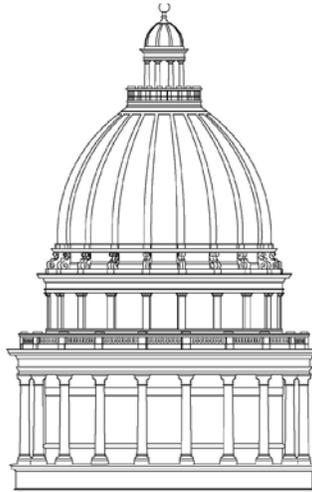


REPORT TO THE
UTAH LEGISLATURE
Number 2010-15



**A Performance Audit Of
County and Municipal TDR Use in Utah**

December 2010

Office of the
LEGISLATIVE AUDITOR GENERAL
State of Utah



STATE OF UTAH

Office of the Legislative Auditor General

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AUDITOR GENERAL

December 2010

TO: THE UTAH STATE LEGISLATURE

Transmitted herewith is our report, **A Performance Audit of County and Municipal TDR Use in Utah** (Report #2010-15). A digest is found on the blue pages located at the front of the report. The objectives and scope of the audit are explained in the Introduction.

We will be happy to meet with appropriate legislative committees, individual legislators, and other state officials to discuss any item contained in the report in order to facilitate the implementation of the recommendations.

Sincerely,

John M. Schaff, CIA
Auditor General

JMS/lm

Digest of A Performance Audit Of County and Municipal TDR Use in Utah

Although Transfer of Development Rights (TDR) programs are commonly used nationwide, they are not widely used in Utah. TDR programs transfer development density away from property where development is not desired toward property where development is desired. We identified five Utah counties and municipalities that use TDRs. Four operate within a structured TDR program framework, while one county uses a discretionary, less structured TDR approach that has caused some controversy. The ultimate goal of any TDR use is to achieve a public preservation purpose. All five Utah entities have achieved, or are set up to achieve, such a public purpose. Nonetheless, the Legislature may wish to provide statutory guidance to ensure that all Utah TDR use is guided by a program structure with clearly outlined procedures.

Summit County Negotiated TDR Use and Additional Density. TDR use and additional density decisions made by Summit County planning commissioners were negotiated during rezoning decisions using broad discretionary powers. These use and density decisions were made on a case-by-case basis. The broad discretion allowed to the planning commissioners does not lend itself to predictability. Unpredictable decisions can cause controversy.

Negotiated Additional Density in Summit County Can Be Difficult to Follow. While final TDR and additional density decisions were outlined in development agreements, the underlying support for those decisions was not always well documented. When decisions are not clearly documented, controversy can arise.

Summit County's TDR Use Resulting in County Property Ownership Was Unique. Summit County's nontraditional TDR use resulted in county ownership of lots and commercial square footage, a controversial TDR use. In addition, some controversy surrounded the non-public sale of the county-owned properties (county TDR lots). Finally, since TDR use had weak programmatic controls, some TDR tasks were overlooked.

Chapter I: Introduction

Chapter II: Summit County's TDR Use Generated Some Controversy

**Chapter III:
Administrative TDR
Programs Provide
Predictability**

Summit County Used TDRs to Preserve Open Space. Summit County's TDR use helped preserve over 1,000 acres of open space. 250 acres were preserved using traditional TDR means. Specifically, development rights were moved from properties desired as open space to properties better suited to increased density. 976 acres were purchased and converted to open space, in part, using revenue generated from the sale of county TDR property.

Most Utah TDR Activity Occurs Within an Administrative Program. Four Utah communities utilize administrative TDR programs that are traditional in nature. Administrative programs are guided by rules and procedures. These TDR programs have been implemented by Weber County, American Fork City, and Mapleton City. West Valley City (the fourth program) operates a traditional TDR program with a nontraditional element: offering an administratively controlled cash-in-lieu option in which developers may either donate cash or property for the purpose of acquiring open space. Each community's program has developed administratively controlled procedures that allow for the transfer of property development rights through a structured process which enables predictable results.

**Chapter IV:
Legislature Could
Require Structure in
TDR Use**

Legislature Could Require Structure in TDR Use. TDR use within an administrative program structure enables predictable results and helps ensure that participants are treated equitably and fairly. What the specific program structure is depends on whether the program is traditional or nontraditional, a decision made at the local government level. However, most programs have certain basic elements that the Legislature could require statutorily.

1. We recommend the Legislature consider requiring communities using TDRs to establish an administrative structure in ordinance. This operating structure would likely include:

- (a) A purpose and goals for the program
- (b) The TDR transfer process, which includes both TDR transfer ratios and receiving area density bonuses
- (c) A method for tracking density transfers and recording transfers in the county's property records within a specific time period
- (d) Sending and receiving zones designation where logical
- (e) Administrative procedures for cash-in-lieu options, including restrictions on expenditures
- (f) Conservation easements or deed restrictions on sending property to ensure a zoning change will not allow the property to be developed in the future. A third-party conservation easement is encouraged.

REPORT TO THE UTAH LEGISLATURE

Report No. 2010-15

A Performance Audit Of County and Municipal TDR Use in Utah

December 2010

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Chapter I

Introduction

Although Transfer of Development Rights (TDR) programs are commonly used nationwide, they are not widely used in Utah. TDR programs transfer development density away from property where development is not desired toward property where development is desired. We identified five Utah counties and municipalities that use TDRs. Four operate within an administratively-driven, structured TDR program framework, while one county used a commission-driven, less structured TDR approach that has caused some controversy. The ultimate goal of any TDR usage is to achieve a public preservation purpose. All five Utah entities achieved, or are set up to achieve, such a public purpose. Nonetheless, the Legislature should consider statutory guidance to ensure that all Utah TDR use is guided by a program structure with clearly outlined procedures.

Local government TDR programs transfer development rights from property to be preserved to property they deem better suited for higher development density. Communities often have preservation of open space, historical landmarks, and farmland, to name a few examples, as land use goals. However, communities generally do not have the money to purchase such properties for preservation. To meet these land use goals, communities have turned to TDRs. TDRs provide an opportunity to obtain desired property at little to no cost to the community.

Private property ownership in the United States comes with a set of land use rights. TDR programs make use of the fact that these land use rights can be separated from one another and from the property. Examples of property rights contained in the set are:

- Water
- Mineral
- Timber
- Agriculture
- Development

Since property rights can be separated from one another and from the property, each right can be separately transferred or sold. TDR

Transfer of Development Rights (TDR) provides an opportunity to obtain desired property at little to no cost to the community.

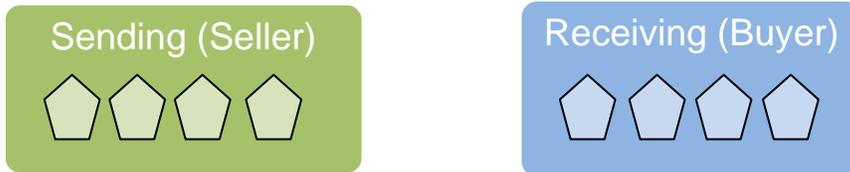
programs enable a landowner to separate the development rights from the other property rights and sell those development rights to another person for use on another property. Once a property's development rights are sold, the property is then restricted from development through a deed restriction, commonly in the form of an easement. The buyer can use the purchased property rights to develop another piece of property at a higher density than otherwise allowed.

A traditional TDR program often has the following structure stated in a TDR ordinance or shown on a zoning map:

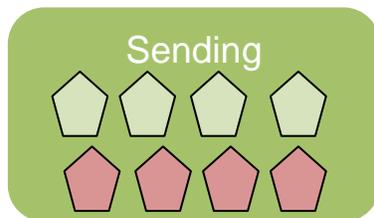
- A designated sending area—the area from which development rights are transferred to protect resources found within those areas (e.g., open space, farmland).
- A designated receiving area—the area to which development rights are transferred and in which development density is preferred.
- A TDR transfer ratio—the number of TDRs landowners in sending areas are permitted to sell, usually expressed per acre. A TDR transfer ratio is established in ordinance and uniformly applied to all projects. This transfer ratio may be one to one or greater than one to one. Indian River, Florida has a 40 to 1 transfer ratio (that is, for every one TDR on the sending property, 40 may be transferred to the receiving property).
- A TDR density bonus—the extra density that can be achieved through using TDRs at a receiving site. A TDR density bonus is established in ordinance and uniformly applied to all projects. Some of the most successful programs have a relatively low density bonus. For example, Montgomery County, Maryland has a 40 percent density bonus (that is, base zoning density can be increased by 40 percent if TDRs are used).
- Recorded conservation easements—these limit development of the sending area property.

Traditional TDR programs include sending and receiving areas, transfer ratios, density bonuses, and recorded easements.

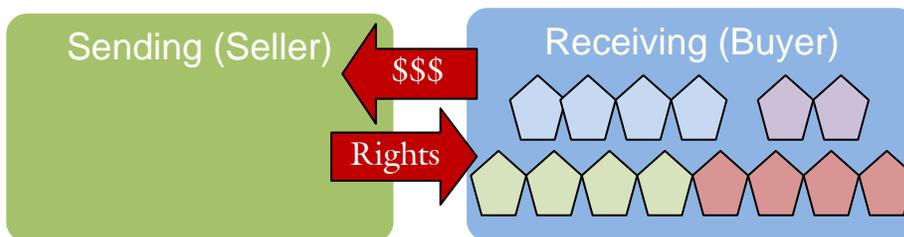
Here is an example of how a traditional TDR system might operate. In this example, both the sender who wants to sell his development rights and the receiver who wants to purchase additional rights have 20-acre parcels with a base zoning of one unit per five acres. Therefore, each property has four development rights.



In this example, local officials want to provide a selling incentive, so a two to one transfer rate is established. This means if the sending property owner chooses to develop the property, then four units can be developed. However, if the sending property owner chooses to sell the property rights, then rights for eight units can be sold.



The sending property owner (seller) and the receiver property owner (buyer) negotiate the sales price of the eight development rights in the private market.



After the sale, the receiving property owner has 12 development rights, the original four rights plus the eight rights (TDRs) that were purchased. However, local officials also want to offer a density bonus to the receiving property. In this example, one density bonus unit is granted for every four TDRs acquired. As a result, the receiving property ultimately acquires 14 development rights. The sending property has no more development rights. The local government

places a conservation easement on the sender's property acknowledging that all development rights have been sold.



As a result of this process, the sender is compensated for the loss of development rights, the developer is allowed more density than current zoning allows, and the general public is granted preserved open space at minimal public expense.

While these are the elements and processes for a traditional TDR program, other communities have been experimenting with nontraditional TDR programs for years in an effort to tailor programs for local circumstances.

Density transfer programs in Berthoud, Colorado and Gunnison County, Colorado are examples of nontraditional yet structured TDR programs.

Nontraditional TDR programs may not designate sending zones, but instead offer options such as paying fees, which in turn are used to purchase open space.

- Berthoud, Colorado. This town does not designate sending areas. Receiving areas are created when the town approves a zoning change (an upzone) that allows additional dwelling units. For each dwelling unit in excess of the maximum allowed under the prior zoning, a developer can choose between two compliance options: preserve one acre of significant resource land (as identified in the comprehensive plan) or pay a density transfer fee of \$3,000 per bonus single-family residence or \$1,500 per bonus multiple-family unit. Berthoud leverages the density transfer revenue to purchase high-priority acreage.
- Gunnison County, Colorado. Participating developers on a qualifying receiving site can reduce the onsite open space requirement from 30 percent to 15 percent of the total project area which can increase the number of allowable lots. The Gunnison County assessor provides land values of the project site before and after the onsite open space reduction. The developer pays Gunnison County 10 percent of the increase in land value.

Gunnison County uses this revenue exclusively for purchasing land and conservation easements.

One advantage of these nontraditional TDR programs is that high priority land can be targeted for purchase. Traditional TDR programs acquire land in the sending zone which may not be the community's highest priority land acquisition.

As seen, these nontraditional TDR programs don't necessarily use the same structure as a traditional TDR program (for example, they do not necessarily have formal sending areas); nonetheless, the goal is the same—to provide a public preservation benefit.

Audit Scope and Objectives

This audit of county and municipal use of TDRs was requested by Senator Wayne Niederhauser. He was concerned that legislative direction in the 2007 General Session dealing with TDRs might have been insufficient. Consequently, this audit focused on the following objective:

- Determine if additional state statutory TDR guidance is needed.

To address this objective, we first sought to identify municipalities and counties which have approved TDRs for use. To do this, we talked with knowledgeable people and sent out a query on the Utah Chapter of the American Planners Association website. From these sources, we identified five counties and municipalities that have approved TDRs for use:

- American Fork City
- Mapleton City
- Summit County
- Weber County
- West Valley City

For these identified local governments, we gathered information on program goals and program structure. One clarification should be made. Summit County is divided into two planning districts: Snyderville Basin and Eastern County. This report focuses exclusively

Five municipalities and counties have approved TDR programs.

on Snyderville Basin. We also reviewed information on two controversial Summit County projects involving TDRs.

In addition, we were provided with some information implying political favoritism in Summit County. Later, we learned of a two-year investigation conducted by five county attorneys on behalf of the Utah Attorney General's Office concerning malfeasance allegations against Summit County officials. In a 2007 report, this panel found no evidence that any county officials or employees used their positions for personal gain. Consequently, we pursued the issue no further.

Regardless of whether TDRs are used traditionally or nontraditionally, they are used within a program having an operating structure clearly outlined in code enabling predictability. This operating structure includes the following elements:

- A stated program purpose/goal
- Specified program operating procedures, including formulas for calculating transfer ratios and bonus density
- Conservation easements or deed restrictions

Summit County's TDR use was unusual in this regard. Specifically, the county commission legislatively granted broad discretion to the planning commissioners which resulted in case-by-case negotiation of TDR use and additional density leading to results that were unpredictable.

Chapter II

Summit County's TDR Use Generated Some Controversy

Transfer of Development Rights (TDR) use in Summit County has not occurred within an administrative, procedurally-based program, but has been negotiated by the planning commissioners using broad discretion granted them by the county commission. Specifically, planning commissioners negotiated TDR use and the resulting additional density on a case-by-case basis, which made the results unpredictable. Unpredictable results can cause controversy. In addition, the documentation behind this negotiated density was sometimes difficult to understand, which can also cause controversy. Summit County's unique TDR use resulted in county ownership of residential lots and commercial square footage. This acquired property was then sold to purchase open space, but the sale may not have obtained the best price. Both the unique TDR use and the sale of the acquired property created some controversy.

As a reminder, Summit County is divided into two planning districts: Snyderville Basin and Eastern County. This chapter discusses Snyderville Basin activity exclusively. The Eastern County planning district is not discussed.

Summit County's TDR use began in 1998, predating the state's TDR statutes. An incentive zoning model was incorporated into Summit County's 1998 development code through use of a tool called the Development Potential Matrix (matrix). The matrix was the primary tool used to implement Snyderville Basin's General Plan. The General Plan's central theme was to halt urban sprawl across hillsides and meadows and promote the clustering of densities in town, village, and resort centers, where higher population density could be serviced more efficiently. In addition, the community also wanted to preserve as much open space as possible.

The matrix supported both of these goals and one of the ways it did so was through the use of TDRs. The matrix encouraged density clustering through the formation of town, village, and resort center Specially Planned Areas (SPAs) and open space acquisition by

Summit County's TDR use has generated some controversy since TDRs were first used in 1998.

allowing developers to exceed SPA density caps through the use of TDRs. (To view an example of the matrix's structure, see Appendix A.)

Summit County Negotiated TDR Use And Additional Density

TDR use and the resulting additional density were most often negotiated during rezoning decisions. The development potential matrix helped guide rezoning decisions, but there was broad discretion given to the planning commissioners within the matrix. In short, the matrix offered the planning commissioners guided discretion in their decision-making. This discretion was purposefully provided to allow the planning commissioners significant negotiating flexibility for each rezoning application. This emphasis on decision discretion and negotiation led to unpredictable results and opened Summit County up to insinuations of inequitable treatment and favoritism.

When properties are rezoned to a Specially Planned Area (SPA), TDRs are often used to increase density within the SPA. The SPA master plan outlines the county's rezoning for the area and is implemented through a development agreement. In Summit County, rezoning decisions and the development agreements that accompany them are both decisions made by commissioners. Consequently, everything pertaining to the SPA and finalized in the development agreement—including TDR use and the resulting additional density—is subject to negotiation within the parameters of the Development Code and the General Plan.

During Summit County's development agreement negotiations, developers present the planning commissioners with their desired ultimate density. Then, using the matrix incentive criteria, developers present the merits of their developments to justify the total requested density. Negotiations occur and the agreement reached between the planning commissioners and the developers is set out in the development agreement.

There are two important TDR factors that impact negotiation:

Instead of following established formulas for determining additional density, Summit County's TDR use is negotiated on a case-by-case basis.

- First, if a developer used TDRs, then there was no density cap on the development. The planning commissioners and the developer negotiated the ultimate density of the project.
- Second, no methodology existed to determine how TDRs would be translated into additional density. Again, this additional density was subject to negotiation between the planning commissioners and the developer.

The removal of the density cap and the absence of methodology enabled unpredictable results but provided Summit County’s planning commissioners a great deal of planning flexibility. Summit County wanted the planning commissioners to be able to negotiate freely and this negotiation included TDRs and resulting additional density.

Ultimately, reliance on negotiation with no specific TDR methodologies and no density cap opened Summit County up to insinuations of inequitable treatment and favoritism. The crux of the controversy may be the possibility that not all developers were successful in their quest for additional density. These developers may have observed others successfully increasing density through the use of TDRs, but were unsure how or were unable to use TDRs to their advantage. As a result, the equity and fairness of Summit County’s TDR use has been questioned.

In hindsight, one Summit County official agreed that more guidance should have accompanied the matrix and TDR use. In fact, a former planning commissioner did encourage the adoption of precise standards for achieving minimum and maximum densities within the matrix, but such standards were not adopted. At that time, the planning commission had a vision and knew what it wanted to achieve. It was believed these planning commissioners would set the precedent for future planning commissioners for development requirements necessary to allow certain densities, but no precedents or standards were achieved.

In 2008, the Eastern Planning District in Summit County put a moratorium on its pursuit of TDRs, noting a lack of specific TDR criteria and processes. It was simultaneously noted that Summit County was preparing a TDR ordinance that would set forth specific

Not having specific methodologies or density caps has generated insinuations of inequitable treatment and favoritism.

The need for specific criteria and processes has been recognized but not implemented.

criteria and processing procedures for TDRs. To date, no such ordinance has been passed.

Negotiated Additional Density Can Be Difficult to Follow

While final TDR and additional density decisions were outlined in development agreements, the underlying support for those decisions was not always well-documented. The Canyons/Colony project was the first and biggest project to use TDRs. In this project, determinations of TDR use and resulting additional density were difficult for us to follow. However, in the New Park project, the process to determine TDRs and the resulting additional density transferred from the Somerset parcel were easy to follow.

TDRs were not widely used in Summit County. TDRs were transferred into the Canyon/Colony project and TDRs were transferred out of the Somerset parcel to other developments. (See Appendix B for more information on the Canyons/Colony project and TDR use. See Appendix C for more information on the Somerset parcel and TDR use.) TDRs were also used in the Willow Creek Subdivision. The use was minor and will not be discussed in this report.

The Canyons/Colony SPA's Total TDR Additional Density Was Not Clearly Documented

The Canyons/Colony project received a significant amount of additional density, but it is difficult to understand how that density was derived. Total TDR additional density in the Colony, an exclusive residential development abutting the Canyons ski resort, is apparent, but the justification is difficult to follow. Total TDR additional density in the Canyons, while acknowledged, is unknown.

In the Colony project, it was clear that 77 Colony lots were added between 1998 and 2000. Less clear was the specific justification for each addition. The TDR source of the additional density could not always be identified clearly. The development agreements containing this information were complex and the reasons behind the negotiated additional lots were not always clearly stated. On the other hand, in the Canyons, the total amount of TDR additional density received was

The reasoning behind some of the additional density given to the Canyons was difficult to understand.

unknown. The Canyons received over eight million square feet of additional density. Though it is acknowledged that some of this square footage was TDR additional density, the precise amount was never specified.

It was the prerogative of the planning commissioners to negotiate and grant whatever TDR additional density they saw fit. Since no specific formula was used to calculate TDR additional density, there may not be a strong relationship between TDRs transferred into the Canyons/Colony and the final density received by the project. Also, in the case of the Canyons/Colony SPA agreement, TDRs were used before the density cap was ever calculated, making any such calculation unnecessary. Consequently, it was not clear what amount of this additional density might be TDR-related. So, TDR use opened the door to density levels limited only through the negotiations between the developer and the planning commissioners. Under this scenario, the relationship between TDRs and additional square footage would not necessarily be clear or predictable.

TDR Density Transfer to New Park Project Was Relatively Straightforward

The proposed density transfer to the New Park project used an identifiable methodology. Seventy-four units from the Somerset parcel in the Spring Creek SPA were transferred to the New Park project. One Somerset unit was defined as 1,600 square feet. The TDR committee, which developed the methodology, made this transfer at a two-to-one ratio. Consequently, the total density transferred from Somerset to New Park was 236,800 square feet ($74 * 1,600 * 2$).

Density transfer incentives are not unusual in TDR use, but the incentive methodology is usually specified in procedure through specific formulas. In Summit County, there were no specific formulas because of its decision to process TDRs as part of the commission's legislative rezoning process, which allowed broad discretion. As a result, it is not clear why the planning commissioners chose to double the density transferred or how another developer might qualify for double density. Nonetheless, the amount of density transferred to New Park is clear.

The New Park project clearly identified the formula used to calculate additional density but did not state why density was doubled.

While controversy surrounded TDR negotiations, controversy also resulted over Summit County's use of TDRs, a use resulting in county ownership of property.

Summit County's TDR Use Resulting in County Ownership of Property Was Unique

Summit County's nontraditional TDR use resulted in county ownership of lots and commercial square footage, a controversial TDR use. This controversy increased with the possibility that the non-public sale of the county-owned properties (county TDR lots) may not have obtained the best price. Finally, since TDR use had weak programmatic controls, such as identifying which department would act as the manager over TDRs, some TDR tasks were overlooked.

A national TDR expert indicated that Summit County's use of TDRs was unique. He was unaware of any other TDR program nationwide that took ownership of property. However, he was interested in the concept and noted that selling property for cash and then using that cash to purchase open space is not far removed from taking cash directly from developers for the same purpose, a relatively common approach.

Summit County Acquired Lots and Commercial Square Footage

Summit County received property from developers in exchange for additional density granted within their development. These exchanges took place during each development's rezoning to a SPA.

The Canyons received over 8,000,000 square feet of additional density and the Colony received 77 additional building lots. In exchange, Summit County requested and received nine Colony lots and 185,000 square feet of hotel/resort space in the Canyons. Summit County granted the New Park project 800,000 square feet of additional density. In exchange, Summit County received 112,000 square feet of commercial space in New Park.

Taking ownership of property in exchange for increased density is a unique practice but is comparable to receiving cash for the purpose of purchasing open space, a more common practice.

Summit County's plan was that all this acquired property would be sold and the money used to acquire open space. From Summit County's perspective, both developers and the general public benefited from this arrangement. The developers got additional density in their developments and the general public ultimately received additional open space. However, before this additional open space could be attained, the property had to be sold.

Summit County May Not Have Received the Best Price

Five county TDR lots were re-sold to the developer for approximately \$4.5 million using a relatively closed private sale process. Summit County did not put the lots on the open market. Nonetheless, the Summit County chief civil attorney maintains that Summit County obtained a fair market price. While this may be true, it is debatable whether the best price was obtained.

Fair market price and best price are not necessarily the same. Fair market price is defined as the price agreed upon by a knowledgeable seller and a knowledgeable buyer. Best price can either be equal to or greater than fair market price.

In 2004, the county commissioners requested that the TDR manager sell the five county TDR lots acquired from the Colony. (For an explanation of where the other four TDR lots went, see Appendix C.) The TDR manager maintained that his job was simply to sell the lots; it was not his job to obtain the best price for the lots. The TDR manager did not put the lots on the open market. Instead, he alerted a few people whom he believed were sophisticated enough to understand TDR lots.

From this effort, he generated an earnest money offer for two lots totaling \$1,850,000, or \$925,000 per lot. Upon hearing of this earnest money offer, the Colony developer negotiated with the TDR manager to purchase all five lots. The final purchase price was a little over \$4.5 million, an average purchase price of \$908,000 per lot.

Utah Code 17-50-312(4) requires that counties dispose of significant pieces of real property through a public process; however, each county is allowed to define what constitutes a significant piece of real property. Summit County has defined TDR lots as real property

The Colony developer purchased all five Colony lots for \$4.5 million, an average purchase price of \$908,000 per lot.

not in public use. In Summit County, this property classification is not considered a significant piece of real property. Thus, under county ordinance, the lots were not required to be sold publicly.

Summit County maintains that fair market price was obtained for the five Colony lots and this may be true. However, it is debatable whether Summit County received the best price for the following reasons:

- The lots were not put on the open market; therefore, it is unknown what price other potential buyers might have been willing to pay.
- The \$925,000 earnest money offer on two of the lots was higher than the average price (\$908,000) received for the five lots.
- The TDR manager who sold the lots indicated that it was not his job to get the best price for the lots. If the TDR manager perceived his job in this way, then it is possible the best price was not obtained.

In order to maximize the amount of money available to purchase open space, we believe Summit County should have tried to ensure the best price for the five lots was obtained.

Some TDR Tasks Should Have Been Addressed

Although Summit County had some controls over TDR use (for example, an inventory of county TDR use), these controls were not adequate. While a TDR manager was hired in 2004 to finalize parts of the TDR program, that position no longer exists. Specifically, the county failed to address the following TDR-related tasks:

- Deed Restrictions/Conservation Easements: Not all properties from which development rights were transferred had conservation easements or deed restrictions. The November 30, 1999 Amended Canyons Development Agreement states that two properties from which development rights were transferred to the Canyons/Colony project would have third-party conservation easements placed on them within 90 days of the amended agreement date or at a later date approved by the county. To date, one of these properties does not have a conservation easement. When we alerted Summit

County officials of this fact, a restricted use covenant (not a conservation easement) was placed on the property in October, 2010. To ensure that property will not be developed in the future, properties from which development rights have been removed should have either a deed restriction or a conservation easement placed on them.

- **TDR Inventory:** Summit County's TDR inventory was not complete. In May, 2001, the TDR committee recommended the transfer of five TDRs to the Willow Creek Subdivision from a 20-acre parcel that abutted the subdivision. The 20-acre parcel was converted into a county park. Neither the five TDRs nor the 20-acre parcel were initially listed on Summit County's TDR inventory. When these missing TDRs were brought to Summit County's attention, the five Willow Creek TDRs and the Willow Creek park property were added to Summit County's TDR inventory.

It is important that the county is aware of all approved TDRs and whether the TDR sending property has a deed restriction or conservation easement. Summit County's Sustainability Coordinator indicated that she is in the process of compiling an inventory of all open space in the Snyderville Basin. She has also recently completed work on a centralized inventory for TDR open space.

- **Ordinances:** According to Summit County's development code, all county council approvals shall be in the form of an ordinance. The Creekside TDRs transferred in 2000 into the Colony were never formally approved in an ordinance by the Summit County Council. On October 30, 2000, the planning staff recommended that the board of commissioners conduct a public hearing on the amendment to The Canyons SPA development agreement regarding the transfer of 20 additional TDR units from the Creekside property into the Colony. Although the public hearing was held and the Creekside TDRs were approved and incorporated into the Colony, no final ordinance on this amendment had been presented and signed. A Creekside ordinance was approved in October, 2010.

Important tasks were overlooked, including recording easements, maintaining an accurate inventory, and passing required ordinances.

In our opinion, Summit County needs to review all necessary TDR tasks and ensure that all records are accurate and complete.

In spite of the controversy and the overlooked tasks, Summit County's TDR use directly and indirectly resulted in the preservation of significant open space.

Summit County Used TDRs To Preserve Open Space

Summit County's TDR use preserved over 1,000 acres of open space in one of two ways:

- Some open space was preserved using traditional means. Specifically, TDRs were moved from properties desired as open space to properties better suited to increased density.
- Some open space was purchased and existing development rights were extinguished using revenue generated from the sale of county TDR property along with other funds.

As part of the Canyons/Colony TDR negotiations, two properties, Mountain Meadows and Creekside, were purchased by a Colony investor and the Colony developer, respectively. The vested property rights were extinguished from these properties and transferred to the Canyons/Colony. Mountain Meadows and Creekside were incorporated into the Swaner Nature Preserve. In addition, the Somerset parcel's vested property rights were extinguished and transferred to other properties. This extinguishment and transfer was the result of an agreement between the developers and Summit County. The bulk of the Somerset property was incorporated into the Swaner Memorial Park Foundation. The acreage preserved as open space is shown in Figure 3.1.

Summit County has preserved a significant amount of open space both by transferring density and by purchasing open space with revenue generated from the sale of county-owned TDR property.

Figure 3.1 Estimated Acreage Preserved as Open Space 1997-2001. Preserving these 250 acres involved traditional TDR exchanges. No open space funds or any other public funds were used to purchase these properties.

Property Name	Acres Preserved
Mountain Meadows*	94
Creekside*	121
Somerset**	<u>35</u>
Total	250

*Mountain Meadows and Creekside are part of Swaner Nature Preserve.
 **Somerset is part of Swaner Memorial Park Foundation.

In addition to this traditional acquisition of open space, open space was also purchased using revenues generated from TDR property sales. TDR property sales revenue was placed in Summit County's open space fund. Revenues also came from other sources, including general fund allocations, interest, and development agreements that required open space contributions for each home sold. Transactions from the open space account are summarized in Appendix D. The open space acquired, all of which was approved by the county council, is listed in Figure 3.2.

Figure 3.2 Snyderville Basin Open Space Expenditures 2003-2009. Funds generated from TDR property sales helped to purchase 976 acres of open space.

Property Name	Acres	Open Space Contribution to Property Purchase	Total Purchase Price*
Rasmussen	219	\$ 399,000	\$ 1,420,000
Roberts	47	250,000	350,000
Hi-Ute Ranch**	200	323,000	1,000,000
Quarry Mountain	183	1,950,000	3,900,000
Koleman***	10	4,000,000	5,000,000
Kimball Junction***	<u>317</u>	<u>12,510,000</u>	<u>16,000,000</u>
Total	976	\$ 19,432,000	\$ 27,670,000

* Open space funds paid only a portion of the purchase price for most properties.
 **Only the development rights were purchased from the owner of Hi-Ute Ranch.
 ***Open space bond funds also helped to finance the Koleman and Kimball Junction purchases.

Open space funds contributed only a portion of the purchase price for most of these properties. For example, the total purchase price for the Rasmussen property was \$1.4 million. The open space fund

About 250 acres were preserved by transferring density from property identified as valuable open space.

Revenue from TDR property sales helped to purchase almost 1,000 acres of open space.

provided about \$399,000 and the Snyderville Basin Recreation District and the Army Corp of Engineers paid the balance.

The open space fund account is currently depleted. In fact, in order to complete the Kimball Junction open space transaction, the county borrowed \$4.5 million from its municipal services fund. The county is attempting to sell its remaining TDR property, 185,000 square feet of commercial property in the Canyons' resort core. This property has an appraised value of approximately \$8.16 million.

As a final note, it was through a significant effort that we determined all open space funds were used to purchase open space. In 2008, a series of complex adjusting entries made it difficult to determine the use of open space funds. For example, adjusting entries were needed to reimburse the open space account for a portion of one transaction that was not open space. In addition, a loan from another account was needed because there were not enough revenues available to cover a transaction. Although, we concluded the open space funds were used appropriately, we feel the county should implement procedures to ensure open space funds are accounted for consistently.

Open space funds were used appropriately, but procedures are needed to ensure the funds are accounted for consistently.

Recommendations

1. We recommend that future TDR use in Summit County be under an administration program with clear procedures and methodologies.
2. We recommend that Summit County review all necessary TDR-related tasks and ensure that all tasks are completed and all records are complete.
3. We recommend that Summit County implement procedures to ensure that open space funds are accounted for consistently.

Chapter III

Administrative TDR Programs Provide Predictability

Four Utah communities utilize traditional TDR programs. These TDR programs contain a clear structure in the form of written policies and procedures that are carried out by the county's administrative branch. These operating and control procedures provide the predictability necessary for county/city legislative body oversight and, ultimately, increased public understanding. This increased awareness helps assure participants and the public of fair and equitable treatment.

Utah Code does not require TDRs to be used within the framework of a program or to have any particular administrative or control elements. In fact, *Utah Code* contains very little statutory language concerning TDRs. Receiving zones, sending zones, and transferrable development rights are defined for municipalities and counties in *Utah Code* 10.9a.103 and 17.27a.103, respectively. Finally, *Utah Code* 10.9a.509.7 (municipal) and *Utah Code* 17.27a.509.7 (county) state the following:

A city(county) may adopt an ordinance:

- (1) designating sending zones and receiving zones
- (2) allowing the transfer of transferrable development rights from an owner of land within a sending zone to an owner of land within a receiving zone.

This language was enacted during the 2007 General Session. Prior to that time, there was no statutory language on TDRs.

In addition, Utah statute allows local governments the freedom to engage in any activity not specifically prohibited by state statute or the state and federal constitution. Since *Utah Code* does not prohibit any particular TDR strategy, counties and municipalities are free to adopt whatever strategy they see fit. Even with this freedom, four of the five TDR programs we reviewed still adopted structured, administrative TDR programs that are, for the most part, traditional.

***Utah Code* currently allows TDR programs but does not specify any operating or controls elements.**

Most Utah TDR Activity Occurs Within An Administrative Program

Four Utah communities utilize administrative TDR programs that are traditional in nature. These TDR programs have been implemented by Weber County and American Fork and Mapleton Cities. West Valley City (the fourth program) operates a traditional TDR program with a nontraditional element. Each community's program has developed administratively controlled procedures that allow for the transfer of property development rights through a structured process.

As traditional programs, these four TDR programs generally have designated sending and receiving zones and specific formulas for calculating development density. Each requires that conservation easements be placed on sending properties giving up their development rights and that the easement information be recorded with the county. West Valley City's program deviates from traditional programs by offering an administratively controlled cash-in-lieu option in which developers may either donate cash or property for the purpose of acquiring open space.

Four communities have established administratively structured TDR programs.

Weber County Operates a Traditional TDR Program

The specific goal of Weber County's TDR program is to preserve the county's rural character by protecting agricultural lands, shore lands, and other sensitive lands from development. The following description outlines some of the program's structure established in Weber County's development code:

- Sending and receiving areas are designated in Weber County's development code. The Ogden Valley is Weber County's sending zone. Receiving areas are designated as recreational resort zones.
- The county calculates TDRs for available sending areas based on zoning. For example, if a property owner has 20 acres and the zoning is one unit on five acres, the property owner is allowed four TDRs. The amount of additional density awarded is based on the location of the sending zone. For example, if the

Weber County awards additional density based on the location of the sending zone. Certificates state the number of TDRs available for transfer and are only valid for 60 days.

density is coming from a valued preservation area such as a specific shoreline zone, the code states the density transferred to the receiving area will be tripled. The development code also lists additional incentives that may be given for various reasons and rates.

- Property owners desiring to sell their development rights submit an application to the county. The county issues a certificate stating the number of TDRs approved and available for transfer. This transfer certificate is valid for 60 days. Property owners can list available TDRs on the county's website.
- Once TDRs are sold, an irrevocable conservation easement must be recorded with the county.

American Fork City Operates a Traditional TDR Program

The goal of American Fork's TDR program is primarily to preserve Utah Lake's shorelines. This TDR program has not been used yet because the shoreline property owners have not petitioned for annexation into American Fork. The following material outlines some of the program's structure established in American Fork's development code:

- Designated sending and receiving areas are established in a TDR Overlay Zone. The development code lists procedures for both sending and receiving zones.
- Procedures include specific formulas and limitations for transferring density. For example, a receiving site's density shall not be increased above 30 percent of the maximum density of the underlying zone or the density recommend by the general plan, whichever is less. For a sending site within the Shoreline Preservation Zone, the development code sets the allowable density at one dwelling unit for each five acres.
- The city issues a certificate to the owner of a property desiring to be a sending site which shows the number of development rights assigned to their property.

American Fork has designated a TDR Overlay Zone and set specific formulas for transferring density but has not needed to use the program thus far.

- Development rights are not transferred until a conservation easement has been recorded with the county indicating the total number of rights which may be transferred, the number actually transferred, and the number remaining. The city maintains this information on a TDR Eligibility Map which includes two sub-zones—TDR Sending Area Sub-Zone and TDR Receiving Area Sub-Zone.

Mapleton City Operates a Traditional TDR Program

The goal of Mapleton’s TDR program is to protect the Mapleton foothills from development. The following information outlines some of the program’s structure established in Mapleton’s development code:

- The development code lists specific procedures for properties designated as either a sending or receiving zone. Property owners in sending areas have two TDR options: they can deed their development rights to the city, which allows them three bonus points for each developable acre (that is, one acre equals three TDRs), or owners can deed the property itself to the city, which allows them five bonus points for each developable acre (that is, one acre equals five TDRs).
- Receiving zones are not specified. Instead, developers request additional density for a specific area, usually an area zoned for one unit per two acres. The development code caps additional density at twice the zoning allowance.
- The recorder issues TDR certificates. A TDR notice is recorded in land records showing total TDRs which may be transferred, total TDRs which were transferred, and those TDRs that remain.
- A conservation easement is required if development rights have been transferred, but private ownership of the property continues. If the property was transferred to the city, then an easement is held by the city, another governmental entity, or a qualified charitable organization.

Mapleton does not set specific receiving zones, caps additional density, and requires a notice be recorded showing TDR transfer information.

West Valley City Operates a Mostly Traditional TDR Program

The goals of West Valley's TDR program are to encourage development in certain areas and preserve wetland habitats. The cash-in-lieu option is a nontraditional element of this program. The following points outline some of the program's structure established in West Valley's development code:

- Designated sending and receiving areas are established as TDR overlay zones. Sending sites receive two development credits per gross acre if the property remains private property with a conservation easement. If the property (including water rights) is dedicated to the city, then development credits increase to either three or four, depending on the property's location.
- Receiving sites are required to use TDRs for any increased density greater than 3.5 units per gross acre.
- The county issues a Development Credit Certificate recognizing the number of development credits available for sale by the sending property owner. The sender negotiates the sale and the certificate is re-issued to the receiver and recorded in county property records.
- A conservation easement or deed restriction is recorded with the county. Sending property owners are responsible for notifying the county tax assessor regarding possible changes in property value.
- A cash-in-lieu option is offered. The applicant provides property from the sending area or a cash payment that equals at least 50 percent of the value increase because of the proposed increase in density. The city must use the cash for land acquisition within the sending area or for storm water management and open space improvements within the sending area.

A common element among these four programs is their administratively controlled structure. TDR procedures are written and available for public review. These operating and control procedures provide the predictability necessary for each city's legislative body program oversight and increased public

West Valley City operates a traditional program, but also offers a nontraditional cash-in-lieu option.

understanding. This increased awareness helps assure participants and the public of fair and equitable treatment.

Chapter IV

Legislature Could Require Structure in TDR Use

TDR use within an administrative program structure enables predictable results and helps ensure that participants are treated equitably and fairly. What that specific program structure is depends on whether the program is traditional or nontraditional, a decision made at the local government level. However, most programs have certain basic elements that the Legislature could require statutorily.

TDRs are valuable tools in land use planning that should be encouraged. TDR use provides a community the opportunity to preserve open space, sensitive environmental areas, or farmland at little to no public cost. Simultaneously, compensation is provided to owners of property from which development rights are transferred.

The Utah Legislature should consider requiring certain basic elements in TDR programs while still maintaining flexibility. Important elements that could be included were evident in the four structured traditional TDR programs we reviewed. These elements were:

- A stated program purpose/goal
- Identified sending and receiving zones
- Specified program operating procedures, including formulas for calculating sending area TDR transfer ratios and receiving area incentive density
- Conservation easements or deed restrictions on the sending property after a TDR transfer was completed

In addition, information was recorded with the county or municipality showing the number of TDRs available, the number of TDRs transferred, and any TDRs remaining.

While these are traditional elements for a traditional TDR program, nontraditional programs may be structured differently. For example, nontraditional TDR programs may not specify sending and receiving zones (for example, Berthoud, Colorado's TDR program

TDR use should be encouraged because it provides an opportunity to preserve open space at little to no public cost. An established program structure helps ensure equity.

The Legislature could require TDR use within an administrative program, but allow flexibility to meet different communities' needs.

highlighted in the introduction). Consequently, the statute should allow for flexibility.

We recognize that community needs differ and communities need the flexibility to design a TDR program that meets their needs. In fact, a national authority on TDRs cautioned if there are too many rules, communities will not utilize this valuable tool. In our opinion, statutory direction may be needed because communities may not establish an administrative program unless it is required. For example, Summit County identified the need for a more predictable and structured TDR process as early as 2001 but has not yet established that structure. In our opinion, the statute should, at a minimum, require a structure that states how a community's TDR program will operate and how basic information will be recorded.

Recommendation

1. We recommend the Legislature consider requiring communities using TDRs to establish an administrative structure in ordinance. This operating structure would likely include:
 - (a) A purpose and goals for the program
 - (b) The TDR transfer process, which includes both TDR transfer ratios and receiving area density bonuses
 - (c) A method for tracking density transfers and recording transfers in the county's property records within a specific time period
 - (d) Sending and receiving zones designation where logical
 - (e) Administrative procedures for cash-in-lieu options, including restrictions on expenditures
 - (f) Conservation easements or deed restrictions on sending property to ensure a zoning change will not allow the property to be developed in the future. A third-party conservation easement is encouraged.

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Appendices

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Appendix A

Snyderville Basin Development Potential Matrix

Major Development Within a Town and Resort Center

	<i>Land Use Planning Principles</i>	<i>Community Benefit Criteria</i>	<i>Incentive</i>
	Mandatory		
	Pedication & Preservation of Viewshed/Environmental Features of the Area 2 Consistency with Desired Neighborhood Character 3 Neighborhood Recreation Facilities 4 Environmental Enhancements 5 Restricted Affordable Housing 6 Contribution to Community Trials and Parks 7 Exceeds Open Space Requirements for Project 8 Tax Base and Economic Enhancement 9 Compatibility with Town, Resort, Village Design Center 11 Maximum Density in a Designated Center 11 Land Bank & Transfer of Development Rights 12 Facilities & Amenities Exceeding Project Requirements 13 Maximum Density in Designated Center 14		
Planning Area	Base Density in Designated Center 1		
East Basin	1 Unit/40 Acres	NA	NA
	Mandatory	Mandatory	Mandatory
West Basin	1 Unit/40 Acres	NA	NA
	Mandatory	Mandatory	Mandatory
West Mountain	1 Unit/40 Acres	NA	NA
	Mandatory	Mandatory	Mandatory
Kimball's Junction	1 Unit/40 Acres	NA	NA
	Mandatory	Mandatory	Mandatory
The Summit	1 Unit/40 Acres	NA	NA
	Mandatory	Mandatory	Mandatory

Only notes invoking TDRs are listed

11 The maximum density possible in a Town and Resort Center shall be five (5) units per one (1) acre unless the applicant can transfer density from other less desirable development locations and/or provide unique benefits to the community. Actual density could be less depending on the project's ability to promote sufficient community benefits. Density could be more if the project complies with all provisions of this matrix, including criteria 12 and 13. To achieve five (5) units per one (1) acre, Summit County will grant density increases when a development provides significant community benefits generally described in this Development Potential Matrix. Areas designated as Town or Resorts Centers are not guaranteed such higher densities. Higher densities can only be achieved through the accomplishment of the community objectives. Maximum densities can only be achieved through significant accomplishment of the community objectives listed on this matrix and criteria 2 through 10 shall be mandatory. Summit County shall make a determination as to whether a developer has reasonably complied with these criteria. Moreover, the designation of a Town or Resort Center on a Land Use Plan Map is not intended to serve as a density windfall for an individual property owner, but require cooperation with surrounding land owners. Density will be affected by how well adjacent property owners work together to accomplish the goals of the General Plan.

12 Summit County will use density incentives to encourage the transfer of development rights from a less desirable location within the Snyderville basin to a more desirable location with the Snyderville Basin or suitable contributions of land for land bank purposes to Summit County. The incentive shall be related to the public benefit received from the transfer, but it is recognized that significant density increases may be considered to achieve density transfers. It also is recognized that sending areas vary in degree of significance to the community. The more significant the sending area the greater the incentive that will be considered. To qualify, developments rights must be transferred from one parcel to another, not within the same parcel. Before a density incentive is granted, it must be demonstrated that the proposed density is appropriate in the receiving area and that a reduction of density in the sending area is appropriate and in the public interest.

13 Unique community/facilities and amenities shall be considered only when it is demonstrated that the improvements or land contribution exceed the specific and identifiable impacts and/or needs of the project. The density shall be directly related to the value of the community benefit. Before a density incentive is granted, however, it also must be demonstrated that there is a need for the proposed improvements, that the improvements or land are needed or desired at the proposed location, that the land is appropriate in size and that the terrain is appropriate to accommodate the intended use, and the improvement is compatible with the surrounding neighborhood. Such benefits may include structured parking when it will result in the preservation of additional and desirable open space, school sites, trail underpass/overpass, public buildings, the provision of alternative transportation systems and facilities, or other such improvements that are determined to be desirable under the General Plan.

14 The maximum density possible in a Town and Resort Center that has been designated on a Land Use Map shall be established in an adopted SPA Plan. The density permitted shall be determined based on the level of compliance with and the degree to which the project advances the community goals established in all of these criteria. To exceed five (5) units per acre in any designated Town and Resort Center, there shall be an appropriate amount of density transfer, as noted in Criteria 13.

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Appendix B Canyons/Colony SPA

The Canyons/Colony project was first approved in 1999 and began with a complex agreement between Summit County and the Canyons/Colony developers involving 34 property owners. The development agreement was amended several times, the last time in 2010. The Canyons/Colony project was the first in Summit County to use the TDR concept. This project was also the first in which Summit County would take ownership of property in exchange for allowing increased density.

Summit County officials wanted the Canyons/Colony project to become an economic engine for the county. At the same time, they also wanted to acquire open space. To accomplish these goals, the Summit County planning commissioners and the Canyons/Colony developers negotiated the following:

- The Canyons/Colony project was allowed over eight million square feet of additional density. TDR use was one factor that contributed to this additional density. In exchange, the county received a parcel located in the Canyons resort core with 185,000 square feet of commercial density.
- In 1999, 60 vested development rights were extinguished from the 94 acre Mountain Meadows property and transferred into the Canyons/Colony project. The Mountain Meadows property was incorporated into the Swaner Nature Preserve.
- In exchange for approving increased density in the Colony, the county received five future Colony lots.
- In 2000, 17 vested development rights were extinguished from the 121-acre Creekside property and transferred into the Canyons/Colony project. In exchange for approving this TDR transfer, Summit County, at its discretion, added three bonus development units (three TDRs) for a total of 20 transferred TDRs and retained those units in the form of three future Colony lots. The Creekside property was incorporated into the Swaner Nature Preserve.
- In 2003, Summit County allowed the Mines Venture parcel a density increase. In exchange, the county received one Mines Venture property lot. This Mine Ventures lot was later exchanged for a Colony lot when the Mines Venture property was purchased by the Colony developer. The remaining 35 developable acres of the Mines Venture property will be placed in an open space conservation easement.

In total, approximately eight million square feet of additional density was granted the Canyons/Colony project; 80 TDRs were transferred into the Canyons/Colony project; nine future Colony lots and 185,000 square feet of commercial density within the Canyons resort core were provided to Summit County; and 215 acres of developable land were conserved and incorporated into the Swaner Nature Preserve.

Appendix C

Spring Creek SPA (Somerset Property)

The origin of the Somerset density (154 residential units) is the primary point of controversy in this project. In fact, there should be no controversy. In July, 1998, the Somerset parcel within the Spring Creek Specially Planned Area (SPA) was vested with a density of 154 residential units on approximately 39 acres. Somerset was in a view shed area and view shed was a high priority in Summit County. In February, 2001, the county requested the developer preserve Somerset as permanent open space by transferring Somerset's density to other developable properties; the developer agreed.

- Sixty units were to be transferred to county property within the Canyons resort core; the units would then be given to the developer.
- Seventy-four units were transferred to the developer's south I-80 property (New Park).
- Ten units were transferred to other parcels within the Spring Creek SPA.
- Four units were extinguished with a conservation easement.
- Six units remained on a portion of the Somerset parcel (the Piano parcel).

The seventy-four units transferred to New Park provided 236,800 additional square feet of density beyond the density cap of 280,000 square feet. In exchange for allowing this additional density, the developer provided the county with 112,000 square feet of density within the New Park development. The county sold this square footage to the Summit County Recreation District for \$1 million, which the county then used to acquire open space.

Ultimately, the county was unable to give the developer title to its Canyon resort core property. Through arbitration, the county retained the resort core property and instead provided four of the county's Colony TDR lots and \$800,000 to the developer.

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**APPENDIX D
Snyderville Basin Open Space Account**

2003		
MJM Arbitration Settlement (Cash plus 4 Colony lots were provided to settle lawsuit for not delivering TDR property within agree time frame)	(799,814)	
Sold Newpark TDR property to Recreation District	1,000,000	
Interest Income	168,807	
	368,993	Balance
2004		
Bear Hollow unit sales (39 units @ \$3400 per unit)	132,600	
Bear Hollow underpass	1,173	
Purchase-Rasmussen Property -Recreation District contributed \$1 million and Army Corp of Enginners \$10,000	(399,118)	
Open Space Title	3,519	
Agricultural Preservation	3,000	
General Fund Contribution	250,000	
Interest Income	4,062	
	(4,764)	Total
	364,229	Balance
2005		
Bear Hollow unit sales (102 units @ \$3400 per unit)	346,800	
Bear Hollow underpass	1,173	
Misc (copies development code)	83	
Purchase-Roberts Property-McAlister funds contributed \$100,000 towards purchase (2006)	(350,333)	
General Fund Contribution	250,000	
Interest Income Jan-Dec	17,433	
	265,156	Total
	629,384	Balance
2006		
Bear Hollow unit sales (44 units @ \$3400 per unit)	149,600	
Bear Hollow underpass	1,173	
County sold 5 TDR lots back to Ski Lands (Colony)	100,000	
Second payment to County for 5 TDR lots sold to Ski Lands	3,600,000	
Misc Copies GRAMA	52	
McAlister funds helped to finance Roberts Property purchase	100,000	
General Fund Contribution	250,000	
Interest Income	105,958	
	4,306,783	Total
	4,936,167	Balance
2007		
Bear Hollow unit sales (45 units @ \$3400 per unit)	153,000	
Final payment to County for 5 TDR lots sold to Ski Lands (includes interest)	840,986	
Purchase Hi-Ute Ranch Development Rights-Utah Open Lands contributed \$677 thousand	(323,000)	
Reimburse settlement charges to buyer-Clissold property	(88)	
Purchase-Quarry Mountain Property-Park City Municipal contributed \$1.95 million	(1,950,000)	
Interest Income	289,179	
	(989,922)	Total
	3,946,245	Balance
2008		
Bear Hollow unit sales (16 units @ \$3400 per unit)	54,400	
Transfer Bear Hollow underpass revenue	(7,038)	
Purchase Koleman property. Bond funds paid \$3.4 million towards purchase	(5,000,392)	
Portion of Koleman property sold	1,000,000	
Purchase PRI/Kimball Junction property -Total purchase price \$16 mil, Park City paid \$3.5 mil, Bond funds paid \$6.6 toward purchase. Loan from Municipal Services Fund covered overdraft.	(12,510,137)	
General Fund Contribution	250,000	
Interest Income	166,014	
Bond Funds & Other Transfers to Municipal Services Fund	10,067,956	
	(5,979,197)	Total
	(2,032,951)	Balance
2009		
Bear Hollow unit sales (8 units @ \$3400 per unit)	27,200	
Basin PTIF/Final Transfer Snyderville, reclassify	7,539	
General Fund Contribution	50,000	
Interest Income	103	
	84,842	Total
	(1,948,109)	Balance

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Agency Response

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MANAGER



ROBERT JASPER

December 7, 2010

John M. Schaff
Auditor General
W315 State Capitol Complex
Salt Lake City, UT 84114

Dear Mr. Schaff:

Thank you for allowing Summit County to review an exposure draft of A Performance Audit of County and Municipal TDR Use in Utah (Report No. 2010-15). Summit County generally agrees with the second and third recommendations as they pertain to Summit County, Chapter 2 of the Audit Report. In fact, the County has already implemented these two recommendations.

- Recommendation #2: The County has been in the process of conducting an inventory of its open space, which included those properties obtained through TDR, long before the initiation of this audit. The auditors were helpful in fleshing out areas that the County had missed. The County's Sustainability Coordinator has recently finished an extensive inventory of open space and has shared that with the auditors.
- Recommendation #3: The County has spoken with the County Auditor about improving accountability with regard to the restricted open space account.

Summit County appreciates the work done by the audit team in putting to rest the spurious allegations on favoritism levied against the County's TDR program. As the audit team noted in the audit report, there was "no evidence that any county official or employee used their position for personal gain."

With respect to the first recommendation, the County doesn't disagree with the audit report that an administrative TDR program has more predictability than a legislative based program. However, the County strongly supports its use of a legislative TDR program to achieve

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open space preservation. With that said, however, the County discontinued its 1998 TDR program in 2004 with the adoption of a new code. Consequently, for all intents and purposes, the County has not had an active TDR program for six (6) years.

The County believes it to be important to explain to the Legislature why its legislative TDR program was successful and necessary. As the audit report provides, the Summit County TDR program was by far the most successful program in the state at preserving open space. Open space is the top priority issue among voters and residents of the Snyderville Basin. Recently, those same voters approved a twenty million dollar general obligation bond for preserving open space. In adopting a legislative TDR program in 1998, the then county commissioners were simply responding to the concerns of their constituents. Although there was board legislative discretion within the TDR program, that program had standards and processes.

Summit County's TDR program was unique from others within the state in that it was legislative and not administrative in nature. This afforded Summit County more discretion and flexibility in administering its program. As the Utah Supreme Court stated in Thurston v Cache County, 626, P.2d 440, 445 (Utah 1981), zoning authorities are "afforded a *broad latitude of discretion* and its decisions are afforded a strong presumption of validity." By using TDRs in the context of a legislative rezone, *broad discretion is the rule*. The county commission decided to use a TDR program within this context for that precise reason, to allow maximum discretion. Without this type of discretion, the Canyons Resort, an economic engine of Summit County and the State of Utah, would never have come to fruition. The discretionary use of TDR was an important element in bringing all 34 property owners into a comprehensive master plan. However, the county commission did realize the broad discretion of legislative actions and hence provided parameters around its use; procedural guidelines and safeguards to guide the planning commission's discretion. The County recognizes that the audit report favors administrative programs to legislative ones because the former has less discretion and thus more predictability.

To give the Legislature an idea of the safeguards and processes used by Summit County under §3.7 of the 1998 Code, what follows is the codified process, which was open to the public and fully transparent:

- A. First, the developer had to submit a sketch plan which was reviewed by county staff. Thereafter, the developer went through a pre-application conference with county staff. Then there is an open and public joint planning meeting with the planning commission. Only once that process is complete may the developer make a formal rezone application.
- B. That application goes to the planning commission who holds multiple open and public work sessions on the application. After the public work sessions, the planning commission schedules a public hearing. The planning commission then takes a public vote and makes its recommendation to the county commission based upon five specific criteria described in the 1998 Code, which includes the

matrix mentioned in the audit report, as well as compliance with the Snyderville Basin General Plan, and its land use maps on sending and receiving zones.

- C. At this point, the county commission schedules a series of public work sessions and ultimately a public hearing on the application. Thereafter, the county commission approves, approves with conditions, or denies the application. A development agreement is processed contemporaneously with the rezone application. That development agreement goes through the same public process and has an additional 11 criteria that must be met.

The other area of disagreement in the audit report involves whether the County could have received a better sales price on the sale of five (5) TDR lots in The Colony. While open market sales have advantages to them, they are not always the best way to achieve a maximum net purchase price on unique commodities and TDR lots were a unique commodity in Summit County. The County appreciates the distinction between Fair Market Value, which clearly the County received, and the “best price,” which the audit report questions. The issue of whether the County received fair value for these lots is the subject of a pending lawsuit in Third District Court.

The county’s property manager entertained offers from sophisticated buyers in private negotiated sales, a fact which the audit report confirms. In making the audit finding, however, the audit report failed to seek expert advice on the issue of private sales from a Certified General Appraiser. According to an affidavit obtained by Summit County from a Certified General Appraiser with over thirty (30) years of experience, a negotiated sale between sophisticated buyer and seller almost always leads to a better net purchase price than does an open market sale. In the case of this sale, the estimated savings to Summit County is at least \$300,000, the cost of broker and commission fees in an open market sale. This fact alone contradicts the finding of the audit report.

Additionally, according to facts currently in evidence before the Third District Court in the pending lawsuit: (1) the agreed upon purchase price per TDR lot was not \$908,000, but rather was \$960,000 per TDR lot; (2) that if the buyer agreed to a bulk sale, the purchase price would be discounted to \$908,000 per TDR lot; (3) that there was a competing offer for \$925,000 per TDR lot for two lots only, as that buyer was not interested in a bulk five lot sale; and (4) that a comparable sale of TDR lots had been made within the year where the lots were sold for \$725,000 per TDR lot. Under such circumstances, the County believes that it not only received fair market value for the sale, but that it also received the best price.

Thank you again for this opportunity to comment on the audit and for the professional manner of your audit staff in researching and recommending improvements to the County's approach to TDR.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Bob Jasper', with a long horizontal flourish extending to the right.

Bob Jasper
County Manager