditional Use Permit to mine County Property**
  In 2000, the County Property "was zoned such that mining and related activities, including the operation of a gravel pit, were among the activities designated as conditional uses for the property."[4] Accordingly, Diamond submitted an application to Tooele County for a Conditional Use Permit ("CUP") to operate a gravel pit on the Property. After several public hearings, a six-month moratorium to re-evaluate extraction operations policy, a failed rezoning attempt, and options for an exhaustive Environmental

[2] *Id.*
[3] *Id.*
[4] *Id.*

Impact Study requested by the Planning Commission were explored, the County Commission denied the Conditional Use Permit application.

Note that there is nothing in the record to suggest that gravel mining operations were active when the CUP was applied for.

- **Lawsuit following Conditional Use Permit denial**
  Diamond then filed a lawsuit in district court, *Diamond B-Y Ranches v. Tooele County,* alleging the CUP denial constitutes a taking of all economically viable use of the Property.[5] The trial court granted summary judgment in favor of the County based on its determination that Diamond had no protectable property interest in the permit and did not provide sufficient evidence to allow approval of the permit. In 2004, the Court of Appeals reversed and remanded, finding that the County failed to cite noncompliance with application procedures in denying the permit and that Diamond's claim that all economically viable uses of the Property were denied the owner was ripe for determination.

- **Settlement Agreement allows mining on County Property only**
  In 2006, Tooele County and Diamond entered in to a Settlement Agreement to "resolve and settle amicably" whether Diamond is entitled to a Conditional Use Permit for gravel operations. The Settlement Agreement resolves the dispute "between the County and Diamond regarding the applicability and enforcement of various of the County's land use ordinances, regulations and requirements and whether Diamond is entitled to a conditional use permit for Gravel Operations on the Diamond Property." Through the Settlement Agreement, the parties agree that Diamond shall have the right to conduct gravel operations on the Diamond Property subject to certain specified conditions. The wording of the Settlement Agreement does not suggest that gravel pit operations were then active on the Property.

  Note that Stockton Town is not a party to this Settlement Agreement and the Stockton Property had apparently already been annexed into Stockton when the Settlement Agreement was entered in to.

- **Stockton issued cease and desist letter to Kilgore**
  In 2019, in response to Kilgore's "conducting or intending to conduct" mining activities on the Stockton Property, Stockton issued a cease and desist letter to Kilgore giving notice that mining operations are not a permitted use on the Stockton Property and is therefore unlawful and will not be allowed.

- **Stockton requests Advisory Opinion**
  Stockton then submitted an Advisory Opinion Request to this office to determine whether Stockton Town has the legal authority to prohibit the commencement of a mining operation on the Stockton Property.

[5] *Diamond B-Y Ranches v. Tooele County*, 91 P.3d 841, 2004.

A quick summary of background information may be useful at this point. The record provides that historically, a gravel pit was operated on property which Diamond then owned. We do not know if the gravel pit was operated in compliance with zoning laws then in effect. Similarly, we do not know when mining activities began and when they apparently ended, or, whether the mining occurred before or after part of the property was annexed into Stockton Town. It is not clear whether Kilgore now owns the site of any historic gravel pit.

We do not know when property was annexed into Stockton Town, but it had apparently occurred by the early 2000's. For unexplained reasons, the Property remained as a single parcel after the annexation and was not split along jurisdictional boundaries until 2019. While we do not know when the historic mine was in operation, it appears that that mining activities had stopped by the early 2000's.

Diamond applied for a Conditional Use Permit to allow mining operations on the County Property (2000), filed a lawsuit when it was denied (2004), and then entered in to a Settlement Agreement with Tooele County (2006) which established that gravel mining operations can be conducted on the County Property. Kilgore then purchased the Property (2007).

In or about 2019, Stockton understood that Kilgore was operating, or intended to operate, gravel mining operations on the Stockton Property. This prompted Stockton to issue a cease and desist letter to Kilgore requiring them to halt any ongoing or proposed mining activity on the Stockton Property.

The Town has now requested this Advisory Opinion to determine whether, given the history, the Town has the legal authority to prohibit the commencement of mining operations on that portion of the Property owned by Kilgore Companies within the Stockton Town limits.

ANALYSIS

Municipal governments are given broad discretion to govern uses within their boundaries.[6] According to state law, "[t]he legislative body may divide the territory over which it has jurisdiction into zoning districts of a number, shape, and area that it considers appropriate to carry out the purposes of this chapter," and further, "[w]ithin those zoning districts, the legislative body may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings and structures, and the use of land."[7]

According to the record, the Stockton Property is currently zoned A2 which is an agricultural use zone with a minimum lot size of two acres.[8] Mining is neither a permitted nor a conditional use within this zone.[9] The Stockton Town Code provides that uses not specifically permitted are expressly prohibited.[10] Therefore, Stockton maintains that mining is not an allowed use on the

[6] *See generally* UTAH CODE § 10-9a.
[7] UTAH CODE § 10-9a-505(1).
[8] STOCKTON TOWN CODE § 10-6B-2 and 3.
[9] *Id.*
[10] STOCKTON TOWN CODE § 10-4-10.

Stockton Property, and the Town may legally prohibit Kilgore from "conducting or intending to conduct" mining activities.

Kilgore argues that despite the current zoning designation, mining is permitted as a legal non-conforming use due to (1) its historic use as a gravel mine, and/or (2) as a result of the Settlement Agreement signed by Kilgore's predecessor in interest and Tooele County, and/or (3) due to protections provided by recently passed Critical Infrastructure Materials Operations legislation.

According to Utah law, if a property owner can establish that a particular use was legally established and the zoning was later changed, rendering that use impermissible, the use may legally be continued under certain circumstances.[11] This is known as a legal non-conforming use.[12]

A property owner's use of its property falls within the definition of a legal non-conforming use if three conditions are met: (1) the use legally existed before its current land use designation; (2) the use has been maintained continuously since the time the land use ordinance governing the land changed; and (3) because of one or more subsequent land use ordinance changes, the use does not conform to the regulations that now govern use of the land.[13]

For mining operations, the "entire tract is generally regarded as within the exemption of an existing nonconforming use . . ."[14] In this case, because the Property historically existed as a single parcel, if Kilgore can establish that gravel mining was conducted as a legal non-conforming use prior to annexation into Stockton Town, and the other prongs of the test are met, Kilgore has the legal right to continue gravel mining operations on the entire tract, specifically including the Stockton Property.

Note that the burden of establishing a legal non-conforming use falls to Kilgore. State law provides that "[u]nless the municipality establishes, by ordinance, a uniform presumption of legal existence for nonconforming uses, the property owner shall have the burden of establishing the legal existence of a noncomplying structure or nonconforming use."[15] Neither party has provided any evidence that the Town has, by ordinance, modified this burden of proof. Therefore Kilgore has the burden to prove that the three prongs of the legal non-conforming use test have been met.

1. *No legal non-conforming use based on historic use*

Kilgore argues that mining is a legal non-conforming use on the Stockton Property based on past mining activities. To establish a legal non-conforming use based on the facts at hand, Kilgore must establish that (1) a gravel pit was legally established on either the Stockton Property, or the County Property prior to the Town of Stockton annexation, and (2) the gravel pit has been continuously operated since the time that the land use ordinance changed, and (3) because of one

[11] UTAH CODE § 10-9a-511(1)(a).
[12] UTAH CODE § 10-9a-103(37).
[13] UTAH CODE § 17-27a-103(38).
[14] *Gibbons & Reed Co. v. North Salt Lake City*, 19 Utah 2d 329.
[15] UTAH STATE CODE § 10-9a-511(4)(a).

or more subsequent land use ordinance changes, the use does not conform to the regulations that now govern use of the land.[16]

To satisfy the first prong of the legal non-conforming use test, Kilgore must establish that mining legally existed on the Property before the current land use designation was established. Kilgore has stated that mining existed on the Property since 1959. To support this claim, Kilgore has submitted a series of historic aerial photographs which, Kilgore states, demonstrate that mining has occurred on the Property from 1959 through 2018. In contradiction, Stockton states that the historical photographs demonstrate that "no mining or extractive activities have taken place on the property in question."

Boundaries and other identifying information have not been included on the photos so it is not clear which property is depicted. Further, it is not obvious which ground disturbances are related to mining activity. As such, the photos do not establish that mining has occurred, or is occurring, on the Property.

However, the record includes a second source of evidence that mining was historically conducted on a portion of the Property. The opinion for *Diamond B-Y Ranches*, whereby the prior owner of the Property sought a Conditional Use Permit to operate a gravel mine on the County Property, notes that "the property has historically been used to operate a gravel pit . . ."[17] The court does not specify whether the mining occurred on the County Property, the Stockton Property, or both. Also, the subject property in the lawsuit was 190 acres, and Kilgore now owns only 128 acres. The historic gravel pit may lie on portions of the property Kilgore does not own. Therefore, this establishes only that mining existed historically on property Diamond owned.

Kilgore has the burden of showing the use *legally existed* before its current land use designation to satisfy the first prong of the test. The record does not include any evidence that the historic mining which occurred was legal. Kilgore has not provided copies of historic ordinances or other any other documention to support its assertion that mining was at some point an allowable use on the property. Furthermore, the record does not provide evidence that the historic mine was located on either the Stockton Property or the County Property prior to annexation of the Stockton Property. As such, Kilgore has failed to establish that mining on the Property is a legal non-conforming use based on historic mining activity.

Note that even were Kilgore to establish the first prong of the legal non-conforming use test, there is no evidence in the record to indicate that the second prong could be met. The first prong of the non-conforming use test requires that mining operations be legally operated, the second prong requires that such mining activity be maintained continuously since the time the land use ordinance governing the land changed. Evidence in the record on this issue is scant, but what indirect evidence is provided indicates mining activity was not a continuously on-going operation. For instance, the 2004 opinion speaks only of "historic mining activity" and an offer to purchase the Property which was "conditioned on [the property owner] obtaining a permit to operate a gravel pit, concrete batch plant, and asphalt hot plant on the property." No mention of on-going mining activity is made. Similarly, the Settlement Agreement states that "[the property

[16] UTAH CODE § 17-27a-103(38).
[17] *Gibbons & Reed Co. v. North Salt Lake City*, 19 Utah 2d 329, ¶2.

owner] shall have the right to conduct gravel operations on the [County Property]," and notably lacks any language indicating permission to continue any existing, on-going use. The historic photos similarly do not establish that mining activities have continuously occurred on the Property.

It is noteworthy that the court opinion includes a statement that the property was historically used to operate a gravel pit, yet the property owners sought a Conditional Use Permit rather than status as a legal non-conforming use. Presumably, had the facts to support a legal non-conforming use claim then been present, the owners would have pursued that option at that time. Establishing status as a legal non-conforming use would have been much faster and much cheaper than requesting a Conditional Use Permit and engaging in a costly legal battle when the CUP was denied. It is noteworthy that neither the *Diamond B-Y* opinion nor the Settlement Agreement that follows make any mention of a legal non-conforming use or the legal continuation of any existing mining operation.

To summarize, the record does not include evidence that historic gravel mining operations were legally established on the Property, nor does the record establish that any such gravel operations have been maintained continuously to this day, as required by the first and second prongs of the legal non-conforming use tests. As a consequence, Kilgore has failed to establish that mining on the Property is a legal non-conforming use based on historic mining activity.

2. *No legal non-conforming use based on the Settlement Agreement*

Kilgore has also argued that the Settlement Agreement between Tooele County and Kilgore's predecessor in interest conveys the right to mine the Stockton Property. In 2006, the owner of the Property and Tooele County entered in to a Settlement Agreement resolving then on-going litigation regarding the owner's right to operate a gravel mine. Kilgore argues that the Settlement Agreement authorized gravel operations on the entire Property. However, Stockton was not a party to the Agreement. Furthermore, the Agreement states several times that it applies only to that portion of the Property located in unincorporated Tooele County.

Regardless, Kilgore argues that according to the relevant common law established in *Gibbons & Reed Co v. North Salt Lake City*[18], once mining activity is legally established on a parcel, it can continue without limitation through "the entire tract." *Gibbons* establishes that:

> [t]he very nature and use of an extractive business contemplates the continuance of such use of the entire parcel of land without limitation or restriction to the immediate area excavated at the time the ordinance was passed. . . Thus, the entire tract is generally regarded as within the exemption of an existing nonconforming use, although the entire tract is not so used at the time of the passage or effective date of the zoning ordinance.

Kilgore argues that the Settlement Agreement similarly confers the right to mine the "entire tract" of Property, including the Stockton Property, because the right conferred by the legal non-

[18] *Gibbons & Reed Co. v. North Salt Lake City*, 19 Utah 2d 329.

conforming use "extends to the edge of the parcel" and despite the prior annexation, the entire Property was identified by a single tax parcel number and thus, was part of one tract.

However, the facts of the case before us are substantially different. In *Gibbons*, the entire subject property had first been zoned to allow mining activities; the zoning was later changed to a residential use which did not permit mining. Mining was found to be a legal non-conforming use because the three prongs of the legal non-conforming use test were met: (1) mining legally existed before the parcel was rezoned residential; (2) the use has been maintained continuously since the rezoning occurred; and (3) because of the rezoning, mining no longer conformed to the regulations now governing the property.[19] The Court held that mining could therefore extend throughout the entirety of the parcel.

In contrast, based upon the information the parties have submitted, and as indicated above, this situation at hand does not involve a legal non-conforming use. In the present situation, the Settlement Agreement conveys the right to operate gravel mining on the County Property only. Principles applicable to legal nonconforming use do not come into play. Moreover, Stockton was not a party to the Agreement. The Stockton Property had been annexed prior to 2004, before the Settlement Agreement was signed in 2006.

Accordingly, the rights conveyed in the Settlement Agreement do not apply to the Stockton Property portion of the Property. Therefore, the Settlement Agreement between the property owner and Tooele County does not create a legal non-conforming use on the Stockton Property.

3. *No protection by Critical Infrastructure Materials Operations legislation*

Kilgore has also alleged that mining on the Stockton Property is protected by recently passed Critical Infrastructure Materials Operations legislation.[20] However, this statute provides protection only to mines "operating in accordance with a legal nonconforming use or a permit that existed or was conducted or otherwise engaged in before: (a) a political subdivision prohibits, restricts, or otherwise limits the critical infrastructure materials operations; and (b) January 1, 2019."[21] As Kilgore has not established that mining is a legal non-conforming use nor do they have a permit to mine the Stockton Property, this legislation does not apply.

In summary, mining is not a permitted use on the Stockton Property. Based on the limited information in the record, Kilgore has not provided evidence to establish that mining is a legal non-conforming use based on either historic mining activity or the Settlement Agreement. Further, Kilgore has not established that recent Critical Infrastructure Materials Operations legislation protects mining on the Stockton Property. Therefore, Stockton has the legal authority to prohibit mining operations on property within the Stockton Town limits and owned by Kilgore Companies

[19] UTAH CODE § 17-27a-103(38).
[20] UTAH STATE CODE § 10-9a-901 et. seq.
[21] *Id.*

CONCLUSION

The property owned by Kilgore Companies within Stockton Town is zoned A2 within the Town's agricultural zoning district. Mining is not a permitted within this zone. The Stockton Town Code provides that uses not specifically permitted are expressly prohibited. Furthermore, Kilgore has not provided sufficient evidence to establish that gravel mining is a legal non-conforming use based on historic legal use. Similarly, the Settlement Agreement between Tooele County and Kilgore's predecessor in interest and the Critical Infrastructure Materials Operations legislation to not convey the right to mine the Stockton Property. Therefore, Stockton City has the legal authority to prohibit the commencement of mining operations on Kilgore's property within the Stockton Town limits.

Jordan Cullimore, Lead Attorney
Office of the Property Rights Ombudsman

NOTE:

This is an advisory opinion as defined in § 13-43-205 of the Utah Code. It does not constitute legal advice, and is not to be construed as reflecting the opinions or policy of the State of Utah or the Department of Commerce. The opinions expressed are arrived at based on a summary review of the factual situation involved in this specific matter, and may or may not reflect the opinion that might be expressed in another matter where the facts and circumstances are different or where the relevant law may have changed.

While the author is an attorney and has prepared this opinion in light of his understanding of the relevant law, he does not represent anyone involved in this matter. Anyone with an interest in these issues who must protect that interest should seek the advice of his or her own legal counsel and not rely on this document as a definitive statement of how to protect or advance his interest.

An advisory opinion issued by the Office of the Property Rights Ombudsman is not binding on any party to a dispute involving land use law. If the same issue that is the subject of an advisory opinion is listed as a cause of action in litigation, and that cause of action is litigated on the same facts and circumstances and is resolved consistent with the advisory opinion, the substantially prevailing party on that cause of action may collect reasonable attorney fees and court costs pertaining to the development of that cause of action from the date of the delivery of the advisory opinion to the date of the court's resolution.

Evidence of a review by the Office of the Property Rights Ombudsman and the opinions, writings, findings, and determinations of the Office of the Property Rights Ombudsman are not admissible as evidence in a judicial action, except in small claims court, a judicial review of arbitration, or in determining costs and legal fees as explained above.

The Advisory Opinion process is an alternative dispute resolution process. Advisory Opinions are intended to assist parties to resolve disputes and avoid litigation. All of the statutory procedures in place for Advisory Opinions, as well as the internal policies of the Office of the Property Rights Ombudsman, are designed to maximize the opportunity to resolve disputes in a friendly and mutually beneficial manner. The Advisory Opinion attorney fees provisions, found in UTAH CODE § 13-43-206, are also designed to encourage dispute resolution. By statute they are awarded in very narrow circumstances, and even if those circumstances are met, the judge maintains discretion regarding whether to award them.

MAILING CERTIFICATE

On this ___________ Day of February, 2020, I caused the attached Advisory Opinion to be delivered via the United States Postal Service, postage prepaid, and certified mail, return receipt requested and addressed to the person shown below.

Kilgore Companies
15 West South Temple, Suite 1701
Salt Lake City, Utah 84101

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Office of the Property Rights Ombudsman