



April 1, 2011

Our File:

Hon. Mel Knight
Minister, Sustainable Resource Development
#404 Legislature Building
10800-97 Avenue
Edmonton, AB
Canada T5K 2B6

Dear Minister Knight:

RE: Bill 10, *Alberta Land Stewardship Amendment Act, 2011*

Thank you for your letter dated February 24, 2011, received in early March 2011, providing a summary of the amendments proposed by Bill 10. We appreciate receiving this information and the opportunity to provide comments on the Bill.

The Environmental Law Centre (ELC) is a charity incorporated in 1982 to provide an objective source of information on environmental law and policy in Alberta and Canada. Our vision is a clean, healthy and diverse environment protected through informed citizen participation and sound law and policy, effectively applied. Our mission is to ensure that laws, policies and legal processes protect the environment. Our work is guided by twin goals of ensuring that sound environmental laws are enacted and enforced, and ensuring effective and informed public participation in decision-making processes.

The ELC was an active participant in the development of the Land-use Framework and the *Alberta Land Stewardship Act (ALSA)*, and provided comments on both.¹ This brief provides the ELC's comments on Bill 10, the *Alberta Land Stewardship Amendment Act, 2011*. While the ELC has consistently supported both the Land-use Framework and *ALSA* as necessary steps towards a strong, integrated, binding land use planning system for Alberta, we have as consistently raised our concerns regarding the limited rights for public participation and appeal within this new system and the broad discretion given to government with little accountability. Bill 10 has not eased our concerns on these points.

¹ Environmental Law Centre, *Comments on Bill 36, the Alberta Land Stewardship Act* (Edmonton: Environmental Law Centre, 2009), online: Environmental Law Centre <http://www.elc.ab.ca/Content_Files/Files/BriefsAndSubmissions/CommentsonBill36may2009.pdf>; Environmental Law Centre, *Comments on the Draft Land-use Framework: "The Devil is in the Details"* (Edmonton: Environmental Law Centre, 2008), online: Environmental Law Centre <http://www.elc.ab.ca/Content_Files/Files/BriefsAndSubmissions/LandUseFramework-final.pdf>.

Our comments on Bill 10 fall into two broad categories:

- Continuing limited rights for public participation and review; and
- Potential adverse impacts on environmental protection.

1. Continuing limited rights for public participation and review

Bill 10 has been touted as expanding opportunities for public engagement in land use planning under *ALSA*, but practically speaking these opportunities will depend heavily on Ministerial and Cabinet discretion and may yield no substantive participation for Albertans.

(a) Making or amending a regional plan – section 5

The proposed amendments to section 5, while requiring that the Minister ensure “appropriate public consultation” has occurred in relation to a regional plan or amendment, provide no guarantee that public consultation will take place or that it will meet any specified standard. Neither *ALSA* nor Bill 10 make public consultation a mandatory element of the regional planning process, nor is any public consultation process specified by either. No criteria are created or required for measuring the adequacy of public consultation and the “findings of such consultation” are not made publicly accessible, but directed to Cabinet.² As such, the public will continue to depend on the good graces and discretion of the government to obtain any form of consultation and involvement on regional plans. This approach gives no certainty to Albertans or institutional stakeholders such as industry, business or other levels of government and continues the politicization of the planning process.

The requirement that the Minister lay a proposed regional plan or amendment before the Legislative Assembly also offers little of direct practical substance to Albertans. While this step would increase transparency beyond what is currently found in *ALSA*, it does not provide any opportunity for citizens to directly engage in review and commentary on a plan or amendment, and comes at a stage when a plan or amendment is virtually a *fait accompli*, rather than at the early stages of plan development.

Recommendations (or Proposed Amendments): Bill 10 should amend section 50 of *ALSA* (dealing with the regional planning process) to provide that the Lieutenant Governor in Council must establish a public consultation process by regulation before the initiation of a regional planning or amendment process. Such regulation(s) should provide the criteria to measure the adequacy of public consultation carried out on any regional plan or amendment. Clause (a) of section 5 of Bill 10 should also be amended to require the findings of the public consultation be made publicly accessible.

² Bill 10, the *Alberta Land Stewardship Amendment Act, 2011*, 4th Sess., 27th Leg., Alberta, 2011, s. 5 [Bill 10].

(b) Review of a regional plan – section 14 of Bill 10

Section 14 of Bill 10 would create a new process for review of regional plans. While in concept citizen-initiated review of regional plans would appear to be a positive step, what is proposed offers little in the way of substantive results and raises more questions than it answers. There is no clear result to be gained in the end by a person who requests a review, as nothing in the amendment binds or otherwise requires either the Minister or Executive Council to take any action upon receipt of the review panel's report and recommendations. This new process would create many uncertainties:

- The ability to request a review, limited to persons who are “directly and adversely affected”, is far too narrow and would effectively screen out broader community-based and public interest concerns. This could exclude important segments of Alberta society from the review process and tip the process in favor of private, economic interests.
- The process' scope is vague. It is unclear whether the application or effect of a regional plan or its actual existence is reviewable. There seems to be no logical link between the review period set (within 12 months of a plan or amendment coming into force) and the matters that may be reviewed; it is conceivable, given the intended long-term nature of regional plans, that concerns regarding plans may not arise until after the 12 month time period has passed. Because it is not clear what specifically is reviewable, it is also unclear how multiple requests for review would be addressed.

As well, it is not apparent what this new process would add to land use decision-making in light of the other forms of review either proposed or currently existing under *ALSA*:

- Proposed variances of regional plans (section 12 of Bill 10);
- Ten year review of regional plans (section 6, *ALSA*);
- Court orders in relation to non-compliance (section 18, *ALSA*);
- Five year evaluation of regional plans (section 57, *ALSA*); and
- Complaints to the Land Use Secretariat (section 61, *ALSA*).

Recommendations (or Proposed Amendments): Section 14 of Bill 10 should be amended to eliminate the proposed section 19.2 dealing with requests for review of regional plans, and Bill 10 should amend section 18 of *ALSA* by enabling any person with a genuine interest in the matter to apply to the Court of Queen's Bench for an order in situations of non-compliance.

2. Potential adverse impacts on environmental protection

Much attention has been given to the potential effect of *ALSA* on Albertans' property rights and the ELC is aware of the government's desire, through Bill 10, to clarify the state of the law in

relation to those rights and Alberta's new land use planning system. However, we are concerned that the steps taken to provide this clarification may result in increased litigation and claims of compensation related to regional plans. This increased litigation and related uncertainty may result in regulatory chill that will limit the effectiveness of regional plans and subsequent decision-making. It also has the potential to create new arenas of compensation beyond those currently enjoyed by Albertans.

(a) Purpose section and property rights – section 2 of Bill 10

Purpose sections are tools used by courts and other decision makers to provide guidance and assistance in interpreting and applying legislation. While we understand the government's intent to clarify its intended relationship between *ALSA* and existing property rights, we are concerned that the proposed amendments to *ALSA*'s purpose section will be interpreted more broadly due to their structure. By setting the property rights limitation in the proposed subsection (1) of section 1 apart from the stated purposes of the Act in the proposed subsection (2), there is a risk that subsection (1) will be interpreted not as part of the Act's purposes but as an administrative direction that must take precedence over all other purposes.

A model which could achieve the government's intent for clarity while minimizing the risk of inadvertently expanding property rights can be found in section 617 of the *Municipal Government Act*, which is the purpose section for Part 17 of that Act, dealing with planning and development.³ Section 617 has been part of that Act since 1995 and states:

The purpose of this Part and the regulations and bylaws under this Part is to provide means whereby plans and related matters may be prepared and adopted

- (a) to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and
- (b) to maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta,

without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest. (emphasis added)

A similar approach to *ALSA*'s purpose section could be implemented in Bill 10. It would not be necessary to make reference to due process of law, as this is a given due to the overriding nature of the *Alberta Bill of Rights*, which provides that protection.⁴

³ *Municipal Government Act*, R.S.A. 2000, c. M-26.

⁴ *Alberta Bill of Rights*, R.S.A. 2000, c. A-14, s. 1(a).

Recommendations (or Proposed Amendments): Section 2 of Bill 10 should be amended by deleting the proposed section 1 and replacing it with the following:

1 The purposes of this Act are

(a) to provide a means by which the Government can give direction and provide leadership in identifying the objectives of the Province of Alberta, including economic, environmental and social objectives;

(b) to provide a means to plan for the future, recognizing the need to manage activity to meet the reasonably foreseeable needs of current and future generations of Albertans, including aboriginal peoples;

(c) to provide for the co-ordination of decisions by decision-makers concerning land, species, human settlement, natural resources and the environment;

(d) to create legislation and policy that enable sustainable development by taking account of and responding to the cumulative effect of human endeavour and other events;

without infringing on the property rights of individuals except to the extent necessary for the overall greater public interest.

(b) Compensable takings as a potential barrier to land use planning and environmental protection – section 14 of Bill 10

As mentioned above, the government's desire to clarify its intent about the interaction between *ALSA* and property rights is apparent and we assume that this intent is to confirm the applicability of current Alberta legislative and common law rules in relation to regulatory takings. However, we believe that the proposed section 19.1, as set out in section 14 of Bill 10, creates confusion, does not necessarily communicate this intent and offers the potential to embroil regional land use plans and related decisions in compensation disputes. Without clear direction on compensation issues, it is likely that provincial treasury officials will be reluctant to support anything but the most timid regional plans, to minimize any risk to provincial funds from possible compensation claims.

Part of the problem lies with the definition of “compensable taking”, which is stated as “the *diminution or abrogation* of a property right, title or interest giving rise to compensation in law or equity”.⁵ As the italicized terms lie on opposite ends of the spectrum in meaning, with diminution referring to “the act or process of decreasing, lessening or taking away”⁶ and

⁵ *Supra* note 2, *Bill 10*, s. 14 (emphasis added).

⁶ *Black's Law Dictionary*, 9th ed., s.v. “diminution”.

abrogation meaning “to annul or repeal”,⁷ a compensable taking could mean any possible effect on property rights. The risk is that this provision will be interpreted in such a manner that it diverges from current application of the law regarding when compensation will be payable as a result of regulatory actions. To better reflect the state of the law in Bill 10, amendment of this definition is needed.

Recommendations (or Proposed Amendments): The definition of “compensable taking” in proposed section 19.1 (section 14 of Bill 10) should be amended by removing “diminution” and replacing it with “deprivation”.

There is also a need for further clarity in relation to when a “compensatory taking” may occur. Specifically, regulatory actions taken for valid public purposes should not give rise to a claim for compensation. While the current state of the law is reflected in part in proposed section 19.1(9), which recognizes the validity of municipal planning and development decisions, it does not go far enough. In this regard, where regional plans direct government departments and agencies in a particular fashion with consequences to the nature of regulatory instruments which may be granted, compensation should not be payable. A chilling effect could occur if regulators feel that compensation claims may result from valid regulatory actions.

Recommendations (or Proposed Amendments): The proposed section 19.1(9) (section 14 of Bill 10) should be amended by adding the following clause:

- (c) in relation to the issuance of or the refusal to issue a statutory consent or any term or condition of a statutory consent.

Conclusion

We thank you for the opportunity to provide comments on Bill 10 and reiterate the ELC’s support for a strong, integrated, binding land use planning and management system for Alberta. While clarity is needed to address concerns about private rights, care must be taken to ensure that the public interest is not shortchanged in the process. A transparent, participatory, accountable system is in the best interest of all Albertans, and the ELC looks forward to continued involvement in the development and implementation of such a system.

⁷ *Ibid.*, s.v. “abrogation”.



We would be pleased to meet with you or your officials to discuss our comments or provide further input on Bill 10 or other elements of the land use planning and management system. The ELC will be following Bill 10 on its path through the Legislature with great interest.

Yours truly,

A handwritten signature in blue ink, appearing to read "C. Chiasson", is written over the typed name and title.

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cc Evan Berger, Parliamentary Assistant

