

The Law of the Land

A Legal Foundation
for Alberta's
Land-Use Framework

February 2009



Steven A. Kennett

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Sustainable Energy Solutions

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Executive Summary

Alberta's new Land-use Framework (LUF) has the potential to be one of the most important provincial policy initiatives in decades. It accurately identifies the deficiencies of the current system for land and resource management and the principal changes that are urgently needed to manage land use differently. Outcome-based management and integrated regional planning are key elements of a new way of making land-use decisions that could enable Albertans to manage cumulative impacts and live within the environmental limits that will become increasingly apparent at regional, provincial, national and global scales over the coming decades. The stakes are high and much of the success of the LUF will depend on an effective legal and institutional structure to support and drive the policy innovation and deliver land-use decisions 'on the ground' that differ significantly from those of the past.

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. In many ways, implementing this initiative resembles the broader societal challenge of achieving sustainability. It is a marathon, not a sprint. The overriding objective for LUF legislation is not immediate perfection, but rather 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. To achieve this objective, LUF legislation should:

- entrench the LUF's new policy direction in law;
- establish the legal structure and hierarchy for land-use decisions;
- establish and empower LUF institutions;
- define the rules of the game for regional planning; and
- create mechanisms for accountability and enforcement.

Setting a New Direction

The starting point for LUF legislation is legal entrenchment of the new policy direction for Alberta's land-use system. Cutting-edge land-use statutes in other jurisdictions include purpose sections built on the concept of sustainability. The definition of this term is typically followed by an enumeration of broad objectives, matters to be considered by decision makers and guiding principles.

Alberta's new legislation should adopt this model, incorporating key 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 activities must be managed so that they do not exceed the carrying capacity of the environment;
- 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 also includes a set of guiding principles that should be included in the new legislation. Finally, the commitment to complete integrated planning for all regions of Alberta should be affirmed.

Legal Structure for Land-Use Decisions

The LUF will be implemented through a hierarchy of policy, planning and operational decision making. Regional planning is central to the LUF, but it is not the whole story. A key role of LUF legislation is to provide the legal framework that will connect all stages of this integrated land-use system.

At the top of the LUF's decision-making hierarchy are the provincial land-use policies that will be needed to establish province-wide goals and provide direction to regional planning on how these goals may be achieved. The LUF's legal framework for provincial policy direction could begin with the identification of land-use goals, or it could authorize the adoption of goals at a later date by regulation. Regardless of whether or not broad land-use goals are identified in LUF 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 or inconsistencies in order to facilitate regional planning.

The clear intent of the LUF is that regional plans will be legally binding on lower levels of the decision-making hierarchy: sub-regional plans, issue-specific plans (e.g., forest management plans and access management plans) and operational decisions such as the allocation of land and resource rights (e.g., forestry and mineral rights) and the approval of projects and other land uses. Provincial government departments and agencies and municipal governments will therefore have to comply with regional plans when making land-use decisions.

This legal hierarchy should be clearly established by LUF legislation. Legislation from other jurisdictions typically requires that 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 mandate of quasi-judicial decision makers such as the Energy Resources Conservation Board should be modified to reflect the legal primacy of regional plans. LUF legislation should also address: (1) aligning lower-level decision makers' mandates with planning constraints; (2) applying regional planning guidelines at sub-regional

scales; and (3) developing principles and practical guidelines for determining whether land-use decisions comply with regional plans.

Other key elements of the LUF that should be included in the legal structure for land-use decisions are sub-regional and issue-specific planning, operational coordination of land-use decisions and authority to implement new policy tools for conservation and stewardship. Amendments to other legislation will also be necessary to ensure alignment with the LUF and provide flexibility to adjust existing land and resource dispositions and land-use approvals.

Establishing and Empowering New Institutions

The new system for land-use governance will be established by LUF legislation. This topic is addressed in some detail in the LUF, which enumerates the key functions of Cabinet, the Land-use Secretariat and the Regional Advisory Councils. These institutional mandates should be formalized in legislation that creates mandatory duties — not simply discretionary powers — and that builds in flexibility for the evolution of LUF institutions.

Cabinet’s functions listed in the LUF should be embodied in legislation. This mandate should include a statutory commitment to implement integrated regional planning across the province, oversight and public reporting functions to enhance accountability and transparency, and responsibility to issue land-use policies and provide written reasons for important decisions on LUF implementation. Political leadership for the LUF should be genuinely cross-ministerial, with the Land-use Secretariat having a reporting relationship to Cabinet that is independent of line departments.

The Land-use Secretariat and the Regional Advisory Councils (RACs) should also be directed by statute to fulfill the functions enumerated in the LUF. The legislation should give legal force to the government’s commitment to diverse representation on the RACs and it should provide specific direction on their terms of reference.

LUF legislation should also fill three important institutional gaps in the LUF as currently proposed by establishing:

- a multi-stakeholder Provincial Advisory Council to provide input on the selection of provincial indicators, the reconciliation of conflicting policies, the articulation of provincial outcomes, and the development of terms of reference for regional plans;
- regional land-use managers or other mechanisms for coordinating land-use decisions at the operational level; and
- a land-use appeal tribunal.

Rules of the Game for Regional Planning

LUF legislation should set out the guiding principles and key elements of the regional planning process. Specific issues to be addressed include:

- the key stages of the planning process;

- the role of terms of reference for regional plans in translating provincial land-use policy to the regional context and providing detailed procedural direction to the planning team and the RAC;
- implementation 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;
- the elements to be included in regional plans;
- the rules governing public and stakeholder participation at all stages of policy development and planning; and
- the processes for amending, reviewing and updating plans.

Accountability and Enforcement

The LUF's hierarchy of policy, planning and operational decisions involves both political and administrative components. Broad policy direction and the approval and amendment of regional land-use plans are Cabinet functions, subject to political accountability. While the ultimate accountability mechanism for these decisions is the ballot box, monitoring and reporting mechanisms are needed to evaluate the extent to which policy and planning objectives are being achieved.

Ensuring that land-use decisions comply with regional plans is central to accountability and enforcement within the LUF. An ombudsman operating at arm's length from decision makers could be appointed to initiate periodic compliance audits and to investigate concerns submitted by individual Albertans or stakeholder groups.

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 some 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.

Finally, LUF legislation should require independent implementation audits for the LUF as a whole. These periodic reviews would contribute to transparency and accountability and support the government's commitment to continuous improvement and a systems approach to monitoring and improving land-use decisions.

Next Steps

LUF legislation will be a critically important determinant of the success of Alberta's new land-use system and it raises a multitude of important issues. The government plans to introduce the LUF bill in the spring 2009 session of the legislature. Opportunities for public and stakeholder input into the development of this legislation should therefore begin as soon as possible.

For this consultation to be useful, it should be based on an initial draft of the legislation. If a complete draft is not available in sufficient time to allow meaningful consultation and still meet the legislative timetable, comments could be solicited on an annotated outline or discussion paper explaining the legislation or on detailed drafting instructions. Once the LUF bill is tabled in the legislature, sufficient time should be allowed for a thorough review by MLAs, stakeholder groups and members of the public.

Legislation to implement the LUF is far too important to be developed behind closed doors and then rushed through the legislature. Meaningful public and stakeholder consultation will result in a better final product and in a legal foundation for the LUF that is more likely to be understood and supported by Albertans.

1. Legal Foundation for the Land-Use Framework

If the words in Alberta’s new Land-use Framework (LUF) are taken at face value, the government is about to initiate major and long overdue changes to 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.”¹ 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.”²

The words in the LUF are clear and reflect accurately the overwhelming majority of public and stakeholder comments on the LUF initiative.³ Experience tells us, however, that the gap between words and action is often wide. Translating the LUF’s positive policy direction into meaningful changes on the ground will require bold political leadership and a sustained commitment to a new way of managing the multiple demands on Alberta’s finite land base. Pressures to revert to the status quo can be expected and government may be tempted to allow short-term political and economic expediency to triumph over the long-term vision, principles and disciplined planning process of the LUF. If the LUF turns out to be a political flash in the pan, it will have accomplished nothing important.

Success will also depend on new policies, decision-making processes and institutions that deliver markedly different environmental outcomes from ‘business as usual’ and that exhibit both durability and the capacity to adapt in the face of the inevitable implementation challenges. This report describes the legal foundation for this combination of effectiveness and resilience that is essential if the LUF is to succeed in putting land and resource management in Alberta on a more sustainable trajectory.

¹ Government of Alberta, *Land-use Framework*, (December 2008) http://www.landuse.alberta.ca/documents/Final_Land_use_Framework.pdf, 6 (referred to as *LUF*).

² *LUF*, 15.

³ Government of Alberta: *Provincial Land-use Framework Initiative Cross-sector Forum, Summary Report* (December 2006), http://www.landuse.alberta.ca/documents/RD_Summary_screen.pdf, *Land-use Framework Workbook Summary Report* (October 2007), http://www.landuse.alberta.ca/documents/LUF_Summary_Report.pdf; *Draft Land-use Framework Public Survey and Public Submissions Report* (November 2008), http://www.landuse.alberta.ca/documents/Public_Survey_and_Public_Submission_Report_N0_Names.pdf.

1.1 The New Policy Direction

The LUF proposes seven strategies to improve land-use decision making in Alberta:⁴

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 water, air and land.
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 landscape.
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. Finally, the LUF promises that implementing legislation will be introduced during the spring session of the Legislature in 2009.

1.2 What Does the LUF Say About Legislation?

The LUF states that scope of the legislation will include:⁵

- Establishing the Land-use Secretariat and Regional Advisory Councils and defining their mandates.
- Outlining the purpose, process and content for regional plans
- Defining the approach to cumulative effects management for the purpose of regional planning.
- Supporting the use of conservation and stewardship tools.
- Defining the authority of regional plans, once approved.

Amendments to existing legislation will also be needed.

⁴ LUF, 19–21.

⁵ LUF, 43.

A planning hierarchy is clearly anticipated because both provincial and municipal decision makers “will be required to comply with regional plans.”⁶ The LUF’s commitment to using existing review and appeal systems to address compliance issues also suggests that regional plans will be legally binding.

The LUF promises that land-use decisions will be “accountable and responsible”, but provides no indication of legal accountability mechanisms that might be included in legislation.⁷ It also states that “decision-making criteria will be clearly defined, consistently followed, and not subject to political expedience,” an approach that is also consistent with legally structured decisions.⁸

Beyond these general statements, the LUF leaves a blank slate for implementing legislation. The rest of this report suggests how that slate might be filled in, beginning with a review of the key arguments for a strong legal foundation for the LUF.

⁶ *LUF*, 26, 27.

⁷ *LUF*, 16.

⁸ *LUF*, 16.

2. Why Legislation Matters

Establishing a solid legal foundation for regional land-use planning has not always been a priority in Alberta. For example, the province’s Integrated Resource Planning (IRP) process for public lands was developed on the basis of a short provision in the *Public Lands Act* that enables the Minister to “classify public land and declare the use for which the Minister considers different classes to be adaptable.”⁹ The purposes and planning processes for the IRP program were never legislated and the resulting plans were treated as policy statements without legal effect. This minimalist legal foundation explains many of the deficiencies of the IRP program and the ease with which it was almost completely dismantled during the 1990s.¹⁰ Successful implementation of the LUF will require a much more robust legal framework.

2.1 The Stakes Are High

Implementing legislation is critically important to the LUF because the stakes are so high. The well-being of present and future generations of Albertans depends on the quality of our water, air, land and natural ecosystems and on the responsible use of our renewable and non-renewable natural resources, yet there is a broad consensus within and outside of government that the current system for managing land use is badly broken. All too often, this system produces decisions that focus narrowly on short-term economic objectives while paying insufficient attention to the determinants of quality of life and long-term sustainability.¹¹ Indicators of environmental quality¹² and quality of life¹³ are declining for many Albertans. The LUF acknowledges that the status quo is no longer adequate and that “Albertans are looking for stronger provincial government leadership to better balance our economic growth with our social and environmental values.”¹⁴

⁹ Government of Alberta, *Public Lands Act*, R.S.A. 2000, c. P-40, s. 11, <http://www.canlii.org/ab/laws/sta/p-40/20080818/whole.html>.

¹⁰ Steven A. Kennett, *Integrated Resource Management in Alberta: Past, Present and Benchmarks for the Future*, Canadian Institute of Resources Law Occasional Paper Series (No. 11) (February 2002), <http://cirf.ca/cirf/files/cirf/OP11Benchmarks.pdf>.

¹¹ Steven A. Kennett and Richard R. Schneider, *Alberta by Design: Blueprint for an Effective Land-Use Framework*, (Canadian Parks and Wilderness Society and Pembina Institute, 2008), <http://www.pembina.org/pub/1590>.

¹² See, for example: Southern Foothills Study, *The Changing Landscape of the Southern Alberta Foothills: Report of the Southern Foothills Study Business as Usual Scenario and Public Survey* (2007), http://www.salts-landtrust.org/sfs/sfs_reporting.html.

¹³ Mark Anielski, *The Economics of Happiness* (Gabriola Island, BC, New Society Publishers, 2007); Amy Taylor, *The Alberta GPI Summary Report* (Pembina Institute, 2005), <http://www.greeneconomics.ca/pub/193>; The Calgary Foundation, *Vital Signs Report 2007*, http://www.thecalgaryfoundation.org/pdf/Final_Calgarys_VitalSigns_fullreport.pdf.

¹⁴LUF, 15.

The LUF accurately identifies the significant reforms that are needed to achieve this better balance. Regional land-use planning fell out of favour in the 1990s during a period of government cut-backs and the rise of an ideological commitment to reducing regulatory constraints on market decisions. The pendulum appears to be swinging back to a more moderate position as the risks of excessive deregulation and market failure are increasingly recognized in areas as diverse as human health effects from contaminated water and food supplies and the economic consequences of the global financial crisis. While markets and market-based policies have delivered many benefits to Albertans, they are imperfect tools for social choice when environmental and social costs or ‘externalities’ are ignored or discounted because they are not incorporated into the price signals that guide market decisions. Without responsible planning and regulation, land-use decisions are particularly prone to this type of market failure. The LUF recognizes that active government leadership on the land-use planning file is urgently needed to achieve the land-use decisions that Albertans want and expect.

Furthermore, as the LUF acknowledges, cumulative environmental impacts can no longer be managed adequately through project-by-project approval processes and mitigation.¹⁵ The cumulative impacts of multiple decisions, some of which are individually insignificant, create many of the most important environmental and social challenges facing Albertans. The growing risk of water shortages in southern Alberta, the fragmentation and conversion of prime agricultural land due to urban sprawl and rural sub-division, the worsening traffic congestion in Calgary and Edmonton, and the decline in species such as caribou and grizzly bears due to loss of secure habitat are all examples of cumulative impacts.

Managing cumulative impacts involves setting and achieving landscape-scale objectives when multiple activities affect land-use values. It requires looking at the bigger picture and recognizing that individual decisions that appear rational or justified when viewed in isolation can sometimes produce outcomes that make everyone worse off. It also requires Albertans to accept that land-use decisions need to respect:

- absolute resource constraints such as water availability;
- limits to carrying capacity, given that human impacts affect the ability of natural ecosystems to sustain themselves and produce the ecological goods and services that we depend on; and
- limits to socially acceptable environmental change at scales ranging from the local effects on air and water quality of an intensive livestock operation to the multitude of economic, social and environmental dislocations that will result from the large-scale disruption of the global climate system.

Managing cumulative impacts is central to meeting the global challenge of ‘living within limits’.

The LUF recognizes that “our watersheds, airsheds and landscapes have a finite carrying capacity” and that future well-being depends on managing activities so that they “do not exceed the carrying capacity of our environment.”¹⁶ It also accepts the need for “limits on the effects of ... development on the air, land, water and biodiversity of the affected region.”¹⁷ Alberta’s

¹⁵ LUF, 31.

¹⁶ LUF, 31.

¹⁷ LUF, 31.

approach to land use is poised for a major transformation from project-by-project incrementalism in a planning vacuum to a new system of outcome-based management that includes the identification of “appropriate thresholds, measurable management objectives, indicators and targets for the environment (air, land, water and biodiversity) at the regional levels and, where appropriate, at local levels.”¹⁸

These challenges of living within limits are not unique to Alberta, nor are the solutions needed to address them. One of these solutions is better integration of decisions across activities sharing a common land base and along the spectrum of policy, planning and operational decision making. The World Commission on Environment and Development (Brundtland Commission), which popularized the term sustainable development, noted that most of the institutions confronting interrelated environmental and economic challenges “tend to be independent, fragmented, working to relatively narrow mandates with closed decision processes.”¹⁹ It concluded: “The real world of interlocked economic and ecological systems will not change; the policies and institutions concerned must.”²⁰ The need for better integration and coordination of provincial policies governing land, air, water, biodiversity, economic development and social objectives was a key theme of public and stakeholder consultations during the LUF initiative²¹ and is a guiding principle of Alberta’s new land-use system.²²

Integrated regional planning is also recognized internationally and within Canada as an essential tool for addressing the challenges of managing cumulative impacts to promote quality of life and long-term sustainability.²³ For example, American legal scholar Charles Wilkinson concluded his review of the anachronistic laws and policies governing much of land and resource use in the western United States — which he refers to as the “lords of yesterday” — with the observation that “it is hard to imagine a sustainable future without some form of planning”²⁴ (see text box). The LUF reaches the same conclusion for Alberta. Integrated regional planning, guided by provincial land-use policy and informed by public and stakeholder participation, will provide a

¹⁸ LUF, 31.

¹⁹ World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987), 9.

²⁰ *Ibid.*, 9.

²¹ LUF, 8.

²² LUF, 16.

²³ See, for example, the following references cited in Ajit K. Krishnaswamy, *Large Area Land Use Planning for Manitoba, Version 2* (Winnipeg: Whelan Enns Associates Inc., April 10, 2000), 5–7; IUCN, UNEP and WWF, *Caring for the Earth: A Strategy for Sustainable Living* (Gland, Switzerland: The World Conservation Union (IUCN), United Nations Environment Programme (UNEP) and The World Wildlife Fund (WWF), 1991), 7; UNCED, *Agenda for the 21st Century (Agenda 21)* (New York: United Nations Conference on Environment and Development, 1992) Section 10; WRI, IUCN and UNEP, *Global Biodiversity Strategy: Guidelines for Action to Save, Study, and Use the Earth’s Biotic Wealth Sustainably and Equitably* (Washington, DC: World Resources Institute, 1992), 35; WCFSD, *Our Forests...Our Future: Report of the World Commission on Forests and Sustainable Development* (Cambridge, UK: Cambridge University Press, 1999), 160–161; Canadian Council of Forest Ministers, *National Forests Strategy (2003–2008) — A Sustainable Forest: The Canadian Commitment* (Hull, Quebec: Natural Resources Canada, 2003), 9–10; Environment Canada: *Canadian Biodiversity Strategy: Canada’s Response to the Convention on Biological Diversity* (Hull, Quebec: Biodiversity Convention Office, Environment Canada, 1995), 21.

²⁴ Charles F. Wilkinson, *Crossing the Next Meridian: Land, Water, and the Future of the West* (Washington, DC: Island Press, 1992), 300.

forum for identifying land-use values explicitly and considering priorities and trade-offs. It will therefore enable Albertans to exercise greater control over the environmental, social and economic legacy that they will leave for future generations.

Planning and Sustainability in the West

How, then, might sustainable use work in the West? After identifying all the economic, environmental, cultural, and abstract—call them spiritual—elements that need to be sustained, it seems to be inevitable that westerners increasingly will turn to various forms of planning. When I say planning, I mean it in the broadest sense: the process of a community coming together; identifying problems; setting goals — a vision — for a time period such as twenty or forty years; adopting a program to fulfill those goals; and modifying the program as conditions change. Some developers, imbued with the traditional *carte blanche* attitude so evident in the lords of yesterday, try to paint any form of planning as a straitjacket. But sensible yet visionary planning is the opposite: it can open our minds to the possibilities for our communities — our neighborhoods, schools, businesses, environment, and culture — so that we can build flexible arrangements for trying to achieve and sustain those possibilities. All across the West, stresses have built to the point where it is hard to imagine a sustainable future without some form of planning.

— Charles F. Wilkinson (1992)²⁵

2.2 Challenges for Integrated Planning and Decision Making

Robust legislation to support the LUF is essential because of the particular challenges of integrated planning and decision making. Legislation is necessary to overcome obstacles to integration, ensure continuity and durability, provide a structure for addressing the inherent complexity of land-use planning, and demonstrate commitment to meaningful change in the face of inevitable pressures to maintain the status quo.²⁶

2.2.1 Obstacles to Integrated Decision Making Have Legal Origins

The structural problems that the LUF is intended to address require legal solutions. Fragmented and incremental decision making is strongly rooted in the province's laws and decision-making processes and in the narrow mandates and organizational cultures of key government departments and agencies. Broad statements of policy direction will not be sufficient to change these realities.

Significant changes to the legal structure for land-use management will be needed to fill the current planning vacuum and to establish an integrated hierarchy of land-use policy, planning and operational decision making. Legal mandates of existing decision makers will have to be modified to require adherence to land-use objectives set by regional plans. A legal framework will also be needed to implement and coordinate the policy initiatives identified in the LUF and

²⁵ Ibid., 300.

²⁶ The general rationale for a legislative foundation for land use planning and sustainability initiatives is described in British Columbia Commission on Resources and Environment, *A Sustainability Act for British Columbia, Provincial Land Use Strategy Volume 1* (November 1994), 39–42.

to provide new tools in areas such as conservation and stewardship. The failure of past attempts at integrated land and resource management can be traced in part to the fact that these initiatives failed to penetrate below the level of broad policy statements to tackle the structural root causes of fragmented decision making and unmanaged cumulative impacts.²⁷

2.2.2 Vulnerability to Short-Term Pressures

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.”²⁸ 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.”²⁹ 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 participation in order to reduce the risk that the benefits of integrated planning will be eroded by decisions based on short-term expediency.

2.2.3 Inherent Complexity of Planning

The rationale for planning is simple, but execution is difficult. Regional planning is inherently complex because it is expected to³⁰

- integrate economic, social and environmental values
- assist decision making where decisions have major political, economic, social and environmental impacts
- foster discussion and seek workable and sound accommodations where conflicts exist
- engage the public so that their needs and preferences are responded to
- plan for and maintain land and water ecosystems based on scientific understanding
- bridge jurisdictional gaps
- coordinate the management capabilities of different agencies towards common objectives.

The complexity of planning makes it essential to provide policy direction, institutional structure and procedural certainty to participants in planning processes. Launching into planning without these elements is a recipe for frustration and failure. LUF legislation is the principal legal vehicle for providing this structure for regional planning and for the other decision-making processes that that will inform the development of regional plans and ensure their implementation.

²⁷ Kennett, *Integrated Resource Management in Alberta*.

²⁸ Commission on Resources and Environment, *A Sustainability Act for British Columbia*, 5.

²⁹ LUF, 16.

³⁰ British Columbia Commission on Resources and Environment, *Planning for Sustainability, Provincial Land Use Strategy Volume 2*, (November 1994), 9.

2.2.4 The Need to Demonstrate Commitment

The legislation implementing the LUF will be a litmus test for the government's commitment to meaningful change. Resistance from interests that benefit from the status quo can be expected, particularly when regional planning processes face the tough choices and trade-offs that are inevitable as Alberta abandons the 'everything, everywhere, all the time' approach to land-use management. 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.

Legislation as a Demonstration of Commitment

The commitment to sustainability in land and resource use must be expressed through a legislative framework that strengthens institutional structures required to deliver the key components of the provincial land use strategy: provincial direction, coordination of government initiatives, participatory planning, independent oversight of land use planning and resource management administration, and a comprehensive and accessible dispute resolution system.

— BC Commission on Resources and Environment (1994)³¹

2.3 Lessons from Past Initiatives

The importance of implementing legislation is also underlined by the disappointing record of earlier land-use initiatives. For example, 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 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 stage.³² In each case, organized interests within and outside of government that benefit from the status quo were able to block meaningful reform of the land-use system. What these initiatives had in common were statements of good intentions and broad policies that paid lip-service to the general principles of integrated planning and stakeholder participation in decision making. What caused them to fail was a combination of the following deficiencies:

- the absence of legal mechanisms to promote integration of government institutions and decision-making processes

³¹ Commission on Resources and Environment, *A Sustainability Act for British Columbia*, 20.

³² Kennett, *Integrated Resource Management in Alberta*; Richard R. Schneider, *Alternative Futures: Alberta's Boreal Forest at the Crossroads* (Edmonton, AB: Federation of Alberta Naturalists and Alberta Centre for Boreal Research, 2002); Steven A. Kennett, *Closing the Performance Gap: The Challenge for Cumulative Effects Management in Alberta's Athabasca Oil Sands Region*, Canadian Institute of Resources Law Occasional Paper Series (No. 18) (May 2007), <http://cirf.ca/files/cirf/OP18Athabasca.pdf>; Steven A. Kennett, "Special Places 2000: Protecting the Status Quo," *Resources*, vol. 50 (Spring 1995), <http://cirf.ca/files/cirf/Resources50.pdf>.

- the absence of a statutory framework to establish and support land-use planning
- the absence of legislation to establish decision-making processes capable of withstanding challenges from the trade-offs inherent in integrated planning
- the absence of legal accountability mechanisms to underpin commitments and allow individual Albertans and stakeholder organizations to challenge land-use decisions effectively
- the failure of government to provide sufficiently clear legal and policy direction to multi-stakeholder processes to enable them to work constructively towards meaningful changes to ‘business as usual’ decision making.

This record of failure cannot be allowed to repeat itself for the LUF. Legislation is needed to avoid these deficiencies and to provide firm and continuing direction to Alberta’s new land-use system.

2.4 Models From Other Jurisdictions

There is no off-the-shelf legislative template that can be adopted for the LUF. Nonetheless, there is plenty of experience from other jurisdictions that Alberta can draw on.

The gold standard for integrated land-use and resource management legislation is set by the *Integrated Planning Act*³³ in Queensland, Australia and the *Resource Management Act*³⁴ in New Zealand. Both statutes were the product of ambitious law reform initiatives that replaced and consolidated a multitude of laws and regulations and created unified land-use systems. Key characteristics of these cutting-edge statutory frameworks are:

- a broad definition of sustainability that provides the guiding principle governing all land-use decisions;
- a commitment to outcome-based environmental management;
- policy, planning and project-specific review and regulation (e.g., environmental assessment and permitting) constitute an integrated and hierarchical system of decision making for land and resource use;
- the legal framework provides explicitly for high-level policy guidance on land-use management;
- integrated regional planning that is binding on subsequent decision making is central to land-use management;
- decision making at the operational stage is integrated across land uses through a unified regulatory or permitting process for projects and activities (e.g., system of resource consents in New Zealand and Integrated Development Assessment System in Queensland);

³³ State of Queensland (Australia), *Integrated Planning Act*, <http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/I/IntegPlanA97.pdf>.

³⁴ http://www.legislation.govt.nz/act/public/1991/0069/latest/DLM231910.html?search=ts_act_Resource+Management+Act_resele

- different levels of government (e.g., national, state, municipal) have defined roles and responsibilities within the hierarchical decision-making system defined by law; and
- a land-use appeal mechanism involving a specialized tribunal and judicial review on points of law ensures the legal enforceability of plans and reinforces the accountability of land-use managers.

Alberta's LUF legislation can also draw on the experience with more conventional planning statutes such as Saskatchewan's *Planning and Development Act*,³⁵ Manitoba's *Planning Act*,³⁶ Ontario's *Planning Act*³⁷ and *Places to Grow Act*,³⁸ and state planning regimes in Australia. These statutes typically establish a legally defined hierarchy of provincial or state policy direction on land-use and regional or municipal planning systems. They include statements of legislative purpose, a process for formalizing land-use policy, authority and direction for regional and municipal planning, and appeal procedures to ensure enforceability and accountability.

Government-sponsored reports and expert commentary on legislation for integrated land-use management and regional planning in other jurisdictions can also provide useful lessons for Alberta. British Columbia's Commission on Resources and Environment proposed a Sustainability Act in the 1990s and issued several reports on that province's land-use strategy.³⁹ The Commission on Planning and Development Reform in Ontario also published a comprehensive report on planning issues.⁴⁰ Detailed analysis of experience with New Zealand's *Resource Management Act* and Queensland's *Integrated Planning Act* is available.⁴¹ Finally, an extensive survey of experience in other jurisdictions was commissioned by the Government of Alberta for the LUF initiative.⁴²

Experience in other jurisdictions confirms that the LUF is headed in the right direction. A legally structured hierarchy of policy, planning and operational decision making that includes integrated land-use planning is a hallmark of the new generation of sustainability legislation. This type of legislation has been adopted in other jurisdictions to address the same problems that have led the Government of Alberta to launch the LUF: fragmented decision-making processes and

³⁵ Government of Saskatchewan, *Planning and Development Act*, <http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/P13-2.pdf>.

³⁶ Government of Manitoba, *Planning Act*, <http://web2.gov.mb.ca/laws/statutes/ccsm/p080e.php>.

³⁷ Government of Ontario, *Planning Act*, http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90p13_e.htm.

³⁸ Government of Ontario, *Places to Grow Act*, http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_05p13_e.htm.

³⁹ Commission on Resources and Environment, *A Sustainability Act for British Columbia*, 30.

⁴⁰ Commission on Planning and Development Reform in Ontario, *New Planning for Ontario*, Final Report (June 1993).

⁴¹ See, for example: Neil J. Ericksen et al., *Planning for Sustainability: New Zealand Under the RMA* (Burlington, Vermont: Ashgate Publishing Company, 2003); State of Queensland, Department of Local Government, Planning, Sport and Recreation (Australia), *Planning for a Prosperous Queensland: A reform agenda for planning and development in the Smart State* (August 2007).

⁴² UMA/AECOM, *Jurisdictional Review of Land Use and Land Management Policy: Focus Area Reports*, Report prepared for Alberta Sustainable Resource Development (October 2007), 52–57, http://www.landuse.alberta.ca/documents/0_FINAL_Jurisdictional%20Review_BW_complete%20with%20Appendices-071102.pdf.

departmental silos based on narrow mandates that have developed over time and that impede the integrated management of multiple projects and activities sharing a common land base.⁴³ A ‘made in Alberta’ approach to the LUF does not require re-inventing the wheel, nor should it ignore the valuable lessons from jurisdictions that have extensive experience with policy and planning tools that the LUF proposes. This experience is directly relevant to the legal foundation for the LUF and lessons from other jurisdictions are noted in the following sections of this report.

2.5 What Should Albertans Expect?

After decades of immobility, Alberta is now playing catch-up on land-use issues. The LUF sets the right strategic direction, but it would be unrealistic to expect the Government of Alberta to close the gap with cutting-edge jurisdictions in a single leap. What should Albertans expect for the legislative component of this initiative?

The LUF has some significant gaps when compared to global sustainability leaders. While relatively strong on the planning component, it is considerably weaker in defining both the policy context for integrated land-use decision making and the operational integration that will be needed to achieve the objectives defined in regional plans.⁴⁴ The LUF does not include the integrated project review and permitting process that is found in leading land-use systems. In areas such as operational integration and land-use appeals, the government’s apparent reluctance to create new institutions may condemn the LUF to inefficiencies and fragmentation that have been addressed in other jurisdictions. LUF legislation could fill some of these gaps, but a more fully integrated land-use system for Alberta will likely be achievable only through a second generation of land-use reform that builds on the LUF’s first steps.

The time lines for implementing the LUF are short and the resources that the government has devoted to this initiative to date are modest, particularly for policy development and law reform. Moving quickly is a sound political strategy given the risks that the LUF will lose momentum if it fails to deliver tangible results in the short term. Paralysis by analysis and the potential for shifting government priorities due to changing political and economic circumstances or the re-assignment of Cabinet positions could doom the LUF. Getting a workable system up and running before the next election is a laudable goal, but it is inevitable that further fine tuning will be needed to make the system run smoothly. Legislation therefore has three critically important roles in ensuring the long-term success of the LUF.

First, it should establish the policy direction and legal structure that will firmly entrench the LUF institutions and decision-making hierarchy as the overarching system for integrated land and resource management in Alberta. Unlike previous failed initiatives, the LUF must penetrate below the level of good intentions and broad policy pronouncements to alter legally-defined mandates and decision-making processes and to establish the new institutions for legally binding

⁴³ The Right Hon. Sir Geoffrey Palmer, “Sustainability — New Zealand’s Resource Management Legislation” in Monique Ross and J. Owen Saunders eds. *Growing Demands on a Shrinking Heritage: Managing Resource-Use Conflicts* (Calgary: Canadian Institute of Resources Law, 1992), 410.

⁴⁴ Steven A. Kennett and Richard R. Schneider, *Making it Real: Implementing Alberta’s Land-Use Framework*, (Pembina Institute and Canadian Parks and Wilderness Society, October 2008), <http://www.pembina.org/pub/1715>.

regional planning. Institutional structure and procedural certainty are therefore key criteria for LUF legislation.

Second, the legislation should provide the impetus and capacity to drive further development of the LUF. Initiatives to fill important policy gaps identified in the LUF will likely lag behind the development of the first regional plans. Furthermore, planning will almost certainly expose policy ‘collisions’ and management deficiencies. The planning process should therefore be flexible enough to address pressing land-use issues and experiment with innovative policy tools, recognizing that some of these innovations may be embodied in more definitive policy direction and statutory amendments over time. LUF legislation should therefore combine procedural certainty with flexibility on the substantive content of regional plans.

Third, LUF legislation should create transparent monitoring, reporting and accountability mechanisms that will provide feed-back loops to improve the LUF over time. It is inevitable that the LUF will encounter challenges given the inherent complexity of land-use planning and the seismic 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. Legislation has an important role to play in creating the conditions for this constructive dynamic. 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.

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. In many ways, implementing this initiative resembles the broader societal challenge of achieving sustainability. It is a marathon, not a sprint. The overriding objective for LUF legislation is not immediate perfection, but rather 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. To achieve this objective, LUF legislation should:

- entrench the LUF’s new policy direction in law
- establish the legal structure and hierarchy for land-use decisions
- establish and empower LUF institutions
- define the rules of the game for regional planning
- create mechanisms for accountability and enforcement.

These topics are addressed in the following sections of this report.

3. Setting a New Direction

The starting point for LUF legislation is legal entrenchment of the new policy direction for Alberta's land-use system. These provisions should include a general statement of purpose, objectives and guiding principles and a clear commitment to implement integrated regional planning.

3.1 Statement of Legislative Purpose, Objectives and Guiding Principles

LUF legislation should have a purpose section that defines in broad terms the government's new approach to land and resource management. The legal roles of a purpose section are to provide direction and criteria for decision making under the act and as an aid to judicial interpretation. Purpose sections should also serve a broader political or symbolic purpose, particularly where new legislation marks a significant change in policy direction.

Cutting-edge land-use legislation such as New Zealand's *Resource Management Act* (RMA) and Queensland's *Integrated Planning Act* include purpose sections built on the concept of sustainability. The purpose of the RMA is "to promote the sustainable management of natural and physical resources" (s. 5(1)). Sustainable management is defined as (s. 5(2)):

managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural wellbeing and for their health and safety while:

- (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations;
- (b) Safeguarding the life-supporting capacity of air, water, soil and ecosystems; and
- (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

The RMA then provides a list of "matters of national importance" that must be recognized and provided for in decision making, including: preservation of the natural character of the coastal environment, wetlands and lakes and rivers; protection of outstanding natural features and landscape from inappropriate subdivision, use and development; protection of areas of significant indigenous vegetation and habitats of indigenous fauna; maintenance and enhancement of public access to the coastal marine area, lakes and rivers; the culture and traditions of Maori; and the protection of historic heritage and recognized customary activities (s. 6). Finally, the RMA directs decision makers to have regard to other matters including Maori guardianship of the land, the ethic of stewardship, the efficient use and development of natural and physical resources, the efficiency of the end use of energy, the maintenance and enhancement of amenity values, the intrinsic values of ecosystems, the maintenance and enhancement of the quality of the environment, any finite characteristics of natural and physical

resources, the protection of the habitat of trout and salmon, the effects of climate change, and the benefits to be derived from the use and development of renewable energy (s. 7).

The purpose of Queensland's *Integrated Planning Act* is "to seek to achieve ecological sustainability" by coordinating and integrating planning at the local, regional and state levels, managing the process by which development occurs, and managing the effects of development on the environment (s. 1.2.1). "Ecological sustainability" is defined as "a balance that integrates (a) protection of ecological processes and natural systems at local, regional, State and wider levels; and (b) economic development; and (c) maintenance of cultural, economic, physical and social wellbeing of people and communities" (s. 1.3.3). The Act also includes a set of principles that elaborate on what is meant by "advancing the Act's purpose" (s. 1.2.3).

A legal commitment to sustainability sets the appropriate direction for modern land-use legislation, but no definition of that term or enumeration of general principles or objectives can provide clear answers to all of the difficult land-use issues that will arise during implementation of the LUF.⁴⁵ As discussed below in Section 5.1, specific direction on the priorities, trade-offs and outcomes to guide integrated planning and operational decision making should be provided through government policy statements. The fact that statutory purposes will inevitably leave broad scope for discretionary decision making also means that planning legislation should pay particular attention to the quality of planning processes and decision makers and the effectiveness of monitoring and accountability mechanisms.⁴⁶

While a statutory purpose section and the enumeration of broad objectives will have limited ability to determine how individual decisions are made within the new land-use system, they should establish clearly the broad policy direction and key objectives of that system. Elements of the LUF that should be affirmed in the purpose section and statement of objectives include:

- commitment to 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 activities must be managed so that they do not exceed the carrying capacity of the environment;
- commitment to regional planning as the centerpiece of an integrated system of policy, planning and decision making for land and resource management;
- commitment to outcome-based planning and decision making, applying a triple bottom line approach that considers environmental, social and economic values;
- commitment to using 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;
- commitment to establishing a new governance structure, including the Land-use Secretariat and Regional Advisory Councils that will be engaged in regional planning;

⁴⁵ See, for example: B.V. Harris, "Sustainable Management as an Express Purpose of Environmental Legislation: The New Zealand Attempt" (1993), *Otago Law Review*, vol. 8, no. 1, 69.

⁴⁶ *Ibid.*, 69, 73.

- commitment to deploying an expanded set of policy tools to promote conservation and stewardship on private and public land;
- commitment to an enhanced information and knowledge system to provide the information, monitoring and evaluation needed for good planning and decision making and for adaptive management and continuous improvement within the land-use system; and
- commitment to supporting the new land-use system by addressing important issues and policy gaps in areas such as mineral rights issuance, access management, parks and protected areas, and the conversion and fragmentation of agricultural land.

The purposes and objectives could be complemented by the enumeration of guiding principles. Like the statutory purposes, these general principles are unlikely to prescribe specific outcomes for land-use decisions. Nonetheless, including principles in the statute provides guidance to decision makers and benchmarks for evaluating implementation of the new land-use system. The LUF contains a statement of guiding principles (see text box) that could be incorporated into the implementing legislation. Although there is certainly room for debate about the specific wording of some of these principles, they touch on the key areas where statutory guidance should be provided.

Guiding Principles From the LUF

Sustainable

Development which meets the needs of the present without compromising the ability of future generations to meet their own needs. Contemporary land-use decisions will balance current economic, environmental and social benefits with the consequences for future generations. This principle of inter-generational responsibility applies to all forms of human land use (residential and industrial, agriculture and forestry, energy and transportation).

Accountable and responsible

All levels of government, the private sector and the community at large will share accountability for responsible land use.

Supported by a land stewardship ethic

This means accepting the responsibility to ensure that our land-use decisions are mindful of consequences for future generations. This responsibility applies to urban planning, forestry and agriculture, habitat and wildlife, watersheds and riparian areas, and all other decisions affecting land use. Where appropriate, market mechanisms will be used to promote stewardship practices.

Collaborative and transparent

Albertans, landowners, land users and governments will work together.

Integrated

Policies, planning and decisions integrate current and new land use on public and private lands and co-ordinate land, air, water, biodiversity, economic development and social objectives within the region.

Knowledge-based

Government decision-making and choices will be informed by science, evidence and experience, including traditional knowledge of aboriginal peoples.

Responsive

Land-use decision-making processes will be responsive to changing economic, environmental and social factors over time and will be improved through periodic review. If there are negative unintended consequences, Cabinet will review policies for possible corrections or repeal.

Fair, equitable and timely

Decision-making criteria and processes will be clearly defined, consistently followed, and not subject to political expediency. Decision-making bodies will be provided with the capacity to perform their responsibilities in a timely manner.

Respectful of private property rights

Decisions will respect the laws of property ownership and the positive role of free markets in making societal (public) choices.

Respectful of the constitutionally protected rights of aboriginal communities

The Government of Alberta will continue to work with aboriginal communities' governments, while respecting the special role and relationship of the federal government regarding the aboriginal peoples. The Government of Alberta recognizes that consultation should take place on matters that impact treaty or constitutionally protected rights of First Nations and Métis peoples.

— Government of Alberta (2008)⁴⁷

3.2 Commitment to Planning

Regional planning is the engine of the LUF and a commitment to undertake integrated planning for all regions of Alberta should be included in LUF legislation. The legislation should either identify the seven planning regions, or clearly confer the power and duty on the responsible minister to designate planning regions covering the entire province. The minister should also be given the duty to ensure that regional plans are completed in a timely manner. While this statutory commitment to regional planning would likely not be legally enforceable, it has both symbolic and practical value in affirming the government's intent to fully implement this key component of the LUF. The general commitment to planning should be supplemented by more detailed statutory guidance on the rules of the game for planning, discussed below in Section 6.

⁴⁷ LUF, 15–17.

4. Legal Structure for Land-Use Decisions

The LUF will be implemented through a hierarchy of policy, planning and operational decision making. Regional planning is central to the LUF, but it is not the whole story. As noted in a Canadian study on land-use planning and sustainability: “land use planning is not to be seen as a sort of free-standing magic formula, but as an intermediate stage in a continuum extending from societal goals to particular administrative acts.”⁴⁸ A key role of LUF legislation is to provide the legal framework that will connect all stages of this integrated land-use system.

4.1 Provincial Policy Direction

At the top of the LUF’s decision-making hierarchy are the provincial land-use policies that will be needed to establish province-wide goals and provide direction to regional planning on how these goals may be achieved. Clear and coherent 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.⁴⁹ Public and stakeholder consultations for the LUF initiative showed that there is widespread support among Albertans for greater leadership by the provincial government on land-use issues.⁵⁰

The importance of jurisdiction-wide goals and policy direction is a recurring theme in analysis of integrated planning regimes.⁵¹ For example, a detailed review of the implementation of New Zealand’s *Resource Management Act* identified lack of clarity about the mandate for planning as a major problem and concluded that “higher levels of government ought to have made the purpose of the environmental legislation clear and assisted councils [the planning bodies] in its interpretation by providing leadership, policy direction and adequate support.”⁵² The authors recommended that the New Zealand government prepare national policy statements as authorized by the Act to set out a clear vision on matters of national importance and their implications for planning.

These themes are echoed in a recent report on planning reform by the Queensland government that identified the need for “greater policy development about State interests” and concluded that these interests should be articulated more effectively “to provide greater certainty about the

⁴⁸ Nigel Richardson, *Land Use Planning and Sustainable Development in Canada* (Ottawa: Canadian Environmental Advisory Council, 1989), 6.

⁴⁹ Kennett and Schneider, *Making it Real*, 13–16,

⁵⁰ *LUF*, 2, 8.

⁵¹ UMA/AECOM, *Jurisdictional Review of Land Use and Land Management Policy*.

⁵² Ericksen et al., 286, 71–72.

outcomes sought through planning and development decisions.”⁵³ The report also concluded that the establishment of “a clear process for the preparation, articulation and adoption of State planning instruments would enhance accountable policy-making rigour for State agencies, ensuring consultation with relevant stakeholders and endorsement by Government.”⁵⁴ The key recommendation was the establishment of a formal and ongoing “State planning policy program” to develop a suite of planning policies based on State interests. The report also identified topics for state planning policies.⁵⁵

The Commission on Planning and Development Reform in Ontario reached the same conclusion, stating: “For the planning process to work effectively, there is a need for clarity on what planning is trying to accomplish. The interests of the province must be stated, and written down. The mechanism to express these interests is through policy statements under the *Planning Act*.”⁵⁶

The LUF’s legal framework for provincial policy direction could begin with the identification of land-use goals in the statutory purpose section, a separate section of the legislation or a regulation. British Columbia’s Commission on Resources and Environment (CORE) enumerated the benefits of land-use goals (see text box), while acknowledging that difficult choices between conflicting goals and values will still have to be made through planning and operational decisions. CORE recommended that sustainability legislation empower Cabinet to give formal regulatory status to provincial land-use goals and that these goals should be supported by a set of strategic policies that would explain in more detail how the government intends to achieve the desired end points.

Benefits of Provincial Land-Use Goals

Land use goals describe the specific benefits and results that we as a society hope to achieve with regard to the environment, the economy and quality of life. Clearly stated province-wide goals can:

- Help ensure that the changing goals of society are properly reflected throughout the planning system;
- Define what a land use strategy must accomplish, providing direction and organizing focus for the rest of the strategy;
- Provide common objectives for all land use agencies, thus focusing resources and energy and helping make the decisions of different agencies more consistent with each other. And common goals should help government identify opportunities for integrating the efforts of various arms and levels of government;
- Make land use decision-making processes more transparent by helping everyone know what the ‘rules of the game’ are. This should make land use decisions more efficient and predictable;

⁵³ State of Queensland, *Planning for a Prosperous Queensland*, 14.

⁵⁴ *Ibid.*, 14.

⁵⁵ These topics include: climate change; integrated land-use and transport (including Transit Oriented Development), hazardous industry sites; air, noise and water pollution to complement environmental protection policies; biodiversity; plantation forestry; intensive animal husbandry; best practices for planning and development (including urban design, subdivision design, etc.), development in waterways; rural residential development; and brown-field development (consolidated in-fill development within existing urban areas).

⁵⁶ Commission on Planning and Development Reform in Ontario, 10.

- Serve as a measuring stick to determine whether our land use system is actually accomplishing what society wants; and
- Help to reduce localized land use conflicts between groups with different values, by commencing the important process of balancing environmental, economic and social objectives. Provincial goals that properly recognize and integrate these diverse objectives will set a general direction for a provincial land use system that accommodates all such objectives, on a province-wide basis.

— BC Commission on Resources and Environment, 1994⁵⁷

Alberta's LUF initiative has not yet developed a suite of specific land-use goals of the type envisaged by CORE. It may be premature, therefore, to include a long list of land-use goals directly in legislation or regulations. Nonetheless, the LUF does identify broad environmental, social and economic outcomes and more specific principles or goals for each component of the triple bottom line. For example, under "Healthy ecosystems and environment" the LUF lists principles such as "Soil and soil fertility are maintained and/or enhanced", "The quality and quantity of ground and surface water are protected" and "Greenhouse gas emissions and air pollution are reduced."⁵⁸

While these principles (or goals) remain fairly broad, they could be included in the LUF statute or an accompanying regulation. LUF legislation could also authorize the identification of land-use goals in a regulation to be adopted at a later date. The Land-use Secretariat could then be assigned the task of developing a more comprehensive and detailed set of goals in consultation with other government departments, stakeholder groups and the public.

Regardless of whether or not broad land-use goals are identified in LUF legislation, there will clearly be a need for detailed policy guidance for planning and operational decision making. These land-use policies should define outcomes, set priorities, and address policy 'collisions' that have been allowed to develop under Alberta's existing land-use system.⁵⁹

The government has also identified "specific areas of provincial interest where clear provincial policy does not exist" (see text box).⁶⁰ Policy direction to fill these and other gaps is essential to address the root causes of land-use conflicts that could derail the LUF. The government has set ambitious time lines for action on these policy priorities, but regional planning will likely begin before they are fully addressed. Interim policy guidance in these areas may be needed if policy gaps or inconsistencies are problematic for the first regional plans.

LUF legislation should therefore follow standard practice in other planning law by authorizing Cabinet to issue binding policy statements to set land-use goals, provide direction on achieving these goals, and address policy gaps or inconsistencies in order to facilitate regional planning.⁶¹

⁵⁷ BC Commission on Resources and Environment, 42–43.

⁵⁸ LUF, 23–24.

⁵⁹ Kennett and Schneider, *Making it Real*, 33–34.

⁶⁰ LUF, 45.

⁶¹ UMA/AECOM, 53–54.

It should also establish a process for developing provincial policy, as discussed below in Section 6.5.1.

Policy Priorities and Gaps — Excerpts from the LUF

Managing subsurface and surface activities — Conflicts between subsurface and surface activities are increasing as activities intensify on the land. The policies that address surface and subsurface values are not well integrated.

Reducing the fragmentation and conversion of agricultural land — Reducing the fragmentation and conversion of agricultural land to other uses is a key consideration, as is the proliferation of other land uses impacting agricultural land.

Developing a transportation and utility corridors strategy — While corridors can affect the land and other land uses, they also create an opportunity for consolidating a number of critical land-use functions within a pre-defined area, thereby reducing land fragmentation and environmental impact.

Managing recreational use of public lands — The Government of Alberta is committed to working with members of the recreational communities and other key stakeholders to develop a comprehensive strategy to better manage growing recreational pressures and activities in Alberta.

Conserving and protecting the diversity of Alberta's ecological regions — The Government of Alberta will address the gaps associated with conserving and protecting the diversity of Alberta's land base (*Natural Regions and Subregions of Alberta Report*), accommodate population growth and improve quality of life opportunities through development of a plan for provincial parks.

Managing flood risk — The Government of Alberta will develop policy to minimize exposure of developments and settlements to flood risk.

— Government of Alberta (2008)⁶²

4.2 Legally Binding Regional Plans

LUF legislation will define the legal authority of approved regional plans.⁶³ The clear intent of the LUF is that these plans be legally binding on lower levels of the decision-making hierarchy: sub-regional plans, issue-specific plans (e.g., forest management plans and access management plans) and operational decisions such as the allocation of land and resource rights (e.g., forestry and mineral rights) and the approval of projects and other land uses. Provincial government departments and agencies and municipal governments will therefore have to comply with regional plans when making land-use decisions.

This legal hierarchy should be clearly established by LUF legislation. Legislation from other jurisdictions typically requires that 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 mandate of quasi-judicial decision makers such as

⁶² LUF, 45–46.

⁶³ LUF, 43.

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 operational decisions is challenging from legal and policy perspectives. These challenges are particularly acute at this early stage in the LUF initiative because the government has provided little guidance on the content and level of detail of regional plans, the role of sub-regional and issue-specific planning within the LUF hierarchy, and the particular planning and policy tools that will be included in regional plans. The LUF legislation should help to chart a course forward through this uncertainty by establishing the legal and institutional framework for addressing these issues.

There are three main types of challenges regarding the relationship of binding regional plans with lower-level planning and decision making: (1) aligning lower-level decision makers' mandates with planning constraints; (2) applying regional planning guidelines at sub-regional scales; and (3) developing principles and practical guidelines for determining whether land-use decisions comply with regional plans.

The first challenge is to determine how the specific planning and regulatory mandates of lower-level decision makers will be affected by regional plans. Since regional plans are intended to constrain land uses and manage cumulative impacts through techniques such as zoning, management thresholds and limits on the intensity of activities or impacts, lower-level decisions should not be permitted to authorize land uses inconsistent with these constraints. Any attempts by lower-level decision makers to defeat the LUF's objective of using regional plans to establish constraints on cumulative impacts should be categorically rejected. Where a decision maker or project proponent wants to argue that the plan is too strict or fails to anticipate a particular type of development, the appropriate forum is the formal amendment process for plans (see below, Section 6.6) or the plan's periodic five or ten year review.

However, it is also possible that sub-regional plans and regulatory decisions may seek to apply more stringent restrictions than those specified in regional plans. For example, a regional plan may establish minimum set-back distances for certain types of facilities, limits on total impacts such as the amount of deforestation, or intensity limits that apply to the density of linear disturbances such as roads, seismic lines and pipeline rights-of-way. Can lower-level decision makers establish stricter limits for specific areas, activities or projects when exercising their planning, project review and regulatory mandates?

There is a strong argument that authorizing the imposition of more stringent requirements through lower-level decisions is consistent with a key purpose of the LUF, which is to better manage the social and environmental impacts of land use in Alberta. These decisions would also be consistent with the mandates of lower-level decision makers who need flexibility to address the potential impacts of land uses at the sub-regional scale and in relation to specific projects and activities.

LUF legislation could address this issue by stating clearly that sub-regional and issue-specific plans, project approvals and other lower-level land-use decisions may be more protective of the environment, human health and other land-use values than the management thresholds and limits established to manage cumulative impacts at the regional scale.⁶⁴ For example, municipal governments should have authority to designate land-use zones on a local level that restrict land uses to lower impacts or different uses than those specified in the broader regional plan. Likewise, regulators should be able to decide that the limits defined in regional plans are not sufficiently protective given the impacts associated with particular development proposals or land uses in a specific local context.

While lower-level planning and regulatory decisions that are more protective than regional plans should generally pass the test of consistency, there may be some circumstances when this approach would be at odds with provincial policy direction or with the trade-offs among competing values and interests that were established in the regional plan. The LUF legislation could therefore specify that provincial policy direction and regional plans may include explicit provisions that prevent or constrain the adoption by subsequent decision makers of limits on land use that are more protective than regional plans.

A second and related challenge concerns the translation of land-use constraints in regional plans to sub-regional scales. For example, if a regional plan sets thresholds and limits for cumulative impacts across the entire region, how should these constraints be applied in sub-regions that may have different existing and projected patterns of land use? Would it be acceptable in some circumstances to allow limits to be exceeded in one sub-region if other parts of the region are below the defined levels of activity or impacts? What is the appropriate scale for determining whether or not constraints such as limits on linear disturbance density are being respected?

These questions must be answered at the operational level by looking at specific patterns of existing and projected land use and making informed choices about priorities and trade-offs. Ensuring that sub-regional and issue-specific planning and project-specific decision making yield decisions ‘on the ground’ that are consistent with regional plans is a key implementation issue for the LUF that is addressed below in Sections 4.4 and 5.4.2. These sections argue that the LUF should provide for operational coordination of land uses within planning regions. This coordination should be linked directly to the legal framework for binding regional plans.

LUF legislation should therefore establish mechanisms to achieve consistency between regional plans and lower-level decisions. For example, British Columbia’s Commission on Resources and Environment recommended a legal requirement that local resource management plans (e.g., forest management plans) be approved by regional inter-agency committees to ensure consistency with regional strategic land-use plans.⁶⁵ In the event of impasse at the regional level, the issue would be referred to Cabinet for a final decision. Another option is to require a

⁶⁴ An example of a statutory provision that applies this criterion for resolving conflicts between regional plans and other direction on land use is section 14(4) of Ontario’s *Places to Grow Act* which states in part that: “if there is a conflict between a direction in a growth plan and a direction in a plan or policy that is mentioned in subsection (5) with respect to a matter relating to the natural environment or human health, the direction that provides more protection to the natural environment or human health prevails” (http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_05p13_e.htm).

⁶⁵ Commission on Resources and Environment, *A Sustainability Act for British Columbia*, 7.

consistency review of draft sub-regional and issue-specific plans and major land-use decisions by the Land-use Secretariat before these plans and decisions are finalized. If regional land-use managers are designated under the LUF, as recommended below, they could assume responsibility for coordinating lower-level decisions to achieve the outcomes and comply with the constraints set by regional plans.

The third challenge for the implementation of binding regional plans is to establish a credible process for assessing whether or not proposed sub-regional and issue-specific plans and operational decisions conform with the letter and spirit of regional plans. Even if regional plans set clear outcomes and constraints and their application is facilitated by the statutory guidance and operational coordination suggested above, determining whether or not proposed land uses ‘fit’ with the applicable plan will not always be easy. LUF legislation should establish a mechanism for making this determination.

The land-use appeal process, proposed below in Section 7.3, would address this issue by establishing a body that is arm’s length from land-use decision makers and that has the expertise and mandate to make final conformity decisions. As this body gains experience with land-use appeals, its decisions should increase certainty by identifying principles and practical guidelines for interpreting regional plans and determining the consistency of lower-level decisions.

4.3 Sub-Regional and Issue-Specific Planning

The LUF anticipates sub-regional planning, notably by recognizing the development of metropolitan plans for the Capital and Calgary regions as immediate priorities.⁶⁶ It is possible that other sub-regional or issue-specific plans may be developed where issues such as growth management or significant environmental impacts require a finer scale of planning. Municipal land-use planning and planning for the management of specific land uses, such as forestry, recreation and public access, will continue to occur. The LUF may also encourage greater attention to land-use planning by the oil and gas industry.

LUF legislation should provide the legal framework for sub-regional and issue-specific plans by:

- enabling regional plans to incorporate by reference sub-regional and issue-specific plans, giving legal status to those lower level plans within the LUF’s legal hierarchy;
- enabling regional plans to direct the development of sub-regional or issue-specific plans when more detailed planning guidance is required to address issues such as growth management, impacts associated with specific land uses, or areas with particular environmental, social or economic values; and
- authorizing Cabinet to initiate sub-regional growth management plans in areas where land-use pressures require special attention.

LUF legislation could also provide some guidance on the appropriate use of sub-regional and issue-specific planning. The risk is that they could provide an escape hatch to avoid setting priorities and making difficult trade-offs at the regional level. Excessive reliance on lower-level plans may also undermine the usefulness of regional plans as means of integrating land-use

⁶⁶ LUF, 43.

decisions at the landscape scale. As a general rule, sub-regional and issue-specific planning should be used to provide more specific guidance for operational land-use decisions in order to achieve objectives and respect constraints that are clearly established at the regional level.

4.4 Coordination of Land-Use Decision Making

The LUF does not clearly describe how sub-regional and issue-specific planning and individual decisions on land and resource allocations and on project and activity approvals will be coordinated to ensure consistency with regional plans. Without attention to hands-on coordination, there is a risk that the integration achieved by setting land-use objectives at the regional scale will be undermined by the persistence of fragmented operational decision making.⁶⁷

As noted above, the legal hierarchy is established through a requirement that operational decisions be consistent with regional plans. Management thresholds and limits in regional plans, for example, must be respected by lower-level decisions. This formal legal requirement may not be sufficient to achieve intended outcomes, however, without a supportive institutional structure and effective accountability mechanisms. The need for institutional coordination and a point of accountability at the operational level is discussed below in Section 5.4.2. Accountability, and enforcement mechanisms are discussed in Section 7.

4.5 Policy Tools

The LUF recognizes the need for new policy tools to achieve the land-use outcomes that Albertans want. In particular, it promises a new strategy to promote conservation and stewardship that will use both market-based instruments and more traditional regulatory approaches.⁶⁸ The LUF lists examples of new policy tools that could be used to achieve better conservation and stewardship on both private and public lands: ecological tax reform, deposit-refund systems, tradable permits, incentive and liability mechanisms, information disclosure, transfer of develop credits, land trusts and conservation easements, and tradable disturbance rights.

Legal authority will be required to implement all of these policy tools. Even the “market-based” or “economic” instruments will require a significant legal and regulatory framework in order to operate effectively. All markets require proper regulation to address areas of market failure and to protect the public interest — as illustrated most recently by the spectacular failure of lightly-regulated components of the global financial market. In the area of land and resource use, where non-market values are often important, regulatory oversight of markets and market mechanisms is particularly important.

⁶⁷ Kennett and Schneider, *Making it Real*, 29–32; Roger Creasey, “Moving from Project-Based Cumulative Effects Assessment to Regional Environmental Management” in Alan J. Kennedy, ed., *Cumulative Environmental Effects Management: Tools and Approaches*, Papers from a symposium held by the Alberta Society of Professional Biologists (Edmonton: Alberta Society of Professional Biologists, 2002), 9.

⁶⁸ LUF, 33.

The need for new tools for conservation and stewardship is, of course, a response to the failure of the existing markets that drive many land-use decisions to reflect non-market values such as the ecological goods and services and the aesthetic, recreational and cultural values provided by Alberta's landscapes and ecosystems. While market mechanisms such as those proposed in the LUF can use price signals to influence some land-use decisions, the underlying regulatory requirements create the economic value that was previously discounted or ignore. Market-based instruments also require strong legal and regulatory underpinnings to reduce transaction costs, prevent cheating and to ensure the fairness and effectiveness of the system in achieving desired environmental and social objectives. LUF legislation should provide the legal authority to implement these new policy tools.

4.6 Aligning Other Legislation

The final pieces of the legal structure are consequential amendments to existing legislation. These amendments will be needed to reinforce the LUF's legal hierarchy by requiring that decisions are consistent with regional land-use plans. For example, as noted above, the legal mandates of quasi-judicial decision makers such as the Energy Resources Conservation Board should be modified to reflect the legal primacy of regional plans over project-specific decisions. Under the LUF, the Board's open-ended 'public interest' test will be circumscribed by the requirement that project approvals be consistent with regional plans.

Legislation governing other significant land-use decisions should also be modified to fit with the LUF. For example, greater transparency and public involvement in decisions about land and resource allocations — such as the issuance of mineral leases and timber rights — will be needed to ensure that proposed allocations can be evaluated for consistency with the applicable land-use plan.

Consequential amendments may also be needed to provide flexibility to adjust existing land and resource dispositions (e.g., mineral rights, water rights, timber quotas, forest management agreements) and approved land uses as part of the planning process. The LUF includes a brief paragraph on “lease-swapping and dealing with existing tenure rights in ecologically sensitive areas.”⁶⁹ It states that “new incentives could be developed to encourage the expeditious removal of industrial activities or hydrocarbon resources from legislated protected areas or lands with high conservation value.”⁷⁰ Existing legislation should be amended if it does not already contain sufficient flexibility to modify dispositions and approvals that unduly restrict planning options.

⁶⁹ LUF, 34.

⁷⁰ LUF, 34.

5. Establishing and Empowering Institutions

The new system for land-use governance will be established by LUF legislation. This topic is addressed in some detail in the LUF, which enumerates the key functions of Cabinet, the Land-use Secretariat and the Regional Advisory Councils.⁷¹ These institutional mandates should be formalized in legislation that creates mandatory duties — not simply discretionary powers — and that builds in flexibility for the evolution of LUF institutions. There are also several major gaps in the proposed governance structure that should be filled.

5.1 Cabinet Oversight and Direction

Integrated regional planning involves the essentially political tasks of defining outcomes, setting priorities and making trade-offs among competing land and resource uses. While this process should be based on sound science and inclusive stakeholder and public consultation, the ultimate decisions involve value judgments that are properly made by politically accountable decision makers at the highest level. The LUF therefore assigns final authority to approve regional plans to Cabinet.

Cabinet's specific functions are to⁷²

- provide provincial oversight of regional planning
- review and decide terms of reference for regional plans
- review and make final decisions on regional plans
- ensure integration of provincial land-use related policies
- ensure regional plans are implemented to achieve provincial outcomes.

This list provides a good starting point for the legal definition of Cabinet's role, but it should be enhanced in three ways.

First, as noted above in Section 3.2, LUF legislation should include a statutory commitment that integrated regional plans will be developed and approved for the entire province. Responsibility for fulfilling that requirement should be assigned to the LUF's lead minister.

⁷¹ LUF, 29.

⁷² LUF, 29.

Second, Cabinet's key functions should be framed as specific duties with accountability mechanisms, not broad discretionary powers. For example, Cabinet's oversight role and its obligation to ensure enforcement of regional plans could be linked to specific actions, such as an annual report on LUF implementation that would be issued by the responsible minister. LUF legislation should also define more clearly how Cabinet will ensure integration of provincial land-use policies. Cabinet's role in this area could be to issue provincial policy statements (see Section 4.1) and to respond to requests for policy guidance from Regional Advisory Councils. Accountability and transparency would be enhanced by a requirement that Cabinet issue written reasons for important decisions on LUF implementation.

Third, legislation should ensure that political leadership for the LUF and responsibility for the Land-use Secretariat is cross-ministerial in order to ensure effective integration of land-use decisions. Locating the LUF within a line department will make it difficult or impossible for regional planning to achieve neutrality from specific mandates and to overcome the silo mentality and tendency towards turf protection that are inherent in departmental cultures. The LUF should be a truly government-wide initiative, not subject to shifting priorities of a single department. Implementation should not depend on the relative strength of a line department at the Cabinet table, particularly given the experience in Alberta that environmental protection has consistently been trumped by economic development and energy interests within Cabinet.

It is also important, however, that the LUF not become a political orphan. The LUF will need a powerful champion in Cabinet who is able to maintain a cross-ministry perspective and provide political leadership and support for the Land-use Secretariat. Furthermore, Cabinet may want to delegate some of its responsibilities for oversight and policy development to a more specialized Cabinet Committee, particularly given the need for regular liaison with the Land-use Secretariat and the regional planning processes. The draft of the LUF released in May 2008 referred to a Cabinet Committee, but this structure was not mentioned in the final version. LUF legislation should authorize the designation of lead responsibility for the LUF to the Deputy Premier or to another Cabinet member acting in a capacity separate from his or her leadership of a line department. It should also authorize the establishment of an LUF Cabinet Committee, chaired by the LUF lead minister.

5.2 The 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 the 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 functions listed in the LUF should be included as legal duties of the Land-use Secretariat (see text box).

Functions of the Land-use Secretariat

- Support the development of terms of reference for regional plans.
- Lead the development of regional plans in conjunction with departments with an interest in land use (regional planning teams) and in consultation with the Regional Advisory Councils.
- Communicate with local planning bodies to clarify and interpret regional plans.
- Support policy reconciliation.
- Provide advice to regional bodies on provincial policy.
- Ensure effective management of cross-regional infrastructure and policy matters.
- Assist provincial departments, municipalities and other local authorities in reconciling their respective roles to the Land-use Framework.
- Provide administrative support to Regional Advisory Councils.
- Ensure application of cumulative effects models.

— Government of Alberta (2008)⁷³

5.3 Regional Advisory Councils

The government will appoint a Regional Advisory Council (RAC) to assist with the development of each regional plan. The LUF states that the RACs will “provide advice on addressing trade-off decisions regarding land uses and on setting thresholds to address cumulative effects.”⁷⁴ They will also advise the government on public and stakeholder consultation and participate in the consultation processes. The LUF states that the RACs will consist of members “representing the range of perspectives and experience in the region.”⁷⁵ The Land-use Secretariat will provide administrative and technical support for the RACs.

LUF legislation should authorize the creation of the RACs and describe their mandate. It should 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 and current employment of members. It should also require that the terms of reference governing the operation of each RAC will:

- provide broad scope for the RAC to advise the government on the development of the regional plan and the implementation of the LUF;
- ensure that the RAC has direct access to independent sources of information, modelling and analysis;

⁷³ LUF, 29.

⁷⁴ LUF, 29.

⁷⁵ LUF, 29.

- guarantee effective sharing of relevant government information with the RAC;
- establish the presumption that information provided to the RAC will be publicly available, while allowing for confidentiality in exceptional circumstances;
- provide for the confidentiality of internal RAC discussions, while ensuring that RAC members can continue to participate effectively in public discussions about the regional plan and the LUF;
- include a commitment by government to provide timely responses to requests from the RAC for policy clarification or direction;
- guarantee that dissenting opinions are fully and accurately recorded in RAC documents;
- provide for the public release of the RAC's advice to government; and
- require government to provide written reasons for decisions not to follow advice from the RAC.

LUF legislation should also provide for honoraria for meeting preparation and participation and compensation for out-of-pocket expenses for RAC members who require funding.

5.4 Filling Institutional Gaps

The drafting of LUF legislation provides an opportunity to consider in more detail the governance structure of the LUF. The current proposal for LUF governance has three significant institutional gaps that should be filled.

5.4.1 Provincial Advisory Council

A major gap in the LUF's governance structure is the absence of institutionalized stakeholder involvement in the establishment of provincial land-use policies. As recommended by the multi-stakeholder Planning and Decision-Making Working Group, convened by Minister Morton to provide comments on the Draft LUF, a Provincial Advisory Council should be established with sectoral representation balanced across the three pillars of the triple bottom line.⁷⁶ The role of this group would be to provide input on the selection of provincial indicators, the reconciliation of conflicting policies, the articulation of provincial outcomes, and the development of terms of reference for regional plans. Structured debate within this group would help to frame issues, identify areas of broad agreement, and generate policy and management options for resolving points of conflict and other challenges.

In addition to bringing public values into the provincial land-use planning process, the Provincial Advisory Council would also help to move information in the other direction. It would do so by directly reporting to individual sectors and by serving as a public window into the process, providing the transparency that the LUF will need to achieve broad acceptance and support.

This type of institutionalized stakeholder and public input at the level of provincial land-use policy was recommended by the Commission on Planning and Development Reform in Ontario. The Commission proposed an amendment to the *Planning Act* to provide for the establishment of

⁷⁶ Draft Interim Report of the Planning and Decision-Making Working Group to the Minister of Sustainable Resource Development (June 10, 2008), 5, 7, 11–12.,

a Provincial Planning Advisory Committee to undertake consultation and provide advice on provincial planning policies. The Commission suggested that membership in the committee be limited to 20 members representing the diverse interests in the planning system such as the development industry, municipalities, community groups, farming groups, environmental groups, Aboriginal interests, planners and architects. The responsibilities of the committee would be to:⁷⁷

- review proposals for policy referred by the Minister or submitted by the public;
- recommend to the Minister, for approval, an annual agenda of planning policy priorities for the committee;
- direct the preparation of background studies, directing assigned staff and retaining consultants, as needed;
- direct public consultation on policy matters, using special committees, as needed, with diverse interests and expertise in particular policy issues;
- review the results of the public consultation and then provide feedback to the public on the recommendations made (explaining how public input was considered);
- make recommendations to the Minister for provincial policies, providing supporting rationale; and
- review the effectiveness of existing planning policy.

The Commission recommended that this committee operate on an ongoing basis, with members appointed for fixed terms. Per diems and expenses should be paid where appropriate and support should be provided by the planning ministry and other departments as appropriate. An administrative staff and separate budget for the committee were also recommended.

The LUF's Planning and Decision-Making Working Group and the Commission on Planning and Development Reform in Ontario provide compelling arguments for a multi-stakeholder body to provide advice on provincial land-use policy. LUF legislation can fill this gap by establishing a Provincial Advisory Council.

5.4.2 Regional Land-Use Manager

The second major governance gap in the LUF is at the level of operational integration of land-use decisions.⁷⁸ Achieving the outcomes defined in regional land-use plans will require legal and institutional mechanisms to coordinate land uses and to provide a focal point for accountability.

Operational integration could be achieved through a designated regional land manager with the authority and capacity to coordinate multiple land uses. Single agencies could also be created for key land-use functions, such as the allocation of resource rights (e.g., forestry and oil and gas rights) and the review and regulation of proposed projects and activities. As noted above in Section 2.4, the leading sustainability legislation such as New Zealand's *Resource Management Act* establishes an integrated review and permitting process for land and resource uses.

⁷⁷ Commission on Planning and Development Reform in Ontario, 40–41, 43.

⁷⁸ Kennett and Schneider, *Making it Real*, 29–32.

While desirable in principle, the establishment of integrated land-use institutions at the operational level may not be possible in the initial stages of the LUF. At a minimum, the LUF legislation should provide a legal framework for improved operational coordination through a combination of oversight by the Land-use Secretariat and the establishment of a senior inter-ministerial committee for each planning region with responsibility, authority and accountability for operational integration.

5.4.3 Land-Use Appeal Tribunal

The third major institutional gap in the LUF is the absence of an arm's-length appeal mechanism with specialized expertise in land-use planning. Recommendations for filling this gap are discussed below in Section 7.3.

6. Rules of the Game for Regional Planning

LUF legislation should set out the guiding principles and key elements of the regional planning process. It should also provide direction for the elaboration of more detailed procedural guidance through the terms of reference for regional plans and the design of public and stakeholder consultations.

6.1 Planning Process

The key elements of the planning process should be described in LUF legislation:

- duty of the responsible Minister to initiate regional planning for each planning region;
- appointment of the Regional Advisory Council (RAC) for each regional plan;
- release of draft terms of reference for each regional plan and opportunity for comments from the RAC and the public;
- finalization of terms of reference for each plan;
- collection and release of key information and analysis for regional planning, including ‘state of the region’ reports and cumulative impact modelling;
- opportunity for initial public and stakeholder submissions on the planning process;
- release of RAC recommendations;
- release of the draft plan for public and stakeholder comment;
- finalization of the plan in response to comments on the draft;
- approval of the final regional plan by Cabinet.

Including this procedural checklist in LUF legislation will help to ensure high and consistent standards for regional planning. The core elements should be mandatory, with flexibility to add other components through the terms of reference for each plan.

6.2 Terms of Reference for Regional Plans

The terms of reference for regional plans have two important functions: translating provincial land-use policy to the regional context and providing detailed procedural direction to the planning team and the RAC. LUF legislation should identify and support these functions.

Regional planning involves combining top-down policy direction and bottom-up knowledge, values and priorities into a set of specific land-use strategies, guidelines and limits designed to achieve particular outcomes. While each plan should be shaped by community and stakeholder input, planning cannot occur in a policy vacuum. LUF legislation should state that the terms of reference for regional plans will define the government’s principal interests and priorities for

land-use in the region and reconcile competing policy objectives. Terms of reference should clearly identify the policies and legislation that will guide and constrain planning decisions.

Setting policy direction for regional planning may include identifying important environmental, social and economic end points to provide direction to government officials on the planning team and to promote constructive and focused multi-stakeholder discussions within the RAC. Without guidance on desired end points and the credible threat of unilateral government action, maintaining the status quo becomes the default position for multi-stakeholder processes and blocking consensus rather than constructively searching for a path forward becomes a winning strategy for many participants. This tendency to frustrate policy innovation and privilege the status quo is reinforced if membership in the multi-stakeholder body is numerically weighted towards entrenched economic interests — as is typically the case in Alberta — and if these interests have privileged access to decision makers outside of the multi-stakeholder forum. If the government is looking to RAC members to engage in constructive dialogue on innovative land-use options, the terms of reference must specify end points and state clearly that the status quo is not an option.

LUF legislation should state that terms of reference will identify important regional outcomes that reflect key provincial policy objectives in areas such as:

- standards for air quality, water quality and instream flow, and biophysical attributes of landscapes;
- levels of industrial access to certain renewable or non-renewable resources;
- recreational and aesthetic attributes of landscapes;
- patterns of residential development and associated transportation infrastructure (e.g., limits on urban and rural sprawl, defined transportation corridors, a system of public transportation nodes linked to areas of population density);
- conditions required for viable populations of specific wildlife species (e.g., core habitat and access management to maintain grizzly bear or caribou); and
- targets for different types of land use, such as percentages of land to be allocated according to the triad approach of zoning for protected areas and for extensive and intensive development or limits on the conversion and fragmentation of agricultural land.

While these end points may be modified in response to public and stakeholder input before the regional plan is finalized, there is little point in embarking on a planning process without any idea of the outcomes that are likely to be endorsed by Cabinet.

Finally, LUF legislation should state that terms of reference will address procedural issues such as the time lines for completing the plan, broad expectations regarding public and stakeholder consultation, the tasks to be completed in the planning process, topics to be addressed in the regional plan, the approval process for the plan, and the budget for the planning process.

6.3 Interim Measures

Interim measures may be needed 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 (e.g., northeast Alberta, Eastern Slopes). The LUF's failure to mention

interim measures is a major omission because of the risk that land use decisions made before planning is completed will foreclose options and undermine the planning process itself. Implementation of the LUF may actually increase the risk of decisions that pre-empt land-use options since the commitment to planning could increase incentives for development, particularly if proponents of development believe that the likelihood of obtaining land and resource allocations or project approvals will diminish once plans are completed.

This problem is far from hypothetical, having already occurred in other land-use planning processes in Alberta. The most recent example is the issuance of mineral leases in candidate protected areas for the oil sands region of northeastern Alberta that were under consideration by the multi-stakeholder Sustainable Ecosystems Working Group, operating under the auspices of the Cumulative Environmental Management Association.⁷⁹

Provisions authorizing temporary restrictions on land use during the planning process are a relatively common feature of planning legislation. For example, Queensland's *Integrated Planning Act* provides for the use of a temporary local planning instrument that suspends or amends normal planning rules when the responsible Minister is satisfied that "there is a significant risk of serious environmental harm or serious adverse cultural, economic or social conditions occurring in the planning scheme area" and that the delay in addressing this issue using the Act's standard planning process to amend the planning scheme would increase that risk.⁸⁰ Ontario's *Planning Act* also authorizes the use of interim control by-laws to impose temporary restrictions on land uses within defined areas when a review or study of land-use planning policies has been ordered.⁸¹

Interim measures have also been legislated directly when planning processes are established to address significant land-use pressures and when the likelihood of future land-use restrictions may create incentives to accelerate the very development patterns that are of concern. For example, an important early step in regional planning and growth management in the Golden Horseshoe area of southern Ontario was the *Greenbelt Protection Act*, which imposed temporary restrictions on re-zoning of land in order to prevent further development from occurring in environmentally significant areas during the planning process.⁸²

The LUF legislation should enable the responsible Minister to implement interim measures. It should include an illustrative list of these measures and a well-defined legal and policy process for establishing and enforcing them. Options for interim measures include:

- adjustments to land and resource tenures to alter the timing of development
- incentives and requirements to minimize new disturbance and other impacts
- restrictions on land re-zoning during the planning process
- temporary limitations on new land and resource dispositions and on project approvals
- interim targets and thresholds for industrial activities and levels of impact

⁷⁹ Kennett and Schneider, *Making it Real*, 46–47.

⁸⁰ State of Queensland, *Integrated Planning Act*, s. 2.1.10.

⁸¹ Government of Ontario, *Planning Act*, s. 38(1).

⁸² Government of Ontario, *Greenbelt Protection Act*, <http://beta.canlii.org/en/on/laws/stat/so-2004-c-9/latest/so-2004-c-9.html>.

- suspension of policy initiatives that may be inconsistent with the principles and policy direction of the LUF (e.g., the Department of Energy’s proposal for shallow rights reversion).⁸³

Interim measures that modify decision-making processes, alter previous land-use decisions and have implications for the activities of land users may need to be implemented through legal instruments. LUF legislation should therefore provide authority for legally binding interim measures.

Interim measures could be implemented when planning processes are initiated and incorporated into the terms of reference for regional plans. Flexibility is needed, however, to implement interim measures even earlier in areas facing acute development pressures or where there is evidence that the prospect of planning is fueling a land rush. In addition, the Minister should have the power to implement interim measures during the development of a plan to address unforeseen issues that threaten to undermine the planning process. This eventuality should be anticipated by a provision in the legislation that authorizes Regional Advisory Councils to recommend the adoption of interim measures by the Minister.

6.4 Content of Regional Plans

LUF legislation should establish the key mandatory elements of good planning while allowing room for experimentation and adjustment. The LUF includes a partial list of the elements to be included in regional plans that should be expanded and incorporated into LUF legislation.⁸⁴ In addition, the government has promised “to develop a process to identify appropriate thresholds, measurable management objectives, indicators and targets for the environment (air, land, water and biodiversity) at the regional levels and, where appropriate, at local levels.”⁸⁵ LUF legislation should provide specific direction for implementing the government’s commitment to managing cumulative environmental impacts at the regional level. Plans should be required to:

- apply the vision, principles and outcomes of the LUF to the region;
- 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 effects modelling to show possible trends in indicators of environmental quality under different land-use scenarios;
- describe a broad vision and specific outcomes for the region;
- align provincial strategies and policies at the regional level;
- determine specific trade-offs and appropriate land and natural resource management for specific landscapes within a region

⁸³ Kennett and Schneider, *Making it Real*, 37–38.

⁸⁴ *LUF*, 26.

⁸⁵ *LUF*, 31.

- 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 cumulative effects management approach for the region and identify targets, management thresholds and absolute limits to control the intensity and impacts of land uses and to protect air, water (quality and instream flow), terrestrial ecosystems, landscape attributes and biodiversity where cumulative effects modelling shows that continued decline in indicators of environmental quality is likely to occur under plausible land-use scenarios;
- provide direction and context for any sub-regional and issue-specific plans and, where appropriate, provide direction for the completion of these plans;
- establish indicators and monitoring programs to evaluate the success in achieving outcomes specified in plans.

In addition to these core requirements, LUF legislation should provide broad authority for Cabinet to direct land and resource management through regional plans. This authority could be granted through a detailed list of elements that could be included in regional plans, followed by a ‘catch-all’ provision to allow the inclusion of other components.

6.5 Public and Stakeholder Participation

Effective public participation in all levels of decision making under the LUF will contribute to the quality and legitimacy of decisions. LUF legislation should provide the legal framework for public participation by establishing key principles and specific measures for promoting the involvement of Albertans in policy development and planning. The act could also authorize the establishment of more detailed procedural rules and a Code of Conduct governing public and stakeholder participation.

6.5.1 Promoting Participation at All stages of Decision Making

Public and stakeholder participation should be encouraged in policy development, planning processes, operational decisions and land-use appeals (i.e., appeals of land-use decisions on the grounds that they are inconsistent with applicable plans). LUF legislation should establish procedural requirements at each stage.

The LUF states that Cabinet “will ensure integration of provincial land-use related policies” but provides little detail on the development of the policies that will guide planning and operational decision making. There is a risk that this critically important part of the LUF’s land-use system will occur through ‘black box’ decision making and that an ad hoc and fragmented approach to land-use policy will seriously impede integrated planning and operational decision making.

This issue was addressed by the Commission on Planning and Development Reform in Ontario, which concluded: “Considerable dissatisfaction exists with the present system of provincial policy development, which is characterized by confusion about what policy is, how it is

developed, and how it gets expressed.”⁸⁶ It argued that this policy must be “developed in a manner credible to those affected” and identified the characteristics of a policy-making process that is “fair, open, accessible, accountable, coordinated and effective” (see text box).⁸⁷ The Commission recommended that this process be legally entrenched through an amendment to the *Planning Act* that would require the responsible minister to undertake public consultation, including providing notice and a fair opportunity for comment, before issuing land-use policy statements.

Recommended Process for Developing Provincial Land-Use Policy

1. Provide notice of intent to formulate a policy about a particular subject, including the suggested timetable for decision-making and a description of the process to be followed.
2. Allow opportunity for early comment.
3. Where appropriate, create a small working committee (or committees) to help produce background studies and a draft policy.
4. Publish a draft policy document and background studies addressing options.
5. Provide opportunities for public review, including, where appropriate, public meetings.
6. Make a recommendation to Cabinet for decision.

— Commission on Planning and Development Reform in Ontario, 1993⁸⁸

There is a significant risk that the development of provincial land-use policy to guide the LUF in Alberta will suffer from deficiencies similar to those identified in Ontario. LUF legislation should require that proposed provincial policies be published in draft form for stakeholder and public comment. A written notice and comment process could be used for some policies, but the responsible minister should be authorized to hold public hearings to obtain input on important and contentious issues. Another mechanism for stakeholder involvement — recommended by the Planning and Decision-Making Working Group that the government convened to comment on the draft LUF — is the establishment of a multi-stakeholder Provincial Advisory Council to assist the Land-use Secretariat with the development and, where necessary, the reconciliation of provincial land-use policies. This option is discussed above in Section 5.4.1.

LUF legislation should also provide guidance on public and stakeholder participation in the planning process. The LUF’s Regional Advisory Councils 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 mechanisms 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 development, periodic review and amendment of regional plans. These requirements should include notification requirements for proposed policies, plans and plan amendments, procedures and time lines for public and

⁸⁶ Commission on Planning and Development Reform in Ontario, 39.

⁸⁷ *Ibid.*, 39.

⁸⁸ *Ibid.*, 40.

stakeholder involvement, access to information, procedure for written submissions, public meetings, and a publicly accessible electronic registry of submissions.

Operational land-use decisions will be made by provincial departments and agencies and by municipal governments. Public and stakeholder participation at this stage will follow procedures specific to each type of decision making. Effective participation in land-use appeals will depend on rules for standing and participant funding.

6.5.2 Standing and Participant Funding

Broad rules governing ‘standing’ or eligibility to participate and access to funding to prepare submissions will be needed to allow community-based, landowner and public interest organizations to represent their members effectively in policy development, planning processes and land-use appeals. Without appropriate standing rules and funding, important segments of Alberta society may be excluded from the LUF process and the playing field will be tipped decisively in favour of economic interests with deep pockets and the ability to retain costly legal advisors and professional lobbyists.

Alberta already has experience with standing and participant funding rules for regulatory and appeal tribunals. The principles that individual Albertans and the community and public interest organizations that represent them are entitled to access to decision-making processes that affect their interests and that funding for interveners may be needed in some circumstances to level the playing field are therefore well established in Alberta. However, the variations on the ‘directly and adversely affected’ test that are used by the Energy Resources Conservation Board (ERCB), the Natural Resources Conservation Board and the Environmental Appeal Board tend to limit eligibility for funding to individuals whose immediate economic interests are directly affected by proposed projects. For remote projects on public lands, there may be no individuals or organizations who meet the test for standing.

The ERCB, for instance, has denied standing to landowner organizations, broad-based environmental groups and even municipal governments that sought to intervene on proposed energy projects. These are precisely the types of organizations that can bring distinctive environmental, social and economic perspectives to the table in policy and planning discussions and that can effectively represent regional interests in both the development and enforcement of regional plans. LUF legislation should establish standing rules that allow these types of organizations to participate and a funding system for groups that lack the financial and human resources to prepare submissions. Different rules might be established for policy development, planning processes and land-use appeals.

The rules for public and stakeholder involvement are often described in some detail in planning legislation. New Zealand’s *Resource Management Act* establishes extensive rights to participate in decision making on both policy statements and plans.⁸⁹ Queensland’s *Integrated Planning Act* provides detailed direction on the process for making or amending plans, including specific requirements for public notice and consultation.⁹⁰

⁸⁹ New Zealand Ministry for the Environment, *Your Guide to the Resource Management Act* (August 2006), 54–62, <http://www.mfe.govt.nz/publications/rma/rma-guide-aug06/index.html>.

⁹⁰ State of Queensland, *Integrated Planning Act*, Schedule 1.

LUF legislation should follow these models and provide specific guarantees of effective public and stakeholder consultations on regional plans. A funding mechanism should be established to provide grants to organizations that can demonstrate both a bona fide interest in the policy or planning process and a need for financial support to prepare submissions.

Standing and funding rules should also be enacted for land-use appeals. While restrictions to prevent abuse of the appeal process are appropriate, organizations with a legitimate interest in ensuring the enforcement of regional plans should have access to the appeal process. Eligibility criteria clearly need to cast the net considerably wider than Alberta's existing directly and adversely affected test.

A good model for intervener funding was proposed by the Commission on Planning and Development Reform in Ontario for appeals to the Ontario Municipal Board (OMB). The Commission recommended that intervener funding be provided for only certain types of applications and that the OMB should be able to reject an application for funding on the basis of a written submission without a hearing. However, it stated that funding should be awarded to an individual or group when the appeal or other decision "affects a significant segment of the public and concerns the public interest and not just private interests."⁹¹ The Commission proposed the following more specific criteria for eligibility:⁹²

- The intervener represents a clearly ascertainable public interest, consistent with provincial policy, that should be represented at the hearing.
- Separate and adequate representation of the interest would assist the Board and contribute substantially to the hearing.
- The intervener does not have sufficient financial resources to enable it to represent the interest adequately.
- The intervener has made reasonable efforts to raise funding from other sources.
- The intervener has demonstrated concern for this issue at the municipal level.
- The intervener has attempted to join together with other objectors.
- The intervener has a clear proposal for the use of the funds.
- The intervener has appropriate financial controls to ensure that funds are spent for the purposes of the award.
- Representation of the intervener would assist the Board and contribute substantially to the hearing.

The LUF legislation should adopt this approach to standing and intervener funding for land-use appeals under the LUF. The key principles and criteria for public and stakeholder participation should be set out in legislation, along with an authorization for the responsible minister to establish more detailed procedures by regulation if necessary.

⁹¹ Commission on Planning and Development Reform in Ontario, 120.

⁹² *Ibid.*, 120.

6.5.3 Access to Information

Access to the information used for planning decisions is essential for effective public and stakeholder involvement. The LUF states that decision making “will be informed by science, evidence and experience” and will be “collaborative and transparent”.⁹³ It also recognizes that “accurate, timely and accessible information is essential to good land-use planning and decision-making.”⁹⁴

LUF legislation should include specific guarantees to ensure that members of Regional Advisory Councils, stakeholders and the public have access to the best available independent science and scenario modelling for land-use planning. Government information relevant to planning should be publicly available unless there is a compelling case for confidentiality. The risk that information will be subject to political or bureaucratic filters should be minimized by legal requirements of access to information.

6.6 Amendments to Plans

Flexibility mechanisms are necessary for any planning system to ensure responsiveness to changing circumstances. Amendments to plans may be considered when there is new scientific information or a significant change in the environmental, social or economic context that calls into question key assumptions underlying the plan. A major policy change or a land-use proposal that was not previously contemplated could also lead to requests for amendment. LUF legislation should establish a process for considering plan amendments that provides the necessary flexibility while ensuring due process so that that legitimate public and stakeholder interests are considered before plans are amended.

The procedures established by LUF legislation for plan amendment will be a key testing ground for the government’s commitment that “Decision-making criteria and processes will be clearly defined, consistently followed, and not subject to political expediency.”⁹⁵ While authority to make amendments rests with Cabinet as the approval body for regional plans, a black-box process that permits ad hoc amendments in response to development pressures will rapidly undermine the effectiveness and credibility of the LUF.

At a minimum, the LUF legislation should establish a notice and comment process for all plan amendments and require a formal assessment of the environmental, social and economic implications proposals for significant changes. These processes should include public notice requirements and time lines for proposed plan amendments, a process for public, stakeholder and Aboriginal consultation that includes public hearings on amendments that significantly affect outcomes or land-use strategies identified in the plan, and a requirement for written reasons to accompany each amendment. These reasons should explain why the amendment was approved, describe any inconsistency with the original intent or specific requirements of the plan, and explain the implications of the amendment for the outcomes, including the quantitative limits on impacts, that are specified in the plan.

⁹³ LUF, 16.

⁹⁴ LUF, 38.

⁹⁵ LUF, 16.

6.7 Periodic Review and Updating of Plans

LUF legislation should also include the timelines for reviewing and updating plans that are set out in the LUF: an implementation report and update every five years for each plan and a complete review of each plan every 10 years.⁹⁶ Including these time lines in legislation is important because experience with Integrated Resource Planning on public lands in Alberta shows that policy commitments to complete and regularly update plans are easily ignored. The effectiveness, efficiency and credibility of the LUF depend on the timely completion of plans for all regions and adherence to a schedule for reviewing and updating plans so that they remain responsive to changing circumstances.

The process for reviewing and updating plans should also be specified in LUF legislation. It should incorporate the key elements of the original planning process described above and should include a systematic assessment of the success of the plan in achieving specified outcomes.

⁹⁶ *LUF*, 26.

7. Accountability and Enforcement

The LUF's hierarchy of policy, planning and operational decisions involves both political and administrative components. This division is typical of land-use planning systems and has important implications for accountability and enforcement mechanisms.⁹⁷

Broad policy direction and the approval and amendment of regional land-use plans are Cabinet functions, subject to political accountability. While the ultimate accountability mechanism for these decisions is the ballot box, monitoring and reporting mechanisms are appropriate to evaluate the extent to which policy and planning objectives are being achieved. Administrative decisions regarding land-use approvals are the appropriate focus of a formal appeal process to ensure consistency with regional plans. Arm's-length oversight mechanisms, such as a compliance ombudsman and an independent implementation audit for the LUF, would also contribute to transparency and accountability and support the government's commitment to continuous improvement and a systems approach to monitoring and improving land-use decisions.⁹⁸

7.1 Outcome Monitoring and Reporting

The LUF states that “a system of monitoring, evaluation and reporting is required to determine if our land-use policies are achieving desired outcomes.”⁹⁹ Regional plans may address the selection of indicators and the establishment of monitoring programs that correspond to the particular outcomes that they identify, but LUF legislation should provide legal requirements and authority to establish an effective monitoring process for the LUF as a whole.

One important role of legislation is to establish principles for effective monitoring. The LUF's endorsement of the Alberta Biodiversity Monitoring Program as an example of a key program to support monitoring and evaluation provides some useful guidance on this topic. The LUF states that this program “is a joint undertaking of government, industry and non-government interests for the purposes of developing and implementing a credible, arm's-length biodiversity monitoring and reporting system for the province.”¹⁰⁰ Biodiversity is only one outcome that will require monitoring under the LUF, but the principle of multi-stakeholder involvement in a credible, arm's-length monitoring process should be included in LUF legislation to guide other monitoring programs.

⁹⁷ Commission on Resources and Environment, *Planning for Sustainability*, 91.

⁹⁸ *LUF*, 39.

⁹⁹ *LUF*, 38.

¹⁰⁰ *LUF*, 38.

The Land-use Secretariat should support outcome monitoring and could be given reporting responsibilities. In addition to issuing five year reports for each plan as part of regular updating, the Land-use Secretariat should issue annual reports on the status of LUF implementation, including the results of monitoring programs.

7.2 Compliance Monitoring by an LUF Implementation Ombudsman

Monitoring compliance with regional plans will also be necessary to ensure effective implementation of the LUF. As with outcome monitoring, an arm's-length mechanism should be established to ensure credibility. LUF legislation could establish an independent LUF ombudsman to initiate periodic compliance audits and to investigate concerns submitted by individual Albertans or stakeholder groups. Guarantees of independence, the power to obtain access to relevant information, authority to issue compliance reports and recommendations, and the process for handling public and stakeholder complaints should be included in legislation. The ombudsman's findings would be advisory only, but would be released to the public. This compliance monitoring function could complement, but should not replace, the formal land-use appeal process and the independent implementation audit that are discussed in the following sections.

Independent Oversight

A fundamental safeguard in our society is that there be independent oversight of the fairness and effectiveness of government administration. This is reflected in offices such as the Auditor General, the Ombudsman and special purpose commissions of inquiry. In the highly sensitive area of land use and resource and environmental management, such independent oversight is also necessary to establish the required level of public confidence.

— BC Commission on Resources and Environment, 1994¹⁰¹

7.3 Appeal Process for Land-Use Decisions

The legal enforceability of regional plans requires an appeal process to challenge sub-regional and sector-specific plans and operational land-use decisions on the grounds of consistency with the applicable plan. Options for appealing land-use decisions within planning systems include¹⁰²

- relying on internal administrative review
- relying on existing appeal mechanisms for land-use decisions (where available)
- establish an independent appeal body with land-use expertise
- combine appeal powers with judicial review
- allow for appeals to the political arm of government.

¹⁰¹ Commission on Resources and Environment, *A Sustainability Act for British Columbia*, 50.

¹⁰² Adapted from Commission on Resources and Environment, *Planning for Sustainability*, 92.

The LUF currently proposes that compliance issues relating to regional plans “will be resolved within existing review and appeal systems.”¹⁰³

There are three problems with this approach. First, there may be no appeal mechanisms for certain land-use decisions that could be challenged for failure to comply with regional plans. For example, it is unclear how administrative decisions relating to resource allocation, such as decisions to lease mineral or forestry rights, could be appealed.

Second, even where appeal mechanisms exist, the scope of issues that they can consider and the rules governing standing to use them may be unduly restrictive. For example, the eligibility rules for participation in ERCB hearings on proposed energy projects will limit who is entitled to appeal the Board’s decisions on the grounds that they fail to conform with the applicable regional plans. It is quite possible that individuals or organizations who are not ‘directly and adversely affected’ by a proposed project, and therefore do not have standing to trigger an ERCB hearing, may nonetheless have a strong and legitimate interest in ensuring that the Board’s decision on that project is consistent with the outcomes specified in the regional plan. In addition to their restrictiveness, the inconsistencies among existing appeal mechanisms on issues such as standing and time limits for appeals will be confusing for appellants who want to challenge land-use decisions.

Third, using existing appeal mechanisms runs contrary to the objective of integrated planning and decision making. Conformity decisions will be made by different appeal bodies, none of which will have specialized planning expertise. This process will make it difficult to develop a sophisticated and consistent approach to interpreting and applying regional plans. It may also lead to excessive deference to administrative decision making, particularly if the courts are faced with consistency issues.

The standard approach in most planning systems is to establish a specialized appeals tribunal to resolve disputes about the consistency of land-use decisions with higher level plans. Further appeal to the courts is typically allowed on points of law and jurisdiction.¹⁰⁴ Examples of jurisdictions with land-use appeal tribunals include New Zealand (Environmental Court), Queensland (Planning and Environment Court), New South Wales (Land and Environment Court) and South Australia (Environment Resources and Development Court). Land-use appeal tribunals are also standard features of municipal planning systems across Canada and in other jurisdictions.

The principal rationale for a separate land-use tribunal is to ensure that appeals are handled by a body with specialized land-use and planning expertise and with the capacity to develop a consistent and therefore relatively predictable approach to interpreting and enforcing land-use plans. It is also generally desirable to provide an administrative mechanism for dealing with consistency issues, so that appeals only go before the courts on questions of law. LUF legislation provides an opportunity to reconsider the proposal to rely on existing appeal mechanisms and to put in place a single appeal process where issues of compliance and plan interpretation are handled by a specialist land-use tribunal. The legislation should also provide for a consolidated

¹⁰³ LUF, 27.

¹⁰⁴ Commission on Resources and Environment, *Planning for Sustainability*, 65.

land-use and administrative appeal process where a decision is challenged on other grounds in addition to the failure to comply with the applicable regional plan.

The first step in the appeal process should be an internal review by the department or agency that issued the land-use decision. Challenges to land-use decisions should then go to an arm's-length appeal board. British Columbia's Commission on Resources and Environment (CORE) considered this function in some detail and adopted the recommendation from the province's Office of the Ombudsman that an appeal body:

“should be expert in the technical area being administered, and as well should have at least one member well versed in the principles of administrative law. The appeal body must be truly independent with wide powers to hear evidence, call witnesses, and, if necessary, to substitute its decision for that of the administrative body in appropriate cases.”¹⁰⁵

CORE recommended that “unresolved appeals based on contravention of plans or procedural flaws would go from internal review in a ministry to an external land use appeal board, with provision for review by a court only on questions of law or jurisdiction.”¹⁰⁶

As to Cabinet involvement in the appeal process, CORE concluded that the political role is best exercised in the areas of approving plans and issuing land-use policies, rather than intervening in specific appeals on land-use decisions. However, it suggested that some discretion for Cabinet review of decisions by the land-use appeal board may be advisable to ensure that any policy direction given by the board is appropriate. CORE also suggested that the land-use appeal board might play a useful role in reviewing technical or policy questions or mediating land-use issues referred to it by Cabinet.

If the government is unwilling to establish a separate land-use tribunal at the present time, LUF legislation should provide some clear guidance to the various bodies that may find themselves adjudicating land-use appeals once regional plans are approved. The legislation should also 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. Finally, it should provide a procedure for appealing important land-use decisions for which there is currently no appeal mechanism.

7.4 Independent Implementation Audit

Implementation of the legislative, policy, planning and operational components of the LUF will take several years and the new land-use system will continue to evolve. Experience in other jurisdictions shows that challenges are inevitable, modifications to the system will be required, and learning-by-doing will be an ongoing process. The commitment to integrated land-use policy, planning and operational decision making must continue over the long term if it is to yield the desired result of allowing Albertans to set and achieve objectives for Alberta's landscapes, watersheds and airsheds in the face of growing demands on finite land and resources.

¹⁰⁵ Commission on Resources and Environment, *Planning for Sustainability*, 93.

¹⁰⁶ *Ibid.*, 93.

Periodic implementation audits to provide an independent assessment of the LUF would be an effective way of assessing progress to date, gathering public and stakeholder input, and generating recommendations for improvements. An expert review could assess the success of the LUF in achieving the government's stated objectives, report on progress in delivering on specific commitments and meeting timelines, evaluate the effectiveness and efficiency of the LUF's institutions and decision-making processes, and comment on adherence to general principles of good governance.

The general objectives for implementation audits could be specified in LUF legislation, with more detailed guidance provided in the terms of reference for each audit. The independent audit could also include a broader sustainability assessment of land use in Alberta, using Genuine Progress Indicators and monitoring information to assess progress toward provincial and regional outcomes defined through government policy, the LUF's regional plans, and other indicators of environmental, social and economic well-being and sustainability.

The *Mackenzie Valley Resource Management Act* (MVRMA) in the Northwest Territories (NWT) provides a model for LUF legislation since it requires the responsible minister to "have an environmental audit conducted at least once every five years by a person or body that is independent."¹⁰⁷ That audit must review the effectiveness of environmental management and evaluate information collected and analyzed by the NWT's cumulative impact monitoring program, another initiative required by the Act. The responsible minister is required to fix the terms of reference for each audit after consulting with First Nations and the territorial government. The MVRMA also specifies that the audit report is to be submitted to the minister, who shall release it to the public. Finally, the MVRMA specifically requires the release of relevant information to the person or body that performs the audit.

The NWT's first environmental audit was completed in 2005.¹⁰⁸ A recently completed report on the NWT's regulatory system by Neil McCrank, former Chair of Alberta's Energy and Utilities Board, demonstrates the usefulness of the independent audit process. Mr. McCrank cited findings of the first audit in his analysis, included a lengthy summary of the audit as an appendix to his report, and recommended that the federal government begin the second audit process.¹⁰⁹ This endorsement of the value of the MVRMA's independent environmental audit by a former senior official of the Government of Alberta supports the use of this mechanism to provide feedback on LUF implementation, particularly since both the LUF and the MVRMA address the complex challenges of integrated land and resource management.

¹⁰⁷ *Mackenzie Valley Resource Management Act*, 1998, c. 25, s.148, <http://laws.justice.gc.ca/en/showdoc/cs/M-0.2///en?page=1>.

¹⁰⁸ See <http://nwt-tno.inac-ainc.gc.ca/nwt-a-eng.asp>.

¹⁰⁹ Neil McCrank, *Road to Improvement: Review of the Regulatory Systems Across the North*, Report prepared for Ministry of Indian Affairs and Northern Development (May 2008), 19–20, 28, 57–75, <http://www.ainc-inac.gc.ca/ai/mr/nr/m-a2008/ri08-eng.pdf>.

8. Next Steps for Developing Legislation

The LUF initiative has involved considerable public and stakeholder consultation, including an opportunity for both multi-stakeholder working groups and the general public to comment on a draft version of the LUF before it was finalized in December 2008. The development of LUF legislation, however, has occurred without a similar public process. Although the legislation is scheduled to be introduced in the provincial legislature in spring session of 2009, the only publicly available information on its content is a very brief section in the LUF.¹¹⁰

For reasons described in this report, LUF legislation will be a critically important determinant of the success of Alberta's new land-use system and it raises a multitude of important issues. Opportunities for public and stakeholder input into the development of this legislation should therefore begin as soon as possible. For this consultation to be useful, it should be based on an initial draft of the legislation. If a complete draft is not available in sufficient time to allow meaningful consultation and still meet the legislative timetable, comments could be solicited on an annotated outline or discussion paper explaining the legislation or on detailed drafting instructions.

Once the LUF bill is tabled in the legislature, sufficient time should be allowed for a thorough review by MLAs, stakeholder groups and members of the public. This process should include opportunities for the interested public to learn about the bill and submit written or oral comments. Input from stakeholder groups could be obtained by inviting submissions or by re-convening the multi-stakeholder working groups that provided advice in earlier stages of the LUF initiative.

Legislation to implement the LUF is far too important to be developed behind closed doors and then rushed through the legislature. Meaningful public and stakeholder consultation will result in a better final product and in a legal foundation for the LUF that is more likely to be understood and supported by Albertans.

¹¹⁰ *LUF*, 43.