ENVIRONMENTAL LAW CENTRE

Comments on Bill 36, the *Alberta Land Stewardship Act*

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Cindy Chiasson, Executive Director
Jason Unger, Staff Counsel
Jodie Hierlmeier, Staff Counsel

Executive Summary

Bill 36, the *Alberta Land Stewardship Act,* is a positive step intended to give legal effect and support to the Land Use Framework; however, the Bill requires amendments to deal with areas of overly broad discretion and limitations on rights to appeal. In its review, the Environmental Law Centre's (ELC) has identified both positive aspects of Bill 36 and amendments to the Bill that are required.

Positive aspects of Bill 36 include:

- The creation of a new governance structure to facilitate integrated regional planning;
- The binding nature of the land-use planning system;
- Increased planning and regulatory review of activities on public lands; and
- The enabling of various conservation tools for use on both public and private land.

Bill 36 requires significant amendments to ensure that land use planning in the province is not undermined by excessively broad decision-making discretion residing with Cabinet. The Bill should be amended to require regional planning in every region of the province with statutory requirements to set objectives and indicators and to monitor and periodically report on the success of reaching the plan's objectives. Discretion to exempt certain decisions or decision-makers from complying with a plan must be removed.

Limitations on the right to judicially review decisions for their compliance with regional plans must be removed. In addition, processes for receiving complaints, investigating and reporting should be revised to allow citizens to participate in promoting compliance with regional plans.

The Bill should also be amended to create standardized rules for appeals, including standing to bring appeals and funding mechanisms to facilitate public participation for decisions on both private and public lands.

Alberta will be well served by substantive, province wide land use planning and the ELC supports the passage of Bill 36 into law with the recommended amendments.

Introduction

The Environmental Law Centre (ELC) is a charitable organization, 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 has been an active participant in the development of the Land-use Framework (LUF), providing comments on the *Draft Land-use Framework* in 2008;[1] acting as a reviewer for the Planning and Decision-making Working Group in 2007; providing comments on the LUF workbook in 2007;[2] and participating in the cross sector forum and focus group sessions in 2006.

This brief provides the ELC's comments on Bill 36, the *Alberta Land Stewardship Act*. Bill 36 is a positive step intended to give legal effect and support to the LUF initiative. It embodies most of the promising elements of the LUF, but the "hows" of putting those elements in place have inherent weaknesses that undermine the LUF's vision, guiding principles and potential. Fortunately, these problems can be remedied by amendments. Our comments below address the Bill's strengths, discuss our concerns and offer recommendations for amendment and reform. The ELC's chief concerns are:

- Broad discretion with little accountability; and
- Limited rights to participate and appeal.

SUPPORT FOR BILL 36

The ELC commends the provincial government for bringing forward Bill 36 as a legal anchor for the new land-use planning system. It has obviously been a challenging task to develop the legislative framework for the system and the government's commitment to bringing the LUF initiative to reality has been clear. The ELC supports the following elements of Bill 36 as positive aspects:

- The Bill brings forward many of the key concepts of the LUF, such as integrated regional planning, a new governance structure and a range of tools to implement the system.
- The binding nature of the new land-use planning system and the regional land-use plans is key to the future success of the system. In particular, we find the

[1] 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>.
[2] Environmental Law Centre, *Written Submission Accompanying Land-use Framework Workbook* (Edmonton: Environmental Law Centre, 2007), online: Environmental Law Centre <http://www.elc.ab.ca/Content_Files/Files/BriefsAndSubmissions/LandUseFrameworkSubmission.pdf>.

consequential amendment to the *Mines and Minerals Act* making grants of mineral rights subject to limitations in regional plans very positive and a clear sign of government's commitment to this system.[3]

- The Bill incorporates provisions to increase transparency in existing regulatory systems, by creating appeals processes under the *Forests Act* and *Public Lands Act*[4] and requiring public notice under the *Public Lands Act* of disposition applications and disposition application decisions.[5]

- A range of conservation and stewardship tools are created to support action by government and Albertans on both public and private land.

1. Conservation and stewardship tools

Part 3 of Bill 36 deals with conservation and stewardship tools and creates regulation-making powers around various conservation tools. These tools will be useful in the planning process for municipalities and the provincial government. The inclusion of these tools in Bill 36 permits landowners and planners to pursue conservation goals. The ELC recommends that, with some minor amendments to the Bill, the regulations be made to fully enable these tools in due course.

(a) Conservation easements

Bill 36 expands the application of conservation easements to cover agricultural lands.[6] The use of conservation easement agreements for agricultural lands will allow for broader conservation goals to be met and will enable the promotion and use of best management practices for these lands. The ELC supports the use of conservation easements and other tools that empower environmental protection by private citizens on private lands.

The ELC recommends that the discretion of the Designated Minister to terminate or modify a conservation easement be removed or otherwise constrained.[7] The existing process of expropriation is sufficient to deal with terminating a conservation easement and ensures that the qualified organization that holds the easement is duly compensated for any removal of the interest.

(b) Conservation directives

The ELC supports the conservation directive approach to managing some areas of land in the province. Enabling the use of conservation directives is an appropriate way to protect important landscape features while recognizing that private property rights may be impacted.

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[3] Bill 36, the *Alberta Land Stewardship Act*, s. 81(1) [Bill 36].
[4] Bill 36, ss. 76(37) and 90(50).
[5] Bill 36, s. 90(13).
[6] Bill 36, s. 28(1)(c).
[7] Bill 36, s.30.

The ELC also supports that Bill 36 limits the impact of conservation directives on municipal governments' planning powers and municipalities' ability to take municipal and environmental reserve through the subdivision process.[8]

The ELC recommends that the Bill provide specific criteria around when a conservation directive may be removed or how long the terms of a conservation directive may be. As compensation is payable to those with lands subject to a conservation directive, there is a need for public accountability around the funds being paid. Conservation directives should not able to be removed on a whim where fair market value was paid for the restrictions that were imposed on land use.

(c) Conservation offsets and counterbalancing

The use of conservation offsets for environmental impacts is a commendable approach to managing impacts. It must be recognized that the use of offsets may not be appropriate in every case, as some impacts may require complete avoidance rather than mere offsetting. The ELC recommends providing substantive criteria where avoidance of impacts will be mandated. Such a provision would direct the decision-maker to require avoidance of impacts where certain factors are present. This includes where species at risk may be impacted, important hydrological recharge areas, cultural or heritage sites are present, or where specific thresholds have been reached.

(d) The use of stewardship units

The ELC supports the enabling provisions for stewardship units. The ELC recommends that further direction on how stewardship units will be created, amended and/or extinguished be included in the Bill.[9] In particular, further prescriptive language should be included in relation to when stewardship units may be extinguished.[10]

The power to extinguish stewardship units, depending on their nature, may need to be limited, particularly where they are used for conservation offsets. Regulations allowing for the delegation of a discretionary power to extinguish these units may significantly undermine their relevance. If stewardship units are purchased as an offset there is a need to ensure their long-term significance to environmental management.

There is also a need to ensure that the integrity of stewardship units is maintained through time for their stated purpose. In this regard, there are regulation making powers provided in Bill 36 to ensure security or bonds in relation to stewardship units.[11] Further clarity around this should be provided in Bill 36 to ensure the integrity of the stewardship unit process. This should include powers of inspection, information gathering, investigation, compliance orders and liability in relation to activities that violate the terms or intent of the stewardship unit.

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[8] Bill 36, s. 43. "Nothing in this Division affects the authority of a municipal authority under Part 17 of the *Municipal Government Act…*"
[9] Bill 36, s. 45.
[10] Bill 36, ss. 45(1)(a), (d) & (f).
[11] Bill 36, s. 46(1)(g)(vi).

CONCERNS WITH BILL 36

1. Broad discretion with little accountability

The LUF is an ambitious undertaking intended to guide the management of Alberta's lands and natural resources to achieve long-term environmental, social and economic goals. Its vision and guiding principles promise a new system based on a balance of those goals, and encompass values of accountability, shared responsibility, collaboration, transparency, fairness, equity, and clear roles, responsibilities and processes. Noteworthy guiding principles in the LUF are:[12]

- Accountable and responsible: All levels of government, the private sector and the community at large will share accountability for responsible land use.

- Collaborative and transparent: Albertans, landowners, land users and governments will work together.

- Fair, equitable and timely: Decision-making criteria and processes will be clearly defined, consistently followed, and not subject to political expediency.

However, these elements are not fulfilled in Bill 36 due to the broad grants of discretionary power given to Cabinet and the lack of limitations or checks on these powers. The significant range of discretion is very apparent in relation to the LUF's governance structure and the elements of the land-use planning process.

(a) Governance structure

A key aspect of the new system proposed in the LUF is the governance structure within which land-use planning will take place. Strategy 2 of the LUF, which deals with creation of a Land-Use Secretariat and Regional Advisory Councils (RACs), states:[13]

> Strong provincial leadership and clear direction are critical elements for sound land-use planning and resource management in Alberta. Establishing a formal governance structure for implementing the Land-use Framework will be necessary for it to succeed.

The RACs are intended to be the main vehicle to ensure local interests and concerns are taken into account when regional plans are developed. As will be discussed more fully in the following section "Limited rights to participate and appeal", the creation, structure and role of the RACs is left wholly to Cabinet's discretion; in contrast, the roles of both Cabinet and the Land-Use Secretariat are more clearly set out in Bill 36.

That the roles of RACs are not clearly established in the Bill gives the impression that the provincial government is not committed to the shared responsibility, collaboration and public and stakeholder participation that have been important elements thus far in the LUF initiative. The ELC's recommendations in "Limited rights to participate and

[12] Government of Alberta, *Land-use Framework* (Edmonton: Government of Alberta, 2008) at 15-16 [*LUF*].
[13] *LUF* at 19.

appeal" seek to remedy this situation, with greater certainty and clarity for the structure and role of the RACs.

While the Land-Use Secretariat's roles and duties are clearly established in the Bill, its accountability requirements are not. Section 56 creates the Secretariat as part of the provincial public service, not of a government department, but does not indicate to whom or which body it must be accountable.

Recommendations (or Proposed Amendments): The ELC recommends that Bill 36 be amended to explicitly make the Land Use Secretariat accountable to the Legislature, with a corresponding requirement to file annual reports of its activities in the Legislative Assembly (amendments to section 56).

(b) Planning process

Important aspects of the regional planning process are left totally to Cabinet's discretion, including the scope and structure of the process, any public communications and consultation, the development of provincial policies to guide land use planning across Alberta, and any environmental, economic or social issues to be considered in the planning process. There are few, if any, limitations or checks on this discretion, which leaves the proposed system very prone to undue political influence.

(i) Process structure

Bill 36 makes many elements of the process structure discretionary. It is not mandatory that Cabinet establish land-use planning regions,[14] in spite of the detailed descriptions and maps of the intended regions in the LUF document. Nor is Cabinet required to develop land-use plans for any regions that may be created.[15] All aspects of how planning should take place, from the scope of the process to the roles of the governance bodies to the forms of public consultation and communication, are left to be determined by Cabinet.[16]

Also of significant concern are the "escape hatches" that have been provided in the Bill. Cabinet may make or amend a regional land-use plan without first creating and implementing a planning process,[17] establishing a RAC or considering the advice of either the RAC or the Land-Use Secretariat.[18] While there may be validity in overriding process and governance bodies in emergency situations, these provisions, which are not limited in any way, seem to render the process as a whole, and local and public participation in particular, meaningless.

Bill 36 purports to make regional land-use plans binding on the provincial government, municipalities, decision-making bodies such as the Energy Resources Conservation Board, and all other persons.[19] This means that these bodies would be obliged to make decisions in accordance with regional plans, and would also require municipalities and

[14] Bill 36, s. 3(1).
[15] Bill 36, s. 4(1).
[16] Bill 36, s. 50.
[17] Bill 36, s. 50(2).
[18] Bill 36, s. 5(1).
[19] Bill 36, s. 15(1).

decision-making bodies to ensure that their by-laws, policies and other regulatory instruments are consistent with these plans.

While this is a very positive step to ensuring a strong land-use planning and management system across Alberta, there is the potential that this may be undermined due to the power given to Cabinet to exempt a body from the definition of "decision-making body" under the Bill.[20] This means that bodies such as the Energy Resources Conservation Board, Natural Resources Conservation Board and Alberta Utilities Commission would not be required to ensure consistency of their regulatory instruments with regional plans, and that the supremacy given to land-use plans over regulatory instruments in cases of conflicts[21] would not apply. It is unclear why or in what circumstances it would be necessary to exempt such bodies.

Recommendations (or Proposed Amendments): These problems with process structure can be remedied if the following amendments are made to Bill 36:

- Cabinet is required to create land-use planning regions, achieved by changing "may" to "shall" in section 3(1);

- Cabinet is required to create regional land-use plans, achieved by changing "may make" to "shall make" in section 4(1);

- Cabinet is required to appoint a RAC before creating a regional plan and must provide written reasons where it does not follow the advice of the RAC or the Land-Use Secretariat in creating a plan (amendments to section 5);

- A regional planning process must be put in place before Cabinet creates regional land-use plans (removal of section 50(2));

- A regional planning process must set out the roles of the various governance bodies, establish the terms of reference for the process, specify the required public and stakeholder communication and consultation, and require the development of provincial land-use policies to guide regional land-use decision-making (changing "may" to "shall" for section 50(1)(a)-(e)); and

- All decision-making bodies must be subject to Bill 36 and regional land-use plans, without exception (removal of section 65(b)).

(ii) Regional land-use plans

Bill 36 deals with a range of matters that can be included as part of a regional land-use plan, but makes very little required content for those plans. Again, this leaves the bulk of the content of plans to Cabinet's discretion and offers the prospect of very minimal plans if Cabinet so chooses. The only mandatory elements of a plan under the Bill are a vision for the planning region and at least one objective.[22]

[20] Bill 36, s. 65(b).
[21] Bill 36, s. 17(1)(b).
[22] Bill 36, s. 8.

Every regional plan should include information about the state of the region at the time of the plan's creation, to provide a baseline against which implementation can be measured. In addition, the following should be required elements of every regional plan:

- Environmental, social and economic objectives;
- Thresholds to achieve or maintain plan objectives;
- Environmental, social and economic indicators for measuring progress towards plan objectives. These indicators should be readily measurable;[23]
- Monitoring and reporting requirements in relation to thresholds and indicators; and
- Timelines for implementing the plans and their objectives and for assessing and evaluating progress towards the objectives.

Recommendations (or Proposed Amendments): The requirements for regional land-use plans can be made stronger and more certain if the following amendments are made to Bill 36:

- Require baseline information about a land-use planning region be included in the relevant land-use plan, by changing "may" to "shall" in section 7;
- Require regional land-use plans to contain thresholds, indicators, monitoring requirements and timelines for assessment and evaluation, by moving clauses (b)-(e) from section 8(2) to section 8(1); and
- Require public reporting on indicators and compliance with regional plans on a biannual basis (amendment to section 8).

(iii) Affect on statutory consents

Section 11 provides that statutory consents, such as licences and approvals, can be affected, amended or eliminated by regional plans. While this is a tool that could, in proper circumstances, prove effective in achieving land-use objectives, the lack of any requirements for notice, process, compensation or appeal makes it a very arbitrary tool and again reflects the very broad discretion given to Cabinet under Bill 36.

To allow for fairness, effectiveness and flexibility in addressing statutory consents that may not be consistent with regional plans, the Bill should establish a process by which such consents may be modified, exchanged or eliminated. The process must include requirements for notice, compensation, dispute resolution and appeal. Section 76(35) of Bill 36, which makes consequential amendments to the *Forests Act*, provides an example of this type of process.

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[23] For examples of how indicators may be applied see Tischa A Munoz-Erickson, Bernardo Aguilar-Gonzalez and Thomas D. Sisk, "Linking Ecosystem Health Indicators and Collaborative Management: A Systematic Framework to Evaluate Ecological and Social Outcomes" *Ecology and Society* 12(2): 6, online: Ecology and Society <http://www.ecologyandsociety.org/vol12/iss2/art6/>.

Recommendations (or Proposed Amendments): This problem can be remedied by amending section 11 of Bill 36 to include a process for modifying, exchanging or eliminating statutory consents that includes requirements for notice, compensation, dispute resolution and appeal.

(iv) Compliance and enforcement

The very broad grants of power in Bill 36 are also evident in relation to compliance and enforcement matters. While it is most common to create offences and penalties in either statutes or regulations, the Bill enables Cabinet to create offences and establish penalties through regional plans.[24] This distances the penal aspect of the land-use planning system further from its parent legislation (Bill 36) and may make it more difficult for those who may be subject to land-use plans to determine the legal requirements they must meet to avoid penalty.

Further, the Court of Queen's Bench is empowered to issue orders dealing with non-compliance with Bill 36, a regulation or a regional land-use plan. Under section 18(3), the Court's powers include the ability to make any order "to manage the conduct of a person", without further limitation. These compliance powers should be focused on areas of non-compliance need not be overly broad.

Recommendations (or Proposed Amendments): To ensure fairness and protect those who may be subject to enforcement under Bill 36, the following amendments should be made:

- Offences and penalties should be established in Bill 36 itself (amendment to eliminate section 9(3)(a)-(b)); and

- The Court's powers in issuing orders to deal with non-compliance should be modified to limit it to addressing conduct causing non-compliance (amendment to section 18(3)(b)).

2. Limited rights to participate and appeal

Effective regional planning involves a good mix of "top-down" direction from government and "bottom-up" input from the public. Unfortunately, Bill 36 is solely a "top-down" process with all power residing in Cabinet. Notwithstanding, many of the concerns outlined below may be remedied by simple amendments to Bill 36.

(a) Discretionary powers vis-à-vis RACs

Bill 36 grants Cabinet the exclusive power to create regional plans and determine the content of these plans.[25] It is also left to Cabinet to decide whether or not to appoint RACs to assist with developing each regional plan. RACs are supposed to consist of members representing the range of perspectives in the region or the "bottom up" perspective on regional plans. In fact, the LUF suggests that RACs will play a key role in regional planning by "provid[ing] advice on addressing trade-off decisions regarding land

[24] Bill 36, s. 9(3).
[25] Bill 36, s. 4.

uses and on setting thresholds to address cumulative effects."[26] They will also advise the government on public and stakeholder consultation and participate in the consultation processes.

Under Bill 36, it is possible for Cabinet to make or amend a regional plan without appointing a RAC and Cabinet may disregard RAC advice without providing written reasons why the advice was not followed. In addition to the RACs, Cabinet also has the power to ignore the advice given by any person (such as a member of the public) as well as advice given by the Land Use Secretariat.[27]

Further, there is no commitment in Bill 36 to ensuring each RAC includes an equal representation from economic, environmental and social perspectives. Without a firm commitment to balanced representation, membership in these multi-stakeholder bodies may be numerically weighted towards economic interests and maintenance of the *status quo.* Sectoral representation must be balanced across the three pillars if a "triple bottom line" approach to planning is to be achieved.[28]

Even if RACs are appointed, it is at Cabinet's discretion to establish terms of reference for RACs and regional plans.[29] As Steven Kennett has noted, "…terms of reference for regional plans have two important functions: translating provincial land-use policy to the regional context and providing detailed procedural direction to the planning team and the RAC."[30] Bill 36 provides no assurance that terms of reference will be required at all, let alone provide some guidance as to the regional outcomes that should be included in regional plans. If the government wants the RACs to constructively engage in difficult decisions such as land use trade-offs and thresholds for development, then the terms of reference must do more than deal with process issues; they must provide some direction to the RACs as to the outcomes their region must achieve.

Recommendations (or Proposed Amendments): These concerns with the RACs can be fixed if the following amendments are made to Bill 36:

- RACs must be appointed for each region (amendments to sections 5(1) and 51(1));

- Each RAC must include equal representation from economic, environmental and social perspectives (adding a provision to section 5 committing the government to ensuring equal representation in line with its "triple bottom line" commitment to planning);

- The government must provide written reasons for decisions not to follow advice from the RAC or from the Land Use Secretariat (amendments to section 5(2) and (3));

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[26] *LUF* at 29.
[27] Bill 36, ss. 5(1) and 51(1).
[28] *LUF* at 6. A "triple bottom line" approach considers environmental, social and economic values.
[29] Bill 36, s. 52.
[30] Steven Kennett, *The Law and the Land: A Legal Foundation for Alberta's Land-Use Framework* (Drayton Valley: Pembina Institute, 2009) at 38.

- Terms of reference must be required for each RAC (amendments to section 52(1)); and

- Terms of reference must clearly identify the policies and legislation that will guide and constrain planning decisions (adding provisions to section 52 to ensure that terms of reference include guidance on desired end points and not just procedural issues).

(b) Judicial review is prohibited

More troubling is that Bill 36 has limited avenues for Albertans to challenge Cabinet's power and decisions that may be inconsistent with the regional plan. Bill 36 has effectively shut the door on Albertans' ability to challenge decisions by "judicial review." Judicial review is an important tool because it allows the courts to review laws and decisions made by government to determine whether they were made "fairly" in accordance with required procedures and authority.

For this reason, judicial review is a key check and balance granted to the courts to review and limit the powers held by other branches of government (namely Cabinet and the Legislature). While many matters may be dealt with by "appeal" (described further under the next section) typically procedural issues, such as whether a party had the right to be heard or whether the decision-maker is biased, are dealt with through judicial review.

Bill 36 expressly prohibits any individual or group from bringing an application for judicial review as well as any other cause of action relating to non-compliance with a regional plan.[31] Instead, all judicial review applications will be channelled through a government representative, the "stewardship commissioner," who will determine whether or not the matter may be brought to the courts.[32] Since the stewardship commissioner will be appointed by the province[33] and will be a member of the provincial civil service, it is unlikely he or she would bring an application for judicial review against Cabinet or a provincial government department or agency for non-compliance with a regional plan. Only the courts should be permitted to determine whether an application for judicial review has merit; this is not the role for a government appointee as it undermines the check and balance function of the judicial review process.

Recommendations (or Proposed Amendments): These concerns can be fixed if the right to judicially review the planning process is given back to Albertans. Section 15 should be removed from Bill 36 and section 18 amended to allow for any individual or group to apply to the court for non-compliance with the regional plan.

(c) Discretionary complaint and investigation process

Although judicial review is excluded, Bill 36 provides that a person may make a written complaint to the Land Use Secretariat that a regional plan is not being complied with.[34]

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[31] Bill 36, s. 15.
[32] Bill 36, s. 18.
[33] Bill 36, s. 56(2).
[34] Bill 36, s. 61(1)-(4).

However, the Secretariat is not required to investigate a complaint; it may investigate. Further, it will only do so if the stewardship commissioner is satisfied the complaint "has sufficient merit to warrant" an investigation, the matter complained of is not one for which there is some other adequate remedy, and the commissioner is satisfied that "no other person should investigate" the matter. Without mechanisms to require complaints to be investigated and the results reported back to the complainant, there is no assurance that regional plans will be complied with. This begs the question: who is watching the watchdogs when no legitimate mechanism (through either complaints or judicial review) has been provided for anyone other than the government to oversee the government's compliance with its own regional plans?

Further, even if there is an investigation, and even if the Secretariat is satisfied that "there is clearly non-compliance" with a regional plan, the remedy is that the commissioner may refer the matter back to the government department or local government body that has jurisdiction (with or without a report or recommendations).[35] The Bill does not detail what happens if the government body does not remedy its own non-compliance.

Recommendations (or Proposed Amendments): These concerns with the complaint and investigation process can be fixed if the following amendments are made to Bill 36:

- The complaint and investigation process are amended to require a complaint to be investigated by the Land Use Secretariat (or preferably by an arm's length body such as an ombudsman) and the results to be reported back to the complainant within a set timeframe (amendments to s. 61(1)-(4)). A similar type of investigation process exists under Alberta's *Environmental Protection and Enhancement Act*;[36]

- If the Secretariat (or ombudsmen) is satisfied that there is non-compliance with the regional plan, it must make a written report outlining the non-compliance event and make that report publicly available (amendments to s. 61(6)); and

- The Secretariat (or ombudsman) must have the authority to correct non-compliance with the regional plan (additions to s. 61).

(d) Appeals

Bill 36 proposes to use new and existing appeal mechanisms to challenge decisions that are inconsistent with regional plans. Although the Bill does create new appeal mechanisms where none existed before (for public land and forestry rights)[37] no appeal mechanisms or rights of public participation have been created in relation to mineral tenure.[38] Transparency and public involvement in decisions about mineral tenure is needed to ensure allocation decisions are consistent with the applicable regional plan.

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[35] Bill 36, s. 61(6).
[36] R.S.A. 2000, c. E-12, s. 196.
[37] Bill 36, ss. 69-76, 119-126, although most of the details of appeal procedures and who has the right to appeal have been left to the regulations.
[38] Mineral tenure refers to a time-limited ownership of the subsurface rights, such as oil, gas and other fossil fuels. In Alberta, publicly owned minerals are leased to the highest bidder with no public input into the process or any procedure for comment or consultation prior to the mineral auction.

The concern with using existing appeal mechanisms is that, in many cases, appeals will be restricted due to the narrow versions of the "directly affected" test for standing[39] that is used by the Energy Resources Conservation Board, the Natural Resources Conservation Board, the Environmental Appeals Board and other decision-makers. The "directly affected" test tends to limit eligibility for standing and funding to individuals whose immediate economic interests are directly affected by proposed projects. For remote projects on public lands, there may be no individuals or organizations who meet this test for standing.

Broad rules governing standing and access to funding to prepare submissions are needed to allow community-based, landowner and public interest organizations to represent their members effectively in planning processes and land-use appeals. Without appropriate standing rules and funding, important segments of Alberta society may be excluded from the planning process and the playing field will be tipped in favour of economic interests.

Recommendations (or Proposed Amendments): These concerns with the appeals process can be fixed if the following amendments are made to Bill 36:

- Mechanisms for public input and appeals related to mineral tenure decisions must be created;

- Standardized standing and funding rules must be enacted for land-use appeals. Individuals and organizations with a legitimate interest in ensuring the enforcement of regional plans should have access to the appeal process. Standing criteria clearly need to cast the net wider than Alberta's existing "directly affected" test; and

- A funding mechanism must be established to provide grants to individuals and organizations that can demonstrate both a *bona fide* interest in the planning process and a need for financial support to prepare submissions.

These are crucial checks and balances needed to ensure that planning is not solely top-down process that is unresponsive to local needs and perspectives. While government leadership on planning is important, it does not override the need for meaningful public input on planning decisions.

CONCLUSION

Many of the elements needed to make Alberta's new land-use planning system a success are embodied within Bill 36's broad grants of Cabinet discretion. What is needed to provide certainty, consistency and a fair system to Albertans are the amendments recommended above, to legally entrench the key aspects of this system and provide reasonable limitations on Cabinet's discretion. Although Albertans have clearly indicated the desire for strong government leadership on land use planning and management,[40] broad and unlimited government discretion does not equate to an

[39] "Standing" is the legal term referring to the eligibility to participate with full party status before the decision-maker, typically a government appointed board or tribunal.
[40] *LUF* at 8.

effective planning system. Bill 36 must be made consistent with the LUF's stated commitments to accountability, collaboration, shared responsibility and transparency.