

January 23, 2012

Our File: 5310

Property Rights Task Force
c/o Diana McQueen
Minister of Environment and Water
425 Legislature Building
10800-97 Avenue
Edmonton, AB T5K 2B6

Via E-mail: propertyrights@gov.ab.ca

Dear Minister McQueen,

RE: Property rights and the regulatory and planning powers of government.

The Environmental Law Centre (ELC) is an Edmonton-based charitable organization established in 1982 to provide Albertans with an objective source of information about environmental and natural resources law and policy. The ELC's vision is an Alberta where the environment is a priority, guiding society's choices. It is the ELC's mission to ensure that Alberta's laws, policies and legal processes sustain a healthy environment for future generations.

Introduction

Property rights and environmental health are intricately linked. How we use property, both public and private, has direct impacts on the environment. When we talk about property rights and how people may be limited in using their property, the issue of environmental impacts must be considered. Water quality, biodiversity and human health all may be impacted by some property uses.

Property rights are also a central aspect of our economic and personal wellbeing. Property rights enable us to have a level of autonomy, and for those who have sufficient resources to own property, to generate further wealth from that property. It is not unusual that when legislation may impose restrictions on property rights people have concerns. At the present time these concerns have arisen in relation to a variety of bills brought forward and passed by the government in 2009. The *Alberta Land Stewardship Act*¹ (as amended) (ALSA), the *Land Assembly Project Area Act*², and the *Electric Statutes Amendment Act*³ were all characterized, in some circles, as a direct attack on property rights.

The ELC views the nature of property rights as coming with certain obligations. These obligations

¹ S.A., 2009, c. 26.8, online: Alberta Queen's Printer

<http://www.qp.alberta.ca/574.cfm?page=A26P8.cfm&leg_type=Acts&isbncln=9780779758579>.

² S.A. 2009, c. L-2.5. online: Alberta Queen's Printer <<http://www.qp.alberta.ca/documents/Acts/L02P5.pdf>>.

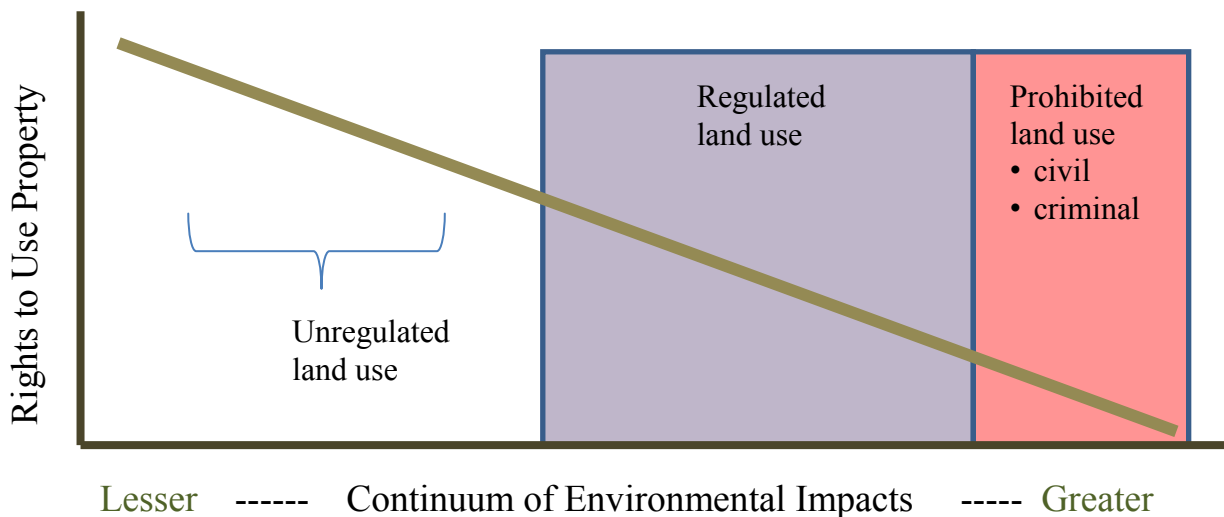
³ Bill 50, 2nd Sess. 27th Leg., Alberta, 2009 (Assented to 26 November 2009), online: Legislative Assembly of Alberta, http://www.assembly.ab.ca/ISYS/LADDAR_files/docs/bills/bill/legislature_27/session_2/20090210_bill-050.pdf

include the need to respect public resources, such as air and water. The ELC is also of the view that broader, binding regional planning is a valid mechanism to reach environmental outcomes. In this regard the ELC has indicated its support for *ALSA* in general, while recognizing the need to amend certain aspects of the Act. Some of the proposed amendments deal directly with creating a system of planning and regulation that respects property rights by ensuring due process is adhered to, and that planning is governed by sound environmental principle, using precautionary measures based in science.

Property rights and the public good

The use of property is currently regulated to a degree, with the aim to protect the public good. Regulations are used to mitigate, manage or simply monitor environmental harm. The Crown has historically had a broad ability to regulate land uses and minimize impacts on the environment through its power to expropriate (which gives rise to compensation) and its power to “injuriously affect” land values through regulations and delegated planning powers of a municipality.⁴ Figure 1 below represents the current state of affairs as it relates to land use in Alberta (and Canada). One can contemplate an ever decreasing ability to freely use one’s land in a certain way as environmental impacts increase. A host of these activities may be carried out with government oversight (regulated land use) while some remain prohibited, either through statutory prohibitions or through civil law remedies.

Figure 1: A graphical representation of land use and environmental impacts



⁴ See *Alberta (Minister of Infrastructure) v. Nilsson*, 2002 ABCA 283, online: Alberta Courts <<http://www.albertacourts.ab.ca/jdb%5C1998-2003%5Cca%5CCivil%5C2002%5C2002abca0283.pdf>> Also see *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, [2004] 3 S.C.R. 304, 2004 SCC 61, online: Judgements of the Supreme Court of Canada <<http://scc.lexum.org/en/2004/2004scc61/2004scc61.pdf>>.

As environmental, social and economic objectives for public resources and public goods change there may be shifts in the regulatory aspect of land use. These shifts, while often necessary to meet specific environmental outcomes, also bring with them a potential for conflict with property rights.

Tools to reach environmental objectives and when compensation should arise

It must be recognized that where private property use degrades or otherwise adversely affects public resources a regulatory response may be justified. The ELC has been an advocate for regionally and locally binding land use plans that contribute to environmental outcomes. This planning is proposed to augment and facilitate the effectiveness of existing voluntary and regulatory tools, that, to date, have proven inadequate in substance and in application to protect the environment. *ALSA* enables several tools for private land protection, including conservation easements (formerly under the *Environmental Protection and Enhancement Act* and with a history of application in Alberta) and “Tradeable Development Credit” (TDC) programs. *ALSA* also provides for more prescriptive tools to land management, including “conservation directives” and the ability for regional plans to amend or rescind statutory consents.

It is important to recognize and convey to landowners that justifiable regulation in the name of environmental outcomes may be taken, without compensation. This is merely a statement of the *status quo* and is in line with our legal history. Similarly, where certain land uses are curtailed retroactively, there may be a need to grant compensation, as set out in current legislation (such as the *Water Act*). This is to note that “injurious” regulatory impacts on property rights should give rise to compensation to the landowner as currently codified in our laws. Similarly, where regulatory action results in an implied or *de facto* expropriation of land, i.e. the landowner is effectively stripped of all possessory rights, compensation may be payable.

The ELC recommends a review of the “compensable takings” section of *ALSA* to ensure new avenues of compensation are not created, unduly hindering *bona fide* regulatory actions to protect the public interest.⁵ A “compensable taking” is defined as “the diminution or abrogation of a property right, title or interest giving rise to compensation in law or equity”.⁶ It may be argued that the use of the phrase “diminution...of a property right, title or interest” expands the instances of compensation beyond what was historically granted at law or equity. While the apparent intention of this section was to maintain the *status quo* by the limiting phrase “in law or equity”, the term “diminution”, i.e., “the act or process of *decreasing, lessening, or taking away*”⁷ (my emphasis) may be used to argue otherwise. Further, the express inclusion of an exception from “compensable takings” for municipal planning activities (at s.19.1(9) of *ALSA*) may be interpreted as a statutory intent to create a right to

⁵ See s. 19.1 of the *ALSA*, *supra* note 1.

⁶ *Ibid.* at s.19.1(1)(a).

⁷ Bryan A. Gardner, ed., *Black's Law Dictionary*, 9th ed. (St. Paul: Thomson Reuters 2009) at 524.

compensation where “injurious affection” occurs.⁸ That is to say, by stating one type of government activity that is excluded, while remaining silent on other government actions, this section may be interpreted that to give rise to new or expanded “compensable takings” claims.

While the prescriptive tools of conservation directives and expropriation are likely to be used sparingly there is a need to ensure that when they are applied property owners are granted full benefit of due process of the law, including judicial review. This will ensure a level of balance in decision making.

Respecting property rights, protecting the environment

The ELC recommends the following amendments be made to *ALSA* to address private property, environmental objectives, and their interface.

1. Remove or reduce the nature of the *ALSA* privative clause (section 15). Recognize the role of the judiciary to review decisions under the Act.
2. Subject retroactive application of plans on statutory consents to public hearings.
3. Create two standing bodies: a technical advisory board and a tribunal to address issues of conflict in regional plans. These bodies should incorporate public interest criteria and evidence gathering to ensure review, variance, enforcement and compensation decisions are based on sufficient information and with input from those with environmental and social information and expertise. These bodies must be granted a level of autonomy and decision making authority regarding the contents of plans and reflect a decentralization of the current *ALSA* planning process. (This recommendation has direct implications for the *Alberta Land Stewardship Regulation*, A.R. 179/2011 and the *Alberta Land Stewardship Act* itself).
4. Include substantive considerations in regional plans and related legislation to guide planning and provide additional clarity and certainty to landowners. These considerations should include:
 - a) An articulation of environmental thresholds required to achieve or maintain plan objectives;
 - b) Environmental, social and economic indicators for measuring progress towards plan objectives. These indicators should be readily measurable;⁹

⁸ A court may be tempted by this *expressio unius est exclusion alterius* maxim of statutory interpretation in specific instances where an equitable remedy seems appropriate. See Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, (4th ed.)(Markham, Ontario: Butterworths, 2002) at 186.

⁹ 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/) <<http://www.ecologyandsociety.org/vol12/iss2/art6/>>.

- c) Monitoring and reporting requirements in relation to thresholds and indicators;
- d) A clear articulation of how government and statutory consent holders will be expected and required to contribute to reaching and maintaining environmental objectives (i.e. a clear line of accountability to environmental outcomes); and
- e) Timelines for implementing and periodic assessment of plans and objectives.

Ensuring that all regional plans have scientific underpinnings and thresholds will provide a level of certainty and transparency to property users on potential impacts of regional plans on their activities, depending on whether the land use has potential impacts on environmental media.

Conclusion

Private landowners and those who carry out activities on the landscape have a responsibility to contribute to environmental outcomes. The government also plays a central role in managing public resources for economic growth and for social and environmental outcomes. It is important to ensure we treat property rights, in light of broader public interest environmental outcomes, with respect and the due process of law. Decisions to curtail certain land uses in some instances will be justified where preventing further environmental degradation warrants. Existing legal norms regarding compensation for injurious affection resulting from regulatory action, as created by statutes and jurisprudence, should neither be narrowed nor expanded.

Please contact the Environmental Law Centre if you have any questions.

Yours truly,

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