

## CHANGE TO BELIEVE IN: A LEGAL CHECKLIST FOR ALBERTA'S LAND-USE FRAMEWORK

Article by Steven A. Kennett ♦

Taken at face value, the words in Alberta's Land-use Framework (LUF) suggest that the province is about to enter a new era of responsibility in land and resource management. The LUF acknowledges the "unprecedented pressure on Alberta's landscapes" and concludes that: "We have reached a tipping point, where sticking with the old rules will not produce the quality of life we have come to expect."<sup>1</sup> The government's response is a new set of land-use planning and policy tools that are intended "to better balance our economic growth with our social and environmental values."<sup>2</sup>

But is the LUF change we can believe in? As a policy statement, it is clearly a step in the right direction. The Alberta government has candidly admitted that the province's current land-use system is broken and has correctly identified the major deficiencies. The proposed solutions accurately reflect the overwhelming majority of public and stakeholder comments during the LUF initiative.<sup>3</sup>

The LUF contains many good intentions and fine words: integrated regional planning; cumulative effects management; thresholds and limits; efficient land use; new tools for conservation and stewardship; accountable and responsible land use; collaborative and transparent decision making; decisions informed by science, evidence and experience; effective monitoring, evaluation and reporting; and continuous improvement. At the present time, however, the LUF is still little more than words.

For this ambitious and long overdue initiative to succeed, these words must be translated into a new way of making decisions 'on the ground'. Unfortunately, the record of land-use initiatives

in Alberta since at least the 1990s suggests that despite the LUF's positive policy direction, optimism regarding its ultimate success is still best characterized as the triumph of hope over experience.

The Alberta Forest Conservation Strategy, Special Places 2000 (Alberta's protected areas policy), the Regional Sustainable Development Strategy for the Athabasca Oil Sands Area, the Northern East Slopes Strategy and the Integrated Resource Management initiative all appeared to be headed in the right direction at the outset, but they ultimately failed because of poor design and inadequate follow-through at the implementation stages.<sup>4</sup> While the disappointing results from these initiatives had many causes, a common thread is that none of them produced meaningful changes to the legislation, institutional arrangements and decision-making processes that govern land and resource use in Alberta.<sup>5</sup> They were statements of good intentions with little or no legal substance.

If this record of failure is not to repeat itself, the positive policy direction of the LUF must be translated into law. The tabling of legislation to implement the LUF, planned for the spring 2009 session of the Legislature, will therefore be a critically important stage in this initiative.

This article summarizes the key elements of the LUF and the reasons why effective implementing legislation is essential. It then provides a brief checklist for evaluating LUF legislation. The analysis and recommendations are based on a longer report entitled *The Law of the Land: A Legal Foundation for Alberta's Land-Use Framework* that was published in February 2009 by the Pembina Institute.<sup>6</sup>





## RÉSUMÉ

Pris au pied de la lettre, les mots du Cadre d'aménagement du territoire (CAT) de l'Alberta suggèrent que la province est sur le point d'assumer de nouvelles responsabilités en matière de gestion du territoire et des ressources. Le gouvernement de l'Alberta a reconnu que la pression du développement sur les paysages albertains est sans précédent et qu'il est nécessaire d'adopter un nouveau système d'affectation du territoire, y compris l'aménagement régional intégré, qui équilibre mieux la croissance économique avec les valeurs sociales et environnementales. Bien que la direction politique du CAT soit positive, l'expérience albertaine en matière d'initiatives d'aménagement du territoire suggère que ce nouveau cadre risque d'échouer s'il n'a pas une solide base juridique. Cet article identifie les éléments fondamentaux qui devraient être inclus dans la législation sur l'aménagement du territoire que le gouvernement a l'intention de présenter au printemps 2009.

### What's New in the LUF?

The LUF proposes seven strategies to improve land-use decision making in Alberta:<sup>7</sup>

1. Establish seven new land use regions and develop land-use plans for all regions by 2012.
2. Create a Land-use Secretariat to support implementation of the LUF and a multi-stakeholder Regional Advisory Council for each region.
3. Use cumulative effects management that recognizes the finite carrying capacity of watersheds, airsheds and landscapes to manage the combined impacts of existing and new development on air, land, water and biodiversity.
4. Develop new policy instruments to encourage conservation and stewardship on private and public lands.
5. Promote efficient use of land to reduce the footprint of human activities on Alberta's landscapes.
6. Establish an information, monitoring and reporting system to contribute to continuous improvement of planning and decision making.
7. Include Aboriginal peoples in land-use planning.

The LUF identifies the ongoing metropolitan planning in the Capital and Calgary areas and the Lower Athabasca and South Saskatchewan Regional Plans as immediate priorities. It also promises to address significant policy gaps in the following areas: conflicts between surface and subsurface activities, fragmentation and conversion of agricultural land, establishment of transportation and utilities corridors, management of recreational use of public land, conservation and protection of the diversity of Alberta's ecological regions, and management of flood risk.

### Why Legislation Matters

Robust legislation to support the LUF is essential because the structural problems that the LUF is intended to address require legal solutions. The fragmentation of land-use management among departmental 'silos' and the project-by-project incrementalism of Alberta's regulatory regime make it virtually impossible to manage the cumulative impacts of multiple activities on a shared land base. These obstacles are strongly rooted in the province's laws and decision-making processes and in the narrow mandates and organizational cultures of government departments and agencies. Broad statements of policy direction will not be sufficient to change these realities.

Legislation is also essential to provide continuity and durability for the LUF. Stephen Owen, who led an ambitious regional planning initiative in British Columbia in the 1990s, stated that "sustainability requires a long-term social commitment and an institutional framework that spans economic and political cycles."<sup>8</sup> There will inevitably be temptations to subvert the planning process and undermine long-term sustainability in response to short-term political and economic pressures.

The LUF recognizes this risk, stating that "Decision-making criteria and processes will be clearly defined, consistently followed, and not subject to political expediency."<sup>9</sup> Establishing a legal hierarchy that makes regional plans binding on subsequent land-use decisions is essential to achieving this objective. Legislation should also set procedural rules, limit discretionary decision making, reinforce accountability and transparency, and provide for meaningful public and stakeholder participation in order to reduce the risk that the benefits of integrated planning will be eroded by decisions based on short-term expediency.





## Checklist for LUF Legislation

Implementation of the LUF raises complex legal and policy issues that cannot easily be captured in a short list of attributes for LUF legislation. Nonetheless, the following nine elements should be included in LUF legislation if it is to establish an effective and resilient land-use system.

### (1) Purpose and Guiding Principles

The starting point for LUF legislation is legal entrenchment of the new policy direction. Cutting-edge land-use statutes in other jurisdictions include purpose sections built on the concept of sustainability.<sup>10</sup> The definition of this term is typically followed by the enumeration of broad objectives and guiding principles.

Alberta's new legislation should adopt this model, incorporating core elements of the LUF such as:

- sustainable management of Alberta's land and natural resources to meet the needs of present and future Albertans and to maintain and improve the capacity of land, air and water to sustain the quality of human life and the diversity and resilience of natural ecosystems;
- recognition that Alberta's watersheds, airsheds and landscapes have a finite carrying capacity and that land uses must be managed accordingly;
- regional planning as the centerpiece of an integrated system of policy, planning and decision making for land and resource management;
- outcome-based planning and decision making, applying a triple bottom line approach that considers environmental, social and economic values; and
- the use of quantitative thresholds and limits to define the acceptable amount and intensity of development that is consistent with meeting the environmental, social and economic objectives specified in land-use plans.

The LUF's guiding principles should also be included in the new legislation, along with the commitment to complete plans for all regions of Alberta.<sup>11</sup>

### (2) Provincial Leadership on Land-Use Policy

Provincial land-use policies will be needed to establish province-wide goals and provide direction to regional planning on how these goals may be achieved. Clear direction is essential because effective and efficient regional planning cannot occur in a policy vacuum or when important land-use policies are inconsistent with

each other.<sup>12</sup> Public and stakeholder consultations for the LUF show that there is widespread support among Albertans for greater leadership by the provincial government on land-use issues.<sup>13</sup>

LUF legislation could enumerate important land-use goals, or it could authorize the adoption of goals at a later date by regulation. Regardless of whether or not land-use goals are included directly in the new legislation, there will clearly be a need for detailed policy guidance for planning and operational decision making.

LUF legislation should follow standard practice in other planning laws by authorizing Cabinet to issue binding policy statements to set land-use goals, provide direction on achieving these goals (e.g., priorities and trade-offs), and address policy gaps and inconsistencies in order to guide and facilitate regional planning.

### (3) Legally Binding Regional Plans

LUF legislation should state clearly that regional land-use plans are binding on municipal plans, sub-regional plans, issue-specific plans (e.g., forest management plans and access management plans), and the decisions of government departments and agencies to allocate land and resource rights (e.g., forestry and mineral rights) and approve projects and other land uses. Planning legislation from other jurisdictions typically requires that lower-level plans and land-use decisions be consistent with regional plans.

The legal status of regional plans should be reinforced by amendments to statutes governing other decision makers. For example, the statutory mandates of quasi-judicial decision makers such as the Energy Resources Conservation Board (ERCB) should be modified to reflect the legal primacy of regional plans. Once the LUF is implemented in law, the ERCB's 'public interest' mandate will require the Board to determine whether or not proposed projects are consistent with the applicable regional plan.

Defining the practical implications of the hierarchical relationship between legally binding plans and lower-level planning and land-use decisions is challenging from legal and policy perspectives. LUF legislation should address this issue directly, providing clear guidance on: (1) aligning lower-level decision makers' mandates with planning constraints; (2) applying outcomes defined in regional plans, including cumulative impact thresholds and limits, at sub-regional scales; and (3) developing principles and





practical guidelines for determining whether land-use decisions comply with regional plans.

#### (4) Cumulative Effects Management

Cumulative effects management is listed as one of seven strategies in the LUF, but in fact it is the thread that runs through the entire initiative. Integrated regional planning is the response to the government's admission that Alberta's current regulatory system, based on project-by-project approvals and impact mitigation, "does not adequately address the cumulative effects of all activities".<sup>14</sup> All of the LUF's strategies are designed to support, directly or indirectly, integrated planning and outcome-based management to address cumulative impacts.

Legislation should entrench in law the LUF's new approach to cumulative effects management by requiring that regional plans:

- summarize the state of the region and describe the key assumptions, information, cumulative impact modelling and analysis that were used to develop the plan;
- identify environmental values in the region that are at risk due to cumulative environmental impacts;
- use cumulative impact modelling to show possible trends in indicators of environmental quality under different land-use scenarios;
- describe a vision and specific outcomes for the region based on the preferred scenarios;
- determine priorities and trade-offs for land and resource management;
- identify management strategies and policy instruments to achieve the desired outcomes (e.g., land-use zoning, protected areas designation, measures to promote conservation and stewardship);
- define the approach to cumulative effects management for the region, including targets, management thresholds and absolute limits to control the intensity and impacts of land uses in order to protect air, water, terrestrial ecosystems, landscape attributes and biodiversity; and
- establish indicators and monitoring programs to evaluate the success in achieving outcomes specified in plans.

#### (5) An Effective Land-use Secretariat

The Land-use Secretariat is the institutional driver of the LUF and the success of this initiative will depend in large measure on the authority and capacity of this agency. It will need to be an effective participant at the highest levels of administrative decision making, with

the autonomy and neutrality to rise above political and bureaucratic rivalries between line departments.

LUF legislation should establish the Land-use Secretariat as a government agency that is separate from line departments and is led by a Deputy Minister who reports directly to Cabinet or to the Chair of the Cabinet LUF Committee. The secretariat's functions listed in the LUF should be included as legal duties.<sup>15</sup>

#### (6) Public and Stakeholder Engagement

The government will appoint a multi-stakeholder Regional Advisory Council (RAC) to assist with the development of each regional plan. LUF legislation should authorize the creation of the RACs and describe their mandate. It should also add legal force to the government's commitment to diversity of RAC membership by requiring that each RAC include approximately equal representation from economic, environmental and social perspectives, as reflected in the personal and professional backgrounds of members. Finally, it should specify key elements of the terms of reference for the RACs to ensure that they operate in an efficient, fair and transparent manner.

The RACs will assist with the preparation of regional plans, but RAC members will not be able to represent effectively all provincial, regional and local interests. Additional avenues for public and stakeholder involvement are therefore essential. The legislation should establish the basic procedural requirements to encourage participation in the planning processes, including the periodic review and amendment of regional plans. These requirements should include public notification of proposed land-use policies, plans and plan amendments and procedures to ensure effective public and stakeholder involvement.

#### (7) Filling Institutional and Legal Gaps

LUF legislation should address three major gaps in the proposed land-use system by:

- establishing a multi-stakeholder Provincial Advisory Council to provide input on the development of provincial land-use policies, the reconciliation of conflicting policies, the articulation of provincial outcomes, the selection of indicators, and the development of terms of reference for regional plans;
- designating regional land-use managers or creating other mechanisms for coordinating land-use decisions at the operational level and providing a point of accountability in each region for implementing the regional plan; and
- authorizing the use of interim measures to maintain land-use values and options and to



avoid a development rush during the planning process in areas of the province where important values are at imminent risk.

#### **(8) Taking Continuous Improvement Seriously**

The LUF will inevitably encounter challenges given the complexity of land-use planning and the shift from fragmented to integrated decision making about land and resource use. Continuous improvement will be facilitated by a credible process for evaluating progress and recommending changes when problems arise. Conversely, a system that seeks to limit scrutiny, restrict information flow and react to problems with aggressive damage control rather than adaptive management will foster inflexibility and black-box decision making that will ultimately undermine the LUF.

LUF legislation should create transparent monitoring, reporting and accountability mechanisms that will provide feed-back loops to improve the LUF over time by:

- establishing a credible, arm's length and multi-stakeholder process for monitoring, evaluating, and reporting on the implementation of land-use policies and plans (modelled on the principles adopted for the Alberta Biodiversity Monitoring Institute that are endorsed by the LUF),<sup>16</sup>
- describing the timelines and a process for the periodic review and updating of regional plans; and
- requiring periodic and independent implementation audits of the LUF.

#### **(9) Meaningful Accountability and Enforcement**

Ensuring that land-use decisions comply with regional plans is central to accountability and enforcement within the LUF. Following the standard practice of land-use planning legislation in other jurisdictions, a specialized appeals tribunal should be established to resolve disputes about the consistency of land-use decisions with higher level plans. Further appeal to the courts should be allowed only on points of law and jurisdiction.

If the government is unwilling to establish a separate land-use tribunal at the present time, LUF legislation should provide clear guidance to the various bodies that may find themselves adjudicating land-use appeals once regional plans are approved. The legislation should expand rules of standing to ensure access to these appeal mechanisms where individuals or organizations with a legitimate interest

in the enforcement of plans may be denied standing. It should also provide a procedure for appealing important land-use decisions for which there is currently no appeal mechanism.

#### **What should Albertans Expect?**

Expectations for LUF legislation should be high, but realistic. Realizing the full promise of the LUF will not be possible within the first few years. Implementing the LUF is a microcosm of the broader societal challenge of achieving sustainability. It is a marathon, not a sprint.

The overriding objective for LUF legislation should be the establishment of a robust, credible and transparent land-use system that ensures the accountability of decision makers and has the capacity and durability to evolve over time. If the LUF is supported by a solid legal foundation, it can establish the management tools and contribute to the ethic of responsibility that are needed to put land and resource use in Alberta on a sustainable trajectory.

The legislation implementing the LUF will be a litmus test for the government's commitment to meaningful change. Tough choices and trade-offs are inevitable as Alberta abandons the 'everything, everywhere, all the time' approach to land use. The current economic down-turn may make it even more challenging to maintain the long-term focus and discipline of integrated land-use planning.

Strong implementing legislation will send an important signal that the government intends to stay the course. Conversely, an unwillingness to give legal force to the policy direction and new institutional structure of the LUF would suggest a lack of political will. The dismal record of past policies directed to integrated land and resource management in Alberta provides legitimate grounds for doubting the government's resolve if it fails to give the LUF a solid legal foundation.

- ◆ Mr. Kennett is a Senior Policy Analyst with the Pembina Institute and a former Research Associate with the Canadian Institute of Resources Law. This article was funded by a grant from the Alberta Law Foundation.



## Notes

1. Government of Alberta, *Land-use Framework* (December 2008) at 6 (hereinafter LUF), online: <<http://www.landuse.alberta.ca/>>.
2. LUF at 15.
3. *Provincial Land-use Framework Initiative Cross-sector Forum, Summary Report*, (December 2006), online:<[http://www.landuse.alberta.ca/documents/RD%20Summary\\_screen.pdf](http://www.landuse.alberta.ca/documents/RD%20Summary_screen.pdf)>; *Land-use Framework Workbook Summary Report* (October 2007), online: <<http://www.landuse.alberta.ca/documents/LUF%20Summary%20Report.pdf>>; *Draft Land-use Framework Public Survey and Public Submissions Report* (November 2008), online: <[http://www.landuse.alberta.ca/documents/Public\\_Survey\\_and\\_Public\\_Submission\\_Report\\_NO\\_Names.pdf](http://www.landuse.alberta.ca/documents/Public_Survey_and_Public_Submission_Report_NO_Names.pdf)>.
4. Steven A. Kennett, *Integrated Resource Management in Alberta: Past, Present and Benchmarks for the Future*, CIRL Occasional Paper #11 (Calgary: Canadian Institute of Resources Law, 2002), online: <<http://ciril.ca/files/ciril/OP11Benchmarks.pdf>>. Richard R. Schneider, *Alternative Futures: Alberta's Boreal Forest at the Crossroads* (Edmonton: Federation of Alberta Naturalists and Alberta Centre for Boreal Studies, 2002); Steven A. Kennett, *Closing the Performance Gap: The Challenge for Cumulative Effects Management in Alberta's Athabasca Oil Sands Region*, CIRL Occasional Paper #18 (Calgary: Canadian Institute of Resources Law, 2007), online: <<http://ciril.ca/files/ciril/OP18Athabasca.pdf>>; Steven A. Kennett, "Special Places 2000: Protecting the Status Quo" (Spring 1995) 50 *Resources*, online: <<http://ciril.ca/files/ciril/Resources50.pdf>>.
5. Alberta's Water for Life strategy has also suffered from the lack of an adequate legal, policy and governance framework. See, Danielle Droitsch, Steven A. Kennett & Dan Woynilowicz, *Curing Environmental Dis-Integration: A Prescription for Integrating the Government of Alberta's Strategic Initiatives* (Drayton Valley and Canmore: Pembina Institute and Water Matters, 2008), online: <<http://pubs.pembina.org/reports/Integration-report.pdf>>.
6. Available online: <<http://www.pembina.org/>>.
7. LUF at 19-21.
8. Commission on Resources and Environment, *A Sustainability Act for British Columbia: Consolidating the Progress, Securing the Future, Provincial Land Use Strategy*, vol. 1 (November 1994) at 5.
9. LUF at 16.
10. For example, New Zealand's *Resource Management Act* and Queensland's *Integrated Planning Act*.
11. LUF at 15-17.
12. Steven A. Kennett & Richard R. Schneider, *Making it Real: Implementing Alberta's Land-Use Framework* (Drayton Valley and Edmonton: Pembina Institute and Canadian Parks and Wilderness Society, 2008) at 13-16, online: <<http://pubs.pembina.org/reports/making-it-real-report.pdf>>.
13. LUF at 2, 8.
14. LUF at 31.
15. LUF at 29.
16. LUF at 38.

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