



## IN THIS ISSUE

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### **ALBERTA LAND STEWARDSHIP ACT: THIS LAND IS YOUR LAND?**

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#### **Introduction**

In June, Bill 36 was passed into law. In October the *Alberta Land Stewardship Act* (“ALSA”) was proclaimed in force. The question posed by the title of this bulletin is whether the inspiration for the ALSA was Woodie Guthrie’s popular American folksong “This Land is Your Land”. Many verses remain to be written through regional plans and regulations required to implement the ALSA. The legislation has the potential, however, to significantly impact both existing and future development in Alberta.

#### **History of Alberta Land Use Planning**

Land use planning is not new. The development of private land has been regulated by local governments throughout Alberta’s history. This regulation has been limited to zoning and development approvals, geographically confined within municipal boundaries and made subordinate to provincial legislation. That said, local zoning and development powers can have a significant impact on property rights and land values.

Provincial attempts at land use planning of public or Crown land is more recent, dating back to the 1970s. Over the past 40 years, dozens of Integrated Resource Plans (“IRPs”) have been established covering much of the province. Although these IRPs could have been given legal status if adopted as regulations under the *Public Lands Act*, this was not done. IRPs remained expressions of government policy, with no legal effect.

The closest Alberta previously came to comprehensive land use planning, applicable to both public and private lands, was to give certain regulatory tribunals broad public interest mandates to approve major resource projects. Authority over energy and utilities projects is given to the Energy Resources Conservation Board (“ERCB”) and the Alberta Utilities Commission (“AUC”).

The Natural Resource Conservation Board (“NRCB”) approves major non-energy projects. Approvals of these tribunals supersede municipal zoning and development bylaws in the event of inconsistency. Further, many of the approvals issued by the ERCB and AUC come with the right to expropriate public and private lands. These administrative tribunals, however, did not believe their responsibilities included setting land use policies. In a number of ERCB and NRCB decisions, approving and denying projects, land use policy issues were referred back to the Alberta government.

#### **Purpose of the ALSA**

The purpose of the ALSA is to create a single land planning process covering both private and public lands, and to consolidate responsibility for land use planning that was historically distributed across different levels of government, provincial departments, agencies and regulatory tribunals. The ALSA also gives legal effect to land use plans and significantly broadens their scope of planning. Consideration of environmental effects on land, air and water are fundamental to the ALSA planning process. Environmental effects are to be balanced with social and economic goals. Land use planning under the ALSA is extremely complex and value laden. This bulletin discusses the structure and administration of the ALSA and attempts to describe its potential to affect existing and future development in Alberta.

#### **Structure of the ALSA**

The ALSA provides for the establishment of regional plans. The ALSA does not mandate specific planning regions, but the current government’s intention is to divide the province into regions along the geographic boundaries of Alberta’s seven watersheds. Sub-regional plans and issue-specific plans can then be adopted for each planning region. Responsibility for designating planning regions, adopting plans, and all other significant powers, rests with the Lieutenant Governor in Council (i.e., Cabinet).

Each planning region must describe a vision and state at least one planning objective. Regional plans are likely to set thresholds for the achievement of objectives. Issues

such as the pace of development, its density, water use, cumulative impacts, disturbance areas and wildlife populations could all be addressed in regional, sub-regional or issue-specific plans.

The *ALSA* creates a new Land Use Secretariat (“Secretariat”), headed by the Stewardship Commissioner, as part of the provincial civil service -- ostensibly independent from any government department. A new ministerial portfolio of Stewardship Minister is created and is given some control over the Secretariat.

The Secretariat is responsible for the initiation and administration of planning processes leading to the preparation of regional plans for submission to the Lieutenant Governor in Council. Either the Lieutenant Governor in Council or the Stewardship Minister can appoint Regional Advisory Councils (“RAC”) for planning regions. The Secretariat would then incorporate RACs into the planning and consultation process for the purposes of providing advice to the Lieutenant Governor in Council regarding proposed regional plans. However, the approval and amendment of regional plans fall within the absolute and unfettered discretion of the Lieutenant Governor in Council. The Lieutenant Governor in Council has no obligation to appoint RACs and, if appointed, no obligation to follow or even consider the advice they provide. The intent of the *ALSA* is to make regional planning a purely legislative function in order to avoid any obligations of administrative fairness that could subject regional planning to review by the Courts.

In the event of conflict between the provisions of the *ALSA* and other provincial legislation, the *ALSA* prevails. Regional plans are given the status of regulations under the *ALSA* and all regulations under it prevail if inconsistent with other provincial regulations. Further, all statutory consents (e.g., approvals, licences, permits, etc.) of local governments, provincial departments, agencies and administrative bodies or tribunals must be reviewed and made to conform with *ALSA* and its regulations. In the event of alleged non-compliance, enforcement is left to the sole discretion of the Stewardship Commissioner who can, among other things, apply to the Courts to compel compliance. Individual rights to initiate enforcement proceedings are expressly precluded. All that individuals can do is register complaints with the Stewardship Commissioner, who has no obligation to pursue them.

### Regional Planning Tools

The *ALSA* creates a number of tools that can be incorporated into regional plans. The most significant of these tools involve direct or indirect expropriation of

property. Direct expropriation occurs when title is taken or confiscated. Indirect expropriation leaves title with the owner, but restricts use of the property, materially impacting its value.

When regional plans provide for direct expropriation, the *Expropriation Act* applies and compensation is available. However, compensation for indirect expropriation is far more restricted. Indirect expropriation can occur in different ways. For example, regional plans can amend or extinguish statutory consents either terminating approved activities or making them significantly more costly to operate. If this occurs, the consent holder can initiate “a regulatory negotiation process”, defined to include arbitration. Although the right to compensation is not expressly granted, it is not expressly denied, leaving it as a possibility. Another means of indirect expropriation is to declare “conservation directives” in regional plans. If the value of land is reduced by a conservation directive, compensation can be claimed by surface title holders and private mineral owners, but not holders of Crown mineral rights.

In addition to extinguishing property rights, the *ALSA* has the potential to create new property rights by creating “market-based instruments” called “Stewardship Units”. Examples of Stewardship Units already exist under various provincial acts and regulations. They would include water rights assignable under water licences, air emissions from thermal power generation and carbon credits. It is also possible that future *ALSA* regulations will allow for the creation of Stewardship Units following the establishment of conservation easements, which were carried over into the *ALSA* from the *Environmental Protection and Enhancement Act* and expanded to cover agricultural lands. Stewardship Units are tradable instruments that can be used in “conservation offset programs” and “Transfer of Development Credit Schemes”. Stewardship Units can, for example, create environmental space by undertaking remediation in one area to provide off-sets for activities undertaken elsewhere.

### Conclusion

The *ALSA* is ambitious legislation with the potential to significantly impact the type, manner and pace of development in Alberta. Both existing and future development is almost certain to be impacted. How rapidly this occurs depends on the approach taken to its implementation and the treatment accorded to existing activities and rights of property owners. For those whose property values are negatively affected, there will be questions of fair allocation of the burdens imposed by this new land planning scheme, relative to the broader public interest benefits it seeks to achieve. At this stage,

many verses of Alberta's version of "This Land is Your Land" remain to be written and sung. Discord around the campfire seems likely.

### **CONTACT US**

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