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Another step in implementing ALSA: the review and variance provisions and compensation for compensable takings

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Regulation commented on:

Alberta Land Stewardship Regulation, Alta. Reg. 179/2011

The *Alberta Land Stewardship Act*, SA 2009, c A-26.8 (*ALSA*) is a work in progress: see my earlier blog: "ALSA and the property rights debate in Alberta: a certificate of title to land is not a 'statutory consent'" We won't know how this beast or angel will turn until we see the first approved plans (see my blog on the draft Lower Athabasca Plan ("The proof of the pudding: ALSA and the Draft Lower Athabasca Regional Plan") and a complete set of implementing regulations. Here we have the next piece of the puzzle in the form of a set of regulations primarily concerned to implement the 2011 amendments to the ALSA (Bill 10, the Alberta Land Stewardship Amendment Act, 2011) which I blogged at "Regulatory chill, weak regional plans, and lots of jobs for lawyers: the proposed amendments to the Alberta Land Stewardship Act" .
I wasn't exactly a fan of Bill 10. I thought that it created too many opportunities to put roadblocks in the way of implementing plans. I don't believe that it is necessary to provide for both plan reviews and variance applications, and I am still of the view that the compensable taking provisions of Bill 10 will foster needless and expensive litigation.

The current regulations have three parts. Part 1 deals with requests for reviews of regional plans, Part 2 deals with requests for variance of regional plans and Part 3 deals with compensation claims resulting from the implementation of regional plans. Division 1 of Part 3 deals with conservation directives and Division 2 deals with the more amorphous (and contentious) concept of compensable takings.

Part 1: requests for reviews of regional plans

As I summarized in my blog on Bill 10:

> A new section 19.2 will allow a person who is "directly and adversely affected by a regional plan" to request a review of the plan. Upon receiving such a request the Minister must establish a panel and charge it with the responsibility of reviewing the plan. Bill 10 envisages that the review procedure will be elaborated through regulations but the Bill is surprisingly silent on the results of a review. A review must be presented to the Minister and to cabinet but what then? Furthermore the amendment has nothing to say about the purpose of a review or a threshold for triggering a review. Once again therefore it is perhaps not unreasonable to expect the Minister to be flooded with requests for reviews, especially if such a request

> entails little or no cost to an applicant. This too may prompt those developing the plan to err on the side of timidity and affirming the status quo.
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> Finally, it is perhaps worth emphasising that there is no similar right of review for a public interest organization which wants to argue that a regional plan has been insufficiently attentive to establishing thresholds and indicators in order to address the central problem of cumulative impacts.

So how do the regulations elaborate upon the bare provisions of the Act? First, and perhaps most importantly, the regulations define the term "directly and adversely affected" so as to mean:

> … in respect of a person with regard to a regional plan, means that there is a reasonable probability that a person's health, property, income or quiet enjoyment of property, or some combination of them, is being or will be more than minimally harmed by the regional plan;

Such a person has standing to trigger the review process. It is unusual for the executive to define "directly and adversely affected". Generally the common law definitions tie standing to an interest in land. Thus, the proposed definition embraces a broader class of parties than would have been included had the term been left undefined. But the definition does nothing to address the problem of public interest standing referred to in the last paragraph of the Bill 10 blog quoted above.

An application for review must contain, amongst other things,

> (d) identification of the specific provision of the regional plan that the applicant believes is directly and adversely affecting the applicant or will directly and adversely affect the applicant;
> (e) an explanation of how the specific provision identified in clause (d) is directly and adversely affecting the applicant or will directly and adversely affect the applicant;
> (f) an explanation of the adverse effects the applicant is suffering or expects to suffer as a result of the specific provision identified in clause (d);
> (g) the relief being requested by the applicant, which may include any amendment to the specific provision of the regional plan identified in clause (d) that the applicant proposes in order to diminish or eliminate the adverse effects identified in clause (f).

Reviews are to be conducted by a panel appointed for that purpose by the Minister except that the Minister may instead elect to send the review "to a board or other body established under another enactment if the Stewardship Minister considers that the board or other body has suitable expertise and resources". Possible candidates might include the Environmental Appeal Board (EAB), the Energy Resources Conservation Board (ERCB) or the Natural Resources Conservation Board (NRCB). There are potential problems with both the ad hoc panel route and the standing board route. Mention of an ad hoc panel raises questions of independence and political neutrality. Just who will be appointed to these panels? Will political party affiliations be an important consideration for the Minister? On the other hand, some Boards may be associated with a particular industry or set of industries (eg the ERCB) and thus may be perceived to continue the silo effect that *ALSA* was supposed to reach beyond. In this context the EAB seems

the more appropriate candidate and indeed the only one whose current jurisdiction is purely an appellate jurisdiction (the NRCB has both an original and an appellate jurisdiction).

And what of the transparency and accountability protections associated with the review procedure? The regulations (s 11) do require posting of the application, the report and any recommendations of the review panel and any report and any recommendations of the Minister to the Executive Council. On the other hand there is nothing here that explicitly requires the panel or the Minister to provide reasons.

Part 2: Variance in Respect of Regional Plans

In my earlier blog on Bill 10, I described the new variance power as follows:

> A new section 15.1 of *ALSA* will allow a title holder to apply to the Minister for variation in a regional plan as it affects that title holder. The Minister may grant the variance if the proposal is: (1) consistent with the purposes of the Act, (2) not likely to diminish the spirit and intent of the plan, and (3) refusal would result in an unreasonable hardship to the applicant without an offsetting public interest.
>
> While the procedures for any such applications are to be prescribed by regulation it is easy to imagine the Minister being flooded with applications.

In the case of variance, the application may be made by a title holder (a defined term in *ALSA*). Under the new regulations the application must contain (s 13) the following information:

> (d) if the application is in respect of a land area, the legal description, or other form of description acceptable to the Stewardship Minister, of the land area;
> (e) if the application is in respect of a subsisting land use, a description of the subsisting land use;
> (f) identification of the restriction, limitation or requirement under the regional plan in respect of which the applicant is seeking a variance;
> (g) an explanation of why the variance is necessary;
> (h) a description of the variance specifically requested by the applicant, including any proposed terms and conditions of the variance being requested.

The effect of filing an application is to suspend "in respect of the applicant" "the operation of the restriction, limitation or requirement to which the application pertains until a decision is made …." (s 16). The Minister may establish an advisory panel to review and make recommendations with respect to the application. There is no suggestion here that the Minister can elect instead to refer the matter to an existing board.

And what of the transparency and accountability protections associated with the variance procedure? Variance orders and applications are to be posted on the Secretariat's website (s 22); and the Minister must provide reasons but only if rejecting a variance application (s 19 (2)). The regulations do not explicitly require the advisory panel to provide reasons in support of any recommendation that it might make.

Part 3: Regional Plan Compensation

As noted above, this part contains two divisions, Division 1 dealing with Conservation Directives, and Division 2 dealing with compensable takings. My principal interest lies in the contents of Division 2 but in many respects the Division 2 provisions are simply *mutatis mutandis* provisions based on Division 1. In any event, here is what I had to say about the "compensable taking" provisions when they were introduced as part of Bill 10:

> **(4) A new provision that creates an additional opportunity for a person to claim compensation on the grounds that the operation of the plan has impaired that person's property rights**
> The current version of the Act (ss. 36-44) provides a right to compensation where a regional plan through means of a conservation directive which seeks to "permanently protect, conserve, manage and enhance environmental, natural scenic, esthetic or agricultural values by means of a conservation directive expressly declared in the regional plan" (section 37). This was, in my view, a generous provision insofar as there was a credible argument that the common law rules on regulatory takings (see *British Columbia v Tener*, [1985] 1 SCR 533) would *not* have required the payment of compensation in all cases covered by section 37. For example, a provision in a plan which prevents an owner from draining an existing wetland would not, I think, create a right to compensation as a matter of common law. And there is good reason for that. After all, in this sort of case the owner purchased the land knowing that it contained a wetland and that that wetland provided certain valuable ecosystem functions for society. There is no "right" to drain a wetland and deprive society of the positive externalities associated with a wetland. But such an owner might well have a good claim under section 37. That, as I say, seems to me to be generous.
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> Bill 10 however goes beyond this in several ways. First the Bill takes a negatively framed provision (the current section 19), "No person has a right to compensation" except in the following circumstances and turns it on its head in the new section 19.1: "A person has a right to compensation …." While the difference in approach may not change the legal position that much, it is clearly an important political statement. Second, section 19.1 creates something called "a compensable taking". The Bill defines a compensable taking as "the diminution or abrogation of a property right, title or interest giving rise to compensation in law or equity" (section 14 of the Bill proposing a new s.19.1). There is a confusing element of circularity to this definition (i.e. you have right to compensation when an existing rule of law or equity gives you a right to compensation – and perhaps not unless) which may yet save the treasury from having to pay compensation for every perceived diminution in a person's property, but two things seem clear. First, the threshold of "diminution" is very low on a linguistic spectrum that includes such words as "deprive" or "infringe". Second, I think that we can pretty much guarantee that this provision will create tremendous legal uncertainty and will lead to much costly litigation. The uncertainty (and the potential risk to the treasury) will also cause those drafting the plan to err on the side of interfering with the status quo as little as possible – the problem of regulatory chill much discussed in the context of investment treaty arbitrations. After all, given this provision, it is likely that the Treasury Board will be asking that a "compensation impact assessment" or some similar document be presented to cabinet along with

> an application for approval of any regional plan. That will be a difficult document to prepare.
>
> As I say above, the circular definition of a compensable taking does perhaps suggest that the government was merely intending to confirm that the legislation was not intending to interfere with the common law rules on regulatory taking. If that is the case then I think a much simpler provision could have been drafted.
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> So what scheme have the regulations put in place to deal with claims that a regional plan has worked a compensable taking?

The *Act* contemplated that

> (10) The Lieutenant Governor in Council may make regulations
> (a) respecting the form and manner of making applications to the Crown, the Compensation Board or the Court of Queen's Bench under this section;
> (b) respecting the application or modification of Part 3, Division 3, and the regulations made under that Division, in respect of applications to the Compensation Board or the Court of Queen's Bench under this section.

The reference to Part 3 Division 3 is a reference to the conservation directive provisions of the Act and thus, even at this stage, the drafters contemplated that the regulations for both conservation directives and compensable takings might follow a similar path. And that is indeed the case in the published regulations.

In each case (i.e. both divisions) the regulations contemplate that the application for compensation will be made in the first instance to the Minister (s 25 (1) and s 33). In the case of an application for a compensable taking the applicant must provide, inter alia, the following information:

> (v) identification of the specific provision of the regional plan, or an amendment to the regional plan, that the applicant believes has caused the applicant to suffer a compensable taking;
> (vi) an explanation of how the specific provision identified in subcl (v) has caused the applicant to suffer a compensable taking;
> (vii) the amount of compensation the applicant is seeking,

Once again, the regulations allow the Minister to establish an advisory panel (s 34) the recommendations of which the Minister must consider but is not bound by. As with the advisory panel on variances there is no specific duty to provide reasons.

The regulations next contemplate that the Minister shall determine eligibility for compensation and any amount (s 29(1)) except that the Minister may refer an application to the Land Compensation Board (LCB) (established under the *Expropriation Act*, RSA 2000, c E-13) "at any time" subject to the right of the applicant to bring its own application to the Court of Queen's Bench (all of this messiness was provided for in *ALSA* in relation to conservation directives). Similarly, if neither the Minister nor the applicant refers the matter to the Court or the LCB and the Minister goes on to make his or her decision, an applicant who does not agree with the result may submit the matter to the Board or to the Court - and it is evident that this is no way an appeal (even a de novo appeal).

I think that the procedure proposed here is problematic. Given what I say above in my comment on Bill 10 I think that applications for compensation under Division 2 are always going to be legally contentious. This is because such claims will raise two important threshold questions: (1) does the new section create a new cause of action, and (2) does the provision of the plan bring about "the diminution or abrogation of a property right, title or interest giving rise to compensation in law or equity". Both pose difficult questions of law (question 1 should be settled definitively once the matter has been to the Court of Appeal, but question 2 will be an issue in each and every case) which ought to be resolved in a public forum and through a publicly reasoned process. If this is correct then it seems to be bad law and bad policy to start the process with an application to the Minister to determine eligibility for compensation and the amount of compensation. The Minister cannot be expected to have expertise in relation to either question. Similarly, it seems odd to have an ad hoc advisory panel (with no duty to provide written reasons) potentially weighing in on these questions. These questions truly are questions for a court or for an expert standing body like the LCB. It will be important in terms of fairness that we have a coherent body of jurisprudence on what constitutes a compensable taking rather than a series of ad hoc political settlements (and there is no duty in this part of the regulations to publish applications or ministerial decisions).