

# Transfer of Development Credits in Alberta: A Feasibility Review

March 2008

Prepared by Guy Greenaway and Kimberly Good



MIISTAKIS  
INSTITUTE



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## EXECUTIVE SUMMARY

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Albertans have an intuitive sense that certain landscapes enhance their communities, that the loss of those valued landscapes diminishes the community, and that some activities threaten those landscapes. Alberta has seen an unparalleled rate of growth in recent years in population, economic activity and associated land uses, putting tremendous pressure for conversion on those valued landscapes. The complexity of addressing the basic dilemma of reconciling development and conservation activity is what has led many communities to the Transfer of Development Credits (TDC) tool. TDC programs allow municipalities to direct development away from areas which are threatened by it, and toward more suitable areas, using a municipal planning framework that allows development potential to be bought and sold on the open market, and perpetually extinguished on the valued landscapes. In the past 18 months, Alberta has seen a dramatic increase in conversations around this tool, often highlighting the need for a supportive provincial level strategy.

A Transfer of Development Credits (TDC) program has four fundamental components: 1) 'sending' areas, the areas targeted for increased conservation; 2) 'receiving' areas, the areas targeted for increased development; 3) a transfer system which facilitates the valuation and transfer of development potential from one parcel to another; and 4) an oversight body that develops and maintains the principles of the program and use of the tool.

In an operational sense, the five main steps in the development of a TDC program are:

1. Determine the need / desirability for a TDC program through consultation, background studies and a review of existing plans;
2. Initiate public consultation, especially with the affected landowner and development communities;
3. Identify TDC 'sending' and 'receiving' areas using existing zoning mechanisms;
4. Create a development 'credit' system which details transfer ratios, valuation, and potential banking mechanisms;
5. Identify mechanisms for extinguishing development potential on conservation parcels, such as conservation easements; and

The unique perspectives on a newly-forming tool breeds the potential for misunderstanding, so the authors have identified several common misperceptions and related challenges. Some of the 'myths' include the perception that TDC programs *must* have a credit bank, that land prices must be at a certain level, that TDC programs cannot protect agricultural landscapes, that they are not legal, that there is an 'average' price for credits, that the tool works in all circumstances, that zoning or land trusts can accomplish the same goals, and that programs can exist only in one municipality.

In particular, the consideration of the legal basis for TDC programs, in the absence of enabling legislation in Alberta, has been cause for significant discussion. Kwasniak (2004) conducted an Alberta-based comprehensive review of all the TDC program fundamentals and components, including the considerations of jurisdiction, permitting uses, establishing sending/receiving areas, transferring density, and restricting development. She concluded that there were no legal barriers, though some challenges did exist in formulating programs in the absence of statutory authorization.

The potential to address the vexing issues around reconciling development and conservation has led several Alberta municipalities to explore the tool. The City of Calgary, Cypress County, Wheatland County, Red Deer County, Beaver Hills Initiative, and Municipal District of Bighorn have all explored or implemented some form of TDC. The Canada West Foundation, Government of Alberta, Agriculture and Food Council of Alberta, and Agriculture and AgriFood Canada have all initiated comprehensive investigations of the tool. And the Alberta Association of Municipal Districts and Counties (AAMDC) and Alberta Urban Municipalities Association (AUMA) have both passed resolutions in favour of pursuing the tool.

In February of 2007, the authours had the opportunity to visit and review in depth four different successful Transfer of Development Rights (TDR) programs in the United States: Larimer County, Colorado; Boulder County, Colorado; Montgomery County, Maryland; and Calvert County, Maryland. A review of the those programs highlighted key lessons learned in each program, including the relative difficulty in establishing receiving areas, need to properly balance sending site and receiving site opportunities, need to manage 'not in my back yard' sentiments, value of local champions, potential role of incentives, prevalence of complementary programs integral to success, importance of clearly identifying program goals, and variety of mechanisms for establishing credit systems.

Based on a review of the American programs, conversations with Alberta municipalities, and a review of the literature, a preliminary assessment of the conditions for success in Alberta included considerations around engaging key stakeholders, catalyzing support at the state/provincial level, properly-conceived credit systems, connecting program goals to pre-existing community values/vision, generating attractiveness for both developers and conservationists, maintaining flexibility and stability, ensuring equity and fairness, and supporting/coordinating with complementary programs.

From a review of both the American programs researched and the current initiatives and discussions in Alberta, the authours feel strongly that there is an important role for the Government of Alberta to play in supporting the development of the Transfer of Development Credits tool in our province.

That role should have at least the following two components:

- Development of enabling legislation for Transfer of Development Credits programs in Alberta; and



- Technical and financial support for municipalities seeking to develop and implement TDC programs.

In the absence of – or in conjunction with – enabling legislation and technical/financial support, at a minimum the provision of strong policy indicators would be vital in assisting the application of the TDC tool in Alberta. Conversations with Alberta municipalities indicate a nervousness about moving forward with implementing TDC programs, which would be alleviated by provincial-level policy indicators. As well, there are great opportunities for the Government of Alberta to play a role in augmenting the effectiveness of TDC programs across the province through stipulations and opportunities built into such legislation.

Enabling legislation should be guided by the principles of putting control of TDC programs should be in the hands of municipalities, locating legislation within the Municipal Government Act (or at a minimum directly coordinating with it), focusing on sustainability of landscapes, grandfathering existing programs, and seeking to be as incentive-based as possible. The legislation itself should feature TDC-specific easements, the promotion of comprehensive conservation and development planning, establishment of stakeholder advisory groups, support for interjurisdictional TDC programs and TDC program credit ‘banks’, inclusion of third-party TDC easement holders, requirements for TDC-specific public consultation, flexibility in determining TDC administrative body, and a Provincial-level dispute resolution process.

As well as the creation of enabling legislation, provision of technical and financial support for municipalities developing TDC programs is a critical role for the Province. The authors suggest a series of potential strategies which could be undertaken by the Government of Alberta, including:

- Technical expertise and training services, especially in the areas of incentives, stakeholder advisory groups, and multi-jurisdictional TDC structures;
- Funding and grant support, including funds for start-up, plan development (TDC plans, areas of significance, sustainability plans), education and awareness, and receiving area infrastructure;
- Technical resources, including circulation of materials on real estate market assessments, TDC credit valuation, measuring ‘value’ in landscapes, sending/receiving area determination, and/or template TDC easements;
- Administrative support where needed and practical, including multi-jurisdictional framework administration, provincial TDC credit bank, identification of third party land trusts, and arbiter/dispute resolution process; and
- Support for complementary programs, such as a Rural Land Use Process (see Larimer County, Colorado), regional partnerships, and Purchase of Development Rights (PDR) programs.

## INTRODUCTION

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Every community in Alberta has landscapes they value.

Although community members may not have worked formally to identify what those are, they have a shared, intuitive sense that the maintenance of those landscapes in their current capacity enhances the community; and that the loss of them diminishes the community. Each of these communities also recognizes that many of the valuable activities they pursue to enhance and develop the community threatens the long-term viability of those landscapes.

Alberta has seen an unparalleled rate of growth in recent years. While Canada's population grew by 5.4% in between 2001 and 2006, Alberta's population grew by and 10.6%, nearly twice the rate (Statistics Canada, *Community Profiles*). That has corresponded to similarly unprecedented growth in virtually all areas economic activity and associated land use, putting tremendous pressure on those landscapes valued by Alberta communities to be converted to more economically substantial ones.

Municipalities, especially rural municipalities are at the nexus of land use change, at once directing it and being buffeted by it. For that reason, Alberta's municipalities are actively seeking out tools that will help them reconcile their conservation and their development goals, tools that are equitable, effective, sustainable and financially-accessible to communities with modest resources. In general, the province is seeing more and more interest in market-based tools at all levels of community and government because of the sense that they provide these qualities.

The complexity of addressing this basic dilemma is what has led many communities to the Transfer of Development Credits (TDC) tool. In brief, TDC programs allow municipalities to direct development away from areas which are threatened by it, and toward areas more suitable for it. The tool works through a hybrid government/private sector model which establishes a municipal planning framework that allows development potential to be bought and sold on the open market, and perpetually extinguished on valued landscapes.

In the past 18 months, Alberta has seen a dramatic increase in conversations around this tool, discussions that often highlight the need for a supportive provincial level strategy. The purpose of this feasibility review is to provide the Government of Alberta with a sense of what the challenges are in developing TDC programming, and to provide guidance on how it might best address these challenges and opportunities through a provincial level approach.

The review is based on three sources. The primary source is a detailed review of four case studies in the United States. Additionally, the authors have been in consultation with several Alberta municipalities throughout the course of a broader project to assess and potentially implement a TDC program in Red Deer County. Finally, a literature review of the topic provides several important insights.

The report is divided into the following seven sections:

- Overview
- Myths and challenges
- Legal considerations
- Review of current TDC activity
- Four American examples
- Conditions for success
- Creating a provincial level strategy

The first six build on each other, and set the context for the final one which outlines recommendations for a provincial strategy. This document should not be seen as a comprehensive assessment of the challenges and opportunities inherent in TDC program development, but rather an introduction leading to provincial-level guidance. As well, there are several recommendations surrounding legal structures, but the authors are not lawyers, and emphasize that legal policy experts will be required to translate the recommendations into the necessary policy or legal instruments.

## OVERVIEW OF THE TOOL

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As described above, a Transfer of Development Credits (TDC<sup>1</sup>) program seeks to move intensive development from landscapes at risk from such activities to landscapes better suited to those land uses. It does so by facilitating a market-based transfer of that development potential, and perpetual conservation of the at-risk landscape.

Every example of the Transfer of Development Credits tool is different, but they share some common elements, including four basic program components and five basic implementation steps.

### TDC Program Components

Fundamentally speaking, a Transfer of Development Credits (TDC) program has four basic components:

- *Sending area* - designation of the area which is targeted for increased conservation (from which development potential will be 'sent')
- *Receiving area* - designation of the area which is targeted for increased development (which will 'receive' the transferred development potential)

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<sup>1</sup> In the United States, Transfer of Development Credits programs carry many different names, but are referred to generically as Transfer of Development Rights (TDR) programs. Because property rights are not constitutionally enshrined in Canada as they are in the United States, Transfer of Development Credits has become the commonly accepted generic term in Canada.

- *Transfer system* - development of a system which facilitates the valuation and transfer of development potential from one parcel to another
- *Program administrator* – an oversight body that develops and maintains the principles of the program and use of the tool

### *SENDING AREA*

Generally, the motivation behind the establishment of a Transfer of Development Credits (TDC) program is concern over a valued landscape which is facing significant demand for conversion due to development pressures in the area. Those landscapes are included in a TDC program as 'sending' areas, or areas from where the development potential will be transferred. Sending areas are often viewed as 'conservation areas,' and there may be several such areas associated with a single TDC program.

The core 'value' of these parcels or regions may be ecological, agricultural, historical, industrial, recreational, or other (or some mix). This determination is made by the community, generally through a municipal planning process, and supported by a deliberate and credible process of assessment.

Typically, sending area parcels are at risk because of their depressed economic power. They may have a degree of economic weight (agricultural production, sustainable timber harvest, cultural tourism, etc.), but to a much lesser degree than the economic opportunities that are inciting land conversion (residential development, commercial/industrial activity, etc.).

Like all areas within a TDC program, sending area parcels are assigned development 'credits' based on some standardized process and/or criteria. Through the TDC program, sending area landowners are able to sell their development credits to landowners/developers in the receiving area. A legal, deed-restricting instrument (generally a conservation easement) is used to perpetually preclude the intensive development of the parcel after the development credit has been transferred away. Generally, sending area landowners also have the ability to use their development credit and build on their property subject to the zoning restrictions in the area.

Thus, a sending area parcel can increase its economic weight by virtue of its conservation value.

### *RECEIVING AREA*

The corollary to the sending area is, of course, the receiving area; the area to which the development potential taken from sending areas is assigned. Receiving areas have a base allowable development density, but have the additional opportunity of increased development potential (i.e., more lots per parcel, more stories per building, etc.) by acquiring development credits from sending areas. The results are not necessarily 'high-density' developments, but

rather *higher density* than would otherwise be allowed<sup>2</sup>. In general, receiving areas are much smaller in spatial extent than sending areas, and potentially some distance away.

Similar to sending areas, receiving areas' suitability is determined by the community through a municipal planning process, one supported by a deliberate and credible process of assessment. Receiving areas may be deemed appropriate by virtue of their proximity to existing development, ease of servicing, limited conservation value, or other related factors. In many cases, receiving areas are established because of an opportunity (development proposal, visionary local developer, etc.), but it must still fit into the overall vision and plan for the community.

Contrary to sending areas, receiving areas have a significant economic weight, and are generally characterized by high value development such as residential construction, industrial operations, etc. For this reason, they have the ability to absorb the cost of acquiring development credits into their cost structure with limited impact.

Whereas sending area landscapes are the motivation for a TDC program, receiving areas are the driver; thus, only areas with a significant level of development pressure will have the opportunity for conservation activity through a TDC program.

### *TRANSFER SYSTEM*

At the core of a Transfer of Development Credits (TDC) program is the need to transfer – and provide compensation for – the development potential from one parcel/landowner to another via an open market mechanism. Although each program has its unique flavour, every program includes a process for establishing the relative value for the development credits versus the development bonus, and for facilitating the exchange between the sending and receiving parties.

Many programs use a simple one-to-one credit ratio when outlining how many credits are available on a parcel of sending area land, and how many credits are required for each additional receiving area development unit. However, many use a differential (one-to-many or many-to-one) ratio. In either case, the transfer system needs to establish the protocols for calculating these ratios in individual cases.

Transfers are not always simple market transactions, and the transfer system may provide opportunities to assist in the development credit transfer. Possibilities include the establishment of a credit 'bank' and the promotion of third-party brokers.

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<sup>2</sup> For example, developers of the Fossil Lake Ranch development in Larimer County, Colorado, estimated they were able to build 8-10 times as many units in the TDC receiving area, than they would have been able to under the base zoning.

## *PROGRAM ADMINISTRATOR*

Transfer of Development Credits programs are not self-organizing. Once a program is created, it needs on-going administration, and perhaps more importantly, the ability to adapt. This body oversees such functions as coordinating the program with the overall planning program<sup>3</sup>, recording transactions, registering restrictive legal instruments on the land title, tracking the success of the program, promoting the program, etc.

These functions are most often executed by some arm of the local government, generally the local planning department, local agricultural services department, historical resources society, or other. In the case of multi-jurisdictional programs, it may be a higher level (provincial/state) agency, which in these cases may have been established solely for this purpose.

## TDC Implementation Steps

In an operational sense, the development of a TDC program has five primary steps:

1. Determine the need / desirability for a TDC program
2. Initiate public consultation
3. Identify TDC 'sending' and 'receiving' areas
4. Create a development 'credit' system
5. Identify a mechanism(s) for extinguishing development potential on conservation parcels

### *DETERMINE THE NEED / DESIRABILITY FOR A TDC PROGRAM*

Although not strictly part of the actual Transfer of Development Credits program, the work leading up to the establishment of a TDC program is extremely important, and may be the difference between a successful and an unsuccessful program. It may also identify that a TDC program is not appropriate for a given community. Such feasibility reviews may include pre-studies, and review of overarching plans.

#### Background studies

Not all TDC programs conduct background studies in support of the development of their program, but a recent review of 52 Transfer of Development Rights programs in the United States found that background studies were positively correlated with success (Kaplowitz et. al, *in press*). That study specifically noted the desirability of an analysis of potential market (estimating

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<sup>3</sup> In Calvert County, Maryland, developments in the program have roads and home sites approved by the Agricultural Preservation Board.

potential bonus development and associated density transfer ratios), the optimal character and size of sending areas, and the most promising approach to formation of receiving areas. Additionally, assessments of the threats to the valued landscapes, and quantification of those values, and investigation of potential participation incentives can be extremely important in planning a TDC program.

Several of the programs reviewed by the authors noted the value of 'build out scenario' studies. These helped to quantify and visualize potential futures, many of which were fundamentally unpalatable to the community when presented, and led to support for tools (like TDCs) aimed at mitigating those issues.

#### Compatibility of overarching plans

Existing statutory municipal plans may or may not be conducive to the conservation/development approach of a TDC program. Land Use Bylaws and Municipal Development Plans may be technically deficient in terms of supporting TDC programs (and need to be harmonized). More importantly, it must be clear that the goals of a conceived TDC program and those of the overarching plans are consistent.

For example, zoning may not be conducive to sending and receiving area designations, or conservation goals may not be adequately articulated. Research indicates that most programs are focused initially on land preservation (82.5%) rather than land development (45.6%), and that having multiple goals does not positively correlate with the success of a TDC program (Kaplowitz et al., *in press*).

#### *INITIATE PUBLIC CONSULTATION*

Several of the programs reviewed by the authors indicated that this step was perhaps the most important step. One successful program (Larimer County, Colorado) dispensed with other studies to focus completely on public communications and engagement in the early stages of program development.

Especially in the Alberta (or Canadian) context where the tool has not yet been fully applied and is mostly unknown, early communication and engagement can be critical to dispelling myths and identifying shared goals (see *Myths and Challenges*, below). Key audiences are the landowner community, the development community, and the conservation community. Key tasks may be polling to understand current associated attitudes, and extensive two-way consultations to raise awareness and establish expectations.



## *IDENTIFY TDC 'SENDING' AND 'RECEIVING' AREAS*

The next step in developing a Transfer of Development Credits program is identifying the land base to which the program will apply, including specifically the sending and receiving areas.

Each municipality needs to establish the area to which the program will apply, even if it is a multi-jurisdictional program as individual zoning and statutory plans must coordinate with the TDC program. Some programs will apply to the entire municipality, and some to only a portion. In the latter cases, the TDC tool may be detailed in an Area Structure Plan or similar document. Regardless, the area chosen must be clearly defensible under the objectives of the guiding documents. For example, if the goal is agricultural land protection, it should be clear that protecting agricultural land in the chosen sending area will support that goal.

It is important to remember that Transfer of Development Credits programming is not a replacement for zoning, and is in fact designed to complement a zoning approach. When sending areas and receiving areas are chosen, that should be reflected in supportive changes to zoning descriptions in the Land Use Bylaw (LUB), Municipal Development Plan (MDP), and applicable Area Structure/Redevelopment Plans. As well as the technicalities of TDC implementation, these plans would establish related zones (e.g., 'Agricultural Conservation Zone', 'TDC Development Zone', 'Open Space Protection Zone', etc.) and the associated allowable uses. Whether the program was to apply to the whole municipality or just a part, the MDP and LUB would need to be modified to facilitate their implementation.

### Sending areas

There are a number of choices to be made in establishing a sending area. First, it should obviously reflect the principles behind the TDC program; i.e., if the goal is to protect ecologically valuable land, the sending area should be chosen on that basis. Background studies, as described above, are a critical support for this step.

Different programs use different methods for delineating the sending area(s). Some identify a broad region that collectively has the values the program seeks to protect. For example, Montgomery County, Maryland identified a loosely demarcated Agricultural Land Reserve, which included a variety of agricultural land types and parcels. Others explicitly identify specific target parcels to be included as sending areas.

From the perspective of a sending area, participation in a TDC program may be mandatory or voluntary. For example, program developers may structure it such that a sending area landowner may enter the program and put his/her credits on the 'market', or they may choose to stay out of the program, and simply develop to the extent allowable under the region's zoning. Other programs, may dictate that any development in the sending area (i.e., of the base credits) must be subject to the TDC program.



Similarly, participation may be by simple virtue of being within the zone, or sending area landowners may *apply* to be a sending area. In these cases, program administrators may reply to a request by a landowner for an evaluation of the property. In some cases (e.g., Calvert County, Maryland), a given parcel may be submitted by a landowner for consideration as either a sending area or a receiving area parcel.

### Receiving areas

There are a number of choices to be made in establishing a receiving areas as well. A key consideration is ensuring the amount of receiving area development opportunity does not overbalance the sending areas. This is a concern in two senses. First, if there are too many credits available for sale relative to opportunities to use them, the price will naturally be depressed, and transfer activity will be low or non-existent as landowners wait for improved opportunities. For example, Montgomery County, Maryland suggests that there should be one sending credit available for every two receiving credits required. Second, if the available opportunities are not carefully balanced against the volume of credits available for transfer, it is possible to promote *more* development impact than would otherwise happen in the absence of the program.

In general, receiving areas are much smaller and more proximate to existing towns or development centres than the associated sending areas.

Participation in the program for increasing density on receiving area lands must be mandatory. Simply put, if a developer can choose between paying for credits in order to develop or not, the choice will be quite clear and the program will die. However, designing opportunities within the receiving area is more than simply tailoring the cost of the credits, as program developers need to look to other incentives as well. For example, Boulder County, Colorado, provides developers in TDC receiving areas the opportunity to meet informally with the Commissioners (i.e., Council) to present and get feedback on their development proposal early on, getting important signals on the features that will or will not be met with favourably before they invest resources in developing them.

It is important in receiving area planning to ensure that there is not competition between incentive programs. If other incentive programs provide potentially more-achievable methods for increasing development opportunities, both programs may suffer. Properly coordinated, this may represent an opportunity, as well. For example, in Larimer County, Colorado, they have increased the density bonus beyond that achievable solely through the TDC program for developments which meet certain affordable housing criteria.

Finally, receiving areas – especially those involved in the early stages of programs – are often chosen opportunistically. Two potential receiving areas may see Area A as better meeting the

program criteria, but Area B with a willing and visionary developer. In this case, Area B may be the better place to focus receiving area activity.

### *CREATE A DEVELOPMENT 'CREDIT' SYSTEM*

TDC program developers must implement a system which facilitates the valuation and transfer of development potential from one parcel to another by assigning credits to related sending and receiving area parcels, identifying the exchange ratios at which they are transferred, and relating this system to the existing zoning/re-zoning process. It is critical to have the landowner and the development communities actively engaged throughout this step.

#### Credit ratios and assignment

Transferable development credits need to be assigned to the sending and receiving area parcels in a fair and equitable way, but in a way that also promotes the start up and continuation of the TDC program.

Program developers need to determine how many credits a given parcel of sending area land will receive, and how many credits a receiving area developer needs to acquire to increase the development density on their parcel. The most simple programs (the minority) use a one-to-one ratio where each parcel is assigned a single credit, and each additional building unit in the receiving area requires a single credit.

Most program developers choose to have more complex systems. In these cases, multiple credits may be assigned to sending area acres, and likewise multiple credits required for each additional unit on a receiving area parcel.

Many programs begin with an initial down-zoning whereby all parcels in the sending area are reduced to the same base development potential to maximize the ability to protect the valued landscape. For example, the base development potential may have been 1 unit per 40 acres, and that is changed to 1 unit per 160 acres. Some programs choose at that point to convert the 'lost' development potential to credits, and initiate the allocation of credits in that way.

A program may establish that the sending area has a base credit ratio, but then 'bonus up' based on the existence of key landscape features on the property. For example, Larimer County, Colorado, provided a starting allotment of credits based on one credit per two acres. However, beyond that, they increased the number of credits per density based on the presence of regional recreation trails or wildlife corridors, agriculture preservation opportunities, recreation and education opportunities, scenic or historical values, vistas of community importance, and existing uses and historical development approvals.

## Credit valuation

There is no set value (nor valuation methodology) for development credits. Values vary dramatically between programs, largely based on the difference in land/development values of various regions, and the variety of credit computation systems. For example, one program may have a value of \$5000 per credit, and another \$1000 per credit, but if the latter program requires 10 credits per additional unit in the receiving area while the former requires only one, the \$1000 credits are in fact 'more expensive' than the \$5000 credits.

Although TDC programs are all market-based, the degree to which that market is influenced may also affect credit prices. In some cases, local governments purchase the majority of credits, doing so for a set price. In those cases, other transactions tend to mimic the prices offered by the local government.

## Credit banking and brokering

The credit transfer system may be entirely unassisted, or it may be brokered. Because in some cases a separation exists in time between when a given credit buyer is looking and when a credit seller is offering, the local government may set up a credit 'bank' which purchases credits from sending area landowners and sells them to receiving area landowners. These systems reduce the administrative burden on program participants, and 'TDC banks' may be designed to function as advocates, information sources, administrators, and fund-solicitors for the program as a whole.

Third-party brokers need not be government agencies. In some cases, third-party brokers have established business ventures whereby they purchase and sell credits for a fee.

Kaplowitz et al. (in press) found that the existence of credit banks was positively correlated with success, but went on to note that this may be due as much to the supportive functions these institutions have come to play (informational, credibility-establishing, etc.) as their basic role as transaction facilitators.

### *IDENTIFY A MECHANISM(S) FOR EXTINGUISHING DEVELOPMENT POTENTIAL ON CONSERVATION PARCELS*

The ability to augment development density (bonusing) is not a new technique in Canada, nor is the ability to create credit systems. One key element that sets Transfer of Development Credits programs apart is the certainty and longevity provided by perpetually extinguishing the development potential on sending area parcels.

Because zoning systems are subject to continual change, and one Council cannot bind a future council, they create a fickle and shifting base on which to build a conservation program. TDC program developers must identify the tool which can provide that certainty and match it to the program goals. For example, in Alberta, the conservation easement provisions under the

*Environmental Protection and Enhancement Act* provide a perpetual conservation mechanism for ecologically valuable land which runs with the title of the land, and is insulated from the vagaries of zoning. Other options may currently exist for conserving historical, cultural or agricultural landscapes (see *Legal Considerations*, below).

If enabling legislation were in effect, it would ideally identify the potential tools in existence for conserving various land-based values, and create tools for those not covered (see *Legal Considerations*, and *Information Necessary for a Provincial Level Strategy*).

It is important that the restrictive mechanisms be capable but not excessive. The advantage of conservation easement-style tools is that they restrict specifically those land use activities which imperil the conservation values of the land, but allow other land uses to persist, thereby preserving the base economic viability of the sending area parcel.

TDC program developers must also identify if the local government, provincial government, or third party (“land trusts”) is going to hold the conservation easements. Most American programs see the local government holding the easement, but many third-party examples exist as well. The key considerations are whether there is a local land trust willing and able, and whether the municipality wants to enter into a perpetual agreement with that organization.

## MYTHS AND CHALLENGES

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The concept of Transfer of Development Credits (TDC) has seen a tremendous up-swing in awareness over the last 6 months to a year. There is discussion in many municipalities, government agencies, think tanks, kitchen tables, and coffee shops across the province. In each of those places, the unique perspectives on a newly-forming tool breeds the potential for misunderstanding. The authors have tried in this section to identify the places where we have seen common misunderstandings.

Related to the myths is getting an understanding of some of the more significant challenges that those establishing a TDC program in Alberta would face. These were developed based on our review of the current Alberta situation, the American case studies, and conversations with municipalities exploring the tool.

As well, Alberta has had the benefit of several presentations from an expert on rural land stewardship from Florida, USA. Craig Evans' presentations on the Rural Land Stewardship Program in Collier County, Florida (and other similar TDC-type programs) have been very inspirational. In an attempt to help us, Mr. Evans has circulated widely a list of seven “musts” for a TDC program. The authors provide below thoughts on those items from the same perspective as thoughts provided on the challenges and myths.

## Myths

### *TDC PROGRAMS MUST HAVE "TDC BANK."*

A "TDC bank" is a mechanism for priming a TDC system. In cases where there is concern that buyers and sellers of credits may have difficulty connecting, a TDC program may establish a 'bank.' This bank can buy credits from 'sending' area landowners, even though no applicable development project may at that time be seeking credits, then sell credits when a 'receiving' area development project is looking for credits. This also allows developers to go to one source, rather than many, when seeking credits. In some cases, banks are set up state-wide, and have the ability to solicit and secure state funds to augment the capacity to buy credits.

TDC banks can be very useful tools, but they are not a pre-requisite for success. Many programs in the United States use a credit banking system; many successful programs do not. In some cases (such as Montgomery County, Maryland), communities have established a bank to get the program started, then eliminated it, moving to an entirely private market system.

### *TDC PROGRAMS REQUIRE LAND PRICES BE AT A CERTAIN LEVEL*

Because TDC programs require development activity to foster conservation activity (and vice versa), a certain amount of pressure for land conversion is required. All other things equal, that pressure will naturally generate an increase in prices. However, that does not mean that a certain price level for land is required before a TDC program is feasible.

There are a couple of related issues which may be more relevant. First, the development of credit pricing (by whatever mechanism) must render a price that is attractive to both the buyer and the seller. It may seem that TDC programs become feasible at a certain price, but it is really more a function of the pressure for land conversion.

Second, it may be that a particularly visionary community plan seeks to include land which is relatively low in price. Such a plan may locate receiving areas in places where pressure for conversion is high, and prices are responding accordingly, but then locate the sending areas in more distant places where land is of high agricultural, ecological, or otherwise value, but pressures for conversion have not yet pushed the prices as high.

### *TDCs CANNOT PROTECT AGRICULTURAL LAND IN ALBERTA*

A core feature of TDC programs is the ability to extinguish (sometimes temporarily, sometimes permanently) the development potential in the 'sending' areas. Because most protective mechanisms are subject to political whim, robust tools such as conservation easements are generally employed.

In Alberta, conservation easements can be used for the protection, conservation and enhancement of “biological diversity” or “natural scenic or esthetic values,” not specifically for the protection of agriculture. However, many conservation easements exist in Alberta on operating farms and ranches, though they are generally structured such that 1) there is demonstrable ecological value on the properties, and 2) the restrictions protecting that ecological value do not prevent the existing agricultural operation from continuing.

Additionally, Kwasniak (2004) has identified that common law restrictive covenants and mechanisms under the Historical Resources Act could be used to facilitate the same objective more broadly for TDCs.

There is no question that the ideal circumstance would be conservation easement style tool explicitly designed for conserving agricultural lands.

#### *TDC PROGRAMS ARE NOT LEGAL*

Over the last several years there has been significant discussion around the topic of whether there are legal barriers to the implementation of TDC programs. In 2004, Arlene Kwasniak (2004) did a step-by-step legal analysis of the various components of a TDC program, concluding that there were no legal impediments to the development and implementation of a TDC program in Alberta.

However, it is important to note the difference between a lack of legal impediments and an explicit legal authority (i.e., enabling legislation). As municipal governments in Alberta receive their authority from the provincial government, legislative and policy silence on the topic continues to leave some municipalities recalcitrant to commit resources to developing a program.

#### *THERE IS AN “AVERAGE” PRICE FOR TDC CREDITS*

There is no valid mean price for TDC credits that can be deduced by looking at multiple programs, much as there is no “average” price of real estate across the United States. In every community, the specific forces influencing land values, development activity, local economies, etc. will dictate

Within a TDC program, one can better identify an “average” price, but again these will be subject to the same vagaries as real estate prices. For a higher end development, for example, a developer may be willing to pay a higher price for credits to secure the density they are hoping to achieve.

As well, different programs use different calculations for how many credits are required to add additional units. For example, one program may see a going price of \$50,000 a credit, but require only one credit per additional housing unit in the receiving area, while another program may see

a going price of \$10,000 a credit, but require 5 credits per additional housing unit, making the two effectively the same.

### *TDC PROGRAMS WORK IN ALL AREAS*

There is a pervasive sense that TDC programs can and should work in every community. This is not the case, and each community should clearly evaluate the potential effectiveness of the tool for them.

For example, TDC programs are a tool which sees conservation and development activity explicitly tied; there is no conservation without development, and no development without conservation. This presumes, then, that there is a certain level of pressure for private development capable of driving participation in the program, which is not the case in all communities.

As well, there may be more effective tools for achieving the same goals (though those tools must be critically evaluated; see the myths regarding zoning and land trusts below). For example, Larimer County, CO uses a TDC program for conserving agricultural land, but a state-supported land purchase program for securing ecologically important areas.

### *TDC PROGRAMS ARE A CONSERVATION "SILVER BULLET"*

Due to the multi-faceted complexity of land conservation and use issues, even the most effective TDC program cannot accomplish all of a community's conservation goals. One striking feature of the conversations the authors had with participants in the successful American programs reviewed was how each program description ALWAYS included a description of a series of complementary programs offered in the County.

These programs included purchase of development rights programs, research and communication undertaken for the comprehensive plans, rural land use strategies, state-level incentive programs, multi-stakeholder advisory boards, NGO programs, etc.

The explicit and inferred message was that TDC programs are not a 'silver bullet' and only work when implemented in conjunction with other programs supportive of valued landscape conservation.

### *TDC PROGRAMS ARE STATIC*

In fact, the authors have not heard comments specifically to this effect, but rather repeatedly hear expressed how dramatically programs can change over time, or an expectation that a new program will be perfect from inception.



Although all programs are different, the programs we have reviewed have the common trait that they have evolved dramatically over time. Single programs have evolved to multiple programs; the price of credits and the methods for determining them have evolved; new sending and receiving areas have come on line; program-support structures like TDC banks have developed; etc.

The successful programs have been conscious that the changes made to improve a program are done in such a way so as not to undermine the stability of the program. This has involved such strategies as review by stakeholder committee, response to participant demand for change, adherence to comprehensive plans and broad communication of the changes.

#### *TDCs WILL TRIGGER PROPERTY RIGHTS VIOLATIONS AND COMPENSATION CLAIMS*

Although this issue arises more in relation to zoning changes and municipal planning, it is raised on occasion with reference to the TDC tool specifically.

Concerns revolve primarily around whether zoning changes in support of TDC programs violate property rights, or at least to the degree that some measure of compensation is required.

Because Canada does not have property rights enshrined in the constitution, the issue is less one of an inherent 'right' and more one of whether some measure of legal entitlement is being infringed on.

Case law in Alberta has repeatedly upheld the ability of municipalities to re-zone their land base, controlling land uses, in support of the public good. Similarly, the legal access to compensation does not apply to changes in zoning.

Having said that, this is an issue more of perception than reality, and that perception is vitally important. Mass down-zonings, while legal, are most likely to be politically unpalatable unless there is either 1) a deeply shared sense that the overall program is in the best interests of the community, or 2) some measure of compensatory activity (e.g., providing TDC credits in an amount equal to the 'lost' development potential).

#### *ZONING ALONE CAN ACHIEVE THE SAME GOALS*

Zoning is a powerful tool available to municipalities to guide land use, development and conservation. For that reason, many people question whether anything beyond the current zoning power is needed.

It is important to note first that TDCs are not a replacement for, but rather a complement to, the existing zoning powers. There are limitations to a zoning-only approach. First, zoning is an extremely blunt tool, and intentionally so. The purpose is to provide an overarching framework of permissible and non-permissible land uses across a municipality, not to finely tune how those



broad goals could be accomplished. Second, zoning is subject to whims and interference, where the best-laid plans can be thwarted by a few politically-motivated decisions, which may not be consistent with the intent of the planning. Using perpetual mechanisms such as the conservation easement provides a much higher level of certainty, for both the conserving and the developing land owners, that the valued landscape to be conserved will be conserved past the next by-law review, development application, or council election.

#### *LAND TRUSTS CAN ACHIEVE THE SAME GOALS*

In Alberta, the use of conservation easements is relatively new (since 1996), and only in limited cases are municipalities actively using them. For this reason, Albertans familiar with perpetual conservation of private land tend to think of land trusts. In some cases, this leads to a perception that land trusts alone could accomplish the same private land conservation goals, and there is perhaps no need for TDC programs.

For example, in the case of Cypress County's 2003 effort to implement an TDC program, post-mortems identified the active work of two land trusts in the region to secure ecologically sensitive land with paid conservation easements as a factor in public and Council hesitancy regarding TDCs.

There are currently approximately 12 land trusts active in Alberta, with most of their work concentrated in southwest Alberta. They do not currently have the capacity, nor the geographic breadth, to satisfy all of the land conservation needs that exist in Alberta's 64 rural municipalities and 127 towns and cities. Nor do they have the mandate to reconcile development and conservation, as municipalities must.

Though they cannot shoulder the entire load, land trusts are a critical community with whom to partner, as they do play a significant role in community-based conservation, and can in many cases provide third-party support (e.g., holding conservation easements, providing stewardship services, contributing conservation planning expertise, etc.).

#### *TDC PROGRAMS MUST OCCUR ON ONE MUNICIPALITY*

Although they occur primarily within one County, TDC programs can extend beyond administrative boundaries. Pruetz (2007) identifies at least 10 programs which are multi-jurisdictional. These programs recognize the pragmatic reality that ideal sending zones may occur in one jurisdiction while ideal receiving zones are in another. These programs also face the pragmatic challenge of managing over those boundaries.

The New Jersey Pinelands program involves 7 counties and 52 local jurisdictions and extends over approximately 1 million acres, and must define a TDC bank, sending and receiving area criteria, cost-sharing, and other program features that are acceptable to all participating

jurisdictions. In Boulder County, Colorado, the County manages (successfully) seven different inter-agency TDC agreements with adjacent cities.

## Challenges

Certainly with the introduction of a new land use planning tool like Transfer of Development Credits (TDC) there will be a number of challenges that will influence the effect of TDC programming at the municipal level. These challenges may occur early in the discussion phase through to a completely developed program.

### *GETTING STARTED*

While there is significant interest in TDC programs in Alberta and Kwasniak (2004) has ascertained that municipalities likely have the legal ability to implement TDC programs, early adopters will undoubtedly be faced with some level of uncertainty and nervousness. Given the broad range of purposes and variable nature of TDC programs, municipalities may feel like they are blazing a new trail as they investigate and endeavour to adopt this tool.

Municipalities are granted their authority through the Municipal Government Act (MGA) and while it appears all the components of a TDC program likely exist, many municipalities will likely be cautious in creating TDC programs without explicit provincial direction. At the same time municipalities that are moving forward without provincial guidance may be concerned about what the Province will bring forward and how it will affect what they have already implemented or future expansions of their program.

Another factor with any new tool is the inevitable misinformation that circulates surrounding it; particularly if it is described as a “silver bullet” to solve land use problems. The impact of misinformation can negatively affect early internal discussions, the public consultation process, as well as the ongoing use of the program. It is important for TDC programs to be transparent and accountable to well planned and realistic goals and for all changes to programs to be widely communicated.

### *PUBLIC CONSULTATION*

Successful TDC programs need participation. This requires “buy in” from landowners, developers and the community at large. Build out scenarios, visioning exercises, threat assessments etc. are activities targeted at gaining community support or “buy in”. These exercises can be very challenging as there will inevitably be detractors. The use of accurate and up to date demographic, ecological, agricultural, historical, recreational, developable lands, etc. data to identify where conservation and development are desired is essential to moving towards a robust public consultation process. Unfortunately few Alberta municipalities have this information, for example most Environmentally Sensitive Area reports are at least 10 – 20 years old.

Community values are generally established through visioning exercises. It is important to understand the values expressed. For instance, if “agriculture” or an “agricultural community” is expressed as a value worth protecting, the difference between agricultural land and agricultural industry should be established. Some people in Boulder County, Colorado questioned the county’s commitment to protecting “agriculture” when they turned down an application to expand a poultry operation on a protected sending area property. Similarly “recreation” may be identified as a value requiring protection; defining the types of recreation would be necessary to fully understand the community vision.

Public consultation may show it would make sense to establish a multi-jurisdictional TDC program based on land use patterns and pressures and important conservation features. This could be difficult in Alberta because many municipalities believe residential development has a net positive effect on their revenue stream. Cost of Community Services studies in the US and in Red Deer County have continually shown this to be false.

### *CREATING THE PROGRAM*

As important as planning areas for conservation, is planning areas for development. It can be a challenge to proactively plan for development instead of reacting to applications. Having said that, occasionally the conditions surrounding a development application are complementary to a desired TDC receiving site, it is prudent to seize that opportunity, especially early in a program, while ensuring that development does not supersede the goals and effectiveness of the program itself.

Sometimes in the creation of a TDC program down zoning may be necessary to reach the goals of the program. For example, before a TDC program, the land use bylaw may allow landowners throughout the municipality the possibility to develop up to 32 lots on 64.7 hectares (160 acres). In identifying sending areas it is recognized that for conservation purposes, a maximum of two units per 64.7 hectares (160 acres) is more reasonable. The sending area landowners could develop up to two units and would then have 30 credits to sell. At the same time if developers are already allowed to build 32 units what would entice them purchase any credits? Either they need to be able to increase density to 62 units through the purchase of credits or the allowed units in the receiving site need to be down-zoned to 2 units and then the acquisition of credits would increase the density back to 32 units. Down-zoning may initially be viewed negatively – especially early in the program when people have no experience in how the credits will be valued.

Understanding the economics of the numbers in zoning changes and determining the maximum amount of density allowed in receiving zones will have a significant effect on the attractiveness of a TDC program to developers. The challenge is to ensure that the program achieves the goals determined through the public consultation process, makes economic sense and is straightforward to use.

A key feature of TDC programs is the mechanism to extinguish development potential after credits have been sold. The challenge in Alberta will be what conservation tool to apply. Currently conservation easements could be used on biologically diverse and/or naturally scenic sending areas; the *Heritage Resources Act* can possibly be used to protect “historical resources”; and restrictive covenants may be used for other circumstances. The challenge with these mechanisms is the lack of consistent application depending on the “landscape value” being protected. Another challenge in the case of conservation easements is who will hold these easements. They can be held by a municipality, the province or a third party eligible NGO. Regardless of what body holds the conservation easements it must recognize and be prepared for the associated liability of monitoring and enforcement over time.

### *SUCCESSFUL APPLICATION OF THE PROGRAM*

Once the program is created and in use, the challenges do not go away; rather, they evolve and change as the program or circumstances change. In the case of a multi-jurisdictional program, there may be factors that affect the program on one side of a boundary and not the other but impact the success on both sides of the boundary. Monitoring and updating development and conservation plans will help ensure the TDC tool is being used where it is most effective and appropriate. TDCs are a neutral tool; it is the use of them that is biased for one purpose or another.

Another challenge can occur when participation in the TDC program is negatively affected by other planning programs. If a developer can achieve the same or comparable densities by another simpler, less expensive method then he or she is not likely to contribute to the conservation of the valued landscape features. Municipal planning departments must consider the effect of new programs on TDC programs.

A legal challenge could come at anytime in the development and application of a TDC program. Municipalities need to involve their legal counsel in understanding the risks associated with the use of a TDC program throughout the life of the program.

### Review of “TDR’s: 7 Conditions for Success”

As noted above, Albertans exploring the Transfer of Development Credits (TDC) tool have recently had the advantage of seeing presentations from Craig Evans’ on the Rural Land Stewardship Program in Collier County, Florida. Based on these experiences, Mr. Evans developed and circulated a short document called, “TDR’s: 7 Conditions for Success”.

The authours have found these assessments to be very useful, but perhaps too prescriptive. Some of the ‘requirements’ may in fact only be ‘important considerations’ especially for the initial establishment of a program. It is in that vein that the following observations are offered.

***1. SUFFICIENT INCENTIVES MUST BE BUILT INTO THE PROGRAM TO PROMOTE THE SALE AND PURCHASE OF DEVELOPMENT RIGHTS.***

As TDC programs are market based instruments, it is necessary that they make enough economic sense that both a buyer and a seller are willing to participate in the transaction. A buyer must offer a price that is considered fair to a seller. While at the same, a buyer will only pay a price that the housing market will bare.

Buyers and sellers may be motivated to participate in TDC programs for non-monetary reasons as well. For example, some programs in the US provide a more streamlined application process for developers who participate in such programs, while others have created land stewardship support for sending area landowners.

***2. THE SIZE OF THE SENDING AREA MUST BE LIMITED SO THE SUPPLY OF DEVELOPMENT RIGHTS DOES NOT EXCEED THE DEMAND (AS RIGHTS ARE SOLD THE SIZE OF THE SENDING ARE CAN BE EXPANDED).***

When establishing a TDC program there certainly must be consideration of the number of credits available in the marketplace. Following basic supply and demand laws of economics if there is significantly more supply than demand the price will be low. Knowing how many credits will be required when planning receiving areas is essential to understanding how many sending credits to make available. Montgomery County, Maryland suggests that there should be one sending credit available for every two receiving credits required.

***3. PROVINCES AND MUNICIPALITIES MUST REMAIN STEADFAST IN NOT ALLOWING DEVELOPERS TO PETITION FOR ZONING VARIANCES TO INCREASE DENSITIES.***

If a TDC program is to be effective and therefore successful, it must be used. If it is easy to not use the program, then likely developers will not participate. In order to increase densities in receiving zones developers must purchase credits. In voluntary programs this does not mean they cannot develop without purchasing TDCs, instead it simply means that they can only develop at base densities and cannot develop at increased densities.

***4. THE PROGRAM MUST BE MANDATORY; TO INCREASE DENSITIES, DEVELOPERS MUST PURCHASE DEVELOPMENT RIGHTS.***

There are a number of successful programs in the US that are labeled as voluntary. Participation is high in these programs because the incentive to participate makes greater economic sense than not participating. In a sense they may be considered mandatory because in order to increase density participation is necessary, however a developer could still build at lower densities.

*5. TDR BANKS MUST BE ESTABLISHED TO HOLD DEVELOPMENT RIGHTS SO LANDOWNERS CAN SELL THEIR DEVELOPMENT RIGHTS WITH WAITING FOR A BUILDER TO INITIATE A SALE; DEVELOPERS THEN HAVE A CENTRAL ENTITY FROM WHICH DEVELOPMENT RIGHTS CAN BE PURCHASED.*

While there are certainly benefits to “banks” their establishment is not essential to a successful program. In Larimer County, Colorado the Transferable Development Unit (TDU) program was geographically specific and of limited size. It was relatively straightforward for the buyers and sellers of credits to identify one another and for transactions to occur. While the size of a program should not necessarily dictate whether a bank is established or not one can see how it would have some influence on the need. (refer to Myths, TDC programs must have “TDC bank”.

*6. THE RECEIVING AREA MUST HAVE A LOW DENSITY SO THERE IS AMPLE OPPORTUNITY TO INCREASE DENSITIES; ADJACENT PROPERTY OWNERS ALSO MUST BE ASSURED THAT THE INCREASE IN DENSITIES WILL NOT RESULT IN SERVICE OR UTILITY OVERLOADS OR INCREASED TRAFFIC CONGESTION.*

If a receiving area has a high density already not participating in a program may be simpler and provide similar profit. This is why it is important to ensure there are sufficient incentives (e.g. simpler application process, increased potential for profit) in order to ensure participation. Well planned receiving areas with genuine and realistic consideration of current and future infrastructure requirements will go a long way to assuring neighbours about the effect of living next to a receiving area.

*7. THE AREA WHERE THE PROGRAM IS IMPLEMENTED MUST HAVE A STRONG DEMAND FOR GROWTH AND AN ACTIVE HOUSING MARKET.*

TDC programs are dependent on development demand for increased density. This means that the receiving area must have an active housing market. Sending areas that represent a community's values may be away from high demand growth area. (refer to Myths, TDC programs require land prices be at a certain level)

## LEGAL CONSIDERATIONS

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*(adapted from Kwasniak 2004)*

When considering the use of Transferable Development Credit (TDC) programs in Alberta, the legality of the creation and implementation is, of course, of considerable interest. Although there is currently no overriding legislation that expressly authorizes TDC programs, Kwasniak (2004) considered the grounds on which a TDC program could be challenged and found significant evidence supporting a municipality's authority to create a TDC program.

## Jurisdiction

The first and likely most important question is whether a municipality has the jurisdiction to create and deliver a TDC program. Municipalities are created by statute and as such have only the powers expressly or implicitly conferred to them in legislation by the province. In Alberta, the Municipal Government Act (MGA) describes all powers granted to municipalities. In general, case law shows that powers granted to municipal governments should be interpreted broadly and purposively. The exception occurs when a grant of power is specifically described then further interpretation of that grant is more limited. In broad terms, since there is not a specific statement limiting a municipality's power with respect to a TDC program and assuming its creation is not unreasonable, uncertain, discriminatory, made in bad faith or for improper purposes then a municipality likely can implement such a program.

While not yet subject to any judicial review, the Natural Person Powers granted to municipalities in the MGA may also allow municipalities to create and implement a TDC program. Natural Person Powers afford municipalities the same capacity, rights, powers, and privileges given to an individual. This means that a municipality may, barter, sell, negotiate contracts, and carry on business where they have not been given explicit authorization by legislation.

Looking more specifically at the details of a TDC program and considering where in the MGA there may be implicit or explicit authorization to implement a TDC program, the purposes described in Part 17 (Planning and Development), Section 617 provide support:

*The purpose of this Part and the regulations and bylaws under this part is to provide means whereby plans and related matters may be prepared and adopted*

- (a) to achieve the orderly, economical and beneficial development, use of the land and patterns of human settlement, and*
- (b) to maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta, without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest.*

TDC programs are introduced in an effort to promote orderly development by putting development where it makes economical and beneficial sense while protecting the physical environment through the conservation of land for its agricultural, ecological, heritage or cultural values. TDC programs offer a way to direct development away from valued landscapes without removing all economic benefit from the owner of lands with valued features (sending areas). By enabling a landowner in a sending zone to gain monetary benefits TDC programs avoid infringing on individuals rights.

Other sections in the MGA provide further evidence that TDC programs are either implicitly or explicitly authorized. The purposes or objectives described in these sections are parallel to



purposes or objectives of TDC programs. TDC programs can be used as a tool to assist municipalities in meeting their requirements and responsibilities as described in the MGA.

The Municipal Development Plan (MDP) is the primary policy document for municipalities. Section 632 of the MGA states that the MDP must address:

- i. future land use within the municipality*
- ii. the manner of and proposals for future development in the municipality,*
- iii. the co-ordination of land use, future growth patterns and other infrastructure with adjacent municipalities if there is no inter-municipal development plan with respect to those matters in those municipalities,*
- iv. the provision of the required transportation systems either generally or specifically within the municipality and in relation to adjacent municipalities, and*
- v. the provision of municipal services and facilities either generally or specifically*

Section 632 also stipulates that the MDP:

- May address environmental matters and any other matter relating to the physical, social, and economic development of the municipality;
- May contain statements on development constraints, goals, targets and planning policies; and
- Must contain policies respecting the protection of agricultural operations.

Section 633 of the MGA enables municipalities to develop area structure plans (ASPs) which set out how development is to occur in a specific area within the constraints of the MDP and land use bylaws. An ASP:

- Must describe the sequence of development proposed for the area
- Must describe the land uses proposed for the area, either generally or with respect to particular parts of the areas
- Must describe the density a population proposed for the area either generally or with respect to specific parts of the area
- May contain any other items that council considers necessary

## The Program

Once a municipality is confident that it has the authority to enter into a TDC program, the municipality must be able to establish the following program components:

### *A PROCESS FOR DETERMINING LAND USE OR PERMIT APPLICATIONS AND SETTING OUT PERMITTED USES.*

Item 2 (c) in Section 640 in the MGA states a land use bylaw must establish a method of making decisions on applications for development permits and issuing development permits for any development.



*A PROCESS FOR IDENTIFYING SENDING AND RECEIVING DISTRICTS AND SETTING OUT PERMITTED USES IN THE DISTRICTS TO CONTROL DENSITY.*

Items 2 (a) and (b) in Section 640 in the MGA state that a land use bylaw must divide the municipality into districts of the number and area the council considers appropriate and must... prescribe with respect to each district... the one or more uses of land or buildings that are permitted in the district, with or without conditions...

*A CREDIT SYSTEM FOR SENDING AREAS.*

While a credit system is not explicitly authorized in the MGA there is support for the creation of a credit system in the MGA and through case law. As detailed above, the MGA grants municipalities in Alberta, natural person powers – through which a municipality can conduct business as a natural person would even without specific authorizing legislation.

Case law has shown that higher courts take a broad and purposive approach to interpreting municipal powers. When other “creative” systems for regulating and controlling land use (e.g. a lottery system for limiting commercial growth in Banff) have been challenged the courts have found implied authority by virtue of the MGA’s conferring powers on municipalities to regulate and control land uses.

*A PROCESS FOR TRANSFERRING DENSITY FROM SENDING TO RECEIVING PROPERTIES.*

Many municipalities currently engage in density transfers without explicit authority to do so. The Alberta Municipal Government Board has considered issues with respect to density transfers without questioning the ability of the municipality to enter into such arrangements. Based on this and considering the broad municipal purposes set out in Part 17 of the MGA and the broad and purposive approach to interpreting municipal powers be the courts Alberta municipalities like have implied authority to formalize density transfers.

*A LEGAL MECHANISM TO SECURE LAND USE RESTRICTIONS ON SENDING PARCELS.*

There are currently three options for legally restricting land use on private lands in Alberta each with its own opportunities and limitations.

- 1) *Conservation easements* are an obvious option as their main purpose is to conserve land with a specific value. Conservation easements are registered on title in perpetuity, are able to restrict development and can be held by a municipality or a qualified land trust. Conservation easement use in TDC programs in Alberta will be limited to land that is valued for environmental purposes. The authorizing legislation, the Alberta *Environmental Protection and Enhancement Act* states that a conservation easement may be granted for one of more of the following:

- (a) *The protection, conservation and enhancement of the environment, including, without limitation, the protection, conservation and enhancement of biological diversity;*
- (b) *The protection, conservation and enhancement of natural scenic or esthetic values;*
- (c) *Providing for any or all of the following uses of the land that are consistent with the purposes set out in clause (a) or (b):*
  - i. *Recreational use;*
  - ii. *Open space use*
  - iii. *Environmental education use*
  - iv. *Use for research and scientific studies of natural ecosystems.*

2) *Restrictive covenants* are an alternative mechanism to restrict development where conservation easements are not appropriate. A covenant is a promise made by one landowner to a neighbouring landowner not to do certain things on his or her land (e.g., not to build in a certain area) (Atkins et al, 2004). A municipality must be certain that the land a restrictive covenant is placed on meets the following conditions:

- (a) *It must be restrictive or negative in nature (e.g. it can require a landowner to refrain from doing something but cannot require a landowner to do something);*
- (b) *There must be two pieces of property, adjacent to or within close proximity of one another, that are owned by different owners where one owner benefits and the other is burdened from the covenant;*
- (c) *The covenant must benefit the land not just the owner of the land;*
- (d) *The covenant must reflect an intention to annex the covenant to the land benefited by the covenant; and*
- (e) *All future purchasers must be given notice of the covenant in order to be bound by it (registration on title is considered notice).*

This is not always straightforward since two pieces of land are required.

3) Through Alberta's *Historical Resources Act* a landowner can enter into a condition or covenant with a municipality relating to the preservation or restoration of any land or building. The Act allows municipalities to designate "historical resources" which include works of nature or of humans that is "primarily of value for its palaeontological, archaeological, prehistoric, historic, cultural, natural, scientific or esthetic interest including but not limited to a palaeontological, archaeological, prehistoric, historic or natural site, structure or object."

Though there is broad potential in this legislation, it was not envisioned to support something like Transfer of Development Credits, and applying it in this fashion will have to be carefully investigated.

### Can TDC Programs Happen in Alberta?

Based on Kwasniak's (2004) review, it is highly likely that a municipality can create and implement a TDC program. However without overriding legislation there are three main areas of concern: 1) inconsistency in program components; 2) limitations in the existing conservation-focused deed-

restricting tools; and 3) municipalities are hesitant to implement a TDC program without the a strong positive signal from the province.

## REVIEW OF CURRENT TDC ACTIVITY IN ALBERTA

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It can no longer be said that Albertans are not aware of TDC programs. Awareness has increased dramatically over the last couple of years as landowners, municipal governments, the provincial government, developers, non-government organizations, and many others across Alberta have started looking for ways to cope with rapid growth and development.

The following are brief summaries of some of the major initiatives recently undertaken (or underway) with regard to Transfer of Development Credits in Alberta.

### *CITY OF CALGARY*

As early as 1981, a transferable development type project occurred in Calgary. In it, a density transfer exchange occurred and a heritage building was protected in perpetuity. In order to increase the height of the Petro-Canada towers and to ensure that the Calgary Chamber of Commerce heritage building was maintained, Petro-Canada purchased the Chamber's air rights for \$2,491,995 in exchange for four extra floors. A restrictive covenant is registered on the title of the Chamber of Commerce building to ensure that the building's character and size are not altered.

### *CYPRESS COUNTY*

As recently as five years ago Cypress County in southeast Alberta began to investigate TDCs. Cypress County brought a TDC program through the first reading of an Area Structure Plan for The Cypress Hills Fringe Area. While the ASP was passed the TDC component did not make the final plan. This happened for a number of reasons. There were some who felt the Area Structure Plan was "good enough" to protect valued landscape features and that since this would be the first program of its kind in Alberta the TDC component may add unnecessary complexity to the plan. That sentiment, in combination with awareness of the Nature Conservancy of Canada and Ducks Unlimited Canada conservation easement acquisition programs in the area, fed the perception that the conservation values of the community would be upheld without a TDC program. There was also the inevitable concern with being Alberta's first program and being a "guinea pig" using a tool for which there was little to no provincial level plan/support/understanding.

### *WHEATLAND COUNTY*

In its March 2006 Land Use Bylaw review, Wheatland County, in consultation with its ratepayers, implemented a Subdivision Credit Area Transfer (SCAT) program. SCAT provides a landowner the opportunity to voluntarily transfer development rights from one parcel of land to another. In the SCAT program there is no perpetual land use restriction mechanism on the sending site, and no open market mechanism for transferring the credits.

### *RED DEER COUNTY*

Red Deer County has taken comprehensive steps in investigating implementation of a Transfer of Development Credits program. In conjunction with the Miistakis Institute, they have been investigating the possibilities and potential applications of a TDC program in the county, initiating the background studies, communicating with the community, and have traveled (with the authours) to review programs in Colorado, Maryland and Florida.

### *CANADA WEST FOUNDATION*

The Canada West Foundation, through their Land Stewardship Initiative has published several supportive reviews of the Transfer of Development Credits tool. These include:

- "What's in it for me: Exploring Natural Capital Incentives"
- Yard Work: "Open Spaces and People Places: Transfer of Development Credits"
- Dialogues: "Transferable Development Credits: Tools for Smart Growth"

They conclude that "TDC does exactly what a good land use policy should do: facilitate the preservation of areas of agricultural, historical and ecological importance and directing development toward more suitable areas."

### *BEAVER HILLS INITIATIVE*

The Beaver Hills Initiative (a multi-sector partnership covering the Counties of Beaver, Camrose, Lamont, Leduc and Strathcona) has retained the Alberta Research Council to help them investigate several market-based tools that might support their sustainability goals. They have taken particular interest in Transfer of Development Credits, and have done the most work in Alberta investigating the potential for a multi-jurisdictional Transfer of Development Credits program.

### *MUNICIPAL DISTRICT OF BIGHORN*

In summer of 2007, the Municipal District of MD of Bighorn amended their Municipal Development Plan to include a Transfer of Subdivision Density (TSD) policy. To accommodate

this, a Conservation Easement District zoning has been created in a specific area in the MD. In advance of subdivision approval for any Area Structure Plan that requires the transfer of density from one or more quarters to another the specified sending quarters must first be rezoned as a Conservation Easement District. Once the density on the receiving quarter is proposed to go beyond four lots, a conservation easement must be registered on the sending quarter. This program uses only third party conservation easements meaning it will rely on private land trusts to hold the conservation easements. The program may be limited if there is no organization able or willing to hold the conservation easements.

### *ALBERTA ASSOCIATION OF MUNICIPAL DISTRICTS AND COUNTIES (AAMDC)*

At their Fall 2006 provincial convention, the Alberta Association of Municipal Districts and Counties debated and passed a resolution put forward by Wheatland County in support of provincial level legislation:

*“Be it resolved that the AAMD&C lobby the provincial government to implement enabling legislation at the provincial level to facilitate and guide the development of Transferable of Development Rights program that includes the ability to register these rights on the land title.”*

The resolution arose out of a shared interest in pursuing Transfer of Development Credits programs, but a shared nervousness that without provincial-level legislation there was an undesirable level of uncertainty for municipalities exploring the tool.

### *GOVERNMENT OF ALBERTA*

A number of Government of Alberta-initiated efforts have returned unsolicited promotion of the TDC tool. In particular, consultations around the Land Use Framework (LUF) gave rise to the following:

- Summary of the LUF Municipal Consultation process described Transfer of Development Credits as a “common policy suggestion”
- TDCs Mentioned prominently by the Growth and Resource Management working group as a necessary tool for local planning agencies “to make effective land use decisions”

As well, the Land Trust Leadership Project recommended the provincial government seriously investigate TDCs.

### *AGRICULTURE AND FOOD COUNCIL OF ALBERTA*

In May 2007, the Agriculture and Food Council of Alberta through the Environment Policy Initiative Project conducted an internet survey of Albertans about knowledge, attitudes and perceptions of TDC concepts. As of February, 2008, these results had not been publicly released.

## *ALBERTA URBAN MUNICIPALITIES ASSOCIATION (AUMA)*

A recent resolution from the Alberta Urban Municipalities Association (AUMA) adopted the 2007 President's Summit Land Use Planning Paper. This included the following recommendation to the Government of Alberta:

*"Encourage use of Transfer Development Credits (TDCs) as a growth management strategy by piloting a provincially supported planning/financial aid program for high growth municipalities to develop a TDC scheme."*

## FOUR AMERICAN TDR PROGRAMS

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In February of 2007, the authours had the opportunity to visit and review in depth the following four different successful Transfer of Development Rights (TDR) programs in the United States:

- Larimer County, Colorado
- Boulder County, Colorado
- Montgomery County, Maryland
- Calvert County, Maryland

The four programs were chosen from the approximately 200 American programs based on a mix of factors including their high level of success, applicability to Alberta in terms of goals and landscapes, and their amenability to meeting. Across the case studies, the authours had the opportunity to meet with a variety of program participants including county planners, developers, landowners, brokers, real estate agents, agricultural preservation organizations, protected area program managers, and others. There was a uniformly high level of welcome, and requests for an hour or two routinely turned into full-day events.

The following is a summary of those programs, including brief program descriptions and overview of their results, and an account of the lessons learned which were applicable to the Alberta context.

### Larimer County, Colorado

There were plans as early as the 1970's that described the regions' vision of maintaining separation between the cities of Fort Collins and Loveland. As the communities expanded towards each other, options were discussed to achieve the goal of city separation for the purpose of open space and wheat fields. Transferable Development Units (TDU) program was introduced as a tool to more fairly implement down zoning that resulted from the regional plan between Fort Collins and Loveland in 1995.

Initially, legal and planning consultants were brought in to develop the TDU program. After a short time that approach changed and a facilitator who helped the community realize an up to date vision for their landscape, was brought in instead. Once the vision of separate communities was reaffirmed work began on establishing the tools to achieve the vision.

State law called Planned Unit Development (PUD) already allowed transferring density from one property to another. A local developer owned land north of Fossil Creek Reservoir which was identified in the County's Master Plan as rural residential or as a TDU receiving site. To initiate that development process the developer purchased land south of the Reservoir and transferred density from it to the land north of the Reservoir. This was the first step towards the creation of a more formal program.

### *PROGRAM*

Larimer County's transferable development right program is called a Transfer of Density Units Program. It is geographically specific to a sending area between Fort Collins and Loveland and to a receiving area called the Fossil Creek Reservoir Area. Its purpose is to maintain significant natural areas, views of the foothills, and farmland between the two cities and to focus development north of the Fossil Creek Reservoir while avoiding development in areas south of and immediately surrounding the reservoir that are important for protecting wildlife habitat and area within the Airport Critical Zone.

TDUs are established on a checklist basis. There is a baseline determination of 114.5% of density allowed by the current zoning assigned as TDUs in a sending area. The baseline can then be increased for sites that include significant natural resources, community buffers, and corridors for wildlife migration or hiking, agriculture, park sites, historic landmarks or important scenic views. Conversely available TDUs can be decreased on sending sites of 40 acres or less, low development potential, property location and existing development. Once the number of TDUs is established the landowner receives a certificate that is in effect for two years. The landowner can sell all or some of the TDUs. Once sold, the landowner has a covenant in favour of the county registered on their title that restricts all future development of the sending parcel. On the receiving sites one and half units can be built for each TDU purchased.

This program is administered by Planning and Building Services Division of Larimer County.

### *KEY LESSONS*

The planners found it quite straight forward to set the sending areas. The goals of what was to be conserved were very clear. It was however more difficult to set the receiving areas. There is a perception that there will be concerns from the neighbours of increased densities. That the "not in my back yard" sentiments will be expressed. It was brought up that "Good Urban Planning" is necessary. That means talking to landowners and gaining input on what people want their



community to look like and showing people what these TDU receiving site communities could be like.

It was identified that having a “champion” (e.g. a long standing community member who has an interest in the end result) or two was very important to the success for this project. In the early stages of the program it was felt that there was high public support which was likely a result of significant publicity through newspaper articles. As the Fossil Creek development has been completed and there are no other receiving sites there is likely less public knowledge now.

It was also pointed out there needs to be incentives for landowners and developers to use the program. In Larimer County they used a multiplier of 1.5 to encourage uptake by developers. Essentially that means for every TDU purchased the developer can develop 1.5 units.

Larimer County has unsuccessfully tried to re-create similar programs to the Fossil Creek Reservoir Project in other areas. It is felt that the right timing, market, and environment are essential to the success of a program. As well as the TDU program, the County uses two other programs – Rural Land Use Process and Parks and Open Space to achieve open space, environmental, and agricultural conservation.

The Rural Land Use Process is administered by the Rural Land Use Centre and is a way for landowners to develop their land within the current zoning rules but by using clustering techniques and then applying conservation easements to the remainder of the land. There is some discussion at the centre about using a process similar to a TDU program to move some lots from one RLUP property to another property, either in the RLUP or not. [www.larimer.org/rluc/](http://www.larimer.org/rluc/)

The Parks and Open Space program uses funds acquired through a County wide ¼ cent sales and use tax. The mission of the program is to protect and preserve significant open space, natural areas, wildlife habitat, and develop parks and trails for present and future generations. The open lands are intended to provide opportunities for leisure, human renewal and protection of natural and cultural resources. They use fee simple and conservation easement purchase and donations to secure land. The goal is to hold 50% in fee simple and 50% in conservation easement. They select the land they are interested in protecting with a Land Use Evaluation System that considers soil, water, and social factors. [www.larimer.org/parks/](http://www.larimer.org/parks/)

## *RESULTS*

The Fossil Creek development is complete. The density of the development was increased between eight and 10 times what it would have been had the program not been used with 721 units being transferred. 503 acres were protected over seven years in the sending areas. Two developers participated in the program. No secondary markets involving real estate agents or brokers have developed in Larimer County.



## Boulder County, Colorado

As early as 1973 the county recognized a loss of agricultural land to residential development and began instituting planning tools to reduce this affect. Originally a clustering technique called Non-Urban Planned Unit Development (NUPUD) was adopted where any property larger than 35 acres could have 2 units with an additional developed unit per 17.5 acres conserved. A maximum of 25% can be developed and a conservation easement is to be placed on the remainder. The intention of NUPUDs, to allow farm families building sites, did not stop the trend of agricultural land loss as developers were purchasing 35 or greater acre properties and using the NUPUD program to develop country estates.

Twenty years later the county increased the land required to do a NUPUD to 320 acres and adopted a TDR program where densities could be moved to non-contiguous parcel under different ownership. The county also has a Purchase of Development Rights program. Not all PDRs are extinguished upon purchase as they are in some other programs. They may be sold as TDRs after public review with the proceeds going to further open space and conservation easement acquisitions by the county.

### *THE PROGRAM*

Boulder County is 2/3 mountainous and 1/3 plains. The Transferable Development Rights program is currently only used in the Plains portion of the county, although the county is in the process of designing a program in the mountainous parts. The purpose of the program is to protect lands with productive agricultural value or environmentally sensitive areas such as wetlands, rare plants or wildlife habitat. It is not specific to one geographic area.

Under the TDR program 2 TDR units per 35 acres can be transferred with an extra unit per 35 acres if an undivided interest in water rights stay used on the land is deeded to the county.

With very limited opportunities, no subdivision developments can currently occur in the county without the use of TDRs. Receiving sites are not designated in this program with two exceptions – Longmont and Niwot. Other receiving sites are approved by assessing “performance” driven factors; for example if the site is near a major transportation artery and water and sewer is available it is a likely candidate as a receiving site.

In the unincorporated areas around Longmont TDR sending and receiving developments can be permitted pursuant to an intergovernmental agreement between the city and the county. The county uses development standards that match those of the city since once the development is complete it will be annexed into the city at some future point. Platted TDR receiving site densities range from 0.75 – 2.0 acres per unit. Without TDRs, these same lands could only be developed at much lower densities of one unit per parcel (i.e. any parcels under 70 acres in size and which are legal buildable sites cannot be subdivided further and can therefore only be developed with a

single residential dwelling). The conservation easements acquired as a requirement of the TDR program are held jointly by the county and the city.

Niwot is an unincorporated community with about 4,500 people. With county assistance the community designated a number of TDR sending areas in their buffer and four receiving sites within the Community Service Area. The county has sold some of the PDRs they had acquired from eligible buffer area properties to developers around Niwot. Currently each TDR costs between \$60,000 and \$90,000 on the free market.

Public support for programs that preserve open space is considered very high in Boulder County. Very few people attended open houses or filed any type of complaint in response to the TDR program. The "Open Space Sales Tax" has been reauthorized repeatedly in Boulder County since initial voter approval in 1993.

### *KEY LESSONS*

A very positive feature of this program, especially to the development community, is that the County Commissioners (akin to Alberta's municipal Councillors) will provide the developer an opportunity to present and have a review or "pre-screen" of their draft plans at an earlier stage than if developing without TDUs. This saves up-front resources and provides some indicator to the proponents about whether or not they have a viable proposal before they make significant expenditures in time, finances, and specific site design/layout work.

Another positive feature is that effort to encourage a healthy matrix of land uses in the receiving areas. In Boulder County, up to 5% of receiving areas may be used for non-residential purposes such as office parks, industrial or public uses (e.g. schools). The use of TDUs is not required to build these kinds of facilities.

### *RESULTS*

Boulder County's land conservation programs (e.g. PDR, open space, TDR, NUPUD) are considered very successful. However with success sometimes comes criticism. The county estimates that perhaps less than 20% of private unincorporated lands are unencumbered and vacant or undeveloped. Following basic supply and demand rules this means the remaining land can be quite expensive to develop. This has caused some people who work in Boulder County to live in surrounding counties where they can buy land and accommodations for less money. As a result, quality of life issues associated with a fairly large commuter population have become an increasing concern to residents in both the municipalities and county.

As this program has evolved naturally there have been changes made to the "rules". As a result there was caution expressed from a public support perspective that the program needs to be very clear in its purpose and function. The developer and the landowner really need to understand

what they can and cannot do on the land once the TDRs have been transferred. It was suggested that when changes are made that there needs to be very clear communications around those changes and about their implications on the old rules, restrictions or guidelines.

## Montgomery County, Maryland

Montgomery County has one of the oldest TDR programs in the country. After WWII there was substantial population growth in Montgomery County and it was starting to have an impact on the land use which was primarily agricultural. In 1956 a preferential tax system was introduced to assess the land at its agricultural value instead of development potential to help encourage landowners to keep their land in agriculture.

Early on in the program the county considered the amount of development possible if the pace of land use change did not slow down. They figured that 3,000 – 5,000 acres could be developed each year. By putting in an Agricultural Land Reserve (ALR) and establishing a TDR program only 6,000 acres have been developed in the last 25 years.

When the ALR was established the zoning was changed from allowing 1 unit / 5 acres to allowing 1 unit / 25 acres. In an effort to make the downzoning fair a TDR program was implemented that allowed the landowner to sell the development rights that they could no longer develop as a result of the downzoning (e.g., before the downzoning a landowner with 100 acres could develop 20 units; while after the downzoning they could only 4 units therefore the remaining 16 units would be available as TDRs). All land in the ALR became the sending area in the program and all acres were treated equally with respect to how many development rights could be sold on each property regardless of landscape features.

### *THE PROGRAM*

Unlike all other programs that we visited the program is administered by two separate groups - the sending areas are administered by Agricultural Services while the receiving areas are administered by the Planning Department. To enter the program a landowner would place a conservation easement in favour of the county on their property. The landowner can sell any number of development rights at any time. Each TDR is given a serial number as it is created and registered on title. All future TDRs on a property reference any previous TDRs sold on that property. The landowner can also sell the TDRs for the "allowed" units (1 unit / 25 acres) except for one building lot.

Receiving sites are chosen based on existing infrastructure (e.g. roads, water, sewage, etc.). Developers can choose not to purchase development rights but then must use current zoning and cannot increase density. By purchasing development rights a developer can increase the density of their project by up to 20% or higher if doing a condo or garden apartment project.

## *KEY LESSONS*

There have been some low activity times in the program when there were not sufficient receiving sites for the TDRs being sent. For that reason, it was recommended that there be twice as many receiving sites available as there are sending sites thereby creating a market for TDRs.

Until now TDRs have only been used in residential developments. The county is considering a Building Lot Termination (BLT) program where landowners could sell the remaining building lot for mixed use zoning developments – e.g. commercial, industrial, retail, etc.

Montgomery County has two tax programs through which public funds support land conservation programs - the "Agricultural Transfer Tax" and the "Real Estate Transfer Tax". Each was voted in by the public and fund "Purchase of Development Right" program and an "Open Space" program, respectively.

Montgomery County also has a Conservation District certify stewardship plans to help land owners become better land managers, dealing with such things as off-stream watering, grassed waterways, fertilizer and pesticide management, etc.

In Montgomery County conservation easements can be "layered" meaning a landowner may have sold their TDRs to protect the agricultural land base, but still have some forested area on their land that could be logged. They can then sell a conservation easement on the forested area. Many landowners who layer conservation easements work with a consultant to help them keep track of all the programs that are available, and can work with farmers to help them maintain the agricultural value of their land while realizing other economic benefits.

One point raised was that these programs need to look at agriculture as a resource, with the underlying assumption that once the land is protected, the industry will take care of itself. For instance many of the farmers in Montgomery County farm 3,000 – 5,000 acres while they may only own about 200 acres. The ALR and TDR program have set up a situation that is very conducive to rental agreements for farmland, thus keeping more land in agriculture.

The vision of Montgomery County was very clear to protect agricultural land. The ALR and TDR program do this very well. To encourage a more sustainable agricultural *industry* the county offers other programs such as a farmer's markets registry to promote the local industry, and management plan services which can promote best management practices.

## *RESULTS*

With a goal to protect 93,000 acres of agricultural land, Montgomery County has secured nearly 49,000 acres through the TDR program. This added to the acres protected in other preservation programs results in almost 65,000 acres in total protected from residential development.

## Calvert County, Maryland

In 1976 a committee was created to review options for preserving land in response to rapid population growth in the early 1970's. The options they reviewed included downzoning, conservation easements, and transferable development rights. Around the same time University of Maryland wrote a paper suggesting that whichever options were adopted should be equitable to all landowners. The options were presented at a series of farmers meetings after which 80% voted in favour of a transferable development rights program.

It was felt that such a program had to be designed by the people who would be using it. The government provided the framework and then the community built the program. In Calvert County's program they downzoned the entire county and then only allowed densities to be increased on receiving areas by using TDRs. There was also a decision that there would be no rezoning anywhere. The result of this is that there was an automatic market for TDRs.

In the late 1990's the county completed a build out scenario that looked at population growth and land use change over time if all possible building sites were used. A mail out survey was sent to all county residents in which all agreed that the results of the build out scenario showed too much development relative to the vision of what they wanted for their county. County wide downzoning was approved from one unit (or home) per five acres to one unit per 10 acres. In 2003 another downzoning was implemented to one unit per 20 acres.

### *THE PROGRAM*

A group of volunteer citizens form the Agricultural Preservation Advisory Board (APAB) which promulgates rules, develops procedures and reviews all applications. To participate in the program, a landowner applies to the APAB to have their land designated as an Agricultural Preservation District (APD). Land zoned as Farm and Forest District by the County or located in a Designated Agricultural Areas by the APAB are priority preservation areas. Land outside of the priority areas may still be eligible, but needs to meet higher standards. All applications are reviewed based on soil classification and quality, as well as suitability for cropland and/or managed forestland. Once accepted as an APD, the numbers of TDRs the land owner can sell are determined based on preset criteria. A sale of any TDRs permanently preserves the land and covenants are recorded. If no TDRs have been sold, a sending site can be removed from the APD after five years, with one years notice to the given to the APAB.

The owner of a designated sending site retains the ability to build up to three houses (one house / 25 acres to a maximum of three houses). When in the program the APAB reviews and approves the house and road locations. Building in the program is a simpler process than on land not participating in the program. Another benefit to entering the program as a sending site is that sending areas in the program are only taxed based on the residences on the land; the farm land is

not taxed. The prices of TDRs in Calvert County are determined by supply and demand in a free market. Five TDRs are required to build one unit.

### *KEY LESSONS*

Though one of the oldest and most successful programs in the country, Calvert County's program is not without criticism. There was some concern expressed that the program has changed focus from agricultural land preservation to growth management (i.e., managing sprawl). Though the two are compatible, some stakeholders felt that if the focus was now on changing the nature of development there are other tools that can be combined with TDRs to better manage growth, such as "town centre planning" and promoting walkable, mixed-use town centers to establish a sense of community and provide a variety of housing choices for local residents.

Although the market price of TDRs had evolved to an acceptable price for both landowners and developers involved (about \$4500), in 2004 the County entered the 'development right' market directly. The County chose to start purchasing and extinguishing rights to more actively protect open space, and ultimately bought rights at \$9000, effectively setting the market. There was also concern expressed that using public money in a program established on the grounds of private conservation was inequitable and may have negative implications on affordable housing in the county (with 5 credits required to add an additional housing unit, the TDR program could add \$45,000 to the purchase price of a house).

Since the TDR value is a factor of supply and demand in the TDR market rather than the agricultural or speculative land price, there was also discussion about the possibility of combining other options with the TDR program to ensure the landowner receives the full equity potential of their land if deed-restricting it. For example, 'layering' of conservation easements granted for different purposes (agricultural, forestry) would allow landowners to receive multiple payments for restricting multiple land values.

### *RESULTS*

As of 2007 Calvert County has preserved over 25,000 acres out of their goal of 40,000 through state and county programs. Out of the 25,000 acres already preserved more than 17,600 acres have been preserved through the TDR program.

## **CONDITIONS FOR SUCCESS IN ALBERTA**

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Determining which factors account for the success of any program is difficult, and more so as the complexity and variety of the program increases. The following is a preliminary assessment of which factors appeared to be related to success in the case studies the authors reviewed,

especially with consideration of the Alberta context. This should be read in conjunction with the case study-specific comments above (see *Four American TDR Examples*).

It is worth noting that one effort to quantify the factors of success for the American program (Kaplowitz et al., in press) found a number of TDC program features positively correlated with their measures of success (acres preserved, number of transfers, an respondent opinion). Briefly these were:

- Joint existence of a Purchase of Development Rights (PDR) program;
- Undertaking of background studies;
- Establishment of a TDR bank; and
- Type of development demand (specifically that programs aimed at addressing housing development correlated with success).

## Engagement of key stakeholders

On-going communication with, and genuine buy in of key stakeholders is critical to program success. Some key stakeholders will be the same regardless of the program, whereas some will vary.

TDC programs are generally set up for a primary purpose (though there may be secondary purposes). The community that stands behind the primary purpose is a key stakeholder. For example, if the program's purpose is to conserve agricultural land, it is vital to get the agricultural community aware of the program facets and involved in communications in an on-going way. If that community does not believe the program will accomplish the goal, that becomes a self-fulfilling prophecy.

Other key stakeholders include the Council and staff within municipality, the buy in of development community, and the voting public (especially in the case of a county-wide program or one that requires significant action like down-zoning).

Some municipal governments will inevitably look to third-party land trusts to hold conservation easements resulting from TDC programs. For this reason, engaging land trusts individually and through the Alberta Land Trust Alliance will be critical to ascertain the level interest, opportunities for collaboration, and a sense of the capacity of land trusts to play this role.

## Support at a State / Provincial Level

Although the exact nature of support is debated, some level of provincial support is valuable, and may range from helpful to critical. Because municipalities get their powers from the Province, conversations with municipalities indicates a nervousness in proceeding with a TDC (or any) program without some measure of support from the higher level government.



Certainly a provincial-level policy indicator would alleviate this nervousness, but would likely also provide critical support and direction given the newness and uncertainty around the tool. Kaplowitz et al. (in press) note that the presence of enabling TDR legislation is not critical for success, but note several related state-level factors that are including background studies, complementary programs, and TDR banks are – all of which can benefit from provincial-level support and guidance.

## Well-conceived Credit System

The authors had the opportunity to meet and discuss program success with planners, real estate agents, brokers, landowners, developers, and others involved in four successful American TDR programs. Discussions about the implementation preferences and concerns generally centred around how credits were assigned, the value of them to sending area parcels, the ratios for their transfer, the influence of administration on their cost structure, etc. Clearly, a well-conceived credit system has a large impact on the smooth and effective operation of a TDC program.

## Connection to Community Vision

Based on our discussions with various municipalities, there appears to be a temptation in Alberta to focus first on development of the TDC tool, and second on tailoring that tool to a community-based desire to conserve valued landscapes. The successful programs the authors reviewed related the TDC tool to pre-existing, well-established conservation goals. For example, in Boulder county, Colorado, comprehensive plans had for many years reflected residents' desire to see a physical separation between two large cities in the county; a desire supported by transferring development potential out of that greenbelt. Similarly, in Montgomery County, Maryland, build-out scenarios several decades back highlighted for residents the future they did not want to see; the search for solutions brought them to TDRs.

The research of Kaplowitz et al. (in press) contradicted the subjective belief that multiple purpose programs were more successful because they were more inclusive. The reverse was in fact found to be the case.

## Attractiveness to Developers as well as Conservationists

Success seems to be dependent on securing the participation of developers and conservationists, perhaps at different critical stages. Kaplowitz et al (in press) found that of the range of potential program initiators, only preservationists and government agencies as initiators were positively correlated with success. However, the authors review found that government agencies and program facilitators identified developers as a key player whose participation was to be actively cultivated.



It is likely the case that the preservationists represent the front end of a program (getting conceptual buy in, engaging voluntary participants in the early stages). Conversely, developers fully engage at the latter stage, one where participation is mandatory so incentives and recruitment take on a much different character.

## Flexibility and Stability

In each of the four programs the authors reviewed in depth, participants and program developers spoke (sometimes explicitly, sometimes implicitly) to the need to balance flexibility and stability. Programs are ever-changing, and aptly so. Like all things, those that evolved were able to keep pace with the changes in the economics and landscapes of their region.

However, many participants, especially real estate agents, brokers and developers, spoke to frustrations with changing rules. Their continued engagement seemed based on their on-going communication, and sense that they were at least being made aware to the best degree possible of those changes. Not surprisingly, in a different breath they also spoke to their particular desires for program change.

## Equity and Fairness

When conversations are initiated in Alberta around the TDC tool, the feature that attracts perhaps the most attention is the ability to 'level the playing field;' that is, that the program creates a financial benefit to *conserving* as well as developing.

For this reason, programs, especially the credit systems, seem to be scrutinized for fairness and equity by all stakeholders. The programs we reviewed went to significant lengths not only to be fair and equitable, but also to be seen as such.

## Support/Coordination with Complementary Programs

In site visits with the American case studies, it was rare not to be led to a different department and told about a complementary program. These were presented as pieces of a whole. Examples included the Great Outdoors Colorado-supported Parks and Open Space PDR in Boulder County; the Agricultural Preservation Board in Calvert County, Maryland; the Smart Growth Maryland state programs in Montgomery County; the Rural Land Use Process in Larimer County, Colorado. As well, all spoke to research and communication services which their programs relied on.

The underlying message was the inability of the TDC program alone to accomplish all the valued landscape conservation work within any county.

## CREATING A PROVINCIAL LEVEL STRATEGY

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From a review of both the American programs that the Miistakis Institute has researched, as well as the review of the current initiatives and discussions in Alberta, we feel strongly that there is an important role for the Government of Alberta to play in supporting the development of the Transfer of Development Credits tool in our province.

That role should have at least the following two components:

- Development of enabling legislation for Transfer of Development Credits programs in Alberta;
- Technical and financial support for municipalities seeking to develop and implement TDC programs.

In the absence of – or in conjunction with – enabling legislation and technical/financial support, at a minimum the provision of strong policy indicators would be vital in assisting the application of the TDC tool in Alberta. As noted above, conversations with Alberta municipalities indicate a nervousness about moving forward with implementing TDC programs, a nervousness which provincial-level policy indicators would likely alleviate.

### Enabling legislation

The authors conclude that, while not strictly necessary, enabling Transfer of Development Credits (TDC) legislation could significantly assist and guide the development and implementation of the TDC tool in Alberta. In particular, it would be a vital signal to municipalities considering the tool that the concept has support at the provincial level.

Additionally, though direction on implementation is not the primary motivation for calling for enabling legislation, there are great opportunities for the Government of Alberta to play a role in augmenting the effectiveness of TDC programs across the province through stipulations and opportunities built into such legislation.

#### *DETERMINING THE NEED FOR ENABLING LEGISLATION*

In assessing the desirability of having enabling legislation, we examined three factors: 1) the experience from the United States; 2) the current legal context in Alberta; and 3) an assessment of the desirability from the perspective of Alberta municipalities.

### The American Experience

Looking at the American examples, there are 33 states with Transfer of Development Rights programs, but only 23 states that have enabling legislation (Pruetz and Pruetz, 2007). Similar to Alberta, most states delegate significant portions of their land use planning and regulation responsibility to local governments. This delegation varies perhaps more broadly in the United States in that some American counties are “home rule” counties (with a similar range of powers as Alberta’s counties and municipal districts), while some are “statutory” counties, where even their basic planning documents (akin to our Municipal Development Plans) must be approved in the state legislature. In the latter case, programs like TDC may *require* enabling legislation at the state level.

In terms of the impact on success, our detailed review included four very successful programs; two in a state with enabling legislation (Maryland), and two in a state without such legislation (Colorado). This, and Pruetz and Pruetz’s (2007) summary suggest that the *simple fact* of enabling legislation does not appear to be a factor in either program establishment nor program success in the United States. Additionally, Kaplowitz et al. (in press) found that the existence of state enabling statutes was not positively correlated with success of TDC programs.

### Legal support for the TDC tool in Alberta

Perhaps the first issue that arises in discussions around the desirability of enabling legislation, is whether the TDC tool would be legally accessible in Alberta in the absence of such legislation.

As discussed in detail earlier, Kwasniak’s (2004) assessment of the legal authority for implementing TDC programs reviewed the various components of a typical TDC program, and found challenges, but no strong legal barriers. As the authors of this report are not legal experts, we can provide no further analysis, except to comment on the effect of this study. Kwasniak’s assessment has been reviewed by legal counsel for at least four municipalities considering implementing a TDC program, with the conclusion that it provided at least enough certainty for them to proceed with exploring use of the tool in their community.

### Demand from municipalities

Perhaps the strongest argument for having enabling TDC legislation comes from the explicit requests by municipalities in Alberta. Several examples of that demand exist (see *Review of Current TDC Activity in Alberta*, above). Again, to summarize:

- The summary of the consultation undertaken in support of Alberta’s Land Use Framework (that done specifically with municipalities), describes the TDC tool as a “common policy suggestion” indicating a message from the municipalities that they wish to see the Province take a definite role in supporting the tool (Praxis Group, 2006).

- The Fall 2006 convention of the Alberta Association of Municipal Districts and Counties (AAMD&C) passed the following very clear resolution:  
*“THEREFORE BE IT RESOLVED that the AAMD&C lobby the provincial government to implement enabling legislation at the provincial level to facilitate and guide the development of a Transfer of Development Rights program that includes the ability to register these rights on the land title.”*
- Four municipalities with whom the authors have worked directly in those communities’ explorations of the TDC tool have expressed – at both the council and staff levels – the wish that there would be legislation at the provincial level to enable TDCs.

It is important to note that the common factor appears to be a desire for some measure of certainty and support for those municipalities making a foray into uncharted territory. Their demand seems to be *less* motivated by a desire for detailed direction regarding implementation than by the need for a strong indicator that the efforts to implement the tool would not suddenly meet with legal, policy, or political disapproval from the provincial government (the level of government from which municipalities get their powers).

#### *POTENTIAL LEGISLATIVE FRAMEWORK*

##### American examples

Enabling state legislation appears to vary in how prescriptive the tone and details are; perhaps, again, based on whether local governments have the jurisdiction to define their own programs or not. Some Acts do little more than enable the creation of TDC programs at the County level, while others detail many of the operational aspects of permissible programs. Components that may be included in state legislation include:

- Criteria for establishing permissible plans (requirement for the development of a Master Transfer Plan, capital improvement requirements for receiving areas, utility servicing plans for receiving areas, and real estate market assessments);
- Guidelines for establishing multi-jurisdictional programs;
- Designation of directing bodies (municipal planning board, agricultural services board, etc.), and decision-making / dispute resolution processes;
- Identification of state-level assistance programs (plan development, potential financial support, etc.);
- Specifications for appropriate sending landscapes / receiving zones; and
- Protocols for the establishment and operation of TDC banks.

## Proposed principles

This paper will not propose a detailed template for TDC legislation, but rather will identify what the authors feel are key guiding principles in developing that legislation. As well, the authors provide suggestions in the following section for key features that TDC legislation should contain to address potential issues and opportunities.

The authors propose that the following principles should guide the development of enabling legislation:

### CONTROL OF TDC PROGRAMS SHOULD BE IN THE HANDS OF MUNICIPALITIES.

Though the TDC tool can, and should, be initiated in some cases by landowners, developers, conservation groups, etc., it should be recognized as a municipal planning tool. Enabling legislation should focus on empowering municipalities to most effectively develop and execute TDC programs.

### THE MUNICIPAL GOVERNMENT ACT IS IDEAL PLACE TO LOCATE ENABLING LEGISLATION.

Following from the previous point, the Municipal Government Act (MGA) is pragmatically the best place to locate enabling legislation. Though they are subject to all provincial legislation, municipalities live and breath by the MGA. The most effective policy signals, and most easily-accepted direction for municipalities will come through that Act.

Having said that, with the evolving environment around regional planning in the province, it may also be appropriate to contain the legislation in as-yet-unknown policy or legislative frameworks. Again, the critical feature in those cases will be coordination with the Municipal Government Act to ensure consistency and a direct connection to municipalities' fundamental legislation.

### TDC PROGRAMS SHOULD FOCUS ON SUSTAINABILITY OF LANDSCAPES.

Both the experience in the United States (Kaplowitz et al., in press) and our own review indicates the large majority of Alberta TDC programs are likely to focus on the conservation of ecological or agricultural landscapes, and to a lesser degree historical properties. There are a number of other potential program purposes seen in American programs from recreation to the protection of marble mining potential (Pruetz, 2003). This begs the question with which landscape types should TDC legislation be concerned.

However, rather than enabling conservation of pre-defined landscape and property types (e.g., agricultural, ecological, historical), provincial TDC legislation should promote the broadest application of the tool, but still within the realm of sustainable land use. Flexibility will allow municipalities to make the best, most creative use of the tool, and the

focus on sustainability will maintain its credibility. Because the discussions around TDCs in Alberta already focus on promoting sustainable land use, a program which (for example) restricts one non-sustainable land use for the promotion of another will likely not enjoy broad public support, and may cause antagonistic confusion.

Having said this, any TDC program will require a mechanism to restrict the development potential on the sending area parcels once credits have been transferred. As noted above, there are significant deficiencies in this area for the application of TDC programs in Alberta (see *Myths and Challenges*). When addressing these gaps, focus should be put on enabling the use of TDC programs for the three most likely purposes: conservation of ecologically, agriculturally and/or historically valued landscapes.

#### EXISTING PROGRAMS SHOULD BE GRANDFATHERED

It is possible that at the time TDC legislation is enacted, programs may already have been initiated. Such legislation may have some prescriptive elements to it, ones not conceived of by the visionary early adopters of the TDC tool. It will be important not to penalize their initiative, nor to undermine confidence in the TDC tool province-wide, by forcing existing or nascent programs to conform immediately to new standards that may be bureaucratically contradictory.

#### ENABLING LEGISLATION SHOULD BE INCENTIVE BASED

Enabling TDC legislative, and the associated regulations and policy, should be incentive based to the greatest degree possible. For example, the authors identify opportunities to promote sustainable land use planning through the TDC enabling legislation, but suggest this should be incented by creative grant making or other such mechanisms rather than by punitive consequences.

#### Proposed features of TDC enabling legislation

As noted above, it is not the intention to provide here a legally-robust set of legislative clauses. Rather, there are a number of features, arising from both our review of the American experiences and our assessment of the Alberta context, which the authors feel provincial legislation should include in some manner.

#### TDC-SPECIFIC EASEMENTS

Perhaps the most significant barrier to TDC implementation in Alberta is the limited tools for extinguishing development potential in the sending areas once the credits have been transferred. As noted above, TDC programs in Alberta are likely to focus on ecologically,

agriculturally, or historically valued landscapes and properties. However, Alberta's conservation easement legislation<sup>4</sup> currently addresses only the *ecological*/landscapes.

Enabling TDC legislation can address this with a two-pronged approach. First, make explicit reference to tools that exist in other legislation. Second, create TDC-specific easements directly within the TDC legislation.

In the first prong, TDC legislation should identify that there is at least one and perhaps two other pieces of legislation that facilitate the kind of perpetual conservation needed to underpin a TDC program (see *Legal Considerations*, above). The ecological conservation easement provisions under the *Environmental Protection and Enhancement Act*, and the broad potential under the *Historical Resources Act* may provide the necessary legislative tools for ecological, historical and perhaps agricultural property conservation.

In the second prong, TDC legislation should create "TDC easements" which can be established for purposes of supporting an ecologically, agriculturally or historically focused TDC program, as well as any other purpose in support of sustainable land use. Language should be based on the conservation easement legislation as the framework there is analogous and already legally robust. Like other easements, TDC easements would be eligible to be registered on the title of the land. A minimum list of restrictions (likely including 'no subdivision') would be created, then additional restrictions based on the each of the main purposes. Drafting should allow these easements to be held by the municipality, but also third parties such as land trusts, agricultural societies, historical societies, etc.

Additionally, these TDC easements should not preclude the placement of traditional conservation easements on the same parcels by active land trusts. Our review of the American programs showed that the 'layering' of easements was a feasible and attractive feature for landowners. For example, in Montgomery County, Maryland, the TDC program places an easement for the purposes of protecting agricultural land, but a state program can provide the landowner with additional compensation for an easement on the same property used to protect the forest resources.

Arlene Kwasniak, professor in the Faculty of Law at the University of Calgary, should be recruited to draft this legislation. Professor Kwasniak was heavily involved in the drafting of the conservation easement legislation, teaches municipal law, and is one of Canada's foremost experts on the legal dimensions of Transfer of Development Credits.

As well, the Alberta Land Trust Alliance should be actively engaged to assist both with ensuring TDC easements are practically feasible, and with proactively ascertaining the

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<sup>4</sup> Alberta Environmental Protection and Enhancement Act, Section 22.



opportunities for Alberta's land trusts to play a role in receiving grants of these kinds of deed-restricting agreements.

#### PROMOTING MORE COMPREHENSIVE CONSERVATION AND DEVELOPMENT PLANNING

There is an opportunity to use enabling legislation for TDC programs to promote more comprehensive planning that deliberately reconciles development and conservation. There are at least two confounding circumstances that this would address.

First, one problem that has bedeviled many start-up TDC programs in the USA (and some of the efforts in Alberta) has been the tendency to develop the TDC tool, *then* fit the municipal plans to it, rather than to develop the tool to support the *pre-existing* conservation and development goals and plans.

Secondly, even in the cases where tools are matched to over-arching documents (such as municipalities' Municipal Development Plans), a challenge exists in that there is usually a heavy focus on planning for the conversion of landscapes, and structural difficulties in *coordinating* development goals/activities with conservation goals/activities.

These two circumstances can inadvertently encourage municipalities to separate both their tool-development and their conservation efforts from their overarching community plans.

'Sustainability Plans' (under a variety of names) are being implemented in more and more municipalities across Alberta and Canada by communities looking to better articulate how they will reconcile their sometimes competing efforts to provide for their community's short-term prosperity and long-term viability. When this type of plan is developed, and goals for reconciling conservation and development of municipal landscapes are explicitly laid out, it can provide a blueprint that addresses some of the shortcomings of the MDP process, and provides a solid foundation for the development of a TDC program.

An opportunity exists to promote the adoption of this sort of planning by making the ability to use the TDC tool contingent on the development of some sort of Sustainability Plan<sup>5</sup>. Legislation could dictate that communities have such a plan in place prior to the adoption of a TDC program, one that includes a clear articulation of what goals are supported by a TDC program.

Incentives for adopting this sort of plan (e.g., financial support for the development of the plan, additional consideration in other areas of municipal granting, etc.) would not only

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<sup>5</sup> Some municipalities will already have some sort of sustainability plan (or a collection of plans) which collectively achieve the same goal.

promote more effective TDC programs, but also more effective sustainability planning in municipalities.

#### STAKEHOLDER ADVISORY GROUPS

The message repeated over and over again, both explicitly and implicitly, in the successful programs which the authors reviewed was the need for community buy-in *throughout the life of the program*. Though much of that discussion focuses on the establishment of the TDC programs, the need to maintain that buy-in once citizens become engaged in these programs is equally important.

There is an important opportunity in enabling legislation to promote the establishment of stakeholder advisory groups to oversee the progress of TDC programs, and advise on proposed changes.

The representation, duties and other specifics should be left relatively broad to allow municipalities to best fit the group to the need. For example, if the focus is the protection of agricultural land, perhaps the agricultural services board is best tasked with developing and managing that advisory group, a structure not appropriate if the focus is historical conservation.

#### INTERJURISDICTIONAL TDC PROGRAMS

As noted earlier, Pruetz and Pruetz (2007) identify at least 10 multi-jurisdictional programs out of the 181 he has catalogued. Some of those, like the New Jersey Pinelands program, were established via specific state-level legislation, with the operational guidelines detailed in the relevant Act. Others, like Boulder County, Colorado, are the result of county-initiated interjurisdictional agreements (in Boulder County's case, seven different agreements with adjacent municipalities).

In either case, these programs recognize the value of multi-jurisdictional TDC programs, in that ideal sending areas may not reside in the same municipality as ideal receiving areas. Because interjurisdictional TDC programs (like any type of interjurisdictional initiative) are particularly difficult to effect due to the increased complexity, encouragement for such programs should exist directly in the legislation. Such encouragement could include:

- Explicit recognition of the value of interjurisdictional TDC programs;
- Incentives such as increased granting opportunities for multi-jurisdictional programs;
- Basic guidelines for the development of multi-jurisdictional programs; and/or
- The opportunity for such programs to be provincially or regionally administered if appropriate.

Municipalities wishing to cooperate in a multi-jurisdictional TDC program may not, in fact, be adjacent (as is the case in the New Jersey Pinelands program). For this reason, guidelines for regional programs should be broad and inclusive, providing a structure allowing for distant municipalities to cooperate, and for the establishment of large regional programs.

#### TDC PROGRAM CREDIT 'BANKS'

Although we earlier challenged the sentiment that credit 'banks' are *required* for a program to be successful, we do believe that there is great value in them in terms of their ability to smooth the operation of a TDC program. Enabling legislation should facilitate the development of such banks.

In some American cases, banks have been state wide, which on its surface seems unwieldy as credits will trade at different values in different regions, and the utility for individual programs will be difficult to judge. However, the authors have not investigated this aspect in enough detail to comfortably provide a recommendation in that respect.

At a minimum, enabling legislation should identify the possibility of establishing these banks, and outline the basic structure (e.g., governing body and its appointment, representation, use of funds, relation to the province, etc.).

In some US cases, these banks have gone on to be *de facto* administrative organizations for the TDC programs, monitoring the effectiveness of the program, securing and distributing grant monies, and setting average credit prices. It is an open question whether this administrative role is appropriately placed here, but the most important consideration is whether that expanded role evolves deliberately or unintentionally. For example, while expedient, an official body determining average credit prices can have the unintended consequence of unduly setting an otherwise open market.

#### THIRD-PARTY TDC EASEMENT HOLDERS

Holding a TDC easement, especially one that is perpetual, represents a liability (on-going stewardship, monitoring and enforcement, exposure to challenge), which can make municipalities hesitant to take them on. As well, in Alberta, there is existing conservation easement legislation (a suitable tool for *ecologically*-focused TDC programs) and a network of land trust organizations operating in most areas of the province with significant capacity, expertise and willingness to hold these easements.

For these reasons, enabling legislation should provide for third-party agreements whereby land trusts can hold the easements that arise out of TDC programs. This should not be a requirement, nor is the existence of a local land trust a guarantee that they would be

willing to hold such easements. However, these circumstances represent a significant enough opportunity that the legislation should speak directly to it.

The Alberta Land Trust Alliance should be engaged directly both in drafting these terms, but also in assessing the opportunities for Alberta's land trusts to play a keystone role in holding and stewarding TDC conservation easements.

#### TDC-SPECIFIC PUBLIC CONSULTATION

In all programs reviewed by the authors, the administrators spoke to the critical importance of public buy-in for the effectiveness and longevity of TDC programs. If communities pursuing TDC programs in Alberta depend only on the broad public consultation required through Municipal Development Plan, Land Use Bylaw or Area Structure Plan development/review, the program could still be undertaken without a genuine effort to consult the community about the role and form of a TDC program.

Enabling legislation should outline the TDC-specific consultation required prior to developing the capacity for a program, identifying sending/receiving areas, or at minimum prior to the release of any supporting grants.

#### FLEXIBILITY IN DETERMINING TDC ADMINISTRATIVE BODY

In much the same way that there is great variety in TDC programs in the United States, there is also great variety in the nature and structure of the body administering the program. The authors have seen successful programs where this role was played variously by the planning department, the agricultural services department, an arms-length board, and a state level board – and there are undoubtedly many others. Matching the structure to the particular circumstances has been a factor of success in many programs.

That flexibility should be maintained and encouraged by enabling legislation, rather than being prescribed or unduly restricted. The final decision on the body best suited to administering the program should be left to the individual municipality.

#### PROVINCIAL-LEVEL DISPUTE RESOLUTION PROCESS

There will undoubtedly be conflicts between participants in these programs. Individual municipalities will be poorly placed to resolve these disputes in that they will very often be one of the parties in the dispute. A provincial-level dispute mechanism, ideally with some sort of standing body, would be well placed to resolve local and interjurisdictional disputes. Over time, such a body would also be able to develop some expertise in the tool at a general level, increasing the efficiency and quality of decisions.

Enabling legislation should speak to the establishment of this process, as well as the operational structure and the scope. It will be important that this process/body be distinct from the development appeal process (which will have difficulty arbitrating over conservation/development issues), and that the process focuses not on the moral quality of the programs, but rather their adherence to the tool's principles and legislated process.

## Technical and financial support

As well as the creation of enabling legislation, a critical role which the Province should play is the provision of technical and financial support for municipalities seeking to develop and implement TDC programs.

The authors suggest a series of potential roles which could be undertaken by the Government of Alberta, and divide them into these five categories:

- Technical expertise and training services;
- Funding and grant support;
- Technical resources;
- Administrative support; and
- Support for complementary programs.

### *TECHNICAL EXPERTISE AND TRAINING SERVICES*

To both respond to and catalyze the development of TDC programs within the province, the Government of Alberta should seek to increase the capacity of municipalities in developing and delivering these programs. This would require developing over time some internal (within the Government of Alberta) or external expertise in order to provide training and services that individual municipalities may seek out.

Some of the important topic areas might include:

- *Incentives* – Many TDC programs use innovative incentive techniques to encourage the engagement of program participants (e.g., trimmed down review process for developments subject to a TDC program). The Province could compile those used by other programs, and work with municipalities to develop effective incentive strategies.
- *Stakeholder advisory groups* – Though the make-up of individual stakeholder advisory groups would vary between municipalities, the principles and basic techniques would be similar. The Province could work with municipalities to develop effective TDC program advisory groups.
- *Multi-jurisdictional TDC structures* – Because interjurisdictional TDC programs necessarily step up a level beyond the jurisdiction of individual local governments, Provincial assistance in the development of frameworks and templates would eliminate much of the up-front establishment effort.

## FUNDING AND GRANT SUPPORT

Funding support for municipalities implementing TDC programs may be critical to their development, especially in a program's start up phase. Funding can be useful to directly support TDC efforts, but also for incenting voluntary activity in support of program goals. For that reason, funding support may come through new granting initiatives, or simply targeted utilization of existing ones (e.g., Municipal Sustainability Initiative).

### DIRECT SUPPORT

- *Start-up funding* – Although likely undertaken by existing staff in municipal planning departments, the initial planning and development process of a TDC program will take additional resources. TDC start-up grants to municipalities would be vital in covering feasibility assessments, initial consultation, exploration of sending/receiving area designations, etc.
- *Plan development funding* – Once a municipality (or group of municipalities) has moved beyond the initial stages and reached the point of implementation, they will (similar to the start-up phase) require some support outside of the normal planning processes.
- *Education and awareness funding* – A great deal of the time establishing a TDC program is spent engaging the local citizenry. Because this understanding and buy-in is so critical, grants should be made available to municipalities specifically for communicating with the local community about the goals and features of a local TDC program.

### INDIRECT SUPPORT

- *Incentives for multi-jurisdictional TDC programs* – While the Government of Alberta would not want to *require* that TDC programs cross municipal boundaries, they should recognize both the unique value and the unique challenges of such an approach. Municipal granting programs could provide additional support for programs involving more than one municipality, or even augment other grant amounts when interjurisdictional activity is part of a TDC program.
- *Areas of Significance planning support* – While not strictly part of a TDC program, municipal Environmentally Significant Areas (ESA) plans are generally woefully out of date or inadequate. Recognizing the important role that such plans could play in the development of local TDC programs, grants should encourage the development/update of ESA plans. A similar need exists for identifying agricultural or historical areas of significance.
- *Sustainability Plan grants* – Similar to the ESA plan grants, the Government of Alberta could encourage the development of Sustainability Plans (or such) through conditions on TDC grants. As noted above, this may not require new granting structures, but simply take advantage of existing ones (e.g., Municipal Sustainability Initiative grants).
- *Receiving area infrastructure grants* – Some programs in the United States have made grants available for the development of infrastructure in areas designated as TDC receiving areas. This approach had created a synergy of incentives by using a more traditional 'Smart Growth' incentive with a TDC incentive.

## *TECHNICAL RESOURCES*

In contrast (or complement) to the technical services described above, the development of a series of stand-alone resources to be made available to local governments could be a potentially more cost-effective approach, and one that is perhaps more appropriate in the early stages of TDC programming in Alberta. These would be based on standard needs likely to be faced by all municipalities that are seeking to develop and implement TDC programs.

Examples could include:

- *Assessing if TDCs are right for communities* – Although every program is unique, there are still general guidelines that dictate whether a given municipality is an appropriate place to implement a TDC program. Municipalities just beginning to consider the tool would benefit from an educational guide or checklist providing criteria to help them make this initial assessment.
- *Real estate market assessment* – Municipalities seeking to implement a TDC program will likely seek to do a real estate market assessment as a basis for determining how a TDC market would interface with the local real estate market. Such municipalities would benefit from 1) a province-wide assessment; and 2) a standardized and locally-applicable methodology for such assessments.
- *TDC credit valuation* – Similar to the above, every municipality would be seeking a way to determine the value of TDC 'credits' in their area. Standard or 'average' prices will be of almost no use for creating the details of local programs. However, information about the methods used, examples from other jurisdictions, etc., would be valuable resources.
- *Measuring 'value' in landscapes* – TDC programs are designed to help citizens conserve the *valued* landscapes in their communities. Getting a sense of the relative 'value' of different landscapes in the municipality (especially from an ecological, agricultural or historical perspective) can be very difficult. Again, developing province wide values will be virtually impossible, but gathering techniques and developing starting-point methodologies could be vital resources.
- *Sending/receiving area determination* – At the centre of any TDC program is the need to identify the areas most appropriate for development, and relate those to the areas most appropriate for conservation. The almost-200 programs in the United States have used different approaches, but a review and suggested approaches would be a valuable resource for Alberta communities seeking to implement local programs.
- *Template TDC easements* – As noted earlier, the authors are recommending the development of specific 'TDC Easements' to support the TDC tool. If that recommendation is acted upon, template easements for each of the three most likely circumstances (conservation of ecologically, agriculturally or historically valuable land) should be developed and made available as a starting-point resource for Alberta municipalities. It is important to note that this potentially valuable resource could be a potential barrier as well to municipalities engaging in TDC programs if the template is prescriptive rather than illustrative.



### *ADMINISTRATIVE SUPPORT*

In some American jurisdictions, the state has chosen to actually administer TDC programs, or to administer supportive programs. From a review of those instances, the authors have identified a handful of administrative structures which the Province could develop in support of TDC programs. Each of these requires an administrative structure of some measure to be established *within* the Government of Alberta.

- *Multi-jurisdictional framework administration* – Especially in the case of multiple jurisdictions being involved in a TDC program (e.g., the New Jersey Pinelands program involves over 60 jurisdictions), some American programs have developed a state-level body to administer those programs. The Government of Alberta should consider this possibility, but only in cases where the participating jurisdictions sought that administrative role from the Province, and there is no other body more appropriate to do so.
- *Provincial TDC credit bank* – Participating municipalities in multi-jurisdictional TDC programs may seek to have a third-party operator of a province-wide or regional TDC credit bank. This would allow individual municipalities and/or regional partnerships to administer most aspects of the TDC program, but use a third-party, trans-jurisdictional entity to administer the most critical transboundary program feature – the movement of credits from one jurisdiction to another. This would be a role well-suited to the provincial government.
- *Identification of third party land trusts* – Many municipalities seeking to create TDC programs will also seek to partner with existing land trusts to hold the easements arising from successful program transactions. The government of Alberta, in association with the Alberta Land Trust Alliance, could play a vital role connecting municipalities with potential local land trusts willing and able to hold TDC easements.
- *Arbiter / dispute resolution process* – As mentioned before, conflicts will arise at some point, and the existing municipal appeal structures will likely be ill-equipped to arbitrate these unique disputes. The establishment at the provincial level of an arbitration process (and potentially arbitrators as well) would greatly assist in protecting the integrity of Alberta TDC programs. Such a structure would provide a level of oversight, while removing the contentiousness from the local players.

### *SUPPORT FOR COMPLEMENTARY PROGRAMS*

As mentioned in the review of the American programs, TDC programs there never exist in isolation. Complementary programs for purchase of development rights, land use planning, protected areas, regional cooperation, etc. all played an important role in supporting the goals of TDC programs. The Province should remain conscious of the opportunity and importance of

supporting existing programs, catalyzing new programs, or responding to emergent programs. Three examples are offered below:

- *Rural Land Use Process* – in Larimer County, Colorado, the county TDC programs enjoy the support of the Rural Land Use Process (see [www.larimer.org/rluc](http://www.larimer.org/rluc)). This is a staffed, associate initiative with the goal of assisting landowners who wish to develop their property while maintaining their land in agriculture or other open space. Promotion of the idea and/or explicit recognition of the value of these sorts of programs by the Government of Alberta would greatly assist TDC program development in Alberta.
- *Regional Partnerships* – Alberta has recently seen the development of several informal and formal regional partnerships seeking to better coordinate and collaborate on land use issues of regional concern. The Government of Alberta can support both the TDC tool and these partnerships by, for example, making policy and enabling legislation as applicable to these partnerships as they are to individual municipalities.
- *Purchase of Development Rights (PDR) Programs* – In several of the programs reviewed, Counties used PDR programs as a complement to their TDR programs. These programs essentially pay for conservation easements to be placed on valued landscapes, perpetually retiring the development potential, and are supported through creative public financing (lottery dollars, cell phone taxes, bond initiatives, sales taxes, etc.). In some cases (e.g., Larimer County, Colorado), the PDR program was used to preserve one landscape type (ecological) and the TDR program another (agricultural). In the study by Kaplowitz et al. (in press) researchers found that the presence of a PDR program was strongly correlated with success for a TDR program. Similarly, the non-government 'land trust' community in Alberta has recently made a proposal to the provincial government to support the purchase of conservation easements, a third-party approach used as an explicit complement to County land conservation programs in several U.S. programs.

## SELECTED REFERENCES

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Kaplowitz, M., P. Machemer, and R. Pruetz. In press. "Planners' experiences in managing growth using transferable development rights (TDR) in the United States." *Land Use Policy* (2007).

Kwasniak, A. 2005. "The Potential for Municipal Transfer of Development Credits Programs in Canada." *Journal of Environmental Law and Practice* 15 (47-70).

Pruetz, R. and E. Pruetz. 2007. "Transfer of Development Rights Turns 40." *Planning and Environmental Law*. Vol 59(6): 3-11.

Pruetz, R. 2003. *Beyond Takings and Givings: Saving Natural Areas, Farmland and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges*. Arje Press. Marina Del Ray, CA.

## APPENDIX 1: *NEW JERSEY FUTURE* – RECOMMENDATIONS FOR EFFECTIVE TDR LEGISLATION

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*New Jersey Future*, New Jersey's oldest and largest smart growth advocacy group, is a statewide research and policy group founded in 1987 by senior corporate, civic and environmental leaders to advance smarter land-use and growth policies. They have worked on the development of a Transfer of Development Rights Act in New Jersey, and offer the following guidelines for the development of TDR legislation:

- **Local Flexibility.** TDR is technically complex. Goals may differ: historic preservation, resource conservation, farmland preservation. Legislation should not constrain towns in their efforts to achieve differing goals, with differing professional resources.
- **Zoning.** TDR legislation must not constrain local government's traditional power to plan and zone land, even for very low densities. "Downzoning" should not be restricted.
- **Capital Facilities Planning.** To create a viable TDR market, towns must adopt a capital improvement plan for growth areas to show that roads, sewers and other infrastructure will be available.
- **Technical Assistance.** Planning grants and technical assistance are needed. The TDR bank legislation (N.J.S.A. 4:1C-51) must be amended to increase planning grants to \$20,000.
- **TDR Banks.** TDR banks provide a market during slow economic periods, guaranteeing landowners a base price. Legislation should authorize the creation of TDR banks by individual municipalities, groups of municipalities or counties. There should be few constraints regarding the price at which TDR banks can buy and sell rights.
- **Regional Options.** TDR legislation must authorize groups of municipalities as well as individual municipalities throughout New Jersey to adopt TDR programs.
- **Consistency with Regional/State Plans.** The benefits of TDR should be offered to those municipalities having master plans endorsed as consistent with the State Development and Redevelopment Plan, and to municipalities in the process of seeking such endorsement.