

A New Alberta Land Use Approach

by Elizabeth Donkervoort

Alberta's population is nearing five million and, according to the Provincial Government, the Province has reached a turning point. Adhering to the old rules of land use planning "will not produce the quality of life [Albertans] have come to expect" (*Land Use Framework*, 2008, p. 2). To this end, on December 3, 2008, the Province released the first part of a new and progressive environmental regime: the "Land Use Framework," or "LUF."

Moving away from the locally-driven planning of the 1990s and 2000s, the LUF centralizes more planning power with the Province. Specifically, it divides the Province into seven regions and requires a Regional Plan to be developed and approved by the Province for each region. The *Alberta Land Stewardship Act*, R.S.A 2009, c. A-26.8 ("ALSA"), proclaimed into force on October 1, 2009, establishes the legal framework for the LUF. The key elements of the Regional Plans under ALSA are:

- Regional Plans are an expression of the public policy of the Government and are binding on the Crown, local governments, decision-makers, and all other persons (ss. 13 and 15).
- Regional Plans are to be monitored regularly, and reviewed once every ten years by the Land Use Secretariat (ss. 6, 57 and 61).
- Once a Regional Plan is developed, every municipality and decision-making body in that Region must bring their regulatory instruments (including planning regulations and statutory plans) into compliance with the Plan (ss. 20 and 21).
- The Province has final jurisdiction over Regional Plans, and the sole authority to determine compliance with the ALSA or a Regional Plan.
- Individuals do not have a right to any cause of action under the ALSA, and are limited to submitting complaints to the Secretariat regarding compliance (ss. 15 and 62).

In addition to the legal requirements for Regional Plans, the ALSA also creates tools for conserving public and private lands. The following Conservation Tools are to be implemented in Regional Plans and local land use regulations:

- **Conservation Easement**. A landowner may voluntarily grant an easement to a "qualified organization" for the protection, conservation, or enhancement of the land for environmental, natural scenic, esthetic, or agricultural values. ALSA Conservation Easements replace and expand the scope of conservation easements previously granted under Alberta's *Environmental Protection and Enhancement Act*, R.S.A 2000, c. E-12, by including the protection, conservation and enhancement of the environment, and agricultural uses, as authorized purposes for such easements.
- **Conservation Directive.** This is a permanent restriction on land that is expressly stated in a Regional Plan, to protect, conserve, manage, or enhance the land's environmental, natural scenic, esthetic, or agricultural values. Landowners whose land is subject to a Directive have the right to apply for compensation from the Province. Alberta's Land Compensation Board settles disputes regarding compensation under ALSA.
- **Transfer Development Credit Scheme ("TDC Scheme").** This allows developers to transfer development credits from one parcel of land to another. Under the ALSA, TDC Schemes can be used to protect, conserve, manage, and enhance environmental, natural scenic, esthetic, or agricultural values, or for recreational use, open space, or environmental education. The ALSA's TDC Schemes must be established in a Regional Plan, or developed by one or more municipalities and approved by the Province.
- **Exchange, Stewardship Units and Conservation Offset Program.** Such programs may be developed and/or administered by "a person" or Provincial department to counterbalance the effects of development on landscapes.

Under Part 3 of the ALSA, the Province is also authorized to support or fund research for "market-based instruments," or to facilitate initiatives for Conservation Easements, Directives, or "market-based instruments."

The ALSA's shift to more provincially-led land use planning by way of the Regional Plans is not unique to Alberta. In 2005, Ontario adopted the *Places to Grow Act*, S.O. 2005, c. 13. Under this legislation, the Province of Ontario may designate regions as "Growth Areas" and require the development and approval of a Growth Plan for the Area. Similar to the ALSA's Regional Plans, municipalities in Growth Areas are required to bring their official plans into compliance with the Growth Plan. The Ontario Government retains significant power under the Act to amend municipal plans so as to bring them into compliance with the Plan. The *Places to Grow Act* is not as far-reaching as the ALSA: to date, only two areas have been designated "Growth Areas" for the purposes of the Act. Further, the *Places to Grow Act* also does not establish or regulate tools for land conservation. Nevertheless, the creation of mandatory provincial regional plans in Ontario and Alberta may suggest a growing trend towards greater centralization of land use

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regulation in Canada for the purposes of conservation.

The progressively ambitious nature of the ALSA could be a model for other jurisdictions seeking to promote land use conservation. However, the ALSA lacks clarity in several key areas, hindering its effectiveness. Most significantly, it fails to clearly define key terms, such as "market based instruments" or "Stewardship Units." It fails to address critical details regarding Conservation Tools—for example, the ALSA leaves the following details to be included in supporting regulations:

- the restrictions imposed by Conservation Directives, how Directives are to be enforced, what constitutes loss or injury and how compensation is to be calculated;
- how Exchange, and Conservation Offset Programs are to be established, managed, and monitored;
- how Stewardship Units are to be created, classified, authenticated or distributed;
- the terms and conditions of use of TDC Scheme units are unclear, as are how these units can be sold, assigned, or otherwise disposed of; and
- how the Exchange is to function is unclear (for example, the TDC Schemes).

(Brownlee, LLP's *Alberta Land Stewardship Act: Maximizing your Municipality's Impact,* 2010). These gaps in the details seriously impair the ability of local governments to make use of the Conservation Tools. To the extent that municipalities wish to adopt conservation measures, such as a Conservation Offset Programs, in municipal or inter-municipal plans, the tools may become ineffective if they are inconsistent with regulations adopted under the ALSA at a later date.

Further, the development of Regional Plans for five of the seven Regions has not begun, and it is unclear when all seven Regional Plans will be completed. As mentioned, compliance with Regional Plans is mandatory, and, given the costs associated with developing and amending municipal and inter-municipal plans, many municipalities may avoid adopting new land use regulations until their Regional Plan is completed. This could result in outdated land use regulations being used, stagnating development or increasing inter-municipal disputes over development in fringe areas.

Accordingly, any government, provincial or local, seeking to employ similar conservation tools or planning regimes to those under ALSA should address these uncertainties by, for example, developing the supporting regulations concurrently with its conservation legislation, or providing for the greater involvement of municipalities and inter-municipal negotiations in plan development. ML

Ordinances

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and 5) it excessively entangles the government in religious affairs.[7] In the *Detroit* case, the Sixth Circuit ruled that none of the five ways applied to Detroit's exterior beautification program. So, will the Ark Encounter theme park withstand an Establishment Clause legal challenge? The law itself and its purpose are arguably neutral. It is a financial incentive used to stimulate the economy through tourism-related projects, including those with cultural, historical, recreation, and entertainment value. The real question is whether the tax incentives have a primary effect of advancing religion. As the Sixth Circuit stated in the *Detroit* case, "a program may have the primary effect of advancing religion if the recipient divert[s] secular aid to further its religious mission."[8] With respect to this, the court in *Detroit* stated "most of the aid the churches received—cosmetic repairs to walls, doors, awnings and parking lots, as well as limited landscaping—does not have dual uses capable of diversion from a secular to a religious purpose. . . . [U]nlike a teacher, a sign-language interpreter, or even an overhead projector —all of which conceivably can be used to communicate secular and religious messages—a brick, gutter or bush (unless burning) cannot be co-opted to convey a religious message."[9]

It will be harder for Kentucky to pass this test. The Ark Encounter's marketing website states that "[t]hrough construction of a massive full-scale Noah's Ark, the Ark Encounter will present . . . a reminder about the Bible's account of the Ark" and "[t]he Ark Encounter will be an immersive, historically-themed experience . . . . [I]t is not an amusement park."[10] Governor Beshear states that "[b]ringing new jobs to Kentucky is my top priority, and with the estimated 900 jobs this project will create, I am happy about the economic impact this project will have on the Northern Kentucky region."[11] The difficult part will be reconciling Kentucky's announced purpose of job creation and economic development with the effect of the government's involvement with the Ark Encounter. The scenario might be set for the perfect storm. ML

Cases

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The U.S. Court of Appeals for the First Circuit turned to several analytical measures to determine whether the law violated the Establishment Clause – the three-part analysis in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the "endorsement" analysis in Justice O'Connor's concurrence in *Lynch v. Donnelly*, 465 U.S. 668 (1984), and the "coercion" analysis of *Lee v. Weisman*, 505 U.S. 577 (1992). Under *Lemon*, a court was to consider whether the statute had a secular legislative purpose, whether its principal or primary effect was one that neither advanced nor inhibited religion, and whether it fostered excessive entanglement with religion. Here, "by design," the recitation of the Pledge was "meant to further the policy of teaching our country's history to the elementary and secondary pupils of the state," and its primary effect was not the advancement of religion, but the "advancement of patriotism through a pledge to the flag as a symbol of the nation." The statute also did not endorse, favor or promote religion, and, in context, the Pledge's words "under God" did not convey a message of endorsement.

The court next held that the Pledge did not violate the Free

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