

# Buying a Better Environment?

Market-Based Instruments & the *Alberta Land Stewardship Act*

*Volume 2: Transfer of Development Credits under the Alberta Land Stewardship Act*



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The Environmental Law Centre (ELC) believes that law is the most powerful tool to protect the environment. Since it was founded in 1982, the ELC has been and continues to be Alberta's only registered charity dedicated to providing credible, comprehensive and objective legal information regarding natural resources, energy and environmental law, policy and regulation in the Province of Alberta. The ELC's mission is to educate and champion for strong laws and rights so all Albertans can enjoy clean water, clean air and a healthy environment.

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## Acknowledgements

The ELC is publishing a series of four volumes concerning Market-Based Instruments & the *Alberta Land Stewardship Act*. This work is to encourage the use of MBIs in a way that benefits the environment and to identify what regulations or other legal changes are necessary to do so.

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# Buying a Better Environment?

## Market-Based Instruments & the *Alberta Land Stewardship Act*

### *Volume 2: Transfer of Development Credits under the Alberta Land Stewardship Act*

#### Executive Summary

The Environmental Law Centre (ELC) has undertaken this project to review the market based instruments (MBIs) that are enabled by the *Alberta Land Stewardship Act (ALSA)*. Our goal in this project is to encourage the use of MBIs in a way that benefits the environment and to identify what regulations or other legal changes are necessary to do so.

The results of this project are published as a report in four volumes:

- Volume 1: An Introduction to Market-Based Instruments & the *Alberta Land Stewardship Act*
- Volume 2: Transfer of Development Credits under the *Alberta Land Stewardship Act*
- Volume 3: Conservation Offsets under the *Alberta Land Stewardship Act*
- Volume 4: Stewardship Units & the Exchange under the *Alberta Land Stewardship Act*

This particular volume looks in detail at Transfer of Development Credits (TDCs). Volume 1 proposes and describes criteria for the assessment of MBIs; this volume applies these criteria to TDCs.

This report defines MBIs as a form of regulation albeit different from conventional command and control regulation. As generally believed, *ALSA* has significant potential to advance use of MBIs. In *ALSA*, MBIs are placed within a comprehensive suite of conservation tools that include options for voluntary or coerced conservation and which make tools available for public and private lands. Because these conservation tools have similar purposes, this should allow them to work together such that the protective tools secure the conservation outcomes of the MBIs.

While *ALSA* provides a broad mandate to develop MBIs, this report focuses on those MBIs that are specifically provided for by *ALSA*. These are:

- **Transfer of Development Credits (TDCs)**, a tool used primarily by municipalities to redirect future development.
- **Conservation Offsets** which involve actions to compensate for the ecological impacts of development.

- **Stewardship Units and the Exchange** which could be understood as credits and the trading platform that could help facilitate TDCs and offsets.

All of these specific *ALSA* tools can be considered true “market” instruments in that all involve buying, selling or trading between private parties rather than simply the provision of financial incentives for environmentally beneficial behaviour.

This report proposes and applies three major criteria for the assessment of MBIs under *ALSA*. These criteria are the need for:

- guiding environmental principles;
- sufficient resolution of property law issues; and
- a strong regulatory framework.

These criteria are applied both to the general scheme of *ALSA* and to the specific MBIs contemplated by *ALSA*. Upon analyzing the general scheme of *ALSA* in light of these criteria, several conclusions can be made:

- *ALSA* is significant for recognizing principles of sustainable development and cumulative effects management that are lacking in provincial land and resource legislation.
- *ALSA*'s potential adverse effect on property rights is likely overstated. *ALSA* largely provides purpose for use of pre-existing regulatory authority and it may have some impact on the existing property rights regime by offering compensation for regulatory action and incentives for voluntary private conservation.
- *ALSA* provides multiple options to strengthen the regulatory framework for MBIs through regional plans or regulations of general application. Regional plans have more ability to overcome systemic barriers to MBI use created by the larger framework for regulation of land and natural resources, while regulations of general application are more suited where the need is for principles and rules of general application.

However, *ALSA* is an imperfect platform for MBIs in other ways:

- *ALSA* does not ensure a principled approach to MBIs. Sustainable development and cumulative effects have proven hard to operationalize through regulatory decisions without more specific sub-principles. *ALSA* leaves need to rely on other legislation for principles of pollution prevention and polluter pay, and it continues trends of restrictive public participation and no precautionary principle under provincial legislation.
- *ALSA* does not provide a private conservation tool for public lands or recognize property interests that could protect private conservation against minerals activity.

*ALSA* also leaves uncertainty around compensation for regulatory restrictions on property interests or property values.

In addition, while designed to implement the *Land Use Framework (LUF)*, *ALSA* does not fully address all the policy gaps identified in the *LUF* nor does it fully implement all the strategies proposed by the *LUF*. *ALSA* also fails to directly fill the policy gaps with which MBIs might help.

There are some universal considerations respecting the regulatory framework for MBIs under *ALSA*:

- The legal effect of *ALSA* depends almost entirely on future regulations or regional plans for which *ALSA* provides Cabinet with broad discretion and little substantive guidance.
- *ALSA* is not a platform for development approvals that would be conditional on conservation, so there is ongoing need for the other land and resource legislation.
- *ALSA* was not necessarily needed for the MBIs in question, as authority to establish simple TDCs likely existed under the MGA and authority to require offsets on regulatory approvals exists under multiple other provincial statutes. The main need from *ALSA* was (and remains) guidance for use of these tools.
- *ALSA* does not clearly require legal securement of conservation activities related to TDCs, offsets or the recognition of Stewardship Units.

To date, *ALSA* has been primarily used for its regional planning provisions. Several needs can be identified from that experience: clear objectives, regulatory limits on the impact of activities, coordination of multiple uses, stronger direction to regulators, legal protection of identified conservation areas, and more attention to administrative functions. These motherhood issues with *ALSA* may become even more important if *ALSA* is to regulate the implementation of MBIs in Alberta.

### General Recommendations

1. Adopt the precautionary principle in any policies, regional plans or regulations that could provide direction on the use of MBIs, especially the biodiversity frameworks.
2. Formalize public and stakeholder participation in the development and implementation of MBIs.
3. Protect private conservation activity carried out in pursuit of public policy objectives from the impacts of minerals activity, beginning with Conservation Easements.
4. Clarify and require legal securement tools for all conservation activities related to MBIs.

5. Explore direct use of regional plans and Conservation Directives as means to designate and protect conservation areas associated with MBIs.

More specific issues with TDCs and Conservation Offsets are sufficiently different to warrant very different regulatory responses under *ALSA*.

### **TDC Recommendations**

Applying our three criteria for assessment of MBIs, it can be seen that TDCs align fairly well with established environmental principles and that the specific principles of TDCs are fairly settled. As well, TDCs raise relatively few property law issues. This favorable context results from the clarity of private land ownership, voluntary participation, the availability of securement tools and the established regulatory powers of municipalities.

However, the main barrier to advancement of TDCs is a regulatory framework involving provincial and municipal authorities. TDCs can only be established under *ALSA*, must have specific components, require Cabinet approval in the absence of a clear process, and still need to be implemented through valid municipal bylaws. Although *ALSA* contemplates regulations setting requirements for TDCs, these regulations do not exist. Nonetheless, TDCs are still legally permissible without these regulations (although the existence of regulations would likely increase their accessibility).

Accordingly, we recommend:

1. Make TDC regulations of general application that affirm municipal authority over TDCs.
2. Regulations should clarify credit matters including:
  - a. Municipal authority to create development credits separate from *ALSA* Stewardship Units.
  - b. Required securement of conservation area parcels through title restrictions and approval of the securement tool by the TDC Authority prior to the use of credits for development approvals.
  - c. Responsibilities for a credit registry or tracking system.
3. Establish a public participation process for municipal TDC plans and bylaws that goes beyond the baseline MGA requirements.
4. Provide a formal application process for provincial approval of TDCs that includes a function for the Land Use Secretariat, produces a decision prior to final municipal bylaw decisions, and does not prejudice the validity of municipal bylaws for other purposes.

5. Regulations and municipal bylaws should require that TDC conservation area parcels that receive credits be secured by Conservation Easements, Conservation Directives or historic resource designations registered on title and that the proposed securement is subject to approval by the TDC authority.
6. Municipal bylaws should:
  - a. Clearly require use of credits for beyond baseline development approvals.
  - b. Provide for timing of securement relative to credit creation and sale, and should require securement prior to use of credits by developers.

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#### Introduction

TDCs as described in Volume 1 of this report involve directing future development away from less suitable areas into more suitable areas so as to protect important landscape values while still recognizing the development interests of landowners.

TDCs are typically used at the municipal level and implemented through municipal plans and bylaws. There has been a growing number of developments towards TDCs in Alberta. Examples cited repeatedly in this report include:

- Published legal commentary on municipal authority to implement TDCs prior to *ALSA*.<sup>1</sup>
- A review of the Canadian (and American) experience with TDCs prior to *ALSA*.<sup>2</sup>
- A feasibility review of TDCs in Alberta that included recommendations for TDC legislation prior to *ALSA* (the TDC Feasibility Review and TDC Legislation Recommendations).<sup>3</sup>
- A resolution of the Alberta Association of Municipal Districts and Counties to lobby for TDC legislation prior to *ALSA* (the AAMDC Resolution).
- Multiple examples of attention to TDCs in municipal plans and bylaws, some of which pre-date *ALSA* and have since been adjusted to reflect *ALSA*.
- The court case of *Keller v. Municipal District of Bighorn (Keller v. Bighorn)* which considered the validity of municipal bylaws and the effect of *ALSA* on TDCs.<sup>4</sup>
- Proposed TDC regulations under *ALSA* that were clearly anticipated but never released (Proposed TDC Regulations).

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<sup>1</sup> Arlene Kwasniak, "The potential for municipal transfer of development credit programs in Canada" (2005) 15 JELP at 47.

<sup>2</sup> Guy Greenaway and Kimberly Good, *Canadian Experience with Transfer of Development Credits* (March 2008), online: Miistakis Institute, <[http://www.rockies.ca/project\\_info/Cdn%20experience%20with%20TDC\\_Final.pdf](http://www.rockies.ca/project_info/Cdn%20experience%20with%20TDC_Final.pdf)>.

<sup>3</sup> Guy Greenaway and Kimberly Good, *Transfer of Development Credits in Alberta: A Feasibility Review* (March 2008), online: Miistakis Institute <[http://www.rockies.ca/project\\_info/TDCFeasibilityReviewMiistakis.pdf](http://www.rockies.ca/project_info/TDCFeasibilityReviewMiistakis.pdf)>. Please note that aspects of this document concerning the feasibility review are cited as TDC Feasibility Review and those aspects concerning the recommendations are cited as TDC Legislation Recommendations].

<sup>4</sup> *Keller v. Municipal District of Bighorn No. 8*, 2010 ABQB 362 (CanLII).

- An online “Practical Guide to Transfer of Development Credits (TDCs) in Alberta” provided by the Miistakis Institute (the TDC Website) that discusses potential TDC regulations, TDC approval process, a Model TDC Bylaw, TDC requirements and other best practices.<sup>5</sup>

A main function of this report is to review the extent to which *ALSA* has responded to need for TDC legislation and to reconsider the need for TDC regulations.

Concerning the ELC’s own criteria, TDCs are a good fit with established environmental principles and raise relatively few issues of property law. Most of the issues surrounding TDCs in Alberta concern municipal authority to use TDCs and municipal obligations in relation to TDC use. The status could be summarized as follows:

Prior to *ALSA*, municipalities in Alberta likely had implied authority to use TDCs under the Municipal Government Act. However, it is unlikely that many municipalities would use TDCs in the absence of a clear signal from the province. *ALSA* has responded to requests for TDC legislation but in a manner that legally “occupies the field” of TDCs.

Going forward, TDCs can only be established in accordance with *ALSA*.<sup>6</sup> *ALSA* provides for:

- establishment of TDCs by a municipality, by multiple municipalities together, or by regional plans;
- the required components of TDCs; and
- regulations on TDCs concerning:
  - additions or modifications to the required components of TDCs, and
  - use of “Stewardship Units” in TDCs and the function of the *ALSA* “Exchange” in TDCs.

From a purely legal perspective, *ALSA* has responded to the need for TDC legislation and there are no further regulations or reforms to use TDCs in Alberta. All that is legally needed for TDCs is compliance with the requirements of *ALSA* and implementation through municipal plans and bylaws.

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<sup>5</sup> Miistakis Institute, *A Practical Guide to Transfer of Development Credits (TDCs) in Alberta* (2013), online: Miistakis Institute <<http://www.tdc-alberta.ca>>. See especially the “policy and legislation” section.

<sup>6</sup> *Alberta Land Stewardship Act*, SA 2009, c A-26.8 at s 48(1).

*ALSA* provides for:

- establishment of TDCs by a municipality, by multiple municipalities together, or by regional plans;
- the required components of TDCs; and
- regulations on TDCs concerning:
  - additions or modifications to the required components of TDCs, and
  - use of “Stewardship Units” in TDCs and the function of the *ALSA* “Exchange” in TDCs.

However, some features of potential concern with the *ALSA* TDC model include:

- mandatory and non-exhaustive substantive components of TDCs,
- requirement for Cabinet approval of all TDCs,
- uncertainty around the relationship between TDCs, Stewardship Units and the Exchange, and
- implied but undefined administrative responsibilities on municipalities.

The TDC schemes in various jurisdictions show variability in the tone, prescriptiveness, and details provided by the legislation.<sup>7</sup> In some cases, the legislation under which municipal authority is found does not expressly provide for TDCs. The *ALSA* model of TDC legislation has been referred to in various ways by the community of interest as legalistic, restrictive, complex and onerous. *ALSA* is definitely at the more prescriptive end of the spectrum yet leaves many legal uncertainties. The TDC Feasibility Review advised the involvement of legal counsel throughout the development of TDCs and this advice is even more relevant after *ALSA*.

*ALSA* also creates some practical barriers to the accessibility of TDCs by municipalities. The TDC legislation recommendations were that “control of TDC programs should be in the hands of municipalities, with the *MGA* being the ideal place for enabling legislation”.<sup>8</sup> TDCs fit well with the other *ALSA* conservation tools and *ALSA* was the reform window at the time. Compared to the *MGA* however, *ALSA* remains relatively unfamiliar legislation wrapped in concerns about property rights and local autonomy. The creation of a provincial level of TDC

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<sup>7</sup> *Supra* note 2.

<sup>8</sup> TDC Feasibility Review at 53.

authority and the expressed link between TDCs and regional plans raises some question of “whose tool is it?”

The implications are that *ALSA* in current form has some disabling effect on TDCs and that regulations may be needed to enable use of TDCs in a widespread way. The nature of TDC regulations under *ALSA* should be to simplify or at least clarify the substantive and procedural requirements on municipalities. There would also be value to regulations clarifying that TDCs can exist without Stewardship Units, and affirming local authority over TDCs in return for compliance with *ALSA*.

Other options for enabling TDCs that should be considered less viable at the outset include:

- Adding TDCs to the *MGA*, which is unadvisable as *ALSA* exists and perhaps unfeasible as the *MGA* review is already at a late stage.
- Reform *ALSA*, which is not clearly on the agenda and would open up broader debate.
- Regional plans to provide guidance or support to municipal TDCs, which might be warranted, however does not preclude TDC regulations and does not enable local use of the tool province-wide.
- Rely on “early adopter” municipalities to create a critical mass of TDC use.

It is important to emphasize the ongoing importance of municipal plans, bylaws and process regardless of any *ALSA* regulations or regional plans. Barriers to TDC use in Alberta include lack of understanding of TDCs, lack of regulatory pressure on landowners and developers to use TDCs, and perception of alternative tools that may not be inaccurate considering the potential environmental and economic outcomes of TDCs.

### State of TDC use in Alberta

Multiple Alberta municipalities have shown advancement of TDCs through municipal plans and bylaws. The intention is not to critique these initiatives but to provide some observations relevant to the ELC’s analysis of *ALSA*. These include:

- Reference to TDCs exist in the context of municipal plans that provide goals such as protection of the environment, agricultural lands, rural character, open space, and wildlife habitat. These goals are established before committing to tools.
- Lack of local community understanding and support for TDCs is a barrier even if provincial authorities, municipal council, qualified organizations, and technical advisors are all in support.

- Concerning community support, identifying development areas may be harder than identifying conservation areas.
- The TDC initiative that most clearly lost momentum at the municipal bylaw stage exhibits a complex context including interjurisdictional scope, lack of central authority, multiple possible goals, need for credit banking, and potential connection to other MBIs.
- The TDC initiative that most clearly advanced through municipal bylaws and legal decisions had the simplest context and concepts.
- There is potential flexibility where components of TDCs are provided as between municipal development plans, area structure plans, non-statutory concept plans, and land use bylaws.
- There are multiple examples of similar tools such as “transfer of subdivision density” (TSD) or “conservation subdivision”, and multiple indications of municipal attempts to distinguish TDCs under *ALSA* from these other tools under authority provided by the *MGA*.
- Most TDCs initiatives are in rural municipalities which raises concerns with legal, technical, and administrative capacity.
- Every TDC initiative in Alberta would likely require further steps to meet the requirements of a TDC under *ALSA*.

The following review canvases several TDC initiatives in rough chronological order. This review focuses on initiatives that have been reflected in municipal planning documents. ELC understands that exploration of TDCs is underway in further municipalities as well.

### Cypress County

Cypress County provided an early attempt to establish TDCs in Alberta around 2003. This was in relation to a proposed subdivision on the fringe of Cypress Hills Provincial Park. The context provided a favorable mix of development pressure, conservation activity and landowner interests. The Area Structure Plan prepared for the subdivision spoke to TDCs, mapping of environmental and agricultural values, and potential for Conservation Easements. This stage of the planning process saw support from council, municipal staff, provincial staff and outside technical assistance. However, the Area Structure Plan was ultimately approved without the TDC provisions.

## Red Deer County

Red Deer County showed early interest in TDCs. Prior to *ALSA*, the municipality mandated the exploration of TDCs in the agricultural land context and held workshops on TDCs. However, this early interest has not carried over into municipal plans and bylaws. A 2010 non-statutory plan for river valleys and tributaries discusses TDCs as an alternative to land acquisition in this new context. It also reviews the array of *ALSA* tools.

## Beaver Hills Initiative

The Beaver Hills Initiative (BHI) pursued a promising yet complex TDC initiative in the years just prior to *ALSA*. The BHI is an unincorporated association with an interest in the ecological integrity of the Beaver Hills, an area comprised of multiple municipalities and a national park.<sup>9</sup> Between 2006 and 2009 the BHI ran a feasibility study of a TDC based on environmental conservation objectives and a pilot project exploring credits, market structures, and administration.<sup>10</sup> The initiative could be considered a successful education and awareness exercise that did not produce municipal TDC programs. The BHI itself has no authority over planning and development, and there were concerns with the complexity created by the interjurisdictional context and potential credit system needs. A reduction in growth pressure in the region may also have contributed to lost momentum.

Strathcona County is a focal municipality in the BHI study area. The feasibility study found that the Strathcona County Municipal Development Plan at the time was already sufficient for TDCs.<sup>11</sup> Some key features of this plan for the purpose of this report include:

- Defined principles of sustainable development.
- A goal to preserve the ecosystem and landscape and to restrict development in the “Beaver Hills Policy Area”.
- An objective of directing urban growth as a means to conserve Priority Environmental Management Areas in the Beaver Hills Moraine.
- Mandatory identification of the Environmental Management Areas.
- Maps of the “policy areas” and the Environmental Management Areas.

As of 2015, Strathcona County is reviewing its Municipal Development Plan. One review document discusses TDCs for country residential development involving limits on the number of lots per quarter section in sending areas and potential for additional lots per quarter section

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<sup>9</sup> Beaver Hills Initiative (2016), online: Beaver Hills Initiative <<http://www.beaverhills.ca>>.

<sup>10</sup> Marian Weber and Chris Arnot, *The Feasibility of Transfer Development Credits for Conservation in the Beaver Hills Initiative Area* (21 September 2007), online: Beaver Hills Initiative <[http://www.beaverhills.ca/media/resources/BHI\\_TDC-feasibility\\_study2007MW.pdf](http://www.beaverhills.ca/media/resources/BHI_TDC-feasibility_study2007MW.pdf)>.

<sup>11</sup> Strathcona County, By-law No 1-2007, *Municipal Development Plan* (22 May 2007).

in receiving areas.<sup>12</sup> There is also brief reference to TDCs as one option to address agricultural land fragmentation under a county agricultural plan.<sup>13</sup> TDCs are not mentioned in the Strathcona County Land Use Bylaw or Area Structure Plans to the ELC's knowledge.

Strathcona County promotes the development of non-statutory "conceptual schemes" by landowner/developers in the absence of Area Structure Plans, and at least one such scheme mentions TDCs.<sup>14</sup> The landowner suggests that if a TDC program becomes available in the future that he be able to sell credits from undeveloped parcels that the scheme intends to be protected with a conservation easement. The scheme itself resembles a Transfer of Subdivision Density (TSD) with one landowner clustering density and protecting lands for agriculture and environmental value.

### Municipal District of Bighorn

The MD Bighorn has been working on a specific transfer scheme since at least 2007 (i.e. two years prior to *ALSA*). The basic scheme involves one landowner transferring subdivision potential between non-adjacent parcels. However, full build out of the development area could require finding credits from sources other than the parcels currently owned by the developer within the eligible policy area. This initiative is important for several reasons:

- It is fully operationalized through municipal plans and bylaws, needing only the execution of Conservation Easements and decisions on subdivision and development (if this has not already occurred).
- The plans and bylaws have been amended over time, first to provide for TDCs and later to recognize *ALSA* coming into force.
- The plans and bylaws, TDCs and *ALSA* were considered by the Alberta Court of Queen's Bench in *Keller v. Bighorn*.
- The nature of the transfer scheme highlights unsettled issues around what counts as a TDC under *ALSA* as compared to a transfer of subdivision density (TSD) and similar tools.
- The initiative reflects aspects of the Model TDC Bylaw and the previously anticipated TDC regulations.

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<sup>12</sup> Strathcona Municipal Development Plan Policy Options & Trade-Offs Report (December 2015), see: Strathcona County, <[http://www.strathcona.ca/files/files/report\\_policy\\_options\\_trade-offs.pdf](http://www.strathcona.ca/files/files/report_policy_options_trade-offs.pdf)>.

<sup>13</sup> Strathcona County, *Agriculture Master Plan* (23 June 2015), online: Strathcona County [http://www.strathcona.ca/files/files/at-lls-2015-06-23-report-9\\_1\\_1.pdf](http://www.strathcona.ca/files/files/at-lls-2015-06-23-report-9_1_1.pdf).

<sup>14</sup> Strathcona County, *Conceptual Scheme NE & SE 30-51-21-W4 SW & SE 29-51-21-W4* (January 2009), online: Strathcona County <[http://www.strathcona.ca/files/files/at-pds-cs-2008cs004\\_-\\_ne\\_and\\_se\\_30\\_and\\_sw\\_and\\_se-29-51-21-w4\\_-\\_conceptual\\_scheme\\_.pdf](http://www.strathcona.ca/files/files/at-pds-cs-2008cs004_-_ne_and_se_30_and_sw_and_se-29-51-21-w4_-_conceptual_scheme_.pdf)>.

The following review concerns the current versions of the plans and bylaws to the ELC's knowledge.

The MD Bighorn Municipal Development Plan states that it was prepared in consideration of the *LUF* and *ALSA*, and that anticipated challenges include the *SSRP* and *TDC* regulations. The Municipal Development Plan is detailed and prescriptive on environmental matters in general.<sup>15</sup> It articulates principles including respect for the environment in general and the precautionary principle in cases of uncertainty. Other relevant concerns expressed by the plan include infrastructure constraints and the viability of agriculture.

Goals and strategies include protection of the environment through use of tools such as *TDCs*. The definitions it provides distinguish *TSDs* and *TDCs*. A *TSD* reduces or eliminates subdivision potential in one parcel(s) while increasing subdivision potential in other parcels by the same amount. A *TDC* is "a unique initiative and goals dedicated to specific *TDC* conservation and development areas".<sup>16</sup>

The *TDC* part of the plan states goals to:<sup>17</sup>

- "provide opportunities to apply innovative land use planning and environmental conservation concepts that improve municipal efficiencies and reduce rural sprawl";
- "encourage preservation of identified conservation values, in perpetuity, that would be damaged or lost if the land were developed . . . by supporting transfer of development potential to land deemed more appropriate for higher density based on identified development criteria"; and
- Support regional planning and conservation goals within the *SSRP* in accordance with *ALSA*.

The *TDC* policies section states that the municipality "supports the *TDC* initiatives allowed under *ALSA* and shall implement a *TDC* scheme in accordance with *ALSA* and associated regulations through the development of a *TDC* bylaw and the land use bylaw".<sup>18</sup> It also provides a "transitional provision" that until the adoption of the said *TDC* scheme with approval of Cabinet according to *ALSA*, the municipality's existing *TSD* program described in Municipal Development Plan and Land Use Bylaw shall remain in effect.

Mandatory provisions on *TDC* programs include:

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<sup>15</sup> Municipal District of Bighorn No. 8, by-law No 05/12, Being a By-Law of Municipal District of Bighorn for the Purpose of Adopting a Municipal Development Plan in Accordance with the Municipal Government Act, Chapter M-26, Revised Statutes of Alberta 2000, as Amended, (13 October 1998).

<sup>16</sup> *Supra* note 15 at Appendix A, Definitions.

<sup>17</sup> *Supra* note 15 at s.5, Transfer of Development Credits.

<sup>18</sup> *Supra* note 15.

- identification of conservation values to aid in protection of local and regional environmental, scenic, agricultural and historical resource values;
- registration of Conservation Easements to protect sending parcels in perpetuity; and
- transfer to areas more appropriate for higher density.

Discretionary provisions include the municipality holding Conservation Easements and intermunicipal TDC schemes for regional goals and mutual benefits.

The Municipal Development Plan leaves it discretionary to cover TDCs in Area Structure Plans. If an Area Structure Plan is to contain provisions regarding TDCs, then the plan must contain:

- The TDC conservation and development areas.
- Eligible sending and receiving parcels or ways to identify them.
- Maximum density for the entire development or specific receiving parcels.

The Municipal Development Plan also provides the mandatory and discretionary components of TDC bylaws. A TDC bylaw must include:

- a specific purpose;
- conservation area;
- development areas;
- eligible land use districts (zones); and
- details on how credits are calculated, bonus opportunities and the number of credits required for bonuses.

Separate provisions on TSDs within the Bighorn Municipal Development Plan reiterate the TDC provisions. However, with TSPs it is mandatory for landowners to prepare an Area Structure Plan and to apply the TSD district (zone) of Land Use Bylaw to the receiving parcel and a conservation easement district (zone) to the sending parcel. The Municipal Development Plan also identifies a “small holdings policy area” where TSDs may be undertaken. For this area, it sets a limit on subdivisions per quarter section and provides that landowners may undertake a TSD program to concentrate subdivision and reduce land fragmentation.

The MD Bighorn Land Use Bylaw resembles the Municipal Development Plan defining TSDs and distinguishing TSDs from TDCs under *ALSA*.<sup>19</sup> It further defines “receiving parcel” as the

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<sup>19</sup> Municipal District of Bighorn No. 8, by-law No 04/10, Being the Land Use By-Law of the Municipal District of Bighorn No. 8, in the Province of Alberta, (12 October 2010).

land granted subdivision and development beyond the baseline density under a TSD program and “sending parcel” as the land restricted from development under a TSD program.

The Land Use Bylaw provides the districts (zones) to implement a TSD as follows:

- The small holdings district, which sets a baseline limit on subdivision density without a TSD made according to the Municipal Development Plan and an Area Structure Plan.
- The TSD district for use of the receiving parcel.
- Conservation Easement district for use of the sending parcels.

The Land Use Bylaw affirms that TSD sending and receiving areas must be located in the Small Holdings Policy Area as defined by the Municipal Development Plan.

Approval of beyond baseline subdivision of the receiving parcel is prohibited unless the developer has registered a Conservation Easement on the sending area parcel that limits subdivision in perpetuity. The Developer is also required to provide negotiated funding to cover costs of preparing the Conservation Easements and managing the lands.

The Land Use Bylaw also allows “overlay” districts to facilitate TDCs pursuant to an adopted TDC bylaw and *ALSA*. These overlay districts must be applied in conjunction with the underlying districts, with the underlying district being subordinate if there is a discrepancy.

As an example, the Area Structure Plan for Carraig Ridge (an area within the Bighorn Municipal District) provides for the specific transfer scheme (and became the subject of litigation).<sup>20</sup> It opens by stating that the developer wants this transfer scheme and has conducted community consultations. The scheme is a 1:1 transfer of subdivision density between development (receiving) area parcels fixed by the Area Structure Plan and conservation (sending) area parcels that are flexible within the “small holdings areas” defined in the MDP. It includes a map stating that sending parcels are “conceptual only” and that the developer may nominate any quarter section in the small holdings area as a source of credits.

The Area Structure Plan anticipates that the scheme would allow subdivision of the development area up to 45 lots; however, that credits from the identified sending area would provide credits for up to 40 lots and that this will be the maximum without further credits. This suggests that creating new sending areas could include participation of other landowners in the “small holdings area” or the acquisition of further land by the developer.

The Area Structure Plan provides the mandatory terms of securement. These include:

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20 Carraig Ridge Conservation Community, *Carraig Ridge Area Structure Plan* (14 September 2007), online: Municipal District of Bighorn No. 8 <<http://mdbighorn.ca/wp-content/uploads/2015/12/Carraig-Ridge-ASP-2013-1.pdf>>.

- Registering a Conservation Easement on the sending parcels that prohibits further subdivision and development but which may allow grazing and specific essential infrastructure.
- Starting the donation of easements once the allowable baseline density is exceeded on the receiving parcel.
- Municipal approval of the qualified organization (the easement holder).
- Developer provision of further funds for ensuring compliance with the Conservation Easements if required by the qualified organization.

The Area Structure Plan also speaks to conservation and stewardship of the development area including restrictive covenants, wildlife management policies and a potential conservation levy on the lot owners.

In *Keller v. Bighorn* the Alberta Court of Queen’s Bench considered the validity of amendments to the Municipal Development Plan, Area Structure Plan and Land Use Bylaw that collectively established the Carraig Ridge transfer scheme prior to *ALSA* coming into force.<sup>21</sup> These amendments included:

- The Municipal Development Plan goals to apply innovative land use planning concept and provisions for TSDs in the “small holdings area”.
- The Area Structure Plan for Carraig Ridge.
- The Land Use Bylaw provisions on TSDs, sending and receiving parcels, TSD and conservation easement zones, and a rezoning of lands to the TSD district.

The challenge was based on multiple grounds including:

- lack of municipal authority under the *MGA*;
- lack of certainty of the bylaws;
- non-compliance of the Area Structure Plan and Land Use Bylaw with the Municipal Development Plan; and
- the effect of *ALSA*, which came into force after the bylaw amendments in question.

The challenger was a landowner adjacent to the development (receiving) area who the court described as maintaining his own land as a nature preserve apart from his personal residence.

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<sup>21</sup> *Supra* note 4.

The aggrieved neighbour purchased his land roughly 18 years before the developer purchased the adjacent parcel.

The challenge was unsuccessful on all grounds and the bylaws were upheld in their entirety. However, the case established that *ALSA* has occupied the field of TDCs going forward, and bylaws were later amended in recognition of *ALSA*.

### **Municipal District of Foothills**

The MD Foothills provides planning documents that leave the door open for TDCs. The 2010 Municipal Development Plan recognizes need to limit agricultural land fragmentation and support conservation of the natural environment.<sup>22</sup> Some relevant features of this document include:

- Articulated principles of sustainable development and expressed concern for future generations in multiple statements of environmental and agricultural policy.
- Goals of maintaining natural agricultural capital and specific aspects of the environment.
- Objectives and prescriptive considerations for land use decisions.
- Expressed support for the *LUF* regarding conservation and stewardship.
- Expressed interest in innovative land use planning and conservation concepts.
- Intention to direct country residential development to maintain open space.
- A definition of TDCs as a tool to direct development.
- Commitment to developing a Municipal Growth Strategy that would promote use of TDCs.

The Growth Management Strategy was adopted by council in 2013.<sup>23</sup> It reiterates the agricultural and environmental conservation goals from the MDP and the strategies proposed by the *LUF*. It also adds content on *ALSA* regional planning and its conservation and stewardship tools including TDCs. It states that for landowners not in areas identified for growth, the municipality intends to explore conservation and stewardship tools such as TDCs to enable landowners to benefit from maintaining land in an undeveloped state or keeping it in agricultural production. One significant strategy is to divide the municipality into growth

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<sup>22</sup> MD Foothills Municipal Development Plan, Bylaw 78/2010 available online <http://www.mdfoothills.com/services/planning-and-development/municipal-plans/municipal-development-plan.html>.

<sup>23</sup> M.D. Foothills No. 31., *M.D. Foothills Growth Management Strategy* 2012 (2016), online: Municipal District Foothills No. 31 <http://www.mdfoothills.com/services/planning-and-development/municipal-plans/md-growth-management-strategy-.html>.

management districts for the creation of district plans and to investigate the possibility of TDCs. For the various districts, there are detailed descriptions of land characteristics, environmental features, growth pressures, and ability to support or not support development.

To the ELC's knowledge, there is no reference to TDCs in the MD Foothills Land Use Bylaw or any Area Structure Plans. One potentially supportive feature is a prescription of maximum density of country residential within the municipal district.

### **Wheatland County**

Wheatland County was the sponsor of the AAMDC resolution to lobby for TDC legislation prior to *ALSA*.<sup>24</sup> The county's current Municipal Development Plan speaks to both TDCs and TSDs. The plan recognizes the importance of agricultural land use and growing pressure for residential and industrial lots. It includes principles of protecting agricultural lands and preserving environmental areas, with agriculture being more relevant to the TSD/TDC provisions. The plan creates an agricultural land policy area with objectives of minimizing agricultural land fragmentation. It also states that it opens the door to a future "TSD Credits Program" based on the foundation of an existing municipal subdivision credit program, and that this program is intended to protect farmland by transferring potential subdivision. The plan expressly distinguishes TSDs driven entirely by municipal policy from TDCs under *ALSA*. The apparent intention of the plan is to pursue the TSD program pending future direction from the province on TDCs. The Wheatland County Land Use Bylaw does not speak to these programs. However, it is currently being re-drafted at the time of publication.

### **Brazeau County**

Brazeau County includes brief reference to the prospect of TDCs to protect agricultural land in its municipal plan (2011).<sup>25</sup> This plan also references the *LUF* and the North Saskatchewan Regional Plan. At the time of publication, the county is anticipating a new Municipal Development Plan.

### **Rocky View County**

At time of publication, there is an Area Structure Planning exercise underway in the Glenbow Ranch area in Rocky View County which includes pursuing a specific TDC with intention of approval under *ALSA*. The area is adjacent to Glenbow Ranch Provincial Park south of Highway 1A between Cochrane and Calgary. While this area has seen minimal development, it

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<sup>24</sup> Dillon Consulting, Planning Wheatland County: pathway to a sustainable future - Municipal Development Plan (MDP) Bylaw 2013-18 Amended By-Law 2014-10, 2014-11 (15 October 2013), online: Wheatland County [https://www.wheatlandcounty.ca/images/edocman/planning\\_and\\_development/MDP.pdf](https://www.wheatlandcounty.ca/images/edocman/planning_and_development/MDP.pdf).

<sup>25</sup> Brazeau County, by-law No 770-11, A Bylaw to Amend Bylaw 725-10 (Brazeau County Municipal Development Plan), (15 November 2011).

is under development pressure from the expanding reaches of Calgary and Cochrane. The Area Structure Plan would remove this area from an existing plan that is larger in area and outdated. The effect of the TDC would be to maintain connected greenspace around that park and along the Bow River corridor while concentrating new development around existing development along Highway 1A .

The plan development was preceded by a structure process of community and landowner involvement in goal setting, mapping, consideration of options, and discussion of TDCs. The Draft Area Structure Plan states that it draws guidance on increasing density and reducing footprint from the SSRP as well as municipal policies. It states that TDCs and Conservation Easements under *ALSA* will play a central role in implementation, discusses these tools, and expressly links the municipality's own planning terminology to the provisions of *ALSA* (for example "build area" being an *ALSA* "development area").

One of the plan objectives is to "meet the legislative requirements for the approval of a Transferable Development Credit program under the *Alberta Land Stewardship Act*". The plan recognizes need for Cabinet approval. It then lays out a full TDC program including objectives fitting *ALSA*, maps of the full TDC Program Area (including multiple conservation areas and multiple "TDC build areas"), means to identify parcels and landowners through the municipal tax roll, baseline and bonus densities, a system to calculate credits, requirements for perpetual Conservation Easements that prohibit subdivision, and for municipal approval of the easements. The draft plan, a TDC question sheet, and related process records are available online.<sup>26</sup> While this is still a draft plan subject to ongoing process, it clearly anticipates what would be the first TDC established under *ALSA*.

## Principles of TDCs

Generally speaking, TDCs are a good fit with established environmental principles. Municipalities exploring TDCs are also articulating principles of sustainable development. The role of municipal plans and bylaws in TDCs also creates a chance to fill gaps in provincial adoption of principles, as evidenced by municipal adoption of the precautionary principle. If a typical TDC follows the best practices: the conservation area embodies pollution prevention, credit transfer embodies polluter pay, and permanent protection embodies intergenerational equity (in environmental value).

The unsettled issues around principles of TDCs under *ALSA* include:

- definition of a TDC;
- goals of TDCs;

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<sup>26</sup> Rocky View County, *Glenbow Ranch Area Structure Plan* (25 July 2016), online: Rocky View County <<http://www.rockyview.ca/Portals/0/Files/BuildingPlanning/Planning/UnderReview/Glenbow/Glenbow-ASP-Draft-2016-07-25.pdf>>.

- participation in TDCs; and
- development pressure, regulatory limits and lack of alternatives.

### Definition of a TDC under ALSA

Generally, TDCs require four elements:<sup>27</sup>

- the designation of conservation area (sending areas),
- identification of a development area (receiving areas),
- a valuation and transfer system that is usually in the form of credits, and
- an administrative body.

ALSA defines a “TDC scheme” in a circular way as a scheme “established in accordance with the TDC part of ALSA.”<sup>28</sup>

ALSA provides at least three substantive components that all TDCs must include:

- The designation of conservation areas with one or more of the following purposes:
  - “protection, conservation and enhancement” of the environment, natural scenic or aesthetic values, agricultural land or land for agricultural purposes;
  - recreational use, open space use, environmental education, research and scientific studies of natural ecosystems; and/or
  - designation as a Provincial Historic Resource or a Municipal Historic Resource under the *Historical Resources Act*;
- identification or a means to identify every parcel of land and title holder in the conservation area; and
- the designation of a development area(s) and any terms and conditions of that designation.

Stripped of the details, the most universal components of a TDC under ALSA are a conservation area with the prescribed purposes, identifiable parcels and landowners, and a

<sup>27</sup> *Supra* note 2.

<sup>28</sup> *Supra* note 6 at s 2.2(1)(ee).

## Elements of a TDC

- designation of conservation area (sending areas),
- identification of a development area (receiving areas),
- a valuation and transfer system that is usually in the form of credits, and
- an administrative body.

development area. *ALSA* also provides two further mandatory components for TDCs whose actual applicability could vary. These are:

- The attributes of any Stewardship Units established by the TDC scheme and terms of use for those units (discussed below).
- Amendments to municipal plans, and bylaws to implement the TDC (discussed below).

*ALSA* does not prescribe administrative responsibilities required for TDCs (discussed below) or the necessary securement tools for conservation areas (discussed below).

TDCs under *ALSA* must also include any other matter required by regulations.<sup>29</sup> TDC regulations may concern:<sup>30</sup>

- Additions or modifications to the required components of TDC schemes.
- Amendments or repeals to bylaws designating conservation and development areas.
- Stewardship Units and the functions of the Exchange related to TDCs schemes (discussed below).

Taken together, the provisions of *ALSA* contemplate all of the components of a typical TDC scheme. However, *ALSA* lacks clarity on how several of these components will be provided by the province or municipalities. The need for conservation and development areas is obvious and *ALSA* is especially prescriptive on conservation areas. However, there is uncertainty around credit systems, administration, and what should be encoded in what municipal plans or bylaws.

Exactly what counts as a TDC for the purpose of *ALSA* is an important issue. It is possible that *ALSA* has turned what was a fairly flexible concept into a legal term of art with implications for municipal authority and compliance obligations. Prior to *ALSA*, the academic commentary, the various municipal initiatives, the court in *Keller v. Bighorn* and even some post-*ALSA* commentary on that case all show some propensity to use terms like TDC and TSD interchangeably.<sup>31</sup> Since *ALSA*, there have been multiple examples of municipal plans and bylaws attempting to distinguish TSDs carried out solely by municipalities from TDCs under *ALSA*.<sup>32</sup> Mere semantic distinctions will likely lack weight, especially as municipal bylaws cannot prevail over a provincial statute. The question is what substantive components of TDCs as generally understood and as provided by *ALSA* distinguish TDCs from similar tools.

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<sup>29</sup> *Supra* note 6 at s. 49.

<sup>30</sup> *Ibid* at s 50(1).

<sup>31</sup> *Supra* note 4; Arlene Kwasniak, "Innovative but controversial municipal bylaws survive challenges" *ABlawg* (25 June 2010), online: University of Calgary, Faculty of Law<<http://ablawg.ca/2010/06/25/innovative-but-controversial-municipal-bylaws-survive-challenges/>>; and *Supra* note 1.

<sup>32</sup> See, for example, the Wheatland County and MD Bighorn examples discussed in the text.

The decisive factor may be the nature of the transfer system. A typical TDC would allow landowners in the conservation (sending) area to receive credits in exchange for protection of the sending area. These credits could be transferred to landowners in the development (receiving) area seeking to develop beyond the regulatory baseline. There is an assumption but no hard rule that these would be purchase and sale transactions between different landowners. *ALSA* allows this assumption as it does not require identification of landowners in the development areas nor prescribe any transfer system in the absence of Stewardship Units.

A case that fits the assumption (i.e. a purchase and sale transaction between different landowners) will almost certainly be a TDC under *ALSA*. Conversely, a transfer within the same parcel should not be a TDC even if it includes development and conservation areas. The uncertainty is that *ALSA* could allow transfer between separate parcels owned by the same landowner to count as a TDC so long as these parcels were in the identified conservation and development areas respectively. This strict interpretation could cover some transfer of subdivision density (TSDs) schemes. Consequently, municipalities seeking to avoid application of *ALSA* would be incented to:

- avoid the purposes of TDC conservation areas (which are laudable to adopt and hard to avoid);
- not identify sending or receiving areas (which raises planning concerns);
- not identify landowners or parcels in a conservation area (which invites legal challenge); and
- restrict programs to same parcel conservation subdivisions (which cannot achieve the outcomes of TDCs).

A more contextual interpretation of the legislation is that *ALSA* sought to expressly enable new authority to use TDCs and should not be interpreted as restricting existing municipal authority. This may carry more weight than expecting courts to understand a “buying and selling” element of anticipated of TDCs.

## Goals of TDCs

Successful TDC programs are connected to well-established conservation goals.<sup>33</sup> Such goals could come from the municipal, provincial or possibly federal policies. Clarity on how TDCs could help meet provincial-level goals has been called “perhaps the most important policy consideration” for a provincial government.<sup>34</sup>

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<sup>33</sup> *Supra* note 2.

<sup>34</sup> *Ibid.*

Prior to the *LUF* and *ALSA*, there were few if any provincial policy signals on what TDCs should be used for even if there was authority to use TDCs. In *Keller v. Bighorn* the court found no applicable law suggesting that TDCs in Alberta were limited to conservation purposes despite that being their typical purpose in other jurisdictions.<sup>35</sup> The plans and bylaws in question had conservation goals; however, also expressed interest in TDCs as a means to address servicing and infrastructure considerations.

The TDC Legislation Recommendations were to:

- focus on the sustainability of landscapes and to a lesser extent on historic properties; and
- promote broad application of TDCs rather than enabling conservation for pre-defined landscape and property types.

*ALSA* has responded to these recommendations concerning the purposes of conservation areas. Under *ALSA*, the focus is on environmental, agricultural and natural scenic values in a broad sense, with historical resources being an allowable purpose. There is no prescription of landscape or property types. *ALSA* is silent on the purposes of TDC development areas or the overall TDC scheme. Some outstanding issues that should be surmountable include source of goals and type of goals.

### Source of Goals

Source of goals as between municipal and provincial policies is the main uncertainty following *ALSA*. While TDCs do not require regional planning, there are potential benefits to regional plans providing goals, clarity, direction, or guidance for municipal TDCs. For example:

- municipalities are required to comply with regional plans;
- even if municipalities set goals for TDCs they face barriers to implementing the zoning, title restrictions and credit systems; and
- the restrictions on court challenges to non-compliance with *ALSA* discussed above extend to regional plans as well as the TDC provisions.

Overall, pursuit of regional plans and compliance with regional plans could help support municipal TDCs in the face of legal risks.

Regional planning to date is producing relevant goals although not strong guidance on use of TDCs. There is some commentary that regional plans are getting increasingly prescriptive on

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<sup>35</sup> *Supra* note 4.

municipalities respecting agricultural land fragmentation.<sup>36</sup> The SSRP is more prescriptive than the LARP on this matter and the Terms of Reference for the pending North Saskatchewan Regional Plan include maintaining an agricultural land base. However, the relevant parts of the regional plans are expressly non-binding and in that way might not differ from the non-legislated policies under the *MGA* that encourage municipalities to preserve agricultural land.<sup>37</sup>

There is uncertainty among municipalities and landowners about the implications of the provincial wetlands policy which provides a goal of minimizing wetland loss. It is important to recognize that this is a non-legislated policy. As with all such policies, there is no legal barrier to adopting these goals for municipal plans and programs however there is also no legal obligation to do so.

Municipalities are definitely free to set their own goals for TDCs provided that the goals of TDC conservation areas match the broad purposes prescribed by *ALSA*. This would include freedom to set goals related to development areas. *MGA* reforms that strengthen the environmental mandates of municipalities and provide more clearly for conservation or sustainability planning would assist.

### Type of Goal

Type of goal is potentially less of an issue with TDCs as the goals do not need to be quantifiable objectives or prohibit net loss of ecological value to the extent needed with some other MBIs. However, overly vague goals would still leave little to pursue and the mere pursuit of TDCs is a questionable goal without clear conservation and development goals. The TDC Feasibility Review noted issues with focusing on tools then fitting them to municipal plans rather than developing tools to support pre-existing conservation and development goals.<sup>38</sup> Multiple examples of Municipal Development Plans in Alberta make the exploration of progressive conservation tools a form of goal in itself and such provisions were the target of litigation in *Keller v. Bighorn*. However, these various plans also appear to have sufficient conservation goals at a higher level of the plan structure.

### Participation in TDCs

As discussed above, there are real tensions between principles of public participation from an environmental law perspective and principles of stakeholder involvement from an MBI perspective, even though these concepts clearly overlap.

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<sup>36</sup> For example, see consultant's comments in: Toma & Bouma Management Consultants, *Strathcona Country: Agriculture Master Plan – A Time to Choose* (8 May 2015), online: Strathcona Country <<http://www.strathcona.ca/files/files/at-tas-agriculture-master-plan-2015.pdf>>.

<sup>37</sup> *Ibid.*

<sup>38</sup> TDC Feasibility Review and TDC Legislation Recommendations.

TDCs offer a relatively better fit with the environmental principle of public participation than do some MBIs when it comes to public consultation on policy development. This is because municipal planning and bylaw decisions are “legislative” in nature. TDCs require that these plans be made by locally elected officials who will want to see a show of support and who must comply with the process requirements of the *MGA*. On the other hand, the stakes in municipal planning and bylaw decisions are very high. There are no rights to intervene on development permits like there is with natural resource development, and appeal rights are restrictive as always in Alberta.

The commentary is unanimous on the importance of local community support or broad local “buy-in” for successful TDCs. Some specific considerations include:

- The interest of landowners in the conservation (sending) area is critical as their participation is completely voluntary.
- The interest of landowners in the development (receiving) area is so important that some successful programs are developer-driven.
- Foreseeable participants in planning exercises include adjacent landowners, councillors, municipal staff, land trusts, and technical experts.

This attention to specific stakeholders suggests that the necessary participation in TDCs development might not extend to the public at large or to public interest organizations lacking a local stake. However, it is definitely broader than only persons with directly affected property rights and economic interests.

Despite (or perhaps because of) their participatory nature, TDCs raise several procedural considerations. These include:

- municipal planning and bylaw process;
- municipal appeals; and
- court challenges to TDCs.

The process for provincial approval of municipal TDCs is discussed further below.

### **Municipal planning and bylaw process**

The TDC Legislation Recommendations were to require and outline specific public consultations for TDCs in legislation. *ALSA* is silent on how public participation in municipal process and the *MGA* will apply. Some observations on the *MGA* are that:

- The *MGA* is relatively permissive of public participation in municipal process however it provides little guidance on this topic.
- The key legal rules are to provide public notice and public hearings at a relatively late stage of the bylaw process.
- Council has broad discretion to hear from persons at hearings however there is a trend towards “open mic night” with little structure for formal interest representation.
- These same public hearing rules apply to Municipal Development Plans, Area Structure Plans and Land Use Bylaws despite the different function of these instruments.
- Area Structure planning is probably the area of municipal planning most in need of reform from a public participation perspective.<sup>39</sup> Concerns beyond late stage public participation include developer-led planning and identification of environmental areas.
- Establishing TDC “conservation areas” might involve “downzoning” to a more restrictive baseline, although this may not be necessary.
- Ongoing reforms to the *MGA* may require municipalities to establish public participation policies.

Thus, there is ongoing need for more specific participation process for TDCs.

*ALSA* regulations and/or municipal bylaws should provide for participation in municipal TDC decisions that goes beyond the baseline *MGA* requirements for notice and hearings on bylaw decisions. Examples may include:

- Notice and participation opportunities for landowners in or adjacent to proposed development and conservation areas and for adjacent municipalities.<sup>40</sup>
- Structured public participation at earlier stages for all planning processes used to establish TDCs.
- Stronger leadership role for municipalities in Area Structure Planning.

Structured participation at earlier stages in municipal process can also help settle local issues prior to seeking Cabinet approval of municipal plans and bylaws.

It is also worth promoting a more central or formalized role for qualified organizations in municipal process. Examples include:

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<sup>39</sup> James S. Mallet, *Municipal Powers, Land Use Planning and the Environment: Understanding the Public's Role* (2005), online: Environmental Law Centre <<http://elc.ab.ca/media/7600/MunicipalPowersLandUsePlanning.pdf>>.

<sup>40</sup> For recommendations: *Supra* note 5.

- helping to set goals;
- identifying conservation areas and development areas;
- inventorying land values and helping to develop the credit transfer system;
- providing education, information and training; and
- assisting with ongoing management of the secured parcels.

These matters might not be ready for regulations as there is outstanding need to establish relationship between land trusts and municipalities.

The TDC Legislation Recommendations also proposed stakeholder advisory or oversight groups for the life of TDC programs. Neither *ALSA* nor the *MGA* provide for stakeholder advisory groups however there is probably no need for legislative enablement to pursue this good advice.

### Municipal appeals

Municipalities can be put in the difficult position of having to arbitrate conservation and development concerns in situations where decisions have legal dimensions. Municipal decisions are appealable to either the Subdivision and Development Appeals Board (SDAB) or the Municipal Government Board depending on their specific nature. In many municipalities there is overlap between councillors, developers, and members of the SDAB. Both the SDAB and the Municipal Government Board are constrained in the issues they may consider and the decisions are made in the adjudicative (i.e. adversarial) format. There are already concerns about the functionality of these systems for environmental matters.

The TDC legislation recommendations included creation of a provincial-level dispute resolution process distinct from the development appeals process.<sup>41</sup> *ALSA* has not changed the municipal appeal regime nor does it clearly contemplate doing so. The closest feature is that regional plans could require decisions of the SDAB and/or the Municipal Government Board. These ongoing reform needs might best be pursued under the *MGA* due to their relevance beyond TDCs.

### Court challenges to TDCs

The manner in which *ALSA* restricts access to the courts extends some protection to TDCs. The court in *Keller v. Bighorn* held that *ALSA* excludes persons other than the Stewardship Commissioner from taking court action for non-compliance with *ALSA*, regional plans, or

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<sup>41</sup> TDC feasibility review and TDC Legislation Recommendations.

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## UNIQUE FEATURES OF A TDC

- Conservation purposes beyond those of environmental reserves, environmental reserve easements and Conservation Easements.
- Alternatives to Conservation Easements that have the same purpose and effect.
- Credit for voluntary conservation to landowners not engaged in development.
- Potential to involve multiple landowners with multiple non-adjacent parcels that can produce larger scale landscape outcomes.

regulations. As discussed above, this was not certain as the provisions preventing such action were imbedded in the regional planning part of *ALSA*. However, the court concluded that these provisions barred anyone other than the Stewardship Commissioner from taking court action for non-compliance with the TDC provisions of *ALSA*. Other persons concerned about TDCs not complying with *ALSA* will be limited to making complaints to the Stewardship Commissioner.

If a TDC program is approved by Cabinet or made through a regional plan then it is hard to imagine the Stewardship Commissioner challenging the TDC or even investigating complaints unless subsequent municipal activities diverge from the approval. If the TDC is made by a regional plan then it might receive additional protection from judicial review of regional plans. These restrictions are a concern from a public participation perspective however they answer some municipal concern with legal challenges to TDCs. *ALSA* offers municipalities some protection from lawsuits in exchange for having their TDCs approved by the province.

These protections only apply to compliance with *ALSA*. A TDC could still be open to court challenge concerning the validity of municipal bylaws. As discussed below, municipalities would still be required to comply with the *MGA* and any mandatory provisions of their own plans, bylaws and resolutions.

### Development pressure, regulatory limits and lack of alternatives

Development pressure can be loosely defined as the recent rate of land conversion or change in land use. Development pressure is a key contextual factor for a TDC program. Multiple TDC initiatives in Alberta discussed above originated in the context of a “hot” real estate market, and if they have not proceeded it may be due in part to a cooler one.

There is also need for regulatory limits on potential development in both the conservation (sending) areas and development (receiving) areas. Regulatory limits on development in receiving areas are necessary to create market demand for development credits. The

regulatory baseline must be sufficiently stringent that developers see profit opportunities from exceeding the baseline. If development areas will likely be rezoned on application so as to allow such opportunities then there is no incentive to purchase credits. In sending areas, some certainty that development will be restricted due to high conservation value will help landowners see value to selling credits. If the land use zones in the conservation areas – often rural and agricultural zones—allow development as a discretionary use, can be easily changed on application or are treated like land banks for future development then there may be less potential for TDCs. Conversely, if the regulatory baseline in conservation areas is adequate but at risk of change then TDC programs can serve to “protect” the zoning.<sup>42</sup>

The US experience indicates that TDCs have more chance of success when there are fewer alternatives. In Alberta there are many tools other than TDCs that have similar purposes of addressing conflicting pressures for development and conservation in the municipal context. Tools including transfer of subdivision density (TSD), cluster development and “conservation subdivision” superficially resemble TDCs by moving future development to reduce footprint and maintaining open space. It is understandable that developers want practical solutions and that municipalities may prefer familiar tools enabled by the *MGA*. However, there may be perception of alternatives to TDCs that do not actually achieve the same outcomes. The unique features of TDCs relative to other tools include:

- Conservation purposes beyond those of environmental reserves, environmental reserve easements and Conservation Easements.
- Alternatives to Conservation Easements that have the same purpose and effect.
- Credit for voluntary conservation to landowners not engaged in development.
- Potential to involve multiple landowners with multiple non-adjacent parcels that can produce larger scale landscape outcomes.

TDCs affirm the potential created by the type of MBIs that involve private “buying and selling” rather than the mere provision of financial incentives and disincentives.

### Property law issues with TDCs

There are relatively few property law issues with TDCs compared to the other MBIs in this report and those that exist should be surmountable. This may sound surprising as TDCs involve designating conservation and development areas on private land, restrictions on land titles and the creation of credit schemes. However, the clarity of private land ownership, the availability of voluntary securement tools to landowners, and the well-established regulatory

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<sup>42</sup> *Supra* note 2.

functions of municipalities all create a favorable context. Nonetheless some issues to consider include:

- Canadian versus American legal regimes;
- infringement on property rights through TDCs; and
- development credits.

### Canadian versus American legal regimes

Most examples of TDCs are from the United States and there are few examples in Canada. This invites speculation that the difference between property rights in Canada and the US is a factor. Such speculation may follow some accurate observations. The property law regime is a factor in the success of TDC programs, and TDCs show potential in situations where there is a strong culture of property rights.<sup>43</sup>

TDCs in the US are often called “transfer of development rights” (TDR), which may reflect the constitutional protection of property in the US. The US system can provide compensation for regulatory restrictions on land use (“regulatory takings”) which would favor public authorities pursuing TDCs. Development rights might also imply that landowners inherently have something to sell and that there is less regulation needed to establish markets. It is important to recognize other national differences as well. The US system features more public programs to support private conservation, a long history of Conservation Easements, larger roles for land trusts, and stronger municipal authority including power to raise revenues beyond property tax.

The lack of regulatory takings in Canada means that conservation goals pursued by TDCs could potentially be pursued by regulatory restrictions, especially if it is a simple TDC. However this clearly is not done where TDCs are under consideration. The Canadian system might also be favorable to establishing the regulatory limits on land use needed to incent both credit supply and demand. In the unlikely event that compensation is due for restrictions on land use, one might have to factor in profits from credit sales or from beyond-baseline developments.

### Infringement on property rights

It is unlikely that a TDC scheme would violate property rights, and if it does it is probably not on account of being a TDC. Participation in a TDC is completely voluntary. Landowners in the sending area are not required to restrict their titles or to sell credits, and landowners in the receiving areas are only required to buy credits if they wish to exceed baseline regulations. For voluntary participants, a TDC typically offers landowners payment for conservation or increased development opportunities for purchase. As emphasized above, it is settled law that

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<sup>43</sup> *Ibid.*

governments acting within their jurisdiction can regulate property and land use. Overall, TDCs can recognize landowners' development interests in situations where regulatory restrictions might be justifiable or may already exist.

As previously discussed, *ALSA* does not alter the property rights regime so much as it provides purpose for the use of existing powers. In *Keller v. Bighorn* the court held that *ALSA* did not "retroactively" alter pre-existing municipal authority or property rights that would have vested under municipal regulations at the time *ALSA* came into force. Nonetheless, there are perceptions of TDCs and *ALSA* causing landowners to lose something to which they had a right, expectation or entitlement. This context matters even if it is more an issue of culture than law.

### Development credits

Development credits could be considered a new form of personal property, especially if they can be transferred between private parties. However, the general concept of credits is not a radical shift from some existing municipal programs. The main issues are less about property in credits and more about regulation of credits.

*ALSA* provides that the mandatory components of TDCs include the attributes of any "Stewardship Units" established by the TDC scheme in accordance with regulations and the terms or conditions for use of these Stewardship Units. This raises a number of uncertainties including:

- municipal authority to establish credit systems without provincial designation of Stewardship Units;
- the potential for the province to designate municipally created development credits as Stewardship Units;
- uncertain responsibilities for administration of credit systems;
- potential function for the *ALSA* "Exchange" in TDC programs; and
- securement requirements for use of credits.

While these requirements do not clarify that municipal TDCs can create credit systems without needing to be Stewardship Units; they definitely can. The separate section of *ALSA* on Stewardship Units specifically allows regulations to designate TDC "development credits" as "Stewardship Units", which indicates that TDC development credits may exist independently.<sup>44</sup> Also, Cabinet can approve TDCs even though there are no stewardship unit regulations at present. *ALSA* reads as though the purpose of stewardship regulations is not to

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<sup>44</sup> *Supra* note 6 at s 46(1).

limit use of development credits but to integrate or bring up TDC credits into larger credit schemes. That is an issue too as development credits will be created to serve the conservation and development goals of a specific TDC program that may be local in nature.

These credit uncertainties should be resolved by regulations clarifying that:

- Municipalities may create development credits for use in TDC schemes without provincial recognition of Stewardship Units or connection to the Exchange.
- Development credits should only be used in the TDC scheme for which they were created.
- Integration of development credits into stewardship unit schemes should require consent of the relevant TDC authorities.

Regulations should provide administrative responsibilities for credit systems in situations where the development credits are not “Stewardship Units” with administration by “Exchange”. Functions should include the tracking of credits through creation, transfer, use for developments and extinguishment. Credit holders should be required to register their credits and provide notice of when the credits are sold or used.

Development credit issues and recommendations are revisited below respecting securement of TDC conservation areas. These issues are also revisited in Volume 4 on Stewardship Units and the Exchange.

### Regulatory framework for TDCs

Apart from issues of development credits, most of the above issues with TDCs do not require a regulatory response under *ALSA*. This section canvases several issues that may require a regulatory response. These include:

- authority to use TDCs under *ALSA*;
- securement of TDC conservation areas;

### Regulations to resolve credit uncertainties should

- Municipalities may create development credits for use in TDC schemes without provincial recognition of Stewardship Units or connection to the Exchange.
- Development credits should only be used in the TDC scheme for which they were created.
- Integration of development credits into stewardship unit schemes should require consent of the relevant TDC authorities.

- alignment and coordination issues (interjurisdictional TDCs and impacts of other programs on TDCs); and
- administration and oversight of TDCs.

### **Authority to establish TDCs**

The authority to establish TDCs under *ALSA* raises several issues. Namely:

- Municipal authority to establish TDCs.
- Process for provincial approval of municipal TDCs.
- Municipal plans and bylaws implementing TDCs.

### **Municipal authority to establish TDCs**

Municipal authority to establish TDCs has been the biggest issue with TDCs in Alberta before and after *ALSA*. Therefore, it is worth reviewing the general needs for authority and how the specific issues have changed due to *ALSA*.

To implement a TDC a municipality must have authority over specific matters. Examples include:

- Setting goals or objectives in plans or policies.
- Designating the conservation (sending) and development (receiving) areas in plans or bylaws.
- Regulating the conservation (sending) areas by sufficiently restrictive zoning and requiring securement by landowners in exchange for credits.
- Regulating the development (receiving) areas by setting baseline limits on development and offering beyond-baseline opportunities for landowners that acquire credits.
- Screening development applications where credits are applied to the development.
- Administration of the credit system.

The starting point for analysis is that all municipal authority must come through provincial legislation.

Prior to *ALSA*, the most cited commentary was that Alberta municipalities likely had authority to run simple TDCs under the *MGA*.<sup>45</sup> This was based on principles of statutory interpretation, the Canadian trend in legislation-making, and the trend in the courts. Prior to *ALSA*, no Canadian province had legislation expressly authorizing TDCs. However, such legislation is not necessary because authority to establish TDCs was implied in legislation governing municipalities. By way of example, the numerous American TDC programs vary in whether or not the legislation expressly authorizes TDCs. Similarly, municipalities in Alberta engage in density transfers without expressed authority.

The trend in legislation making is to provide municipalities with broad powers unless specifically limited. This is compared to the older approach of providing a “laundry list” of specific powers. While the *MGA* generally fits this shift in approach, the planning and development part of the *MGA* (the most relevant part to imply TDC authority) still resembles the old style of providing specific powers.

The trend in the courts is towards a “liberal and flexible approach” to the interpretation of municipal authority. In *Keller v. Bighorn* the court referred to a broad and generous approach. However, prior to *ALSA* most cases applying this liberal approach concerned “general” grants of power, leaving possibility that “specific” grants of power such as the planning and development part of the *MGA* could still be interpreted as legislative intention to limit powers.

Ultimately, the overall opinion was that authority to implement simple TDCs would still be upheld through a combination of the “orderly development” purposes of the *MGA* combined with the powers provided by the planning and development part respecting municipal development plans, area structure plans, and land use bylaws.<sup>46</sup> The greatest uncertainty concerned authority to create a credit system. However this too could be upheld by applying the liberal approach, and by applying the precedent of Town of Banff bylaws that created a lottery system for business permits so as to limit commercial growth.<sup>47</sup>

The municipal perspective prior to *ALSA* made clear the need for policy direction from the province and really for expressed TDC legislation.<sup>48</sup> Key evidence of this view was a resolution of the Alberta Association of Municipal Districts and Counties to “lobby for provincial legislation to guide development of a “transfer of development rights” program that included ability to register these rights on land title.”<sup>49</sup> The wording of this resolution is informative. It suggests that, prior to *ALSA*:

- TDC, TDRs and similar schemes like TSDs may be more like general concepts than legal terms of art.

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<sup>45</sup> *Supra* note 1.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> *Supra* note 2 and TDC feasibility review and TDC Legislation Recommendations.

<sup>49</sup> Alberta Association of Municipal Districts and Counties (AAMDC) Resolution Regarding Transfer of Development Credits (Fall 2006 Convention) available online <http://www.tdc-alberta.ca/Files/AAMDC%20TDC%20resolution.pdf>.

- There are perceptions of property rights at stake, even though there are no “development rights” in the Canadian context.
- There is need to register interests on land titles and for authority to require this condition.

Municipalities lack faith in implied powers under the *MGA* and fear legal challenges to TDCs. While legal challenges could occur “with any program”<sup>50</sup>, TDCs create numerous risks due to the large array of instruments and decisions involved. Even a simple TDC may require multiple levels of plans and bylaws, the creation of credit systems, decisions on subdivision and development applications, and requirements for title restrictions.

In *Keller v. Bighorn* the Court held that while the *MGA* does not refer to a TDC, such a scheme “clearly falls within the broad powers of regulation and control provided to the municipality” under the *MGA*.<sup>51</sup> In upholding the municipal authority, the Court considered the opinion discussed above, articulated a “broad and purposive” approach (i.e., the above-mentioned “liberal and flexible” approach) to the interpretation of municipal authority. Most notably it applied this approach to the planning and development part of the *MGA*. The Court considered: the purpose of the planning part, the matters which “must” and “may” be in a Municipal Development Plan, matters that “must” and “may” be in an Area Structure Plan if one is made, the requirement to make a Land Use Bylaw and matters that must be in a Land Use Bylaw.<sup>52</sup> This included finding that municipalities had authority to provide for density in Land Use Bylaw.

As well, the Court affirmed that *ALSA* has now occupied the field of TDCs. It held that going forward, TDCs may only be established according to *ALSA* and that this includes a requirement for Cabinet approval of TDCs. In reaching this conclusion, the Court stated that: “the general scheme of *ALSA* is one where the province assumes a greater role in local planning and has power to determine compliance with *ALSA* and regional plans.”<sup>53</sup> The implication is that a contextual approach to statutory interpretation found authority under the *MGA* then took it away under *ALSA*. Because the bylaws in question pre-dated *ALSA* and *ALSA* is not retroactive, so the court did not consider the requirements of *ALSA* in much detail. This leaves the above question of what exactly is a TDC for the purpose of *ALSA*.

### Process for provincial approval of TDCs

*ALSA* provides that TDCs may be established by:

- A regional plan.

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<sup>50</sup> *Supra* note 2 at 60.

<sup>51</sup> *Supra* note 4.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

- A local authority (a municipality) with approval of the Lieutenant Governor in Council.
- 2 or more local authorities (multiple municipalities, with or without “other persons”, according to an agreement among them that is approved by the Lieutenant Governor in Council.<sup>54</sup>

The implication of requiring approval of the Lieutenant Governor in Council is that Cabinet is the effective approval authority for all TDCs in Alberta.

However *ALSA* is silent on the process for approval of TDCs or power to make regulations on the approval process. This procedural uncertainty is a barrier to establishing TDCs. It is not even clear how *ALSA* allows this barrier to be overcome through means like regulations, non-legislated guidance documents, administrative screening process or informal requests.

Some general observations on the approval process are that:

- The approval of TDCs is not just a regulatory approval. It more resembles an affirmation or delegation of legislative authority to make municipal plans and bylaws on TDCs.
- Need to seek approval of legislative authority will create a direct role for municipal council in seeking Cabinet approval of TDCs. This could involve a council resolution to seek Cabinet approval and/or a municipal council appearance before Cabinet.
- A rejected application could be prejudicial to the municipality’s regulatory authority or the validity of its plans and bylaws.
- Cabinet cannot be expected to understand the technical aspects of a TDC. Approval decisions involving technical subject matter are normally delegated to the expertise of administrative agencies.

It is notable that the other processes for compliance with *ALSA* that are prescribed in the Act or regulations involve swearing a statutory declaration of compliance. Two examples are affirmations that municipal instruments comply with regional plans and affirmations that Conservation Easements comply with their prescribed purposes and are held by qualified organizations.

Multiple ministries may need to be involved in TDC applications:

- The scheme of *ALSA* favors that a TDC application be supported or screened by the Stewardship Commissioner and Land Use Secretariat.

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<sup>54</sup> *Supra* note 6 at s 48(2).

- The dual status of the Stewardship Minister as Environment Minister may make the TDC application subject to competing Ministerial priorities for Cabinet.
- Municipalities may prefer to take TDC applications through Municipal Affairs; however this ministry lacks the mandate to champion the environment or the *ALSA* conservation tools.

Cabinet decisions on TDCs may be subject to broad political considerations unrelated to compliance with *ALSA* or merits of the TDC.

#### Regulations should clarify that:

- The provincial approval or non-approval of TDCs is not a statement on the validity of municipal bylaws for other purposes.
- Once TDC schemes are approved by Cabinet the municipality has authority over that TDC.
- Regulations should clarify the timing of applications for provincial approval. Applications should be made before the municipalities' final reading of the bylaws.

There is need for an application form to screen TDCs. One idea provided by the TDC Website is a form of approval "checklist" for the components required by *ALSA* and further best practices that help determine the merits of the TDC.<sup>55</sup> The Model TDC Bylaw (discussed below) could facilitate applications by consolidating required components and best practices of TDCs into one instrument. However, a specific TDC bylaw is not required and the approval process should not be designed in ways that restrict municipal flexibility for implementing TDCs through various plans and bylaws. One option is simply to provide a checklist and append whatever municipal bylaws provide the components.

The application process should involve screening and recommendations by administrative agencies prior to Cabinet. This resembles the manner in which municipal staff makes recommendations to council on technical planning and development matters. The screening agency should preferably be the Stewardship Commissioner and Land Use Secretariat.

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<sup>55</sup> *Supra* note 5.

## Municipal plans and bylaws establishing TDCs

This aspect of authority to establish TDCs raises two considerations - content and validity of municipal TDC plans and bylaws.

Some early thinking in Alberta was that TDCs usage should be linked to a larger framework for municipal conservation planning. The TDC Feasibility Review found that example components of TDC legislation include criteria for establishing plans and specification for appropriate sending and receiving areas.

The TDC Legislation Recommendations were to “[p]romote more comprehensive conservation and development planning, for example municipal sustainability plans upon which TDC use is contingent”. A further recommendation was that TDC legislation be under the *MGA* (recall that these recommendations predate *ALSA*). This is because municipal planning and bylaw decisions related to TDCs were and remain under the *MGA*. *ALSA* is not a platform for municipal planning and does not provide much guidance for municipal decisions beyond requiring compliance with *ALSA*.

As previously mentioned, the main substantive requirements for TDCs include a conservation (sending) area with prescribed purposes, a development (receiving) area, and means to identify the parcels and landowners in the sending area. Further, *ALSA* provides that TDCs established by municipalities must include provisions to adopt or amend a municipal development plan, area structure plan, land use bylaw, inter municipal development plan, or other bylaw to implement the TDC scheme. *ALSA* regulations may further provide for amendments or repeals to bylaws designating conservation and development areas. Further requirements for inter-jurisdictional (multi-municipality) TDCs are discussed below.

*ALSA* definitely requires municipalities provide the components of TDCs in statutory plans and bylaws under the *MGA*. However, it offers flexibility on what plans or bylaws provide the various components of TDCs. There is no single right answer.

Some observations include:

- Municipal Development Plans would be the obvious place for goals that may be pursued by TDCs.
- Land Use Bylaw or TDC Bylaw would need to include sufficiently restrictive zoning.
- Land Use Bylaw or TDC Bylaw would need to reflect regulatory baselines, beyond baseline opportunities and conditions for approval in the development area, however it may be advisable to establish these parameters at a higher level in the planning hierarchy.
- Area Structure Planning may be sufficient to deal with the specifics of the development area, especially if the TDC concerns subdivision density.

- Area Structure Planning is an area of municipal planning that is in need of reform as discussed above. This favors municipalities taking a greater leadership role where Area Structure Plans concern TDCs and probably warrants guidance from ALSA regulations on the participatory elements.
- Bylaws will need to provide for credit matters including recognition of credits in the conservation area and requirements for credits in the development area and conditions (such as securement) for application of credits against developments.
- Municipalities will need a credit registration and tracking system which might be provided through bylaws as well.
- The words “conservation area” and “development area” are not legal terms of art and are used for numerous conceptual designations unrelated to TDCs. Conversely, the words “sending area” and “receiving area” are unfamiliar terms that are not required by ALSA. This may warrant clear designation of “TDC conservation areas” and “TDC development areas”.
- There are several possible options for the identification of conservation and development areas is flexible including:
  - Proactive identification by the municipality.
  - Landowner applications that should be screened based on criteria.
  - Following non-binding policies of the province (such as Environmentally Significant Areas, the wetlands policy or species recovery plans).
  - Regional plans.
- The conservation areas and development areas need not be a 1:1 with the districts (zones) in land use bylaws as the same zones may exist in other parts of the municipality.
- Bylaws should require securement by Conservation Easements or historic resource designations registered on title, municipal vetting of the securement arrangement, and provide for timing of securement relative to credit recognition, transfer and use by developers.

The Model TDC Bylaw attempts to help answer the question of what municipal bylaws should include.<sup>56</sup> This Model proposes that it could be used as an “overlay” on the Land Use Bylaw. The permitted and discretionary uses provided by the zones of the Land Use Bylaw would remain until securement of the conservation area and the awarding of bonuses in the

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<sup>56</sup> *Ibid.*

development areas. This overlay concept is reflected in the MD Bighorn bylaws (discussed above).

In addition to satisfying *ALSA*, municipal plans and bylaws establishing TDCs must meet the general requirements for the validity of bylaws. *Keller v. Bighorn* involved multiple issues of bylaw validity. Specifically at issue were public consultation requirements, uncertainty, and compliance with the municipal development plan.

Concerning public consultation, the amendments to the Municipal Development Plan providing for TDCs were passed with a council motion to undertake public consultations to “improve” the policy in question. However, consultations were not held until after the Area Structure Plan and Land Use Bylaw providing for the specific TDC were also passed. The Court in *Keller v. Bighorn* held that the council motion did not require consultations before passing these bylaws or require changes to bylaws following consultation. The general *MGA* requirements for notice and public hearings on bylaw changes applied and were met.

The bylaws were also challenged on the basis of uncertainty for not providing assessment criteria for the lands to be protected and for those to receive additional density. The court held that these bylaws could still be understood by persons affected by them. The Municipal Development set a goal and proposed TDCs as a means to meet the goal. It required that sending parcels receive Conservation Easements that in turn must meet the requirements of provincial legislation. Furthermore, the scheme did not remove statutory duties to consider land characteristics when deciding subdivision applications.

Finally, concerning compliance with the Municipal Development Plan, the issue was there were some area identification provisions in the plan and neither the Area Structure Plan nor the Land Use Bylaw identified sending area parcels. The Court found that the requirement in the Municipal Development Plan was only that the sending and receiving parcels be in the “small holdings area” and not that the parcels be specifically identified.

Though not discussed here, *Keller v. Bighorn* is also important concerning rules for judicial review of decisions under the *MGA*, and the standard of review applied by the courts in such cases.<sup>57</sup> For the purpose of this report, a key outcome of the case is that courts are unlikely to question the substantive conservation goals or merits of TDC schemes.

### **Securement of TDC conservation areas**

Requiring the legal securement of TDC conservation (sending) areas that have produced credits is necessary to maintain the integrity of TDC schemes from a conservation perspective. There are several aspects to this requirement - eligible securement tools; vetting of securement, and timing of securement.

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<sup>57</sup> *Supra* note 4.

## Eligible securement tools

All commentary discussed above and those municipalities that have proceeded to bylaws favour securement by Conservation Easements or other instruments that are registered on land title and can run in perpetuity. This need is consistent with the likely enduring nature of the development.

The TDC Feasibility Study discussed the need to update securement tools in Alberta. These needs included expanding the purposes of Conservation Easements to include agriculture and historic resources and creating a TDC specific easement that would restrict subdivision and could be layered with regular Conservation Easements for other purposes.

*ALSA* has responded in part by expanding the purposes of Conservation Easements to include agriculture and by making historic resource designations an option for TDCs. However, it does not include a historic resource easement that would allow landowners to unilaterally protect historic resources. It also does not include a TDC specific easement, so it remains on TDC authorities, landowners, and qualified organizations to ensure that Conservation Easements restrict subdivision if that is the intention.

The TDC Feasibility Review did not clearly flag the prescription of securement tools as a feature of TDC legislation, nor did the TDC legislation recommendations state that the statute itself should prescribe the required securement. Despite its incomplete response to recommendations, Conservation Easement legislation in Alberta has definitely been a factor in the success of this tool and *ALSA* improves the regime further. The largest gap around securement tools may be in the urban context if TDCs lack goals of historic resource protection.

*ALSA* does not prescribe required securement tools for TDCs. However, it provides a strong indication as the purposes and allowable uses of TDC conservation areas are either:

- The same purposes and allowable uses of Conservation Easements and Conservation Directives under *ALSA*, or
- The same as historical resource designations under the *Historic Resources Act*.

Past commentary has focused on Conservation Easements and historic resource designations.

Conservation Easements are the top option due to their purposes, purely voluntary nature, direct accessibility to landowners and potential for title restrictions of perpetual duration.

There is need to recognize some barriers to creating conservation easement holders in the TDC context. Examples discussed above include potential lack of tax benefits to easement donations made for credit, different tax liabilities based on characterization of the landowner's

occupation, and reticence of provincial and municipal authorities to hold Conservation Easements even though the easements help pursue policy objectives. The inability of Conservation Easements to prevent minerals activity is not a barrier to using TDCs; however, it may disincent easement donation by landowners.

In the TDC context it is important to note that many land trusts in Alberta are not connected to municipalities, may not understand TDCs, and may not share the conservation goals being pursued by the TDC. The experience from other jurisdictions strongly supports making these connections if TDCs are to flourish. These various barriers to Conservation Easements affirm the value of having other options with similar legal effect.

Historic resource designations are important options due to meeting purposes of TDCs beyond the purpose of Conservation Easements. Historic resource designations also have favorable legal features for TDCs including ability to be designated by municipal bylaws, registerable on land titles, and enforced by municipalities.<sup>58</sup> Historic resource designations also have landscape protection attributes as they can include land on which buildings stand and adjacent land.<sup>59</sup> *ALSA* and the *Historic Resources Act* have also addressed potential compensation issues that could otherwise deter use of the tool. Historic resource designations made by municipal bylaws typically provide statutory rights to compensation; however, the *Historic Resources Act* now states that this provision does not apply to a municipal historic resource designated as part of a TDC under *ALSA*.<sup>6061</sup>

Conservation Directives should be considered a specialized securement option due to having the same purpose as TDC conservation areas yet different legal abilities from Conservation Easements. Access to Conservation Directives is limited by their connection to regional planning, however if they are available then possible uses include situations where:

- minerals activity would undermine achievement of TDC program goals;
- the TDC requires provincial involvement anyway due to goals around provincially regulated subject matters like water and wildlife;
- temporary developments create arguments for temporary securement;
- there is inadequate demand for development credits to incent the donation of Conservation Easements;
- there is desire for flexibility in delegating management authority; or
- regional plans directly create a TDC.

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<sup>58</sup> *Historical Resources Act*, RSA 2000, c H-9 at s. 26.

<sup>59</sup> *Ibid* at s 20.

<sup>60</sup> *Ibid* at s 28(5).

<sup>61</sup> *Ibid* at s 28.

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*TDC regulations under ALSA should require securement of TDC conservation areas by restrictions on title through Conservation Easements, Conservation Directives or historic resource designations.*

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Historic resource designations create a precedent of having landowners voluntarily consent to a regulatory restriction on title in exchange for a statutory right to compensation (or in this case compensation by TDC credit). It may be possible for Conservation Directives to be used in a similar voluntary manner.

Fee simple title acquisitions, common law restrictive covenants, and alternative forms of conservation agreements used by land trusts are all theoretical options to secure TDC conservation areas. However, none of these tools provide legislated purposes consistent with *ALSA*. These options may add complexity without equivalent conservation benefit or assurance of compliance with *ALSA*.

Mere municipal zoning should not be considered a TDC securement tool given its ease of change and vulnerability to broader political considerations. However, zoning and related bylaw requirements on credit recognition and use provide an important regulatory backstop for the execution of the title restrictions. Further, as discussed above, restrictive zoning may incent voluntary securement and such securements may serve to “protect the zoning” against bylaw changes.

Based upon the forgoing, TDC regulations under *ALSA* should require securement of TDC conservation areas by restrictions on title through Conservation Easements, Conservation Directives or historic resource designations.

### **Vetting of Securement**

Commentary on the TDC Website discusses the merits of securement being satisfactory to the municipality. This could be done by having the municipality hold the securement instrument or chose the holder. The same logic would apply to a provincially established TDC. While *ALSA* does not directly require vetting of securement by the TDC authority, it implies that its regulations may. *ALSA* regulations can require that Conservation Easements, historic resource designations or “other forms of protection” be satisfactory to the Stewardship Minister or municipalities in order to qualify for Stewardship Units. *ALSA* does not clearly consider the same vetting of securement where TDCs do not involve Stewardship Units. However, this would be the logical interpretation as securement serves conservation outcomes irrespective of the particular credit scheme.

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*Accordingly, ALSA regulations should require securement tools to be satisfactory to the TDC authority whether or not Stewardship Units are contemplated. Further, if TDC development credits are recognized as Stewardship Units by ALSA regulations then these types of Stewardship Units should face the same requirements for TDC securement tools and vetting.*

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### **Timing of Seurement**

ALSA is silent on timing of securement relative to the production and transfer of credits. This matter is presumably left to the TDC authority. The following options and considerations are drawn from the TDC Website:<sup>62</sup>

- Seurement when credits are assigned is rare as it removes the voluntary nature of TDCs by requiring securement for nothing.
- Seurement when first credits are transferred out of the sending area is most common as it ensures conservation activity at the outset of trading.
- Seurement when the last credits are transferred creates risks of land use changes that effect conservation values after payments have been received.
- Seurement when credits are applied by the developer creates the highest risk of no conservation activity occurring.

Timing of securement is discussed in Volume 4 in relation to Stewardship Units.

### **Alignment and coordination of TDCs**

When looking at planning and policy alignment, inter-jurisdictional (multiple municipality) TDCs and the positive and negative effect of other programs on TDCs must be considered.

### **Interjurisdictional (multi-municipal) TDCs**

Guidelines for establishing multi-jurisdictional programs is one feature of TDC legislation in other jurisdictions. The TDC Legislation Recommendations include recognition of

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<sup>62</sup> *Supra* note 5.

interjurisdictional TDC programs, provision of basic guidelines, and allowing opportunities for provincial or regional administration.<sup>63</sup>

ALSA has responded to these recommendations in a general sense. Under ALSA, there are two formal requirements for interjurisdictional TDCs:

- the standard requirement for provisions to adopt or amend plans and bylaws which may include inter-municipal development plans; and
- a written agreement or arrangement between the municipalities respecting the TDC, which may be made with or without “other persons” (which only applies where the TDC is established by two or more municipalities).

The option to include other persons by agreement is significant as it suggests that the province, a regional body, or a qualified organization could be the TDC administrator. Because an inter-municipal development plan is not required by ALSA, this is something that could be required by regulations for interjurisdictional TDCs.

### Positive and Negative Effect of Other Programs on TDCS

TDCs succeed where there is broad support for conservation as exemplified by the existence of other programs.<sup>64</sup> One example is a clear connection between land trusts, municipalities, and state [provincial] programs. Another example is conservation taxes or citizen payments. Voter-approved conservation taxes are a feature of multiple US jurisdictions and in British Columbia under municipal government legislation.<sup>65</sup> The ELC has already recommended similar revenue generation tools for Alberta municipalities as an outcome of the current MGA reforms.<sup>66</sup>

Municipal dependence on property tax is a deterrent to land conservation in Alberta. It is notable that multiple municipalities that have shown interest in TDCs in Alberta have some industrial tax base, an agricultural economy, constraints on providing services and infrastructure, or some combination thereof. Other examples of conflicting programs and incentives in Alberta include:

- most municipal opportunities for government funding are for infrastructure projects; and

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63 TDC Feasibility Review and TDC Legislation Recommendations.

64 See materials on the US experience with TDCs/TDRs provided through the Beaver Hills Initiative, Resources (2016), online: Beaver Hills Initiative <<http://www.beaverhills.ca/resources/>>.

65 See for example, South Okanagan Similkameen Conservation Program, *Establishing a Regional Conservation Fund in British Columbia: A Guide for Local Governments and Community Organizations* (2011), online: South Okanagan-Similkameen Conservation Program <<http://www.soscp.org/wp-content/uploads/2011/12/Conservation-Fund-Guide-Web.pdf>>.

66 Environmental Law Centre, *Empowering Municipalities for Environmental Management* (2014), online: Environmental Law Centre <<http://elc.ab.ca/pub-archives/empowering-municipalities-for-environmental-management-2/>>.

- legal and financial barriers to brownfield redevelopment (greenfield development tends to be favoured).

Without further reforms in Alberta, there may be ongoing perceptions of TDC costs outweighing benefits to municipalities.

Alternative conservation incentives for landowners could interfere with the donation of Conservation Easements. An example to be aware of in Alberta is the opportunity for short-term agreements for wetland restoration under the Wetlands Policy. If the profit opportunity equals that provided by Conservation Easements, then there is a deterrent to enter into the Conservation Easements necessary to secure TDCs (because of the same profit opportunity with a shorter term obligation). Generally, the goals of other incentive programs might also conflict with the goals of the TDC program respecting the specific land or land values to be protected. Again, a potential conflict in Alberta is between wetlands restoration and keeping land in agricultural production.

A benefit to having complementary conservation and stewardship programs is that TDCs are not well suited to prescribing or encouraging land management practices.<sup>67</sup> Trying to use TDCs for more than land conservation can result in administrative problems and decreased program participation.<sup>68</sup> Plans, agreements, and cost support are better tools for encouraging management practices and are excellent complements to TDC programs.<sup>69</sup> The potential harmony between TDCs and incentives for ongoing stewardship is discussed in Volume 4 as **credit stacking**.

### Administration and oversight of TDCs

There is some perception that TDCs create administrative burdens with or without *ALSA*. Types of administrative functions could include:

- planning, zoning and screening of development permits;
- credits administration;
- monitoring and enforcement of secured conservation areas; and
- advisory or technical assistance bodies.

The TDC Legislation Recommendations were proposed to provide flexibility in determining a TDC administrative body.<sup>70</sup> *ALSA* offers flexibility by enabling TDCs to be “established” by the province, or one or more municipalities along with **other persons**. Other persons could be any

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<sup>67</sup> *Supra* note 2.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> TDC Feasibility Review and TDC Legislation Recommendations.

legal person, including qualified organizations, but this option is limited only to interjurisdictional TDCs. TDCs created through regional plans might further provide access to the provisions of *ALSA* allowing delegation of authority for regional plans.

*ALSA* equally allows administrative duties to fall by default on the party that establishes the TDC scheme, most likely a municipality. *ALSA* does not directly create any administrative structures or support programs and it provides little guidance on specific TDC administrative functions. Planning, zoning and development decisions are functions of the municipality or provincial TDC authority and are discussed at length below.

Credit administration is the function most considered by *ALSA*. The TDC Feasibility Review identified protocols for TDC banks as an example component of TDC legislation. Banks are not required for TDCs; however, banks may have value depending on the nature of the specific TDC.<sup>71</sup> The TDC legislation recommendations were for legislation to facilitate TDC banks. *ALSA* has responded by providing for regulations that may extend use of Stewardship Units and the Exchange to TDCs. These tools are discussed below. However, *ALSA* provides no guidance on credit administration functions if the Exchange is not used and mere “TDC development credits” are left to municipal authority. Credits registration and tracking systems are crucial for a functioning credit market and for environmental outcomes.

Monitoring and enforcement of conservation areas may be onerous but can be assigned with some clarity. This would typically be a responsibility of the qualified organization holding the conservation easement or title restriction, or the public authority responsible for a regulatory protective designation. There may be some overlap.

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*Based on the foregoing, TDC regulations should provide parties that establish TDCs with administrative responsibilities for a credit registry that tracks the creation, use and extinguishment of credits.*

*Credit holders (landowners) should be required to register credits and provide notice when credits are transferred and applied against developments.*

*Municipal bylaws should clearly require credits and the conditions for credit use for beyond baseline development approval in development areas.*

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<sup>71</sup> TDC Feasibility Review and TDC Legislation Recommendations.

## Synthesis of Findings and Conclusions

Using our three criteria for assessment, this section of the report synthesizes findings on *ALSA*'s general scheme, TDCs, Conservation Offsets, Stewardship Units and the Exchange. It considers:

- How *ALSA* has enabled or disabled MBIs.
- The extent to which *ALSA* is necessary or unnecessary for MBIs.
- The similarity or difference in issues between the types of MBIs provided by *ALSA*.
- Similarity or difference between multiple examples of the same type of MBI.

### General scheme of *ALSA*

*ALSA* offers high potential to subordinate markets to desired policy outcomes, and thus offers a key hallmark of MBIs as a form of regulation. The suite of Conservation and Stewardship Tools-- including the MBIs and the securement tools—are well aligned with the *LUF* and can foreseeably work together. The specific MBIs – TDCs, Conservation Offsets, Stewardship Units and the Exchange – are fairly sound choices to pursue from a market perspective or a conservation perspective. TDCs and Conservation Offsets foreseeably involve buying and selling rather than mere provision of incentives, while Stewardship Units and the Exchange could facilitate these markets. *ALSA* is especially important for mandating MBIs aimed at the conservation of land and biodiversity. *EPEA* and *CCEMA* enable MBIs in the context of pollution and emissions management. However, the land and natural resource statutes lack MBI provisions, and mere authority to limit impacts and impose conditions is not driving MBIs without policy guidance.

On the other hand, *ALSA* is an unconventional and less ideal platform for MBIs than might be assumed. Looking at the broader legislative framework in which MBIs must exist, *ALSA* is not the most accessible legislation for decision makers nor can it implement MBIs by itself. *ALSA* is separate from the subject-specific statutes that impose regulatory limits on activities and which remain necessary for use as approvals platforms. Despite mandating pilot projects, *ALSA* does not favor the organic development of MBIs so much as the imposition of constructed MBIs.

Further, *ALSA* did not fully implement the *LUF*. *ALSA* does not expressly include all proposed strategies, most notably efficient use of land and footprint reduction. Nor does *ALSA* directly fill the policy gaps identified by the *LUF* around matters including coordination of surface and minerals activity, agricultural land fragmentation, and the under-representation of ecological regions in the protected area system. *ALSA*'s legal impact depends heavily on future regulations and regional plans for which there is broad discretion, few substantive criteria, and little accountability for outcomes. The *ALSA* model further depends on strong political

leadership, a Land Use Commissioner and Secretariat with notable independence, and widespread capacity for implementation.

### **Guiding environmental principles**

The principles adopted by *ALSA* – sustainable development and cumulative effects – fill an important gap in provincial land and resource legislation. If developed according to best practices, the *ALSA* MBIs could reflect most of the more specific sub-principles such as pollution prevention, polluter pay and the precautionary principle. The principles articulated by the *LUF* and *ALSA* are already reflected in the plans of multiple municipalities with interest in TDCs and could be considered a driver of Conservation Offsets in Alberta.

However, sustainable development and cumulative effects management are both notably hard principles to operationalize. *ALSA* leaves need for the adoption of more specific sub-principles and grants of authority in regulations, regional plans or other legislation. There is acute need to recognize the precautionary principle and to resolve systemic issues of public participation in Alberta.

Issues of principle differ between TDCs and Conservation Offsets. The principles of TDCs are fairly settled and well aligned with established environmental principles. Municipal plans can further fill some gaps in principle in the provincial regime. Principles of Conservation Offsets are highly specialized, less established in the legal regime, and their workability in Alberta remains unsettled despite the recent development of conservation offset policy. There is a need to adopt principles into provincial regulations yet caution against encoding the current policy direction in regulations.

### **Sufficient Resolution of Property Law Issues**

Property law issues are not the leading concern with MBIs under *ALSA*, although they exist. Conservation Easements are especially valuable as they answer need for voluntary conservation tools that provide a hybrid of a statutorily-enabled designation and a private land interest. Stewardship Units and municipally created development credits answer the need for transferable personal property separate from the land itself. The *ALSA* MBIs should not require creating new private property rights in ecosystem services except for perhaps the specific situation of using public lands as the site of Conservation Offsets. Concerning restrictions on property rights and compensation for restrictions, *ALSA* is at least neutral and probably generous towards property rights as compared to the general legal regime.

However, *ALSA* has not resolved systemic property law issues that create barriers to MBIs. Risk of damage to conservation value by minerals activity is a widespread concern. This concern applies wherever private conservation occurs with or without MBIs, although it is potentially strongest with Conservation Offsets. The options are basically to strengthen

private property rights on private and public lands, or to provide regulatory protections. A government response is needed in any event where private conservation supports public policy objectives.

*ALSA* leaves multiple debates over need for more conservation tools. One is demands for alternatives to Conservation Easements on private lands. Concerning MBIs, this demand is mostly relevant to Conservation Offsets with limited goals or duration. Alternative agreements are already in use which suggests that legislative enablement of new tools may not be necessary, and there is disagreement on the merits of such tools.

Another demand is for tools to implement Conservation Offsets on public lands. This issue is widely recognized and should be resolved prior to any regulatory enablement or recognition of credit for offsets on public lands. The options canvassed above include those under *ALSA* and other legislation. The *ALSA* options are less efficient; however, among the strongest and most flexible.

*ALSA* leaves multiple questions around compensation that merit further exploration. Again these issues mostly concern Conservation Offsets rather than TDCs. One issue is remedies for harm to conservation sites. Neither the current proposals nor the current policy direction would deal with irreparable harm. The other issue is compensation for restrictions on resource rights resulting from regulatory protection of Conservation Offsets. *ALSA* may not change the baseline however the terms of dispositions and agreements can.

### **Strong regulatory framework**

The regulatory framework for MBIs is where *ALSA* offers the most potential and creates the most issues. A combination of regional plans and regulations under *ALSA* can possibly do everything needed from the regulatory framework: clarify rules and applicability, set goals, set limits on impacts of activities, affirm authority to use the tools, provide guidance for regulatory approvals, require securement of conservation sites, align conflicting policies, and provide administrative structures.

Concerning administration, *ALSA* implies MBI-related functions for the Land Use Secretariat, the Exchange, qualified organizations, and further delegated authorities to pursue objectives of regional plans. *ALSA* creates no barriers to administrative responsibilities falling by default to municipalities in the case of TDCs or regulators in the case of offsets. While how to divide responsibilities remains an issue, *ALSA* definitely contemplates options as compared to other legislation. The larger issues around division of functions concern Conservation Offsets rather than TDCs.

TDCs and Conservation Offsets under *ALSA* share several high level challenges:

- *ALSA* was unnecessary for legal authority to use these MBIs. Municipalities likely had implied authority to establish simple TDCs under the *MGA*. Provincial regulators

definitely have authority to impose offset conditions on activities and this already occurs with wetlands. The main need for MBI legislation was, and still is, to provide guidance for use of existing authority.

- Anticipation of *ALSA* regulations or regional plans has had some cooling effect on the ground-up pursuit of MBIs. This is clearest with TDCs as *ALSA* has legally occupied the field and creates compliance concerns. Similar concerns exist with Conservation Offsets in the demand for “credit for early action”, and legitimate reticence by government to offer certain credit before establishing what qualifies.
- Further regulations or regional plans under *ALSA* may not be necessary. *ALSA* allows TDCs to be established without any further provincial regulations, even though lack of regulations is a practical barrier to use of the tool by municipalities. Likewise, a regulated Conservation Offsets system under which offsets are required as a routine matter can be established with guidance from other policies.
- There is need to require securement for all TDCs and Conservation Offsets. *ALSA* provides more clarity around the appropriate securement tools for TDCs; however it does not clearly require their use. Potential non-securement or inadequate securement of Conservation Offsets should be considered a serious issue unless dealt with by regulations.

The main need for *ALSA* regulations is to provide for Stewardship Units and the Exchange. Even these tools speak mostly to market efficiency in a narrow range of contexts. The recognition of Stewardship Units and the functions of the Exchange are some of the more unsettled issues in this report.

No limits on the impact of land use activities in Alberta should be considered a pervasive barrier to the use of TDCs, Conservation Offsets, and other MBIs possible under *ALSA*. There is inadequate regulatory pressure on the development industries to purchase conservation. There are inadequate incentives for private parties to pursue conservation for profit because there are few buyers and because development opportunities of their own are foreseeable.

There is uncertainty regarding the link between the MBIs and regional planning. Regional plans and regulations could do many of the exact same things needed to enable these tools due to the regulatory status of regional plans. Neither TDCs nor Conservation Offsets need to be used to implement regional plans; however, either of them could and there is good argument for regional plans to guide use of these tools. Furthermore, only regional plans under *ALSA* can clearly respond to cumulative effects. If MBIs are to be used to respond to cumulative effects, then there is a tie to regional planning.

TDCs and Conservation Offsets also display different issues that warrant very different regulatory responses:

- TDCs show fair adherence to environmental principles and few issues of property law. The main issue with the regulatory framework for TDCs under *ALSA* is that it *ALSA* is already highly prescriptive of substantive and procedural requirements. The need for regulations is to affirm municipal authority, clarify the substantive and procedural requirements of *ALSA*, and provide for local administration of credit systems outside of Stewardship Units and the Exchange. This is best done through regulations of general application rather than regional plans.
- Conservation Offsets show multiple unsettled questions of principle and property law concerning public land and resources. The main issue with the regulatory framework for Conservation Offsets under *ALSA* is that it could allow practically anything. The need for regulations is to restrict or settle the range of possibilities contemplated by *ALSA* and the non-legislated conservation offset framework. The pending instruments should provide program goals, geographic scope, and guidance for the application of offset principles that are not amenable to general prescriptions. This may best be done through regional plans that provide for specific conservation offset programs rather than through regulations of general application.

Pursuit of TDCs and Conservation Offsets has been mostly separate to date, with Stewardship Units and the Exchange being linked more closely to Conservation Offsets. This accurately reflects the general scheme of *ALSA* and should continue in the early rounds of regulation making.

## Recommendations

Regional plans, regulations and further action under *ALSA* are definitely needed to advance the MBIs contemplated by *ALSA*. While not all of these actions are a technical legal necessity, they are all contemplated by the provisions of *ALSA* and several have already been anticipated or recommended.

### General recommendations

1. Adopt the precautionary principle in any new plans, policies or regulations concerning use of MBIs in Alberta. The biodiversity frameworks are an ideal candidate for this inclusion.
2. Formalize a public and stakeholder participation in the development and oversight of all MBIs.
3. Protect private conservation activities from minerals activity. Begin by protecting Conservation Easements that fit the objectives of provincial plans or policies.

4. Regulations should require securement of all conservation activities related to MBIs. Securement should include an instrument registered on land titles or Crown land records wherever possible.
5. Explore the direct use of regional plans and Conservation Directives to designate and protect conservation areas associated with the MBIs under *ALSA*.

### **TDC recommendations**

1. Make TDC regulations under *ALSA* as previously anticipated. These should be regulations of general application not tied to regional plans. TDC regulations should include the following details.
2. Clarify credit matters including:
  - a. Municipal authority to create development credits separate from *ALSA* Stewardship Units and the Exchange.
  - b. Required securement of conservation area parcels through title restrictions and approval of the securement tool by the TDC Authority prior to the use of credits for development approvals.
  - c. Municipal responsibilities for a credit registry or cradle-to-grave credit tracking system. Credit holders should be required to register their credits and provide notice when the credits are sold or used.
  - d. Credits may only be used in the TDC for which they were created.
3. Regulations should provide a public participation process for municipalities that goes beyond the baseline requirements of the *MGA* for development of municipal plans and bylaws that establish a TDC. This process should include:
  - a. Earlier and more structured participation than bylaw hearings.
  - b. Notice and participation opportunities for landowners in and adjacent to TDC conservation and development areas.
  - c. More central roles for municipalities and qualified organizations in area structure planning or other processes that identify TDC conservation and development areas.
4. Provide a structured process for provincial approval of municipal TCDs. Some features of this approval system should include:

- a. An application form. Consider the checklist of *ALSA* requirements and TDC best practices approach proposed by the TDC website.<sup>72</sup>
  - b. Proposed municipal bylaws providing the mandatory components should be submitted as part of the application, however the application process should not require specific types of bylaws.
  - c. The timeline should produce a provincial decision prior to final reading of municipal bylaws.
  - d. Clarify that provincial approval or non-approval of TDCs is not a statement on the validity of municipal bylaws.
  - e. Affirm that municipalities whose TDC is approved by the province become the TDC authority.
  - f. Provide a role for the Stewardship Commissioner and Land Use Secretariat in screening applications and making recommendations to Cabinet.
5. Regulations and municipal bylaws should require that TDC conservation area parcels that receive credits be secured by Conservation Easements, Conservation Directives or historic resource designations registered on title and that the proposed securement is subject to approval by the TDC authority.
  6. Municipal bylaws should:
    - a. Clearly require use of credits for beyond baseline development approvals.
    - b. Provide for timing of securement relative to credit creation and sale, and should require securement prior to use of credits by developers.
  7. Outside *ALSA*: reform the *MGA* to provide municipalities with a stronger environmental mandate and increased revenue tools including ability to raise conservation tax.

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<sup>72</sup> *Supra* note 5.