



What Should a TDC Bylaw Include?

There is currently no requirement for a *TDC Bylaw* to be created by a municipality. However, based on Miistakis' review of best practices around the continent, we have concluded that this structure might provide the best chance for successful TDC programs in Alberta.

This approach requires that the primary enabling document is a distinct bylaw, enacted after public review, which details one (or multiple) TDC programs within a municipality. It would include specific information about *TDC Conservation Areas*, *TDC Development Areas*, bonus opportunities, credit calculations, transfer process details, title-restriction devices, and local administration.

The *TDC Bylaw* would define *each* TDC program within the municipality's overall TDC scheme / plan by identifying the unique parameters around each program (though the *TDC Bylaw* could also stipulate that one TDC program exist for the entire municipality). This would provide more detail for implementation, and would allow potential program participants to understand how individual programs approach realizing the goals laid out in the MDP.

Considerations here would include which Zones or Land Use Districts would be eligible as TDC Conservation or Development Areas, parameters around credit establishment, and details of the bonusing opportunities.

To assist that exercise, we have put together a description of what we believe an effective TDC Bylaw should include. Every municipality is different – for that reason, it is important to test our assertion against your own municipality's culture, legal counsel, planners, landowner community, etc.

Purpose

Although the MDP should lay out all the possible purposes for a TDC program, the *TDC Bylaw* would clarify the specific purposes of the program in a given area. By law (ALSA), these purposes must relate to environmental, agricultural, scenic, and/or historic conservation.



As TDC programs must be authorized by the Lieutenant Governor in Council this section of the bylaw would detail that authorization, providing potential participants the higher-level context for the municipal program.

In the case of a multi-jurisdictional TDC program, this would be the place where the *TDC Bylaw* would reference the Intermunicipal Development Plan, and the associated *TDC Bylaw* in the partner jurisdiction.

TDC Conservation Area and Parcel Determination

A *TDC Bylaw* would need to identify the area or areas (e.g., region, policy area) from which development potential (in the form of credits) may be transferred. It will also need to give direction as to how the specific parcels are determined.

TDC CONSERVATION AREA DESIGNATION

The *Alberta Land Stewardship Act* and the *TDC Regulation* require that municipalities designate an area or areas of land as the *TDC Conservation Area* through their *TDC Bylaw*. The Act states that the designated areas may be only for one of the approved purposes (environmental, agricultural, scenic or historic conservation). This suggests that the *TDC Bylaw* should address at least these three items:

Specific program purpose(s) – Each TDC program description should state explicitly which of the allowable purpose(s) it is designed to accomplish.

Associated TDC Development Areas – Each *TDC Conservation Area* will be connected to a particular *TDC Development Area*, designated and described elsewhere in the *TDC Bylaw*. Credits may only trade between associated areas, so it should be made explicitly clear which *TDC Development Areas* are associated with the *TDC Conservation Area*.

Land Use Districts – Each TDC program should identify the Zones or Land Use Districts (as detailed in the Land Use Bylaw) to which it applies. This would include stating if those land districts are affected differently in different areas. For example, parcels in areas zoned Agricultural Conservation in a particular region or policy area may be eligible to be part of the TDC program, but Agricultural Conservation or similarly zoned parcels in other regions may not.



TDC CONSERVATION AREA PARCEL DETERMINATION

As well as identifying the area or region that will be a *TDC Conservation Area*, ALSA requires municipalities to develop an explicit process for identifying the specific parcels that are eligible to be part of the program. Municipalities will also need to outline if there is a process that an interested landowner will need to follow in order to become a *TDC Conservation Area* parcel.

The *Alberta Land Stewardship Act* directs that a municipality must identify every parcel in the *TDC Conservation Area*, and every associated title holder, OR a means of identifying them. This gives some latitude for municipalities in that they can choose to:

1. Proactively identify every parcel in a spatially explicit way, potentially even mapping the potential program opportunities; or
2. Prescribe an application / review process that allows landowners to 'apply' to be in the program, and have their parcel designated as a *TDC Conservation Area* parcel.

The latter option opens the possibility for using a 'criteria-based' program, whereby features the municipality wishes to protect (e.g., headwaters, habitat, riparian, native grass, forest, etc.) can be listed, and the onus is on the landowner to indicate how their parcel meets those criteria.

TDC Development Area Parcel Determination

The *Alberta Land Stewardship Act* requires a municipality seeking to establish a TDC program to designate an area or areas of land to be the *TDC Development Area*. ALSA's direction beyond that is intended to be limited to give municipalities a great deal of flexibility. It is important to note that, unlike the *TDC Conservation Area*, there are no legislated limitations on what type of development can be used to anchor the TDC program; industrial, residential, and commercial would all be deemed acceptable.

With regard to the *TDC Development Area*, the *TDC Bylaw* should address at least these three things:



Terms and Conditions – ALSA notes that the municipality must list any terms and conditions associated with the *TDC Development Area* (types of development allowed, densities, application processes, approval processes, etc.)

Land Use Districts – Similar to the *TDC Conservation Area*, the *TDC Bylaw* will need to identify the Zones or Land Use Districts (as detailed in the Land Use Bylaw) eligible to be *TDC Development Area*. Again, this would include stating if those land districts are affected differently in different areas. For example, if R-2 Residential is eligible for bonus development under TDC's only in one part of the municipality, that should be stated clearly here.

Associated TDC Conservation Area – The designation of a *TDC Development Area* should also include explicit reference to the *TDC Conservation Area(s)* with which it is associated.

TDC Credit Calculations and Transfer Ratios

The *TDC Bylaw* would need to indicate how many (or a process to determine how many) credits are available on each sending site and how many (or a process to determine how many) credits are required per bonus units / opportunity.

TDC Credit Assignment, Realization and Use

The municipality's *TDC Bylaw* would have to address several aspects related to the realization, assignment and use of the TDC credit, including at least the following:

Conditions of Transfer or Sale – If there are conditions that must be met before the municipality will allow a credit to be conveyed from one owner to another (such as the requirement to place a conservation easement on the *TDC Conservation Area* parcel as a condition of approving the sale), these should be stated in the *TDC Bylaw*.

Changes in Land Use – Once the credit opportunities are calculated for a given *TDC Conservation Area* parcel, but no sale has occurred and a CE is not yet registered, it is conceivable that the land use could change, potentially changing the conservation value of the parcel. The municipality needs to determine and communicate what are the ramifications of such an eventuality.



Exchange within Designated Program – The *TDC Regulation* requires that a development credit can only be exchanged and used within (and subject to the terms and conditions of) the TDC program by which it was created.

Creation – Credits may be calculated and created automatically (e.g., 1 credit for every acre in a given area), subject to criteria, based on a landowner application, or some combination of these. Regardless, this process should be identified and formalized.

Authentication – Because the step of creating credits is distinct from the steps of issuing and transferring, it may be advisable to have some process for the municipality to ‘authenticate’ the credits. Calculations may be made of how many credits a given parcel is *eligible* for, but the municipality should create a process for the credits to be authenticated and made available for sale (similar to validating a train ticket and making it available for use).

Irrevocability, expiration – The municipality will have to determine if credits can be revoked, and if so, under what circumstances. The municipality will also have to determine if the credits have a ‘shelf life’ and can expire if they are not used. They will also have to determine if a landowner can determine the “shelf life” – can they choose to opt out once their credits have been determined? And if so, how would that work?

TDC Program Records and Notification

As with any municipal planning process, a TDC program should have a robust information tracking system for at least the following reasons:

- Track program activity;
- Measure program success against the goals;
- Satisfy any regulatory requirements; and
- Make relevant information available for potential program participants.

A TDC registration and information system need not be complicated. The *TDC Bylaw* should address:

- What tracking is required;
- How unique credits are identified (e.g., by serial numbering);
- Who is required to provide it;
- At what point in the process it is required;
- What records the program participants are required to maintain;
- How the records will be maintained; and



- Under what circumstances the records can or must be disclosed.

For proper information tracking, the municipality will likely want to require at least the following features be tracked by program participants.

Issuance of Credits – This information relates largely to the *TDC Conservation Area* and would include information such as: which parcels are eligible for credits; which parcels / landowners have received credits; which *TDC Development Area* are they associated with; how many credits have been transferred; how many credits remain.

Transfer or Conveyance of Credits – This information relates largely to the credit sales information and would include information such as: who has sold credits; who were the credits sold to; what were the sale prices; what were the conditions of sale and have they been met.

Conservation activity – This information relates largely to the title restriction activity and would include information such as: which parcels are now subject to title restriction; what title restriction was used; who holds any conservation easements; what is the monitoring plan or protocol; what monitoring activity has taken place.

Use or Redemption of Credits – This information relates largely to the *TDC Development Area* and would include information such as: who currently holds redeemable credits; which *TDC Development Areas* are they applicable to.

Expiry or Revocation of Credits – This information would only be applicable if the *TDC Bylaw* has stated these types of limitations on credits and would include information such as: which credits have been revoked; which credits have expired; what are the expiry dates of the credits currently available for redemption?

NOTIFICATION

Ultimately, credit transactions and title restrictions under TDC programs cannot take place without the municipality's knowledge, but there are several aspects of the credit transaction for which the municipality may want to require notification.

Thus, the *TDC Bylaw* should identify:

- What notification is required;
- Who is to provide that notification; and



- What notification is required under the Act or the Regulation.

Notification which the Municipal Government Act and the *TDC Regulation* will require include:

The Municipal Government Act requires public notification with regard to the development and amendment of the MDP and municipal bylaws. Beyond that, the TDC Bylaw should include direction around notification to:

- Affected landowners including those in potential TDC Conservation and Development Areas, as well as those immediately adjacent to where TDC activity is due to take place;
- Adjacent municipalities in cases where TDC-related designation or activity is slated to take place immediately adjacent to their jurisdictional border; and
- Partner municipalities in the case where TDC programs are multi-jurisdictional.

Title Restriction

ALLOWABLE INSTRUMENTS

Based on the allowable purposes for a TDC program under the *Alberta Land Stewardship Act*, two types of title restriction are most likely to be used in the *TDC Conservation Area*:

- A conservation easement (for environmental, scenic, or agricultural conservation programs); or
- A Provincial Historic Resource or a Municipal Historic Resource designation under the Historical Resources Act (for historic conservation programs).

The *TDC Bylaw* should indicate which instrument(s) is to be used in the program(s), and any further review requirements, partnerships, etc.

TIMING OF TITLE RESTRICTION

A title restriction is required for a TDC program under ALSA, but the *timing* of when that title restriction comes into force is up to the municipality. A municipality has at



least the following choices with regard to the point at which a title restriction must be entered into by a title holder in a *TDC Conservation Area*:

When the credits are assigned / issued – The title restriction may be required as soon as the credits are assigned to the owner of a parcel. There are few, if any instances where this option is so bluntly used, largely because this completely removes the voluntary aspect of TDC's, turning them into a prescriptive conservation exercise. Perhaps the biggest barrier to this approach is landowner participation; it is highly unlikely a landowner would consent to granting a title restriction when they have received nothing in return, and cannot know what the value of their credits would be on an open market.

When the first credit is transferred – This requires the title restriction to occur as soon as the first credit is conveyed in some manner to another party. The remaining credits associated with the parcel would still be available for sale or disposition as the landowner chooses. This is the most common approach in the United States, and ensures conservation activity happens at the outset. Landowners 'commit' to the program by the act of that first transfer, but still have the ability to phase the sale of credits, potentially over several years. Without this approach, the parcel is still available for significant changes in land use after the *TDC Conservation Area* landowner has been compensated for the sale of some of the development potential, creating a significant risk to the program.

When the last credit is transferred – This requires that the title restriction occur after all available credits associated with the parcel have been conveyed or disposed of. As described above, this creates significant risk for changes in land use to occur that significantly affect the conservation values, after payment has been made for transferring development potential.

When the credits are applied / redeemed – This requires the title restriction be placed only after the credits have actually been redeemed in return for bonus development approval in the *TDC Development Area*. Similar to the options above, this means credits would have been bought and sold – potentially years prior – with no conservation activity having taken place, and a high risk of changes in land use having occurred.

Regardless, the *TDC Bylaw* should make it clear which of the above is the requirement in the municipality's policy.



PERPETUITY

There is no provision in either the conservation easement clauses or the Transfer of Development Credits clauses of ALSA that requires a title restriction to be in perpetuity, but there is provision that they can be. A municipality can direct within the *TDC Bylaw* that title restrictions must be of a certain term or granted in perpetuity.

With regard to a title restriction under a TDC program, a municipality therefore has to determine if their conservation goals (e.g., clean water, wildlife habitat, arable land) are intended to be temporary or enduring.

TDC Development Area *Bonus Opportunities*

Although the conservation goals of a municipality often drive the development of TDC programs, what fuels the program is the incentive for a developer to become involved. Indeed several successful TDR (Transfer of Development Rights) programs in the United States were initiated by visionary developers.

The bonus opportunities for the *TDC Development Area* are the key to the involvement of developers, and they should to be clearly articulated in the *TDC Bylaw*. Traditionally, the development 'bonus' is a higher density of development on a parcel than is otherwise available. However, there can be several other types of development bonus, which would, again, need to be clearly outlined in the *TDC Bylaw*. Based on experience in American programs, these bonus opportunities might include:

- Density of units (e.g., greater units per acre);
- Floor space (e.g., greater allowable floor space);
- Process efficiencies (e.g., streamlined development review options, or more specific development guidelines);
- Land use bonuses (e.g., decreased municipal reserve requirement);
- Development guidelines (e.g., fewer required parking spaces, relaxation of architectural controls); or
- Other or some combination of the above.

As well, if the development bonus opportunities are different in different *TDC Development Areas*, this needs to be clearly outlined in the *TDC Bylaw*.