The Potential for Municipal Transfer of Development Credits Programs in Canada

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This article is about municipal transfer of development credits programs. Such programs are common in the United States but Canadian municipalities have only recently considered them. Transfer of development credits programs provide a method of preserving rural landscape or urban areas by permitting the transfer of development potential from one area and conferring it on another. The owner of the restricted parcel receives development potential credit, which may be sold and used by a purchaser to increase development potential on another parcel, more suitable for development, all in accordance with the program. Unlike traditional zoning, transfer of development credits programs are designed to enable compensation for a landowner for the loss of development potential to carry out municipal preservation policies. They can provide economic incentive to preserve undeveloped land or other landscape features. A successful program can assist municipalities in implementing preservation policies, while serving development interests. The article deals with the question of whether municipalities in Canada may establish all aspects of TDC programs in the absence of specific legislative authority. It considers potential jurisdictional legal challenges to Canadian TDC programs, focussing on Alberta. It also assesses legal instruments currently available to municipalities to secure development restrictions.

Cet article porte sur les programmes municipaux de transfert des crédits de d'aménagement. Bien que fréquents aux États-Unis, ce n'est que récemment que les municipalités canadiennes ont commencé à les envisager. En permettant le transfert d'un potentiel d'aménagement d'une région à l'autre, les programmes de transfert des crédits d'aménagement fournissent ainsi un moyen de conserver le paysage rural ou les régions urbaines. Le propriétaire du terrain assujetti à des restrictions reçoit un crédit de potentiel d'aménagement, qui peut être vendu et ensuite utilisé par l'acheteur pour augmenter son potentiel d'aménagement à l'égard d'un autre terrain convenant mieux à l'aménagement, le tout étant fait en conformité avec le programme. Contrairement au zonage traditionnel, les programmes de transfert de crédits d'aménagement sont conçus afin de pouvoir dédommager un propriétaire terrien pour la perte du potentiel d'aménagement, et ce, dans le but d'appliquer les politiques de conservation de la municipalité. Ces programmes peuvent fournir un incitatif

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économique pour préserver des terrains non aménagés ou d'autres aspects du paysage. Si le programme a du succès, il peut aider les municipalités à implanter des politiques en matière de conservation, tout en desservant leurs intérêts en matière d'aménagement. Dans cet article, on aborde la question de savoir si les municipalités canadiennes sont capables de mettre sur pied ces programmes de transfert, même si la loi ne leur a spécifiquement conféré un tel pouvoir. On examine les attaques judiciaires de type juridictionnel qui pourraient possiblement être lancées contre ces programmes de transfert, en mettant un accent particulier sur l'Alberta. On examine également les instruments législatifs dont disposent déjà les municipalités et qui leur permettent d'imposer des restrictions en matière d'aménagement.

1. INTRODUCTION

Municipalities throughout Canada struggle with reconciling municipal urban or rural landscape protection policies with development pressures. Often municipal protection policies are forsaken to permit zoning changes and consequent subdivision and development inconsistent with them. Even though municipal councils may have the legal right to turn down land development applications that would violate municipal landscape protection policies, councils often grant such applications for a variety of reasons. These could include considerable pressure by developers, claims for compensation if applications are turned down,[1] need for

1 Subject to only a few exceptions, in Canada only rarely could a council's denial of a zoning change, subdivision or development application, legally give rise to a right to compensation. Nevertheless, such claims are made and councillors are influenced by them either because they are not fully aware of the municipality's legal rights, or, for political or other reasons, they are not willing to fully assert the municipality's legal rights. One exception is where legislation requires compensation for municipal action. For example, in Alberta, there is a requirement for payment of compensation for designation as a municipal historic resource or municipal historic area under the *Historical Resources Act* (R.S.A. 2000. c. H-9, ss. 26-27). Section 28 of the Act requires municipalities to compensate owners for any diminution of the economic value of land or buildings caused by a designation. The definition of "historical resource" includes works of nature and natural sites significant for their natural interest (s. 1(e)). Another exception is where all of the conditions set out in *British Columbia v. Tener* ([1985] 1 S.C.R. 533) are met. These conditions are: (a) the existence of a property interest or right that was extracted by virtue of government legislation; (b) the deprivation of the interest by government action; (c) the acquisition of the interest by the government; and (d) legislation that explicitly or implicitly provides for compensation for the taking of the right or interest. Although cases that refer to *Tener* suggest that an actual property interest, such as an access easement or a profit a prendre must be taken by government action, they also contain language that suggests that condition (a) could be met if government action left the landowner with no viable use of the land at all, regardless of whether an actual property interest was extracted. For example, the Nova Scotia Court of Appeal in *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)* ((1999), 1999 CarswellNS 254 at para. 59) found that the condition would be met ". . .when virtually all of the aggregated incidents of ownership have been taken away."

increased tax base, and a desire to avoid denying developers some economic return for their land. This article considers the potential for the use of a tool that can enable municipalities to honour their landscape protection policies while still enabling landowners and developers some economic return for their land and allowing for increased tax base. This tool is a municipal transfer of development credits (TDC) program, sometimes called a transfer of development rights (TDR) program.

TDC programs provide a method of preserving rural landscape or urban areas by permitting the transfer of development potential from one area and conferring it on another. The owner of the restricted parcel receives development potential credit, which may be sold and used by a purchaser to increase development potential on another parcel, more suitable for development, all in accordance with the TDC program. Unlike traditional zoning, TDC programs are designed to enable compensation for a landowner for the loss of development potential to carry out municipal preservation policies. The concept has been hailed as an "innovative way to accommodate both preservation interests and development interests."[2]

This article deals with the question of whether municipalities in Canada may establish all aspects of TDC programs in the absence of specific legislative authority.

It is divided into four Parts. Part 2 takes a closer look at the nature of TDC programs and provides an overview of the role they have played in the U.S. Part 3 considers potential jurisdictional legal challenges to Canadian TDC programs, focussing on Alberta. It considers whether a municipality has authority to develop and implement a TDC where there is no specific authorizing provincial legislation. It also assesses legal instruments currently available to municipalities to secure development restrictions. Part 4 summarizes and concludes the article.

2. ABOUT TDC PROGRAMS

(a) Objectives of a TDC Program

In rural settings the objectives of TDC programs typically are to preserve landscape features such as agriculture, open space, wildlife habitat, or important ecological features as well as to prevent fragmentation. In urban settings the objectives typically are to maintain heritage or green

2 Michigan Farmland and Community Alliance, "Transfer of Development Rights," available online at <www.mfcaonline.com/quickfacts/tdr.shtml>.

areas, or to preserve preferences for low density. In both rural and urban settings overall objectives are to promote and realize orderly development. A TDC program meets these objectives by shifting permissible densities from areas where development is less desirable to areas where it is more desirable. A TDC program can enhance equity to landowners restricted by zoning or other land related regulations by giving them opportunity to earn economic return from their land. A municipal TDC program does this by enabling a landowner to sell units of development potential inherent in parcels of land in accordance with a municipal TDC program.

(b) General Mechanics of a TDC Program

A typical TDC program involves transferring development potential from one parcel of land to another parcel of land in accordance with municipal plans, policies and by-laws. "Development potential" means the difference between existing land use and potential land use as allowed by and set out in applicable local land use by-laws and municipal plans. The parcel from which development potential is transferred is the "sending parcel." The parcel that receives the development potential is the "receiving parcel." For example if a land use by-law allows one single family residence per titled parcel in a given land use zone, a TDC program could give a landowner who holds four undeveloped titled parcels in the zone four development credits. The landowner may transfer the credits for value. Appropriate legal instruments secure restrictions on development in the sending parcel, such as conservation easements or restrictive covenants.

In the U.S., where TDC and TDR programs are common, the transfer is normally done in one of two ways. The first is on a market model. Here the holder of credits sells them to a willing purchaser at whatever price the market will bear. The municipality is not involved in the transaction. The second is a more regulated model. Here the holder of credits transfers them to a broker who arranges for ultimate sale. The broker could be the municipality or some other entity approved by the municipality. On either model, the purchaser can use the credits in a receiving zone, identified in municipal plans and by-laws, subject to any required change of zoning, and subdivision and development processes. On either model, appropriate legal instruments secure development restrictions on sending parcels.

(c) A Word About Transfer of Development "Credits" in Contrast to Transfer of Development "Rights"

In the U.S., TDC-type programs often are known as "transfer of development rights programs," or "TDR." This article uses the expression transfer of "development credits" or "TDC" in respect of potential programs in Canada. Given constitutional protection of property rights in the U.S. it may well be appropriate to use the term "development rights."[3] However, considering the absence of such constitutional guarantees in Canada, as well as the author's attempt to remain neutral regarding the relationship between any landowners' rights to develop and land use regulation, this article uses the notion of "development credits" in respect of potential Canadian programs.[4]

(d) Voluntary or Mandatory Programs

With respect to sending areas, a TDC program may be either voluntary or mandatory. With a voluntary program a landowner may choose to participate in the program. If the landowner does not want to participate, then the prevalent zoning, subdivision, and development rules apply. For example, a land use by-law with a voluntary program might give a landowner with a titled parcel of land in a sending area the choice of either selling a credit for choosing not to develop by building one single family residence, or building a single family residence on the parcel. A mandatory program would not give this choice. It would prohibit development inconsistent with the objectives of the program and allow potential eco-

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3 In the U.S. property rights are constitutionally protected by virtue of the Fifth and Fourteenth Amendments to the Constitution. The Fifth Amendment reads: "No person shall be. . .deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment states that "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws."

4 The term "transfer of development credits" or "TDC" was used in a proposed program of Cypress County in Alberta to address development pressures on the area adjacent to Cypress Hills Interprovincial Park, which straddles the southern Alberta-Saskatchewan border. This unique montane forested area was missed by the last Ice Age's glaciation and is the highest point between the Rocky Mountains and Labrador. The term "TDC" was used, at least in part, at the author's suggestion, for the reasons set out in the text relating to this note. Ultimately council rejected the TDC program for lack of clear public support. See L. Prestayko, "County says no to debut of Canadian program" *Commentator/Cypress Courier*, (April 8, 2003) at 9.

nomic return by enabling an owner of land in a sending area to sell a development credit.

Normally a TDC program is mandatory for receiving areas for those who wish to develop beyond permitted density. It would be a futile exercise to develop a TDC program that was voluntary in respect of such development. Developers would not participate in a TDC program if they could achieve their objectives to develop to desired densities without purchasing development credits.

(e) Practical, Policy and Miscellaneous Legal Considerations for a Municipality

Before embarking on a detailed legal analysis, there are a few practical and policy considerations for any municipality contemplating a TDC program:

- A TDC program's success depends on the presence of a market for TDC credits. If there is no market, landowners in sending areas will have no incentive to restrict the uses of their property to acquire TDC credits. The more active the market the more likely that the holders of credits will receive a fair price.[5] A key factor in the existence of a healthy market is sufficient development pressure to support a TDC program. If there is no need for a developer to purchase credits to develop in the receiving area then the developer will not participate in the program. As well, the receiving area must be enticing to developers to induce them to purchase credits to enable additional development. If a developer can simply develop to desired density elsewhere, the developer will not purchase development credits.
- It is critical that a municipality contemplating amending its plans and by-laws to establish a TDC program get community support. This may not be easy. Some landowners and developers may reject the idea of a TDC program in principle as they feel that the program will be taking something away from them. They may not appreciate the rights of municipalities to impose land use restrictions by zoning and how a TDC program could be actually giving them something. The municipality will have to convince the residents in the receiving area that it can absorb additional density. The concepts underlying a TDC program may not be easy to understand. The idea of separating off development potential from land may be difficult to comprehend. A municipality must use familiar analogies, like splitting off mineral title from surface title,[6] or placing restrictive covenants or conservation easements.
- More than one municipal jurisdiction may be involved in establishing a TDC program and the municipality must consult and reach appropriate arrangements with other jurisdictions. For example, in most provinces the provincial Crown owns the beds and shores of rivers, lakes, and of at least some naturally occurring water bodies. Insofar as a TDC program may affect these resources, the municipality must get provincial buy in and cooperation.
- The desired resource to be protected may span municipal borders, for example, wildlife habitat or other environmental features. In such case it will be necessary to achieve inter-municipal cooperation, and, where appropriate engage in inter-municipal planning and by-law processes to achieve protection objectives.[7]
- Existing zoning will have to be carefully examined before a municipality embarks upon the TDC path. If a municipality's plans and by-laws offer a wide variety of zones, there may not be sufficient incentive for developers to participate in a TDC program.[8]
- Last, and certainly not least, a municipality in any given province might not be able to legally formalize a TDC program through adopting it in plans and passing the requisite by-laws without a change in provincial authorizing legislation. Part 3 of this article explores whether a municipality may formalize a TDC program without specific authorizing legislation.

(f) Rich History of TDC Programs in the U.S.

TDC type programs were first introduced in the U.S. in the 1960's. By 1998 there were more than 112 programs in 25 states. Of these, 47

5 J. Stinson and M. Murphy, "The Transfer of Development Rights," Pace Law School, Pace University, Land Use Law Centre, at 3. This article is available online at <http://www.law.pace.edu/landuse/tdr.html> [Stinson and Murphy].

6 This point is made in Stinson and Murphy, ibid. at 4.

7 For a discussion of multi-jurisdictional management of environmental features, see A. Kwasniak, *Reconciling Ecosystem and Political Borders: A Legal Map* (Edmonton: Environmental Law Centre, 1997). Some provincial legislation contains tools or processes that allow multi-jurisdictional management. For example, the Alberta *Municipal Government Act* (R.S.A. 2000. c. M-26) [the MGA] enables intermunicipal development plans, intermunicipal by-laws, intermunicipal planning authorities, and intermunicipal service agreements.

8 This point is made in Stinson and Murphy, *supra* note 5 at 5.

were in cities, 30 in counties, 30 in towns and 5 are multi-jurisdictional, allowing density transfers between municipalities.[9] Nine states had specific state enabling legislation for TDC programs. There was no specific authorizing legislation for the remainder. In the remainder, TDC programs were instituted only through local policies, zoning laws and other land use regulations. Legal opinion in New York State express the view that lack of specific statutory authority enabling TDR programs would not prevent their legal use. The opinion notes that New York courts have generously interpreted municipal land use powers and have allowed innovative techniques.[10]

(g) A U.S. Example

An example from the U.S. shows how a TDC program works. The example is from an article by Maanvi Mittra published by the PACE Law School in New York.[11]

The TDC program concerned an area in New Jersey called the "New Jersey Pinelands." The area covered a million acres between Philadelphia and Atlantic City. This environmentally sensitive region with marshlands and forests contained seven counties and 52 small municipalities. Some of the marshland areas were used to harvest cranberries and blueberries.

With the objective of addressing encroaching development that threatened the region's environmental resources, state legislature enacted the *New Jersey Pinelands Protection Act*, and created the Pinelands Planning Commission.[12] In 1980, the Commission adopted a comprehensive management plan. The plan's main objective was to "protect the Reserve by limiting residential development through such controls and permitting development only as a conditional use."[13] The plan authorized a TDC program called the "Pinelands Development Credit" or PDC program. The program designated sending areas, which restricted development,

9 R. Preutz, "Putting Growth in its Place with Transfer of Development Rights," (1998) 31 Planning Commissioners Journal 14.

10 G.S. Shaffer, Secretary of State (New York), "Legal Memorandum: Transfer of Development Rights" for the NYS Department of State, (no date given) available online at <www.hellskitchen.net/develop/doslm.html>. Internet resources on TDR or TDC often refer to this memorandum.

11 M. Mittra, "The Transfer of Development Rights: A Promising Tool of the Future," (White Plains: PACE Law School, 1996) available online at <http://www.law.pace.edu/landuse/tdrpap.html#fn3> [Mittra].

12 Mittra, ibid. at footnote 9, provides the following to support this statement: Richard J. Roddewig and Cheryl A. Inghram, "Transferable Development Rights Programs: TDR's and the Real Estate Marketplace," (1987) 401 American Planning Association 1.

13 Mittra, ibid. at 3.

and receiving areas, which permitted additional density. The Act required municipalities in the area to enact land use planning and development legislation consistent with the comprehensive plan. In Mittra's words:

> The amount of credits that would be allocated to a landowner depended on the development potential of the land. For instance, uplands and woodlands were allotted 1 credit per 39 acres. . . . Certain woodlands were allotted 2 credits if they were located above a watershed. Wetlands were given .2 credits per 39 acres because there was not much threat of development in these areas. However, wetlands used in the harvesting of cranberries and blueberries were given 2 credits per 39 acres. When a credit was transferred, it permitted the purchaser to build four residential units above density. In other words, if a developer owns one acre which is currently zoned for 1 unit, he could develop 5 units on the acre after purchasing one credit. If a developer only wished to build one additional unit, he could purchase 1/4 of a credit. Once a landowner sold a credit he would have to record a deed restriction which limited his future use of the property.[14]
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> . . .
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> In order to ensure that there would be a market for the credits, the commission decided to designate receiving sites that could accommodate twice as much development as there were credits. The commission determined that 70,000 units could be built above permitted density. It calculated that a maximum of 8,315 credits could be purchased. Since each credit allows for four extra units to be built above density, a total of 33,260 additional units could be built in the Receiving Area under the plan.
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> . . .
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> As of 1991, a total of 10,920 acres of land have been permanently preserved through the purchase of development credits.[15]

3. TDC PROGRAMS IN CANADA: POTENTIAL CHALLENGES OF LACK OF JURISDICTION

No province in Canada has legislation that expressly authorizes municipalities to develop TDC programs.[16] This does not mean that any given municipality may not legally develop a TDC program. This Part of the article explores the potential for a successful jurisdictional challenge against a municipality on the basis of lack of legislative jurisdiction. It

14 Mittra refers to Roddewig and Inghram, *supra* note 12 at 6.

15 Mittra, *supra* note 11 at footnote 11, refers to New Jersey Pinelands Commission, *New Jersey Pinelands Comprehensive Management Plan: The Second Progress Report On Plan Implementation*, IV-4 (1991).

16 Later the article points out that some provinces' legislation authorizes some aspects of TDC programs. See Part 3 (c)(iii) of this article.

focuses on Alberta though similar analyses could be made for other provinces.

(a) Jurisdictional Challenges: Statutory Interpretation Principles, Purposes

Assume that a municipality's actions in setting up a TDC program were not unreasonable, uncertain, discriminatory, made in bad faith or for improper purposes. An important remaining jurisdictional challenge would be whether a municipality had legislative jurisdiction to establish and carry out a TDC program.

Caselaw has established that municipalities, like all statutory creations, have no authority beyond the powers expressly or implicitly conferred by legislation. The legislation that establishes municipal powers, of course, is provincial legislation, since municipalities acquire all of their authority from provincial legislation. If a municipality acts beyond conferred powers, a court may determine any purported action to be *ultra vires* and accordingly without legal effect.

The rules regarding how courts should interpret legislated municipal powers have evolved through the years. Early on courts very strictly limited municipal powers in accordance with what has been known as "Dillon's Rule." The Rule derives from a 1906 case that states:

> It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others, first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.[17]

In the 1993 decision, *R. v. Greenbaum,* the Supreme Court of Canada reaffirmed Dillon's Rule though it somewhat softened its impact. It reaffirmed that "[M]unicipalities are entirely the creatures of provincial statutes. Accordingly, they can exercise only those powers which are explicitly conferred upon them by a provincial statute."[18] But later the court stated that authorizing legislation should be given a "broad" and "benevolent construction"[19] and that courts should adopt a construction

17 *Ottawa Electric Light Co. v. Ottawa (City)* (1906), 12 O.L.R. 290 at 299 (C.A.). From *Dillon on Municipal Corporations*, 4th ed., section 89.
18 *R. v. Greenbaum* [1993] 1 S.C.R. 674 at 687.
19 Ibid. at 688, quoting Davies J. in *City of Hamilton v. Hamilton Distillery Co.* (1907), 38 S.C.R. 239 at 249.

that would render municipal regulation *intra vires* where the authorizing legislation reasonably permits an *intra vires* interpretation.[20] The court went on, however, to endorse "a somewhat stricter rule of construction" where "the municipality is attempting to use a power which restricts common law or civil rights" and stated that "courts must be vigilant in ensuring that municipalities do not impinge upon the civil or common law rights of citizens in passing *ultra vires* by-laws."[21]

The Supreme Court of Canada continued to guide the evolution through prescribing a liberal and flexible approach, at least in respect of general and omnibus grants of power. In *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*[22] the Court stated:

> It appears to be sound legislative and administrative policy, under such provisions, to grant local governments a residual authority to deal with the unforeseen or changing circumstances, and to address emerging or changing issues concerning the welfare of the local community living within their territory. Nevertheless, such a provision cannot be construed as an open and unlimited grant of provincial powers. It is not enough that a particular issue has become a pressing concern in the opinion of a local community. This concern must relate to problems that engage the community as a local entity, not a member of the broader polity. It must be closely related to the immediate interests of the community within the territorial limits defined by the legislature in a matter where local governments may usefully intervene.[23]

The evolution culminated with the Supreme Court of Canada decision in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City).*[24] The case questioned whether the City of Calgary had legislative authority under the *Municipal Government Act* (MGA) to pass a by-law that limited the number of taxi plate licenses (TPLs) available. The by-law had the effect of limiting the number of taxis that could carry on business in the city. The majority of the Court of Appeal[25] in *Dillon*-esque fashion microscopically analyzed the statute's by-law making authority word by word and concluded the City's limitations and freeze on TPLs was *ultra vires*. The dissent took a broader, more liberal, purposive approach and found that the city's power to regulate businesses, including the taxi

20 *Supra* note 18 at 688.
21 Ibid. at 689.
22 [2001] 2 S.C.R. 241 (S.C.C.) [*Spraytech*].
23 Ibid. at para. 53 per LeBel J.
24 (2004), 236 D.L.R. (4th) 385 (S.C.C.) [United Taxi].
25 *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2002] 8 W.W.R. 51 (Alta. C.A.).

business, implies the power to limit, including limiting TPLs.[26] The Supreme Court allowed Calgary's appeal. The Court agreed with the dissent at the appeal level that the City had the right to limit TPLs either on the basis of its power to regulate, or licensing power under the MGA. The court perfected the interpretive evolution in stating:

> The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities.... The "benevolent" and "strict" construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced.[27]

(b) General and Specific Grants

Notwithstanding the evolved interpretive approach, care must be taken when applying court pronouncements on interpreting municipal powers. *Spraytech*, for example, may have only limited application regarding legislated authorities relating to land use planning and development. This is because the *Spraytech* case focussed on general and omnibus grants and not on specific grants of authority. General and omnibus grants confer broad authority over generally defined matters.[28] Specific grants more definitively describe municipal authority in a more particularized area.[29] *Spraytech* will be relevant in interpreting generally stated purposes of municipalities, and these purposes are relevant to interpreting any legislated municipal powers, including specific grants. However, the case likely will have little impact on interpreting specific grants themselves. *United Taxi*, in contrast to *Spraytech*, should be relevant to any grant of power, general or specific. The provisions under consideration in that case were fairly specific, though not as specific as other provisions found in the MGA.

In the end, it is fair to say that cases culminating in *United Taxi* have moved interpretation of municipal powers to a broad and purposive approach. Nevertheless, the more specific a grant of power, the more evidence of legislative intent to limit municipal authority.

26 Ibid. at para. 217. In taking this approach, Mr. Justice O'Leary, for the dissent, relied on the Supreme Court of Canada decisions in *Spraytech*, *supra* note 22, and *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342.

27 *Supra* note 24 at para. 6.

28 *United Taxi, supra* note 24 at paras. 5 and 6.

29 The *Municipal Government Act* expressly distinguishes between general and specific grants. General by-law making powers are granted by ss. 7 and 8 in Division 1 of Part 2 of the Act. Section 10 of Division 1 of Part 2 defines "specific by-law passing power" as a "municipality's power to duty to pass a by-law that is set out in an enactment other than this Division, but does not include a municipality's natural person powers." This article discusses natural person powers in Part 3(c)(ii).

(c) Jurisdictional Challenges: An Alberta Application

(i) *Municipal Purposes and General By-law Making Power*

Part 1, s. 3 of the MGA sets out the purposes of an Alberta municipality. The purposes are set out in broad, general terms. They are:

> The purposes of a municipality are
>
> (a) to provide good government,
> (b) to provide services, facilities or other things that, in the opinion of council, are necessary or desirable for all or a part of the municipality, and
> (c) to develop and maintain safe and viable communities.

Under *Spraytech* the purposes clauses should be interpreted flexibly and broadly. Since the general purposes apply to the entire Act, even the more specific grants should be read in light of the broad purposes. Regarding a TDC program, provided that an Alberta TDC program is intended to develop viable communities it should fall within municipal purposes.

The MGA contains general grants of power to pass by-laws under Part 2, Division 1 and a range of grants from fairly general to quite specific under other Parts and Divisions of the Act. Grants specifically relating to planning and development are found in Part 17, Planning and Development. General by-law making powers are given in s. 7, Part 2, Division 1. With respect to general grants under Part 2, Division 1, s. 9 of the MGA states that the power to pass by-laws under this Division is stated in general terms to

> (a) give broad authority to councils and to respect their right to govern municipalities in whatever way the councils consider appropriate, within the jurisdiction given to them under this or any other enactment, and
> (b) enhance the ability of councils to respond to present and future issues in their municipalities.

Nothing in Part 2, Division 1 appears to authorize, even implicitly, the development or implementation of a TDC program. Accordingly, authorization for a TDC program must be sought elsewhere. The provisions in Part 17 of the MGA are the logical place to look to find authorization, explicit or implicit, for a municipality's developing and implementing a TDC program.

(ii) *Natural Person Powers*

There is a source of municipal powers that have not yet been subject to judicial review in respect to municipalities: the natural person powers. The MGA, along with a handful of other provinces' municipal laws, gives municipalities natural person powers.[30] Under natural person powers, a municipality enjoys the same capacity, rights, powers and privileges accorded to a natural person. Any limitation on these rights must be set out in legislation. Although it is not entirely clear the extent to which natural person powers have extended municipal powers, it may be said that they enable municipalities to conduct business as a natural person would even though specific authorization is not given by legislation. So, for example, a municipality with natural person powers likely may barter, sell, negotiate contracts, and carry on businesses, even where not specifically authorized. It is possible that natural person powers could fill some gaps regarding authority to establish and implement TDC programs where explicit authorization is not given. For example, the authority to issue credits, or to set up a credit bank or exchange might be derived from natural person powers in the absence of express authority given.

(iii) *Part 17 of the MGA—Planning and Development*

A. Purposes of the Part

The purposes for the planning and development authority in Part 17 are set out in broad terms, and accordingly should be interpreted in accordance with *Spraytech* principles. They are:

> 617 The purpose of this Part and the regulations and bylaws under this Part is to provide means whereby plans and related matters may be prepared and adopted
>
> (a) to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and
> (b) to maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta, without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest.

Both the underlying policy and implementation of a typical TDC program should meet the purposes provisions. Regarding underlying policy, preserving landscapes such as agricultural landscapes, heritage or low density areas, wildlife habitat and important ecological features, preventing fragmentation and promoting orderly development, would appear to fit squarely under (a) and (b). Using a TDC program, perhaps among other methods, to achieve the underlying policy also seems to fit squarely under (a) and (b). A TDC program would be initiated to achieve orderly development. A TDC program promotes economical and beneficial development in that it provides incentives to achieve orderly development. One purpose of a TDC program is to maintain and improve the quality of the physical environment. Finally, by enabling monetary benefits to landowners in sending areas, a TDC program aims at avoiding infringing on rights of individuals for the public interest. It does this better than other methods of achieving orderly development, such as through ordinary development freezes.

30 MGA, at s. 6.

B. Land Use Plans and By-laws—Introduction

The text of a TDC program will be located in an Alberta municipality's land use plans and the land use by-law. The description and adoption of the TDC program as matter of policy should be set out in land use plans. The regulatory aspects of a TDC program will be set out in the land use by-law.

The MGA's provisions relating to land use planning, subdivision, and development range from fairly broad to fairly specific grants. Accordingly, a reviewing court should be compelled to apply *Spraytech*'s principle of broad and flexible interpretation for general grants while, subject to *United Taxi's* requirement of a broad and purposive approach, invoking a stricter interpretation to more specific grants. In either case, planning and by-law authorities should be interpreted against the broad and flexible purposes of a municipality set out in s. 3 of Part 1 of the Act, and the broad purposes of Part 17 set out in s. 617 of the Act.

C. Land Use Plans—Municipal Development Plan

In Alberta, the primary statutory plan for establishing policy objectives is the municipal development plan (MDP). The MGA requires council of a municipality with a population of 3500 or more to develop a MDP, while less populated municipalities may also develop one. The MGA states what must and what may be contained in a MDP. The following excerpts from the MGA offer considerable evidence that the Act either explicitly or implicitly authorizes the adoption of a TDC program as a matter of policy.

Section 632 of the MGA states that the MDP must address:

- future land use within the municipality
- the manner of and proposals for future development

The section continues to state that the MDP:

- may address environmental matters and any other matter relating to the physical, social and economic development of the municipality
- and may contain statements on development constraints, goals, targets and planning policies.[31]

D. Land Use Plans—Area Structure Plan

Section 634 of the MGA enables council to develop area structure plans (ASPs). ASPs set out how development is expected to proceed in an area. As renowned planning and development legal expert, Fred Laux, puts it, ". . .once such a plan has been adopted, each prospective owner-developer can fairly accurately anticipate the land uses council will allocate to its land in the land use bylaw."[32]

The following excerpts from s. 634 of the MGA show considerable evidence that the section either explicitly or implicitly authorizes the adoption of a typical TDC program to be set out in an ASP. As well they reveal that an ASP would be an ideal plan in which to set out the nuts and bolts of a TDC program.

The MGA states that an ASP:

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

E. Land Use By-law and Regulatory Aspects of a TDC Program

The land use by-law will provide the regulatory aspects of the plan. At their bare bones these aspects include:

(a) setting out a process for determining applications in respect of participants in the TDC program;

31 MGA, parts of s. 632.

32 F. Laux, *Planning Law and Practice in Alberta,* 2nd edition (Toronto: Carswell, loose-leaf, up to 1998) at 5-5. (Note the third edition was published in 2002 by Juriliber in Edmonton).

(b) identifying sending and receiving area districts and setting out permitted uses in the districts to control density;
(c) providing for a credit system for sending areas;
(d) providing for density transfers from sending areas to receiving areas; and
(e) providing a process for the effective restriction of uses on sending parcels.

An Alberta municipality has legislative authority to include the necessary provisions to accomplish (a) to (e).

Re (a) and (b)—processes for determining applications and setting out permitted uses

Section 640 of the MGA clearly authorizes these requirements. It states:

(2) A land use bylaw

(a) must divide the municipality into districts of the number and area the council considers appropriate;
(b) must, unless the district is designated as a direct control district pursuant to section 641, prescribe with respect to each district . . . the one or more uses of land or buildings that are permitted in the district, with or without conditions . . .
(c) must establish a method of making decisions on applications for development permits and issuing development permits for any development . . .

Re (c)— credit systems

An essential element of a TDC program is that a municipality formalize a program of giving credits to those who agree to permanently limit development on their property. It could be argued that unless authorizing legislation specifically or by necessary implication enables municipalities in a province to do this, a TDC program giving credits would be *ultra vires.* Someone taking this position could point out that some municipal legislation in Canada specifically authorizes other credit systems, such as giving development credits for future development levies.[33]

Prior to the Supreme Court of Canada decision in *United Taxi,* the question of whether a court would find implicit authorization to use a credit system in the land use planning, subdivision and development processes would have depended in large part on whether the court used a broad and purposive statutory interpretation approach, or used a more,

33 For example, the *Development Charges Act,* S.O. 1997, c. 27.

slave to the words restrictive approach, as in the majority decision at the Alberta Court of Appeal in *United Taxi*.[34] However, given the Supreme Court's nod to the broad and purposive approach, it is likely that, at least in Alberta and provinces with similar municipal legislation, a court would find implied powers for a municipality to develop plans and by-laws that formalize a credit system. Canadian courts have approved of development controls where there is no specific statutory authorization. For example, in *698114 Alberta Ltd. v. Banff (Town)*,[35] the Alberta Court of Appeal found that a municipal by-law creating a lottery system for limiting commercial growth was valid notwithstanding that the MGA did not specifically authorize such an allotment process. The court found implied authority for a lottery by virtue of the MGA's conferring powers on municipalities to regulate and control land uses. The court agreed with the Chamber Judge's conclusion that:

> The allotment system provided under Bylaw 31-3 is quite logically the regulation and control of the development of the land within the Town pursuant to a new philosophy of commercial development control. Section 640(1) is distinct from s. 640(2) and the s. 640(2) requirements relating to development permits. Bylaw 31-3 still meets the requirements under s. 640(2): it divides the municipality into districts, prescribes the permitted or discretionary uses, and establishes the means by which decisions will be made regarding development permits. However, in addition to this, the Town has decided to further regulate land development by instituting a random allotment system. While this is not specifically authorized by the Municipal Government Act, the broad powers of regulation and control outlined in s. 640(1) provide the Town with legal authority to create such a system.[36]

Re (d) density transfers

Must density transfers be specifically authorized in order for a municipality to officially adopt a TDC program? Although at least one province has legislation that specifically authorizes density transfers,[37] many municipalities engage in density transfers on an informal case by case basis without express legislative authority. The Alberta Municipal Government Board has even considered issues arising out of a density transfer without questioning its validity owing to the lack of specific authorizing provincial legislation.[38] In the author's view it is unlikely that a court would strike down an Alberta TDC program for the reason that the MGA does not explicitly authorize density transfers. Taking into account the broad municipal purposes set out both in Part 2 and Part 17 of the MGA, the direction of the Supreme Court of Canada to use a broad and purposive approach in interpreting municipal powers, and the liberal interpretation of subsection 640(1) of the MGA to "prohibit or regulate and control the use and development of land and buildings in a municipality" given in *698114 Alberta Ltd.*, municipalities likely have implied authority to formalize density transfers.

34 *Supra* note 25.

35 (1999), 50 M.P.L.R. (2d) 170 (Alta. Q.B.), affirmed (2000), 190 D.L.R. (4th) 353 (Alta. C.A.), application for Leave to Appeal to the Supreme Court discontinued, [2000] S.C.C.A. No. 534. Banff is located within a National Park, and is a creature of both federal and provincial legislation, namely the *National Parks Act*, R.S.C. 1980, c. N-14 and the *Parks Town Act*, S.A. 1989, c. P-1.5. The Federal and Alberta governments incorporated the Town effective January 1, 1990 pursuant to an incorporation agreement. Under the agreement, all planning laws of Alberta (in the MGA) apply to Banff, subject to the agreement.

36 Ibid. at para. 28 (C.A.).

37 The British Columbia *Vancouver Charter* authorizes municipalities to develop a transfer of increased density programs in connection with heritage designation (*Vancouver Charter*, S.B.C. 1953, c. 55, s. 595A, as enacted by the *Vancouver Charter Municipal Affairs Statutes Amendment Act, 1995*, S.B.C. 1995, c. 29, s. 7). The Ontario *Planning Act*, R.S.O. 1990, ch. P-13, ss. 37-39 which specifically grants the right to municipalities to pass by-laws authorizing increased density than otherwise allowed in an area "in return for the provision of such facilities, services or matters as are set out in the by-law" provided "there is an official plan in effect in the local municipality that contains provisions relating to the authorization of increases in height and density of development" (s. 37). Saskatchewan municipalities have similar powers under s. 83 of *The Planning and Development Act, 1983*. However, these powers granted to Ontario and Saskatchewan municipalities, also known as "bonusing" or "incentive zoning" are not the same as density transfer schemes. The difference is aptly explained by Stinson and Murphy (*supra* note 5): ". . .where incentive zoning may create a density bonus out of whole cloth to reward the developer's provision of some amenity, TDR allows the developer to exceed normal density restrictions on one piece of property in exchange for permanently foregoing some degree of development on another piece of property."

38 The Alberta Municipal Government Board considered whether development restrictions on a property owing to a transfer of density was a sound basis for lowering the property tax assessment of the restricted property. The Board accepted that a density transfer occurred without questioning its validity owing to lack of specific legislative authority. The Board, however, disallowed an assessment reduction on a number of grounds, including that the appellant offered no concrete evidence as to the value of transferred density. See *C.P. Hotels v. Banff*, [2002] A.M.G.B.O. No. 28.

Re (e) Legal mechanisms to secure land restrictions on sending parcels

Conservation easements

Conservation easements should meet some needs of a TDC program to secure development restrictions on sending parcels. All provinces, except Newfoundland and Labrador, as well as the Yukon, have passed some form of conservation easement legislation.[39] In the various pieces of legislation, the statutory interests enabled come under many names including conservation "easements," "covenants," "servitudes," or "agreements." For convenience, this article refers to such interests as "conservation easements."[40] No matter what they are called in the various laws, they all share many features. These include:

- The right of a landowner (the "grantor") to grant an interest in all or part of their property to a specified qualified holder (the "grantee") for purposes set out in the legislation.

39 Proceeding from the west, 1996 amendments to the British Columbia *Land Title Act* authorize covenants for conservation purposes; *Land Title Act*, R.S.B.C. 1996, c. 250, s. 219(3). 1996 amendments to the Alberta *Environmental Protection and Enhancement Act* authorize conservation easements; *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, ss. 22-24. The 1996 *Conservation Easements Act* enables conservation easements in Saskatchewan: *Conservation Easements Act*, R.S.S. 1996, c. C-27.01. Manitoba authorizes conservation agreements in the *Conservation Agreements Act*, C.C.S.M c. C173. Ontario's *Conservation Land Act*, R.S.O. 1990, c. C.28, enables conservation covenants. The Quebec *Natural Heritage Conservation Act*, L.R.Q., c.-61.01m which replaced *An Act Respecting Nature Reserves on Private Land*, L.R.Q. c. R-26.2, authorizes conservation servitudes. New Brunswick's *Conservation Easements Act*, R.S.N.B. 1998 c. C-16.3, allows the creation of conservation easements. Nova Scotia's *Conservation Easements Act*, S.N.S. 2001, C. 28, which replaced the *Conservation Easements Act*, S.N.S. 1992, c. 2, authorizes conservation easements. Prince Edward Island's, *Natural Areas Protection Act*, R.S.P.E.I. 1988, c. N-2 authorizes restrictive covenants to protect natural values. The covenants are tantamount to conservation easements in that the legislation states that such "restrictive covenants" may be positive or negative, and do not require a dominant tenement (s. 5). Sections 76 to 80 of the *Environment Act*, S.Y. 1991, c. 5, authorize the granting of conservation easements in Yukon.

40 For general information on conservation easement-type interests in Canada see Judy Atkins, Ann Hillyer, and Arlene Kwasniak, *Conservation Easements, Convenants and Servitude in Canada: A Legal Review* (Ottawa: Environment Canada and Canadian Wildlife Service, 2004). The text provides an overview of conservation easement legislation throughout Canada, and includes information on related topics, including drafting conservation easements, drafting conservation easement legislation, income and property tax implications, the U.S. experience, and caselaw on conservation easements.

- The express removal of all or many of the common law requirements for similar partial interests in land, such as restrictive covenants and easements.[41]
- Provisions stating that the interest runs with the land and accordingly binds future owners, and may be terminated only in specified circumstances.
- The anticipation or requirement that the interest be registered at the appropriate land titles or land registry office.

Provided that legislation authorizing conservation easements in a province enables municipalities to hold them, a municipality could use conservation easements as part of a TDC program to secure development restrictions on sending parcels. Currently, 9 of the 10 jurisdictions in Canada with conservation easement legislation, specifically allow municipalities to hold conservation easements.[42]

Limitations of conservation easements

Although conservation easements might be appropriate to secure development limitations on sending parcels, in some situations they may not be suitable. A main reason concerns limitations on the purposes for conservation easements. A conservation easement may only be granted for the specific purposes set out in authorizing legislation. For example, the Alberta *Environmental Protection and Enhancement Act* states that a conservation easement may be granted for one or more of the following purposes:

a) the protection, conservation and enhancement of the *environment* including, without limitation, the protection, conservation and enhancement of biological diversity;

41 Common law requirements include the existence of a dominant tenement which is a separate parcel of land from a servient tenement. The dominant tenement must demonstrably benefit from restrictions (for restrictive covenants) or permissive conditions (for easements) placed on the servient tenement. The dominant tenement must be owned and occupied by someone different from the owner or occupier of the servient tenement. The common law interest could be defeated through a number of circumstances over time, such as disuse of the benefit, changes in the servient tenement or area that are inconsistent with the restrictions or rights, or non-enforcement. The common law rules may be altered by statute. For example, the Alberta *Land Titles Act* allows the separate titled parcels to be owned by the same person (R.S.A. 2000 c. L-4, s. 68). See A. Kwasniak, "Facilitating Conservation: Private Conservancy Law Reform," (1993) 31 Alta. L. Rev. 607, for further discussion of the common law requirements and for reasons leading up to law reform to enable conservation easements.

42 The Quebec legislation does not authorize municipalities to hold conservation servitudes.

b) the protection, conservation and enhancement of natural scenic or aesthetic values;
c) providing for any or all of the following purposes of the land that are consistent with purposes set out in clause (a) or (b):
   (i) recreational use;
   (ii) open space use;
   (iii) environmental education use;
   (iv) use for research and scientific studies of natural ecosystems.[43] (Emphasis added)

The Act defines "environment" to mean the "components of the earth" and includes

   (i) air, land and water,
   (ii) all layers of the atmosphere,
   (iii) all organic and inorganic matter and living organisms, and
   (iv) the interacting natural systems that include components referred to in subclauses (i)-(iii).[44]

It follows from the quoted statutory provisions that conservation easements were meant to protect natural landscapes and their components and not human created landscapes such as agricultural or heritage areas. This is because of the way the Act defines "environment" and from the fact that purposes (a) or (b) above must prevail before purpose (c) is permissible. Accordingly, conservation easements will be useful in an Alberta TDC program only where development limitations are put on to protect natural scenic, natural aesthetic or biological diversity values. However, they will not be appropriate if a municipality wishes to protect, for example, cultivated agricultural landscapes. This does not mean they cannot be used to protect any agricultural landscapes. For example, conservation easements are appropriate to protect natural rangeland biological diversity values. Maintenance of these values is consistent with livestock use, provided that the conservation easement agreement contains appropriate range management requirements to protect natural values.

Legal mechanisms other than conservation easements

Where it is not appropriate to use a conservation easement to secure development restrictions it may be possible to use other legal instruments. One possibility is a restrictive covenant. The municipality, however, must be sure that the common law conditions for a valid restrictive covenant have been met.[45]

Another possibility is a municipality using other legislation that creates interests that run with title and restrict land uses. A prevalent example is heritage protection legislation that enables municipalities to enter into agreements with landowners to protect historical or heritage values. Most Canadian provinces have such legislation[46] and definitions of historic or heritage resources typically are fairly broad. For example, the Alberta *Historical Resources Act*, which enables such agreements to protect a historic resource, defines "historic resource" to include a work of nature or of humans that is "primarily of value for its palaeontological, archaeological, prehistoric, historic, cultural, natural, scientific or esthetic interest including but not limited to, a palaeontological, archaeological, prehistoric, historic or natural site, structure or object."[47] Such a broad definition could apply to a spectrum of landscapes and befit a variety of purposes for restricting land uses in sending areas.

43 *Environmental Protection and Enhancement Act, supra* note 39 at s. 22.1(2).
44 Ibid. at s. 1(t).

45 See note 41.
46 Starting from the west, s. 966 of the *Local Government Act*, R.S.B.C. 1996, c. 323, authorizes a local government, by by-law, to enter into a heritage revitalization agreement with the owner of heritage property. Section 29 of the Alberta *Historical Resources Act*, R.S.A. 2000, c. H-9, authorizes a landowner to enter into a "condition or covenant" with a municipality relating to the preservation or restoration of any land or building. The Act also contains provisions for a municipality to a designate historical resource (ss. 26-27). The Saskatchewan *Heritage Property Act*, R.S.N.S. 1989, c. 199, ss. 3, 28(f) and 59, authorizes a landowner to enter into an "easement or covenant" with a municipality relating to the protection of "heritage property." The Act also provides for municipal council's designation of Municipal Heritage Property (ss. 2(k.2) and 1(1)(a)). Manitoba's *The Heritage Resources Act*, C.C.S.M., c. H39.1, s. 21 enables owners to enter into heritage agreements with municipalities. Section 33 of the *Ontario Heritage Act*, R.S.O. 1990, c. O.18., authorizes a landowner to enter into "agreements, covenants, or easements" with a municipality for the conservation, protection and preservation of heritage of Ontario. The New Brunswick *Historic Sites Protection Act*, c. H-6, s. 2.1(1), authorizes the minister responsible for administration of the Act, or any other person if the easement or covenant is approved by the minister, to enter into an easement or covenant with respect to a historic site with the owner of the land on which the site is located. The Nova Scotia *Heritage Property Act*, R.S.N.S. 1989, c. 199, s. 20, authorizes a municipal council to enter into an agreement with the owner of "municipal heritage property" in a municipality regarding the use, preservation or protection of the property. The Prince Edward Island *Heritage Places Protection Act*, R.S.P.E.I. 1988, c. H-3.1, s. 10(1), enables a conservation or heritage organization approved by the minister to enter into an agreement with the owner of property of heritage significance. Although the Act does not specifically authorize municipalities to hold the interest created by the agreement, the Act enables the interest to be assigned.
47 R.S.A. 2000, c. H-8, s. 1(e).

4. CONCLUSIONS AND CLOSING COMMENTS

In all likelihood an Alberta municipality has jurisdiction to develop all aspects of a typical TDC program without the need for legislative changes. Hopefully, this article provides a mode of analysis for other provinces to determine whether municipalities may develop programs without amendments to laws providing municipal authority.

Establishing legislative authority is just the first step to a successful TDC program. A successful TDC program must be painstakingly thought out and carefully integrated into municipal plans and by-laws in the most advantageous manner. Appropriate legal instruments must secure development restrictions in sending areas. However, once established, a good TDC program can benefit all participants. For the landowner in sending areas, it is preferable over restrictive zoning with no economic return. For developers, it enables appropriate density increases in areas, and avoids complaints over development in sensitive areas. For the municipality it eases implementation of landscape protection policies. For all residents, it helps to secure orderly development and viable communities.

Journal of Environmental Law and Practice

Published in Association with
The Law Foundation of Saskatchewan and
The University of Saskatchewan College of Law

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