

Tuesday, March 19, 2013, 7:00 p.m.

City Council Chambers, 333 Civic Center Plaza

Web Site: www.ci.tracy.ca.us

Americans With Disabilities Act - The City of Tracy complies with the Americans with Disabilities Act and makes all reasonable accommodations for the disabled to participate in Council meetings. Persons requiring assistance or auxiliary aids should call City Hall (209/831-6000) 24 hours prior to the meeting.

Addressing the Council on Items on the Agenda - The Brown Act provides that every regular Council meeting shall provide an opportunity for the public to address the Council on any item within its jurisdiction before or during the Council's consideration of the item, provided no action shall be taken on any item not on the agenda. Each citizen will be allowed a maximum of five minutes for input or testimony. At the Mayor's discretion, additional time may be granted. The City Clerk shall be the timekeeper.

Consent Calendar - All items listed on the Consent Calendar are considered routine and/or consistent with previous Council direction. A motion and roll call vote may enact the entire Consent Calendar. No separate discussion of Consent Calendar items will occur unless members of the City Council, City staff or the public request discussion on a specific item at the beginning of the meeting.

Addressing the Council on Items not on the Agenda – The Brown Act prohibits discussion or action on items not on the posted agenda. Members of the public addressing the Council should state their names and addresses for the record, and for contact information. The City Council's Procedures for the Conduct of Public Meetings provide that "Items from the Audience" following the Consent Calendar will be limited to 15 minutes. "Items from the Audience" listed near the end of the agenda will not have a maximum time limit. Each member of the public will be allowed a maximum of five minutes for public input or testimony. However, a maximum time limit of less than five minutes for public input or testimony may be set for "Items from the Audience" depending upon the number of members of the public wishing to provide public input or testimony. The five minute maximum time limit for each member of the public applies to all "Items from the Audience." Any item not on the agenda, brought up by a member of the public shall automatically be referred to staff. In accordance with Council policy, if staff is not able to resolve the matter satisfactorily, the member of the public may request a Council Member to sponsor the item for discussion at a future meeting. When members of the public address the Council, they should be as specific as possible about their concerns. If several members of the public comment on the same issue an effort should be made to avoid repetition of views already expressed.

Presentations to Council - Persons who wish to make presentations which may exceed the time limits are encouraged to submit comments in writing at the earliest possible time to ensure distribution to Council and other interested parties. Requests for letters to be read into the record will be granted only upon approval of the majority of the Council. Power Point (or similar) presentations need to be provided to the City Clerk's office at least 24 hours prior to the meeting. All presentations must comply with the applicable time limits. Prior to the presentation, a hard copy of the Power Point (or similar) presentation will be provided to the City Clerk's office for inclusion in the record of the meeting and copies shall be provided to the Council. Failure to comply will result in the presentation being rejected. Any materials distributed to a majority of the Council regarding an item on the agenda shall be made available for public inspection at the City Clerk's office (address above) during regular business hours.

Notice - A 90 day limit is set by law for filing challenges in the Superior Court to certain City administrative decisions and orders when those decisions or orders require: (1) a hearing by law, (2) the receipt of evidence, and (3) the exercise of discretion. The 90 day limit begins on the date the decision is final (Code of Civil Procedure Section 1094.6). Further, if you challenge a City Council action in court, you may be limited, by California law, including but not limited to Government Code Section 65009, to raising only those issues you or someone else raised during the public hearing, or raised in written correspondence delivered to the City Council prior to or at the public hearing.

Full copies of the agenda are available at City Hall, 333 Civic Center Plaza, the Tracy Public Library, 20 East Eaton Avenue, and on the City's website www.ci.tracy.ca.us

CALL TO ORDER

PLEDGE OF ALLEGIANCE

INVOCATION

ROLL CALL

PRESENTATIONS – Swearing In – Police Corporals and Police Officer

Proclamation – American Red Cross Month

Measure E Residents' Oversight Committee – Certificate of Recognition

1. CONSENT CALENDAR

- A. Approval of Minutes
- B. Approve Revised Boundaries of the Targeted Employment Area (TEA) for the San Joaquin County Enterprise Zone
- C. Acceptance of the Police Firearms Practice Range (FPR) – Septic System -- CIP 71072B, Completed by Taylor Backhoe Services, Inc. of Merced, California, and Authorization for the City Clerk to File the Notice of Completion
- D. Approve Professional Services Agreements (PSA) With Schack and Company, Inc. and Kjeldsen, Sinnock & Neudeck, Inc. (KSN) to Provide Technical Support Services for Multiple Capital Improvement Projects, Authorize the Mayor to Execute the Agreements, and Authorize the Director of Development Services to Extend the Agreement/s for Another Year if Needed
- E. Authorize Amendment of the City's Classification and Compensation Plans and Position Control Roster By Approving the Establishment of a Class Specification and Pay Range for a Part-Time, Limited Service Drug Abuse Resistance Education (D.A.R.E.) Officer

2. ITEMS FROM THE AUDIENCE

3. PUBLIC HEARING TO INTRODUCE AN ORDINANCE AMENDING TRACY MUNICIPAL CODE SECTIONS 10.12.060 AND 10.12.080 AND ADDING A NEW SECTION 10.12.065 RELATING TO COMPLIANCE WITH REGIONAL HOUSING NEEDS ALLOCATIONS AND STATE AND FEDERAL LAW RELATING TO DEED RESTRICTIONS – THE APPLICATION IS INITIATED BY THE CITY OF TRACY – APPLICATION NUMBER ZA12-0008

4. FOLLOW UP DISCUSSION AND DIRECTION TO STAFF RELATED TO EXPANDING THE PROVISIONS OF THE EXISTING BOARDING UP OF BUILDINGS WITH UNSECURED OPENINGS ORDINANCE

5. DIRECT STAFF TO CEASE NEGOTIATIONS WITH SPIRIT OF CALIFORNIA ENTERTAINMENT GROUP, INC. FOR A NEW EXCLUSIVE NEGOTIATING RIGHTS AGREEMENT; ADOPT A RESOLUTION TERMINATING THE EXISTING EXCLUSIVE NEGOTIATING RIGHTS AGREEMENT WITH TRACY'S CALIFORNIA BLAST, LLC AND FIRST AMENDMENT WITH TRACY BLAST DEVELOPMENT, LLC; AND DIRECT STAFF TO RETURN AT A LATER DATE WITH OPTIONS FOR POSSIBLE USES OF THE CITY-OWNED PROPERTIES OUTSIDE OF THE CITY LIMITS ON THE WEST SIDE OF TRACY BOULEVARD ADJACENT TO LEGACY FIELDS AND ON THE EAST SIDE OF TRACY BOULEVARD NORTH OF ARBOR ROAD AND NORTH OF THE CITY'S WASTEWATER TREATMENT PLANT ("HOLLY SUGAR PROPERTY")
6. SECOND READING AND ADOPTION OF ORDINANCE 1182 AN ORDINANCE OF THE CITY OF TRACY APPROVING AN AMENDED AND RESTATED DEVELOPMENT AGREEMENT WITH THE SURLAND COMMUNITIES, LLC APPLICATION DA11-0002
7. ITEMS FROM THE AUDIENCE
8. COUNCIL ITEMS
 - A. Appointment of City Council Subcommittee to Interview Applicants for Vacancies on the Transportation Advisory Commission
9. ADJOURNMENT

February 5, 2013, 7:00 p.m.

City Council Chambers, 333 Civic Center Plaza

Web Site: www.ci.tracy.ca.us

Mayor Ives called the meeting to order at 7:00 p.m. and led the Pledge of Allegiance.

The invocation was offered by Chaplain Jim Bush.

Roll call found Council Members Manne, Rickman, Young, Mayor Pro Tem Maciel and Mayor Ives present.

Mayor Ives presented a Certificate of Appointment to Council Member Manne.

Leon Churchill, Jr., City Manager, presented the Employee of the Month award for February 2013, to Steven M. Clayton, Police Department.

1. CONSENT CALENDAR - It was moved by Mayor Pro Tem Maciel and seconded by Council Member Young to adopt the Consent Calendar. Roll call vote found all in favor; passed and so ordered.
 - A. Approval of Minutes – Special meeting minutes of December 4, 2012, regular meeting minutes of December 4, 2012, and closed session minutes of January 22, 2013, were approved.
 - B. Approving the 2013 Calendar Year Budget For the Operation of the Tracy Material Recovery Facility and Solid Waste Transfer Station – Resolution 2013-013 approved the budget.
 - C. Approval of the Water Supply Assessment for the Cordes Ranch Specific Plan – Resolution 2013-014 approved the assessment.
 - D. Authorization of a Supplemental Appropriation of \$190,000 from the Water Enterprise Fund for Water Purchase – Resolution 2013-015 authorized the appropriation.
 - E. The City Council of the City of Tracy Acting as the Governing Body of the Successor Agency for the Community Development Agency of the City of Tracy Approving the Recognized Obligation Payment Schedule (ROPS) – Resolution 2013-016 approved the Recognized Obligation Payment Schedule.
2. ITEMS FROM THE AUDIENCE - Paul Miles, 1397 Mansfield Street, provided Council with a letter dated February 5, 2013, and a DVD. Mr. Miles outlined a longstanding dispute he has had with the City of Tracy.

Francesca Shelton, 4215 Tropaz Lane, addressed Council regarding her track teams' inability to practice on a field in the City of Tracy due to unreasonable costs. Ms. Shelton indicated Tracy Unified School District charges between \$120 and \$150 per hour of practice on their fields and asked why a public facility was not available for their use.

3. INTRODUCTION OF AN ORDINANCE AMENDING CHAPTER 11.30 "RECYCLED AND NON-POTABLE WATER" OF THE TRACY MUNICIPAL CODE - Steve Bayley, Deputy Director Public Works, provided the staff report. Mr. Bayley stated Council adopted Ordinance 1035 on April 2, 2002, which established Chapter 11.30 of the Tracy Municipal Code, Recycled and Non-Potable Water. Use of recycled water has the potential to reduce potable water demand, especially where potable water is used for landscape irrigation and industrial processes such as evaporative cooling.

Recent legislative actions include: the California Water Conservation Act of 2009 (SBx7-7; Water Code section 10608 and following); State Water Resources Control Board Resolution No. 2009-0011 (Adoption of Recycled Water Policy); the 2010 California Green Building Standards Code; the California Department of Water Resources Model Water Efficient Landscape Ordinance; and the City's Sustainability Action Plan.

The California Water Conservation Act of 2009 (SBx7-7) requires municipalities to reduce per capita water consumption by 20% by the year 2020. Use of recycled water for landscape irrigation in lieu of potable water reduces the per capita consumption of potable water. Use of recycled water will assist in meeting the 20% per capita reduction requirement.

The Tracy Municipal Code allows the use of untreated surface water as non-potable water. There are no users of untreated surface water for landscape irrigation within the City. In the future, untreated surface water will be used for irrigation at the new Holly Sugar sports fields. Use of untreated surface water would be included in the City's per capita water consumption whereas recycled water would not. In order to meet the timeframe for compliance with SBx-7-7, use of untreated surface water for landscape irrigation would need to be switched to recycled water by 2020. The proposed ordinance contains the requirement that use of untreated surface water supplies in lieu of recycled water supplies is not permitted after 2020.

The proposed ordinance is statutorily exempt from California Environmental Quality Act, as an action by a regulatory agency for the protection of the environment and natural resources.

There is no fiscal impact to the General Fund, Water Enterprise Fund or Wastewater Enterprise Fund resulting from preparation of this ordinance. Implementation and use of recycled water will result in future expenditures.

Staff recommended that Council introduce and adopt an ordinance amending Chapter 11.30 of the Tracy Municipal Code, Recycled and Non-Potable Water.

Mayor Ives invited members of the public to comment on the item.

Robert Tanner, 1371 Rusher Street, asked if untreated water could include contaminants that might affect the health of park users. Mr. Bayley indicated untreated water would come from the Delta where people swim and play, which is also used for drinking water after being treated. Mr. Bayley added that the same water was currently being used for irrigation.

The Clerk read the title of proposed Ordinance 1183.

It was moved by Mayor Pro Tem Maciel and seconded by Council Member Rickman to waive the reading of the text. Voice vote found all in favor; passed and so ordered.

It was moved by Mayor Pro Tem Maciel and seconded by Council Member Rickman to introduce Ordinance 1183. Voice vote found all in favor; passed and so ordered.

4. SECOND READING AND ADOPTION OF ORDINANCE 1182 AN ORDINANCE OF THE CITY OF TRACY APPROVING A MODIFIED AND RESTATED DEVELOPMENT AGREEMENT WITH THE SURLAND COMMUNITIES APPLICATION DA11-0002

The Clerk read the title of Proposed Ordinance 1182.

Mark Connolly, 121 E. Eleventh Street, representing TRAQC, provided Council with a letter dated February 5, 2013, indicating the Development Agreement did not include Exhibit A, which was a description of the property.

Mr. Sodergren indicated the item could return at the next Council meeting and a description of the property would be included.

It was Council consensus to have the item return for consideration on February 19, 2013.

5. ITEMS FROM THE AUDIENCE - None

6. COUNCIL ITEMS

A. APPOINTMENT OF CITY COUNCIL SUBCOMMITTEE TO INTERVIEW APPLICANTS FOR VACANCIES ON THE MEASURE E RESIDENTS' OVERSIGHT COMMITTEE - Mayor Pro Tem Maciel and Council Member Young were appointed to interview applicants for the upcoming term expirations on the Measure E Residents' Oversight Committee.

B. APPOINTMENT OF CITY COUNCIL SUBCOMMITTEE TO INTERVIEW APPLICANTS FOR VACANCY ON THE TRACY PLANNING COMMISSION - Council Member Rickman and Council Member Manne were appointed to interview applicants for the vacancy on the Planning Commission.

C. CONSIDER WHETHER AN ITEM TO DISCUSS THE TRACY BALLPARK SHOULD BE PLACED ON A FUTURE CITY COUNCIL AGENDA - Mayor Pro Tem Maciel indicated discussion at the previous meeting concerning the park, centered on what was not going to happen to the park. Mayor Pro Tem Maciel stated there should be discussion about future use of the property. Mayor Pro Tem Maciel suggested Council should begin discussions and obtain input from users so that the site can compete for Capital Improvement Projects in the future.

Council Member Rickman stated Council should ensure that individuals in the neighborhood are notified and the boundaries expanded for noticing.

Mayor Ives clarified that the site would be used for recreational purposes. Council Member Rickman indicated he would like to see as many people as possible involved in the process.

Mayor Ives invited members of the public to comment on the item.

Robert Tanner, 1371 Rusher Street, asked if the process Mayor Pro Tem Maciel contemplated for this park would have naturally come up when talking about Capital Improvement Projects. Mayor Ives indicated it was important enough to merit its own process. Mr. Tanner asked if other parks might warrant the same level of review before this park was placed on a Capital Improvement Project list. Mayor Ives stated this park warranted its own discussion.

Joe Silveria 455 Loma Verde Drive, stated he supported anything that can be done to promote athletics for youth.

Leon Churchill, Jr., City Manager, indicated the item would have to return soon since proposed Capital Improvement Projects were scheduled for Council review in March.

Council Member Young announced that February was Black History Month and invited the community to an event sponsored by Tracy Unified School District being held on February 22, 2013, 6:30 p.m. at West High School.

7. ADJOURNMENT - It was moved by Council Member Rickman and seconded by Mayor Pro Tem Maciel to adjourn. Voice vote found all in favor; passed and so ordered.
Time: 7:31 p.m.

The above agenda was posted at the Tracy City Hall on January 31, 2013. The above are summary minutes. A recording is available at the office of the City Clerk.

Mayor

City Clerk

TRACY CITY COUNCIL - SPECIAL MEETING MINUTES

March 5, 2013, 6:00 p.m.

City Council Chamber, 333 Civic Center Plaza, Tracy

1. CALL TO ORDER - Mayor Ives called the meeting to order at 6:00 p.m. for the purpose of a closed session to discuss the items outlined below.
2. ROLL CALL - Roll call found Council Members Manne, Rickman, Young, Mayor Pro Tem Maciel and Mayor Ives present.
3. ITEMS FROM THE AUDIENCE – None.
4. CLOSED SESSION -

I. Real Property Negotiations (Gov. Code, § 54956.8)

- Property Location: City-owned Fuel Facility located at the Tracy Municipal Airport (5749 South Tracy Boulevard).
Negotiator(s) for City: Rod Buchanan, Interim Public Works Director
Negotiating Parties: Representatives of the Turlock Air Center, LLC dba Tracy Air Center
Under Negotiation: Price and terms of payment for the lease of the property
- Property Location: City of Tracy Northeast Industrial Grant Line Road Project (APN#s: 213-070-08; 213-070-48; 213-070-49; and 213-070-51).
Negotiator(s) for City: Andrew Malik, Director of Development Services; Kul Sharma, Assistant Director Development Services; Zabih Zaca, Senior Civil Engineer; and Associated Right of Way Services
Negotiating Parties: Maria O. Silva; Frank I. Silva; Mary L. Silva; Bernadine Silva; and Manual Silva
Under Negotiation: Price and terms of payment for the purchase of the property or a part of the property

II. Initiation of Litigation (Gov. Code, § 54956.9(d)(4))

- One case

III. Pending Litigation (Gov. Code, § 54956.9(d)(1))

- *Horizon Planet v. City of Tracy, et al.*
(San Joaquin County Superior Court)
 - *TRAQC v. City of Tracy, et al.*
(San Joaquin County Superior Court Case No. 39-2009-00201854-CUWM-STK; Court of Appeal Case No. C069741)
5. MOTION TO RECESS TO CLOSED SESSION – Mayor Pro Tem Maciel motioned to recess the meeting to closed session at 6:01 p.m. Council Member Manne seconded the motion. Voice vote found all in favor; passed and so ordered.
 6. RECONVENE TO OPEN SESSION – Mayor Ives reconvened the meeting into open session at 6:50 p.m.
 7. REPORT OF FINAL ACTION – None.
 8. ADJOURNMENT – It was moved by Mayor Pro Tem Maciel and seconded by Council Member Manne to adjourn the meeting. Voice vote found all in favor; passed and so ordered. Time: 6:50 p.m.

The above agenda was posted at City Hall on February 28, 2013. The above are action minutes.

Mayor

ATTEST:

City Clerk

AGENDA ITEM 1.B

REQUEST

**APPROVE REVISED BOUNDARIES OF THE TARGETED EMPLOYMENT AREA (TEA)
FOR THE SAN JOAQUIN COUNTY ENTERPRISE ZONE**

EXECUTIVE SUMMARY

One of the requirements of an Enterprise Zone is to have a designated Targeted Employment Area (“TEA”). A TEA is one of several qualifying factors which enable an employer to obtain state hiring tax credits. A TEA is defined by census tracts with at least 51% of residents at low or moderate income levels.

The California Department of Housing and Community Development (the “State”) requires each Enterprise Zone to update boundaries of their TEA within 180 days of new United States census data becoming available. The State provided each Zone with a list of eligible census tracts based on 2010 census data and all municipal partners in the San Joaquin County Enterprise Zone must approved the revised TEA before it is submitted to the State for final approval..

DISCUSSION

On June 22, 2008, Governor Arnold Schwarzenegger announced the final designation of eight Enterprise Zones statewide, including San Joaquin County. The California Enterprise Zone Program targets economically distressed areas using special state and local incentives to promote business investment and job creation. By encouraging entrepreneurship and employer growth, the program strives to create and sustain economic expansion in California communities. Each zone designation is in effect for 15 years.

The primary goal of a state designated enterprise zone is to provide employment opportunities for residents of economically distressed areas. The State of California encourages businesses to hire local workers by offering the new Employee Hiring Tax Credit (EHTC) for enterprise zone employees. As an incentive, businesses can receive a state tax credit of \$37,440, or more, per eligible employee over a five-year period. To qualify as an eligible employee, the individual must meet specific criteria as defined by the California Enterprise Zone Program. One of the qualifying criteria is to reside in a Targeted Employment Area (“TEA”).

A TEA is an area composed of census tracts with at least 51% of their residents in the low to moderate income levels. The purpose of a TEA is to encourage businesses within the enterprise zone to hire eligible residents of a qualified geographical area that are most in need of employment.

In 2008, the San Joaquin County Employment and Economic Development Department identified a list of census tracts throughout the San Joaquin County (the “County”) that qualified for the TEA with at least 51% of residents in the low to moderate income level. These census tracts were identified using 2000 United States census data and comprise the current TEA for the San Joaquin County Enterprise Zone (Attachment A). Residents of

the TEA automatically qualify for an Enterprise Zone Hiring Tax Credit voucher. The County and each of the participating municipalities approved the current TEA in 2008.

The California Housing and Community Development Department (the "State") regulations compel each Enterprise Zone to update the boundaries of their TEA within 180 days of new United States census data becoming available. The State provided each Zone with a list of eligible census tracts in January 2013 (Attachment B), which are based on 2010 census data. All municipal partners in the San Joaquin County Enterprise Zone must approve the revised boundaries of the TEA (Attachment C) before it becomes effective.

As a result of revised census data – the County and several cities have seen a change in their respective TEA boundaries. The City of Tracy gained a single census tract, identified on Attachment D as census tract 53.02.

FISCAL IMPACT

There is no fiscal impact to the General Fund for this item.

RECOMMENDATION

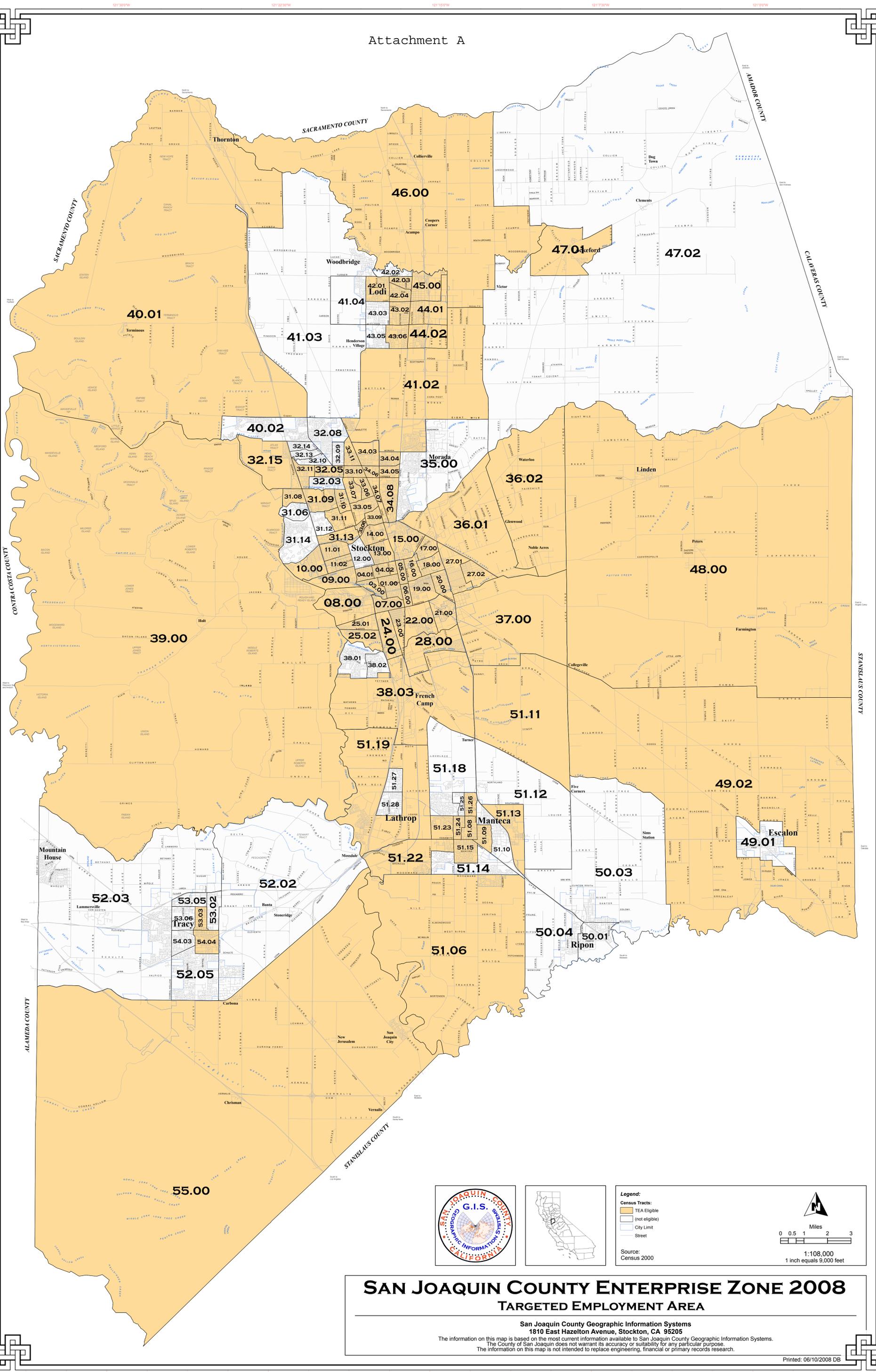
Staff recommends that Council approve, by resolution, the revised boundaries of the Targeted Employment Area (TEA) for the San Joaquin County Enterprise Zone.

Prepared by: Amie Mendes, Economic Development Analyst
Reviewed by: Andrew Malik, Development Services Director
Approved by: R. Leon Churchill, Jr., City Manager

ATTACHMENTS:

Attachment A - Current San Joaquin County Enterprise Zone TEA Map
Attachment B - Revised San Joaquin County Enterprise Zone Eligible Census Tract Listing
Attachment C - Revised San Joaquin County Enterprise Zone TEA Boundaries
Attachment D - Revised City of Tracy TEA Boundaries

Attachment A



Legend:

- Census Tracts:
 - TEA Eligible (shaded orange)
 - (not eligible) (white)
- City Limit (dashed line)
- Street (thin grey line)

Source: Census 2000

Scale: 1:108,000
1 inch equals 9,000 feet

SAN JOAQUIN COUNTY ENTERPRISE ZONE 2008
TARGETED EMPLOYMENT AREA

San Joaquin County Geographic Information Systems
 1810 East Hazelton Avenue, Stockton, CA 95205

The information on this map is based on the most current information available to San Joaquin County Geographic Information Systems.
 The County of San Joaquin does not warrant its accuracy or suitability for any particular purpose.
 The information on this map is not intended to replace engineering, financial or primary records research.

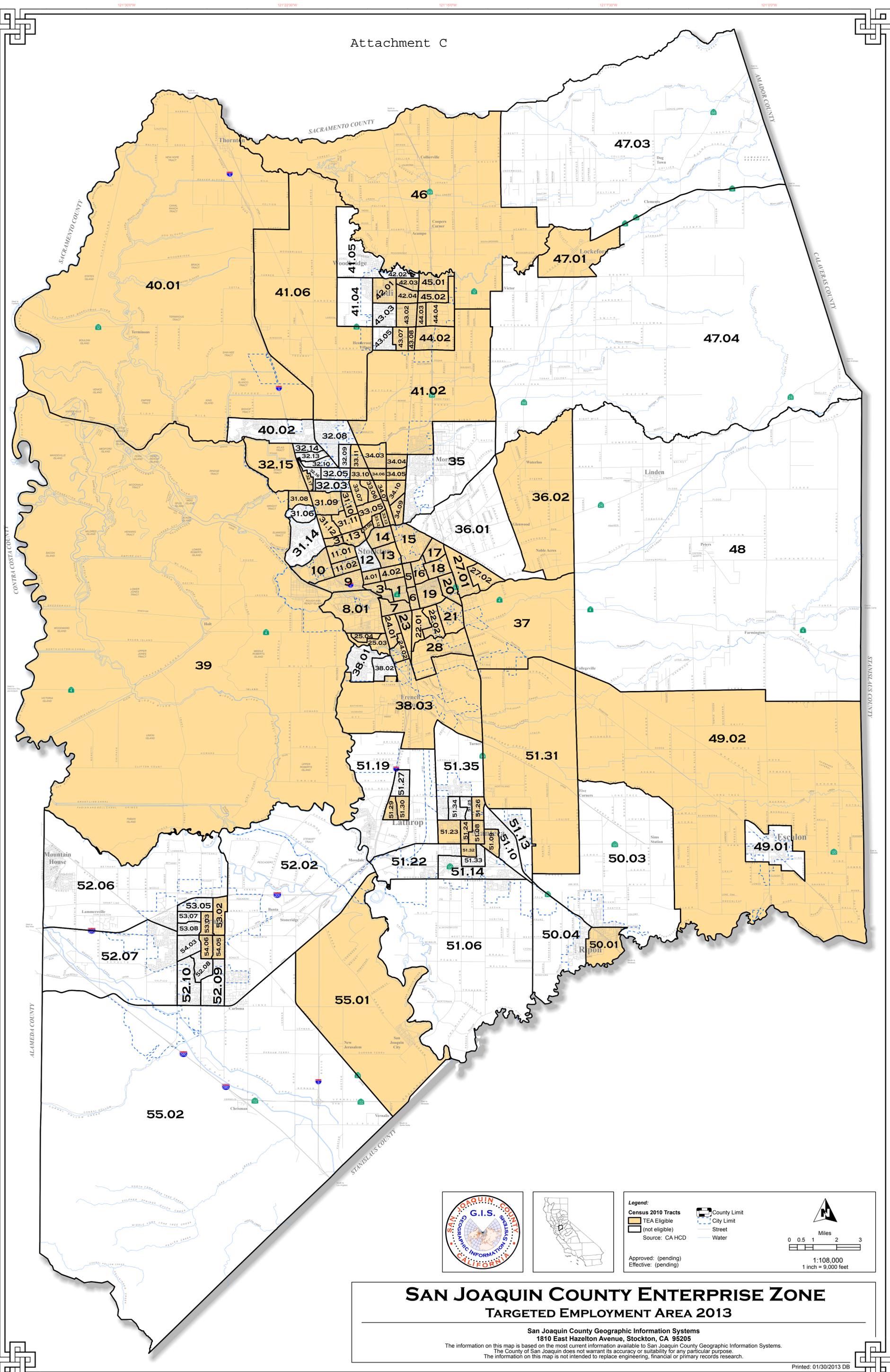
Printed: 06/10/2008 DB

San Joaquin County Enterprise Zone
Qualifying TEA Tracts

1	3	4.01	4.02	5	6	7	8.01	9	10
11.01	11.02	13	14	15	16	17	18	19	20
21	22.01	22.02	23	24.01	24.02	25.03	25.04	27.01	27.02
28	31.08	31.09	31.10	31.11	31.12	31.13	32.15	32.17	33.05
33.06	33.07	33.08	33.10	33.11	33.12	33.13	34.03	34.04	34.05
34.06	34.07	34.09	34.10	36.02	37	38.03	39	40.01	41.02
41.06	42.01	42.03	42.04	43.02	43.07	43.08	44.02	44.03	44.04
45.01	45.02	46	47.01	49.02	50.01	51.08	51.09	51.23	51.24
51.26	51.29	51.3	51.31	51.32	53.02	53.03	54.05	54.06	55.01

* Portion Tracts indicated with asterisk

Attachment C



Legend:

- Census 2010 Tracts
 - TEA Eligible (Orange)
 - (not eligible) (White)
- Source: CA HCD
- County Limit (Thick black line)
- City Limit (Thin black line)
- Street (Blue dashed line)
- Water (Blue solid line)

Approved: (pending)
Effective: (pending)

Miles
0 0.5 1 2 3

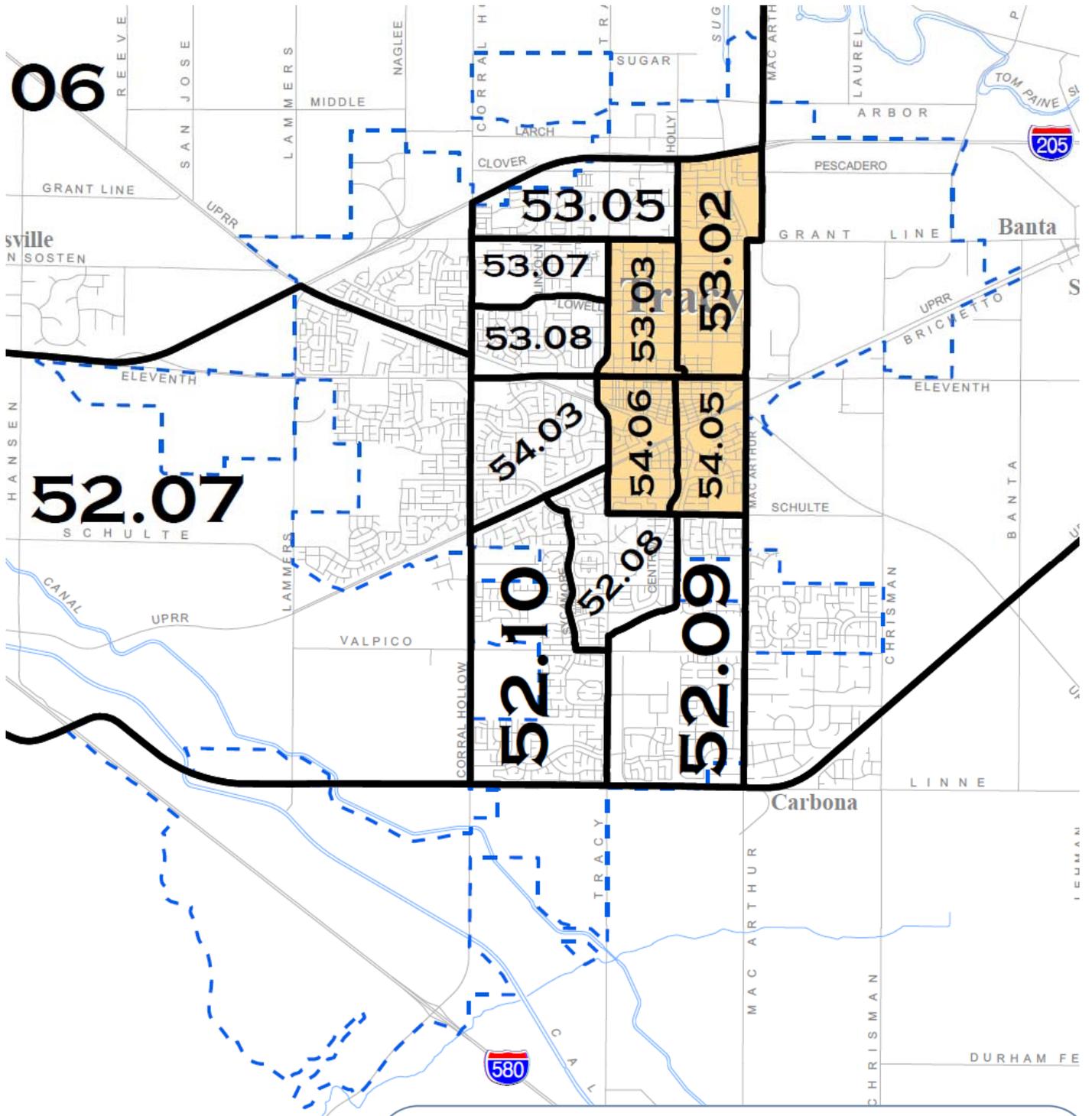
1:108,000
1 inch = 9,000 feet

SAN JOAQUIN COUNTY ENTERPRISE ZONE TARGETED EMPLOYMENT AREA 2013

San Joaquin County Geographic Information Systems
1810 East Hazelton Avenue, Stockton, CA 95205

The information on this map is based on the most current information available to San Joaquin County Geographic Information Systems. The County of San Joaquin does not warrant its accuracy or suitability for any particular purpose. The information on this map is not intended to replace engineering, financial or primary records research.

Revised City of Tracy TEA Boundaries



Legend:

Census 2010 Tracts TEA Eligible	County Limit
(not eligible)	City Limit
Source: CA HCD	Street
	Water

RESOLUTION _____

APPROVE REVISED BOUNDARIES OF THE TARGETED EMPLOYMENT AREA (TEA)
FOR THE SAN JOAQUIN COUNTY ENTERPRISE ZONE

WHEREAS, The City of Tracy is part of the San Joaquin County Enterprise Zone (SJCEZ) which was established on June 22, 2008; and

WHEREAS, The primary goal of a state designated enterprise zone is to provide employment opportunities for residents of economically distressed areas; and

WHEREAS, Businesses can receive state tax credits for eligible employees who qualify through meeting specific criteria as defined by the California Enterprise Zone Program; and

WHEREAS, One of the qualifying criteria is to reside in a Targeted Employment Area (TEA); and

WHEREAS, The purpose of a TEA is to encourage businesses within the enterprise zone to hire eligible residents of a qualified geographical area that are most in need of employment; and

WHEREAS, The California Housing and Community Development Department regulations compel each Enterprise Zone to update the boundaries of their TEA within 180 days of new United States census data becoming available, and

WHEREAS, As a result of revised census data, San Joaquin County and several cities have seen a change in their respective TEA boundaries.

NOW, THEREFORE, BE IT RESOLVED, that the City Council approve, by resolution, the revised boundaries of the Targeted Employment Area (TEA) for the San Joaquin County Enterprise Zone.

The foregoing Resolution _____ was passed and adopted by the Tracy City Council on the 19th day of March, 2013, by the following vote:

AYES: COUNCIL MEMBERS:
NOES: COUNCIL MEMBERS:
ABSENT: COUNCIL MEMBERS:
ABSTAIN: COUNCIL MEMBERS:

Mayor

ATTEST:

City Clerk

AGENDA ITEM 1.C

REQUEST

ACCEPTANCE OF THE POLICE FIREARMS PRACTICE RANGE (FPR) – SEPTIC SYSTEM – CIP 71072B, COMPLETED BY TAYLOR BACKHOE SERVICES INC., OF MERCED, CALIFORNIA, AND AUTHORIZATION FOR THE CITY CLERK TO FILE THE NOTICE OF COMPLETION

EXECUTIVE SUMMARY

The contractor has completed construction of the Police Firearms Practice Range Septic System Project in accordance with project plans, specifications, and contract documents. Project costs are within the available budget. Staff recommends Council accept the project to enable the City to release the contractor's bonds and retention.

DISCUSSION

This project involves the construction of a 1,200 gallon septic system with leach lines and appurtenances in the Police Firearms Practice Range facility located south of the Delta Mendota Canal and west of Tracy Boulevard. The construction cost was estimated to be less than \$25,000. Public Contract Code Section 22032 & 22036 allows the public agency to procure informal bids for such projects with an anticipated cost less than \$45,000. The Engineering Division prepared the plans and specifications of this work in house.

The project was advertised for informal bids on the City of Tracy website and builder's exchanges on November 15, 2012, and eight bids were received on November 27, 2012.

On January 24, 2013, the City Manager executed a construction agreement with the low bidder, Taylor Backhoe Services Inc., of Merced, California, in the amount of \$16,445 for the Police Firearms Practice Range Septic System Project – CIP 71072B in accordance with Tracy Municipal Code section 2.20.260

The contractor has completed the construction and no change orders were issued. Status of budget and estimated project costs is as follows:

A. Construction Contract Amount	\$16,445
B. Change Orders	\$ 0
C. Design, construction management, inspection, Testing & miscellaneous expenses (Estimated)	\$ 2,000
D. City wide Project Management Charges (Estimate)	\$ 3,000
Total Project Costs	\$21,445

Total budgeted amount for Police Firearms Practice Range Improvements CIP71072 is \$586,250 and construction of the Septic System is the first phase of this larger CIP. The project has been completed within the available budget, on schedule, per plans, specifications, and City of Tracy standards

STRATEGIC PLAN

This agenda item is a routine operational item and does not relate to the Council's strategic plans.

FISCAL IMPACT

CIP 71072 is an approved FY 12/13 Capital Improvement Project with sufficient funding. There is no fiscal impact to the General Fund.

RECOMMENDATION

That City Council, by resolution, accept the Police Firearms Practice Range septic system Project - CIP 71072B, completed by Taylor Backhoe Services Inc., of Merced, California, and authorize the City Clerk to record the Notice of Completion with the San Joaquin County Recorder. The City Engineer, in accordance with the terms of the construction contract, will release the bonds and retention payment.

Prepared by: Paul Verma, Senior Civil Engineer

Reviewed by: Kuldeep Sharma, City Engineer

Approved by: Andrew Malik, Development Services Director
R. Leon Churchill, Jr., City Manager

RESOLUTION _____

ACCEPTANCE OF THE POLICE FIREARMS PRACTICE RANGE (FPR) – SEPTIC SYSTEM – CIP 71072B, COMPLETED BY TAYLOR BACKHOE SERVICES INC., OF MERCED, CALIFORNIA, AND AUTHORIZATION FOR THE CITY CLERK TO FILE THE NOTICE OF COMPLETION

WHEREAS, On January 24, 2013, the City Manager executed a construction agreement with the low bidder, Taylor Backhoe Services Inc., of Merced, California, in the amount of \$16,445 for the Police Firearms Practice Range Septic System Project – CIP 71072B in accordance with Tracy Municipal Code section 2.20.260; and

WHEREAS, The contractor has completed construction of the Police Firearms Practice Range Septic System Project in accordance with project plans, specifications, and contract documents; and

WHEREAS, Status of budget and project cost are estimated to be as follows:

A. Construction Contract Amount	\$ 16,445
B. Change Orders	\$ 0
C. Design, construction management, inspection, Testing & miscellaneous expenses (Estimated)	\$ 2,000
D. City wide Project Management Charges (Estimate)	\$ 3,000
Total Project Costs	\$ 21,445

WHEREAS, Total budgeted amount for Police Firearms Practice Range Improvements CIP71072 is \$586,250 and construction of the Septic System is the first phase of this larger CIP;

NOW, THEREFORE BE IT RESOLVED, That City Council accepts construction of the accept the Police Firearms Practice Range septic system Project - CIP 71072B, completed by Taylor Backhoe Services Inc., of Merced, California, and authorize the City Clerk to record the Notice of Completion with the San Joaquin County Recorder.

The foregoing Resolution _____ was adopted by the City Council on the 19th day of March, 2013, by the following vote:

AYES:	COUNCIL MEMBERS:
NOES:	COUNCIL MEMBERS:
ABSENT:	COUNCIL MEMBERS:
ABSTAIN:	COUNCIL MEMBERS:

Mayor

ATTEST:

City Clerk

AGENDA ITEM 1.D

REQUEST

APPROVE PROFESSIONAL SERVICES AGREEMENTS (PSA) WITH SCHACK AND COMPANY, INC. AND KJELDSSEN, SINNOCK & NEUDECK, INC. (KSN) TO PROVIDE TECHNICAL SUPPORT SERVICES FOR MULTIPLE CAPITAL IMPROVEMENT PROJECTS, AUTHORIZE THE MAYOR TO EXECUTE THE AGREEMENTS, AND AUTHORIZE THE DIRECTOR OF DEVELOPMENT SERVICES TO EXTEND THE AGREEMENT/S FOR ANOTHER YEAR IF NEEDED

EXECUTIVE SUMMARY

Due to right-sizing and retirement of engineering staff, outside services for computer aided drafting is needed to complete various capital improvement projects. Approval of professional services agreements with the above consultants will assist the City to use their services on an as needed basis to complete various capital improvement projects in a timely manner.

DISCUSSION

Due to staffing constraints in the Engineering Division, services of consultants are needed to provide computer aided drafting (CAD) to complete various capital improvement projects in a timely manner.

In accordance with the Tracy Municipal Code, Section 2.20.140 on December 18, 2012 a "Notice of Request for Proposals" was posted on the City of Tracy's website. The City received proposals from three consultants on January 13, 2013.

The term of these agreements are for a period of three (3) years and can be further extended for another year.

After careful review and evaluation of proposals, Schack and Company of Tracy, California and KSN, Inc. of Stockton, California, were found to be the most qualified consultants to provide the necessary services. Both consultants will provide design/drafting services for a period of up to three (3) years on an hourly basis as needed. Agreements allow the city to extend one or both agreements to provide services for an additional year after satisfactory completion of subject agreement/s Both consultants listed below have the capacity to perform required services if needed within the city of Tracy premises or within their offices.

- Schack and Company, Inc. of Tracy California
- Kjeldsen, Sinnock & Neudeck, Inc. of Stockton, California

The scope of work for the proposed consultant agreements will be on an as-needed basis and shall not exceed the following amounts over a three year period:

Schack and Company, Inc,	\$399,360.00
KSN, Inc.:	\$374,400.00

The cost of services will be charged to the Capital Improvement projects for which the consultants will be required to work.

FISCAL IMPACT

There is no impact to the General Fund. Cost of required services will be paid from Capital Improvement Projects which requires design/drafting services.

STRATEGIC PLAN

This agenda item is a routine operational item and dose not related to the Council's strategic plans.

RECOMMENDATION

Staff recommends that City Council by separate Resolutions, approve Professional Services Agreements with Schack and Company, Inc of Tracy California for a not-to-exceed amount of \$399,360, and with KSN, Inc. of Stockton, California for a not-to-exceed amount of \$374,400, to provide professional support services in assisting with design/drafting of the Capital Improvement Projects for a period of three (3) years, authorize the Mayor to execute Professional Services Agreements between two consulting firms and the City of Tracy, further, authorize the Development Services Director to extend the agreement/s for another year if needed.

Prepared by: Zabih Zaca, Senior Civil Engineer

Approved by: Kul Sharma, City Engineer

Approved by: Andrew Malik, Development Services Director
R. Leon Churchill, Jr., City Manager

Attachments:

- Attachment A – Professional Services Agreement with Schack and Company
- Attachment B – Professional Services Agreement with KSN, Inc.
- Attachment C – Resolution Approving PSA with Schack and Company
- Attachment D – Resolution Approving PSA with KSN, Inc.

CITY OF TRACY
PROFESSIONAL SERVICES AGREEMENT
PROVIDING PROFESSIONAL STAFF SUPPORT SERVICES FOR
ENGINEERING DIVISION OF DEVELOPMENT SERVICES DEPARTMENT
FOR DESIGN/DRAFTING FOR CAPITAL IMPROVEMENT PROJECTS

THIS PROFESSIONAL SERVICES AGREEMENT (hereinafter "Agreement") is made and entered into by and between the CITY OF TRACY, a municipal corporation (hereinafter "CITY"), and **SCHACK & COMPANY, INC.** (hereinafter "CONSULTANT").

RECITALS

- A. CONSULTANT has a licensed professional engineer on staff to provide qualified design/drafting services for a duration of three years with the possibility of a fourth year extension.
- B. On December 18, 2012, in compliance with Tracy Municipal Code, Chapter 2.20, CITY issued a Request for Proposals (RFP) for the PROJECT and received three (3) proposals. CITY staff determined CONSULTANT's proposal to be responsive to the RFP. After negotiations between CITY and CONSULTANT, the parties have reached an agreement for the performance of services in accordance with the terms set forth in this Agreement. On March 19, 2013, the City Council authorized the execution of this Agreement, pursuant to Resolution No. 2013-____.
- C. CONSULTANT represents it has the qualifications, skills and experience to provide these services and is willing to provide services according to the terms of this Agreement.

NOW THEREFORE, THE PARTIES MUTUALLY AGREE AS FOLLOWS:

- 1. **SCOPE OF SERVICES.** CONSULTANT shall perform the services described in Exhibit "A" attached hereto and incorporated herein by reference. The services shall be performed by, or under the direct supervision of, CONSULTANT's Authorized Representative: **Scott F. Schendel**. CONSULTANT shall not replace its Authorized Representative, nor shall CONSULTANT replace any of the personnel listed in Exhibit "A," nor shall CONSULTANT use any subcontractors or subconsultants, without the prior written consent of the CITY.
- 2. **TIME OF PERFORMANCE.** Time is of the essence in the performance of services under this Agreement and the timing requirements set forth herein shall be strictly adhered to unless otherwise modified in writing in accordance with this Agreement. CONSULTANT shall commence performance, and shall complete all required services no later than the dates set forth in Exhibit "A." Any services for which times for performance are not specified in this Agreement shall be commenced and completed by CONSULTANT in a reasonably prompt and timely manner based upon the circumstances and direction communicated to the CONSULTANT.

**CITY OF TRACY -- PROFESSIONAL SERVICES AGREEMENT
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CONSULTANT shall submit all requests for extensions of time to the CITY in writing no later than ten (10) days after the start of the condition which purportedly caused the delay, and not later than the date on which performance is due. CITY shall grant or deny such requests at its sole discretion.

- 3. INDEPENDENT CONTRACTOR STATUS.** CONSULTANT is an independent contractor and is solely responsible for all acts of its employees, agents, or subconsultants, including any negligent acts or omissions. CONSULTANT is not CITY's employee and CONSULTANT shall have no authority, express or implied, to act on behalf of the CITY as an agent, or to bind the CITY to any obligation whatsoever, unless the CITY provides prior written authorization to CONSULTANT. Contractors and CONSULTANTS are free to work for other entities while under contract with the CITY. Contractors and CONSULTANTS are not entitled to CITY benefits.
- 4. CONFLICTS OF INTEREST.** CONSULTANT (including its employees, agents, and subconsultants) shall not maintain or acquire any direct or indirect interest that conflicts with the performance of this Agreement. In the event that CONSULTANT maintains or acquires such a conflicting interest, any contract (including this Agreement) involving CONSULTANT's conflicting interest may be terminated by the CITY.
- 5. COMPENSATION.**

 - 5.1.** For services performed by CONSULTANT in accordance with this Agreement, CITY shall pay CONSULTANT on a time and expense basis, at the billing rates set forth in Exhibit "B," attached hereto and incorporated herein by reference. CONSULTANT's fee for this Agreement is Not To Exceed Three Hundred Ninety Nine Thousand Three Hundred Sixty Dollars (\$399,360). CONSULTANT's billing rates shall cover all costs and expenses of every kind and nature for CONSULTANT's performance of this Agreement. No work shall be performed by CONSULTANT in excess of the Not To Exceed amount without the prior written approval of the CITY.
 - 5.2.** CONSULTANT shall submit monthly invoices to the CITY describing the services performed, including times, dates, and names of persons performing the service.
 - 5.3.** Within thirty (30) days after the CITY's receipt of invoice, CITY shall make payment to the CONSULTANT based upon the services described on the invoice and approved by the CITY.
- 6. TERMINATION.** This Agreement shall commence upon the date all parties have signed the Agreement and shall run through March 16, 2016, or until the Not to Exceed amount set forth in section 5.1 has been reached provided, however, that the CITY reserves the right to terminate this Agreement at any time by giving ten

**CITY OF TRACY -- PROFESSIONAL SERVICES AGREEMENT
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days written notice to CONSULTANT. Upon termination, CONSULTANT shall give the CITY all original documents, including preliminary drafts and supporting documents, prepared by CONSULTANT for this Agreement. The CITY shall pay CONSULTANT for all services satisfactorily performed in accordance with this Agreement; up to the date notice is given.

7. **OWNERSHIP OF WORK.** All original documents prepared by CONSULTANT for this Agreement, whether complete or in progress, are the property of the CITY, and shall be given to the CITY at the completion of CONSULTANT's services, or upon demand from the CITY. No such documents shall be revealed or made available by CONSULTANT to any third party without the prior written consent of the City.
8. **ATTORNEY'S FEES.** In the event any legal action is commenced to enforce this Agreement, the prevailing party is entitled to reasonable attorney's fees, costs, and expenses incurred.
9. **INDEMNIFICATION.** CONSULTANT shall indemnify, defend, and hold harmless the CITY (including its elected officials, officers, agents, volunteers, and employees) from and against any and all claims, demands, damages, liabilities, costs, and expenses (including court costs and attorney's fees) resulting from or arising out of CONSULTANT's performance of services under this Agreement, except for such loss or damage arising from the sole negligence or willful misconduct of the CITY.
10. **BUSINESS LICENSE.** Prior to the commencement of any work under this Agreement, CONSULTANT shall obtain a City of Tracy Business License.
11. **INSURANCE.**
 - 11.1. **General.** CONSULTANT shall, throughout the duration of this Agreement, maintain insurance to cover CONSULTANT, its agents, representatives, and employees in connection with the performance of services under this Agreement at the minimum levels set forth herein.
 - 11.2. **Commercial General Liability** (with coverage at least as broad as ISO form CG 00 01 01 96) "per occurrence" coverage shall be maintained in an amount not less than \$2,000,000 general aggregate and \$1,000,000 per occurrence for general liability, bodily injury, personal injury, and property damage.
 - 11.3. **Automobile Liability** (with coverage at least as broad as ISO form CA 00 01 07 97, for "any auto") "claims made" coverage shall be maintained in an amount not less than \$1,000,000 per accident for bodily injury and property damage.
 - 11.4. **Workers' Compensation** coverage shall be maintained as required by the State of California.

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- 11.5. Professional Liability** “claims made” coverage shall be maintained to cover damages that may be the result of errors, omissions, or negligent acts of CONSULTANT in an amount not less than \$1,000,000 per claim.
- 11.6. Endorsements.** CONSULTANT shall obtain endorsements to the automobile and commercial general liability with the following provisions:
- 11.6.1** The CITY (including its elected officials, officers, employees, agents, and volunteers) shall be named as an additional “insured.”
- 11.6.2** For any claims related to this Agreement, CONSULTANT’s coverage shall be primary insurance with respect to the CITY. Any insurance maintained by the CITY shall be excess of the CONSULTANT’s insurance and shall not contribute with it.
- 11.7. Notice of Cancellation.** CONSULTANT shall obtain endorsements to all insurance policies by which each insurer is required to provide thirty (30) days prior written notice to the CITY should the policy be canceled before the expiration date. For the purpose of this notice requirement, any material change in the policy prior to the expiration shall be considered a cancellation.
- 11.8. Authorized Insurers.** All insurance companies providing coverage to CONSULTANT shall be insurance organizations authorized by the Insurance Commissioner of the State of California to transact the business of insurance in the State of California.
- 11.9. Insurance Certificate.** CONSULTANT shall provide evidence of compliance with the insurance requirements listed above by providing a certificate of insurance, in a form satisfactory to the City, no later than five (5) days after the execution of this Agreement.
- 11.10. Substitute Certificates.** No later than thirty (30) days prior to the policy expiration date of any insurance policy required by this Agreement, CONSULTANT shall provide a substitute certificate of insurance.
- 11.11. CONSULTANT’s Obligation.** Maintenance of insurance by the CONSULTANT as specified in this Agreement shall in no way be interpreted as relieving the CONSULTANT of any responsibility whatsoever (including indemnity obligations under this Agreement), and the CONSULTANT may carry, at its own expense, such additional insurance as it deems necessary.
- 12. ASSIGNMENT AND DELEGATION.** This Agreement and any portion thereof shall not be assigned or transferred, nor shall any of the CONSULTANT’s duties be delegated, without the written consent of the CITY. Any attempt to assign or delegate this Agreement without the written consent of the CITY shall be void and of no force and effect. A consent by the CITY to one assignment shall not be deemed to be a consent to any subsequent assignment.

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13. NOTICES.

13.1 All notices, demands, or other communications which this Agreement contemplates or authorizes shall be in writing and shall be personally delivered or mailed to the respective party as follows:

To CITY:

Kuldeep Sharma
City of Tracy
333 Civic Center Plaza
Tracy, CA 95376

To CONSULTANT:

Daniel R. Schack
Schack & Company, Inc.
1025 Central Avenue
Tracy, CA 95376

13.2 Communications shall be deemed to have been given and received on the first to occur of: (1) actual receipt at the address designated above, or (2) three working days following the deposit in the United States Mail of registered or certified mail, sent to the address designated above.

14. MODIFICATIONS. This Agreement may not be modified orally or in any manner other than by an agreement in writing signed by both parties.

15. WAIVERS. Waiver of a breach or default under this Agreement shall not constitute a continuing waiver or a waiver of a subsequent breach of the same or any other provision of this Agreement.

16. SEVERABILITY. In the event any term of this Agreement is held invalid by a court of competent jurisdiction, the Agreement shall be construed as not containing that term, and the remainder of this Agreement shall remain in full force and effect.

17. JURISDICTION AND VENUE. The interpretation, validity, and enforcement of the Agreement shall be governed by and construed under the laws of the State of California. Any suit, claim, or legal proceeding of any kind related to this Agreement shall be filed and heard in a court of competent jurisdiction in the County of San Joaquin.

18. ENTIRE AGREEMENT. This Agreement comprises the entire integrated understanding between the parties concerning the services to be performed for this project. This Agreement supersedes all prior negotiations, representations, or agreements.

19. COMPLIANCE WITH THE LAW. CONSULTANT shall comply with all local, state, and federal laws, whether or not said laws are expressly stated in this Agreement.

**CITY OF TRACY -- PROFESSIONAL SERVICES AGREEMENT
PROVING PROFESSIONAL STAFF SUPPORT SERVICES FOR
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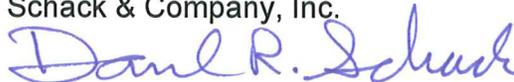
20. **STANDARD OF CARE.** Unless otherwise specified in this Agreement, the standard of care applicable to CONSULTANT's services will be the degree of skill and diligence ordinarily used by reputable professionals performing in the same or similar time and locality, and under the same or similar circumstances.

21. **SIGNATURES.** The individuals executing this Agreement represent and warrant that they have the right, power, legal capacity, and authority to enter into and to execute this Agreement on behalf of the respective legal entities of the CONSULTANT and the CITY. This Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

IN WITNESS WHEREOF the parties do hereby agree to the full performance of the terms set forth herein.

CITY OF TRACY

CONSULTANT
Schack & Company, Inc.



By: Brent H. Ives

Title: MAYOR

Date: _____

By: Daniel R. Schack

Title: President

Date: 03/07/13

Fed. Employer ID No. 68-0197400

Attest:



By: Richard Paulsen

Title: Vice President

Date: 03/07/13

By: Sandra Edwards

Title: CITY CLERK

Date: _____

Approved As To Form:

By: Daniel G. Sodergren

Title: CITY ATTORNEY

Date: _____

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EXHIBIT A
SCOPE OF SERVICES

TASK NO. 1

**I. PROJECT PRELIMINARY DOCUMENTATION, REVIEW AND COORDINATION
(PROJECT BY PROJECT BASIS):**

- A. Review the project scope, requirements, coordination and schedule with City staff and consultants.
 - 1. Review and confirm each project scope of services
 - 2. Confirm roles of project participants
 - 3. Discuss City's expectations and goals
 - 4. Establish and prepare project design/drafting schedule
- B. Review and coordinate with City for design/drafting and processing requirements.
- C. Complete necessary project research, obtain and review (with City staff) all available information, plans, reports and other documents (relevant to each assigned project.)
- D. The Project Preliminary Documentation, Review and Coordination services will be performed or completed at the City of Tracy Department of Engineering offices, or at other locations (as required or as needed.)

TASK NO. 2

II. DESIGN/DRAFTING TECHNICIAN SERVICES:

- A. The Design/Drafting Technician will provide design/drafting services to the City for the preparation of professional plans and details on a variety of Capital Improvement Projects, including roads, parks, utilities, off-site improvements, and all other projects as assigned.
- B. The Design/Drafting Technician will complete all work with minimum (or no) support and/or supervision provided by the City Engineer or other City staff. (Note: some administrative assistance may be provided by City staff for typing and procedural matters.)
- C. The Design/Drafting Technician will complete all computer-aided, design/drafting work (Plans and Details) at the Schack & Company, Inc. business office, 1025 Central Ave., Tracy.

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- D. All Plans and Details shall be prepared using AutoCad 2009 or newer format (or as approved by the City Engineer.) Finished drawings (at stages and/or at final completion) shall be delivered by electronic file to the City for review, comments and/or approval.
- E. The Design/Drafting Technician shall report directly to the City's Senior Civil Engineer or his designated representative as authorized by the City Engineer.
- F. During all phases of each project, the Design/Drafting Technician shall maintain clear and open communications, coordination and cooperation with the City Engineer, other staff, and other City departments.
- G. During each project, periodic meetings (as required) may be held at the City offices for project and plan reviews and comments.
- H. Requested professional assistance will be provided in a timely manner.

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Exhibit B

2013 FEE SCHEDULE

ENTITLEMENT PROCESSING/REPRESENTATION/MUNICIPAL NEGOTIATIONS:

Principal Engineer	\$270.00 / Hour
Associate	\$220.00 / Hour

REGISTERED CIVIL ENGINEER/PRINCIPAL ENGINEER.....	\$190.00 / Hour
ASSOCIATE ENGINEER/PROJECT MANAGER I.....	\$125.00 / Hour
ASSOCIATE ENGINEER/PROJECT MANAGER II.....	\$ 90.00 / Hour
DESIGN/DRAFTING TECHNICIAN.....	\$ 80.00 / Hour
ASSOCIATE ENGINEER/PROJECT MANAGER III.....	\$ 80.00 / Hour
ENGINEERING TECHNICIAN I/DESIGNER I.....	\$ 75.00 / Hour
BUILDING DESIGN/ARCHITECTURAL TECHNICIAN I.....	\$ 70.00 / Hour
ENGINEERING/ARCHITECTURAL TECHNICIAN II.....	\$ 60.00 / Hour
CONSTRUCTION PROJECT MANAGER/ESTIMATOR.....	\$ 80.00 / Hour
CLERICAL.....	\$ 45.00 / Hour
SPECIALIZED COMPUTER SYSTEM SERVICES.....	\$ 75.00 / Hour

FIELD WORK:

(Includes mileage and supplies within the Tracy Area)

2 - MAN SURVEY CREW.....	\$190.00 / Hour
COURT APPEARANCES/DEPOSITIONS (2 hour minimum).....	\$245.00 / Hour
BLUEPRINTS - 18" x 26".....	\$ 3.00 / Each
- 24" x 36".....	\$ 4.00 / Each
- 30" x 42".....	\$ 5.00 / Each

**CITY OF TRACY -- PROFESSIONAL SERVICES AGREEMENT
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PHOTO COPIES - 8.5" x 11".....	\$.30 / Each
- 8.5" x 14".....	\$.45 / Each
- 11" x 17".....	\$ 1.00 / Each

ELECTRONIC FILES: Charged at staff time to copy, e-mail, etc.
(CDs charged at \$4.50 each)

TRAVEL TIME: Charged for distances greater than 50-mile radius at one-half hourly rate

NOTE: Reimbursable project expenses paid by this office on behalf of client; outside consultant fees, agency fees, inspection fees, etc., will be billed to client at cost plus twenty percent (20%).

**CITY OF TRACY
PROFESSIONAL SERVICES AGREEMENT
PROVIDING PROFESSIONAL STAFF SUPPORT SERVICES FOR
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FOR DESIGN/DRAFTING FOR CAPITAL IMPROVEMENT PROJECTS**

THIS PROFESSIONAL SERVICES AGREEMENT (hereinafter "Agreement") is made and entered into by and between the CITY OF TRACY, a municipal corporation (hereinafter "CITY"), and **KJELDEN & SINNOCK & NEUDECK, INC.** (hereinafter "CONSULTANT").

RECITALS

- A. CONSULTANT has an Engineering Design/Drafting Technician on staff to provide qualified design/drafting services for a duration of three years with the possibility of a fourth year extension.
- B. On December 18, 2012, in compliance with Tracy Municipal Code, Chapter 2.20, CITY issued a Request for Proposals (RFP) for the PROJECT and received three (3) proposals. CITY staff determined CONSULTANT's proposal to be responsive to the RFP. After negotiations between CITY and CONSULTANT, the parties have reached an agreement for the performance of services in accordance with the terms set forth in this Agreement. On March 19, 2013, the City Council authorized the execution of this Agreement, pursuant to Resolution No. 2013-_____.
- C. CONSULTANT represents it has the qualifications, skills and experience to provide these services and is willing to provide services according to the terms of this Agreement.

NOW THEREFORE, THE PARTIES MUTUALLY AGREE AS FOLLOWS:

- 1. **SCOPE OF SERVICES.** CONSULTANT shall perform the services described in Exhibit "A" attached hereto and incorporated herein by reference. The services shall be performed by, or under the direct supervision of, CONSULTANT's Authorized Representative: **Steve C. Blankenship**. CONSULTANT shall not replace its Authorized Representative, nor shall CONSULTANT replace any of the personnel listed in Exhibit "A," nor shall CONSULTANT use any subcontractors or subconsultants, without the prior written consent of the CITY.
- 2. **TIME OF PERFORMANCE.** Time is of the essence in the performance of services under this Agreement and the timing requirements set forth herein shall be strictly adhered to unless otherwise modified in writing in accordance with this Agreement. CONSULTANT shall commence performance, and shall complete all required services no later than the dates set forth in Exhibit "A." Any services for which times for performance are not specified in this Agreement shall be commenced and completed by CONSULTANT in a reasonably prompt and timely manner based

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upon the circumstances and direction communicated to the CONSULTANT. CONSULTANT shall submit all requests for extensions of time to the CITY in writing no later than ten (10) days after the start of the condition which purportedly caused the delay, and not later than the date on which performance is due. CITY shall grant or deny such requests at its sole discretion.

3. **INDEPENDENT CONTRACTOR STATUS.** CONSULTANT is an independent contractor and is solely responsible for all acts of its employees, agents, or subconsultants, including any negligent acts or omissions. CONSULTANT is not CITY's employee and CONSULTANT shall have no authority, express or implied, to act on behalf of the CITY as an agent, or to bind the CITY to any obligation whatsoever, unless the CITY provides prior written authorization to CONSULTANT. Contractors and CONSULTANTS are free to work for other entities while under contract with the CITY. Contractors and CONSULTANTS are not entitled to CITY benefits.
4. **CONFLICTS OF INTEREST.** CONSULTANT (including its employees, agents, and subconsultants) shall not maintain or acquire any direct or indirect interest that conflicts with the performance of this Agreement. In the event that CONSULTANT maintains or acquires such a conflicting interest, any contract (including this Agreement) involving CONSULTANT's conflicting interest may be terminated by the CITY.
5. **COMPENSATION.**
 - 5.1. For services performed by CONSULTANT in accordance with this Agreement, CITY shall pay CONSULTANT on a time and expense basis, at the billing rates set forth in Exhibit "B," attached hereto and incorporated herein by reference. CONSULTANT's fee for this Agreement is Not To Exceed Three Hundred Seventy Four Thousand, Four Hundred Dollars (\$374,400.00). CONSULTANT's billing rates shall cover all costs and expenses of every kind and nature for CONSULTANT's performance of this Agreement. No work shall be performed by CONSULTANT in excess of the Not To Exceed amount without the prior written approval of the CITY.
 - 5.2. CONSULTANT shall submit monthly invoices to the CITY describing the services performed, including times, dates, and names of persons performing the service.
 - 5.3. Within thirty (30) days after the CITY's receipt of invoice, CITY shall make payment to the CONSULTANT based upon the services described on the invoice and approved by the CITY.
6. **TERMINATION.** This Agreement shall commence upon the date all parties have signed the Agreement and shall run through March 16, 2016, or until the Not to Exceed amount set forth in section 5.1 has been reached provided, however, that

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the CITY reserves the right to terminate this Agreement at any time by giving ten days written notice to CONSULTANT. Upon termination, CONSULTANT shall give the CITY all original documents, including preliminary drafts and supporting documents, prepared by CONSULTANT for this Agreement. The CITY shall pay CONSULTANT for all services satisfactorily performed in accordance with this Agreement; up to the date notice is given.

7. **OWNERSHIP OF WORK.** All original documents prepared by CONSULTANT for this Agreement, whether complete or in progress, are the property of the CITY, and shall be given to the CITY at the completion of CONSULTANT's services, or upon demand from the CITY. No such documents shall be revealed or made available by CONSULTANT to any third party without the prior written consent of the City.
8. **ATTORNEY'S FEES.** In the event any legal action is commenced to enforce this Agreement, the prevailing party is entitled to reasonable attorney's fees, costs, and expenses incurred.
9. **INDEMNIFICATION.** Consistent with the provisions of California Civil Code Section 2782.8, CONSULTANT shall indemnify, defend, and hold harmless the CITY (including its elected officials, officers, agents, volunteers, and employees) from and against any and all claims, demands, damages, liabilities, costs, and expenses (including court costs and attorney's fees) resulting from or arising out of CONSULTANT's performance of services under this Agreement, except for such loss or damage arising from the sole negligence or willful misconduct of the CITY.
10. **BUSINESS LICENSE.** Prior to the commencement of any work under this Agreement, CONSULTANT shall obtain a City of Tracy Business License.
11. **INSURANCE.**
 - 11.1. **General.** CONSULTANT shall, throughout the duration of this Agreement, maintain insurance to cover CONSULTANT, its agents, representatives, and employees in connection with the performance of services under this Agreement at the minimum levels set forth herein.
 - 11.2. **Commercial General Liability** (with coverage at least as broad as ISO form CG 00 01 01 96) "per occurrence" coverage shall be maintained in an amount not less than \$2,000,000 general aggregate and \$1,000,000 per occurrence for general liability, bodily injury, personal injury, and property damage.
 - 11.3. **Automobile Liability** (with coverage at least as broad as ISO form CA 00 01 07 97, for "any auto") "claims made" coverage shall be maintained in an amount not less than \$1,000,000 per accident for bodily injury and property damage.

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- 11.4. **Workers' Compensation** coverage shall be maintained as required by the State of California.
- 11.5. **Endorsements**. CONSULTANT shall obtain endorsements to the automobile and commercial general liability with the following provisions:
- 11.5.1 The CITY (including its elected officials, officers, employees, agents, and volunteers) shall be named as an additional "insured."
- 11.5.2 For any claims related to this Agreement, CONSULTANT's coverage shall be primary insurance with respect to the CITY. Any insurance maintained by the CITY shall be excess of the CONSULTANT's insurance and shall not contribute with it.
- 11.6. **Notice of Cancellation**. CONSULTANT shall obtain endorsements to all insurance policies by which each insurer is required to provide thirty (30) days prior written notice to the CITY should the policy be canceled before the expiration date. For the purpose of this notice requirement, any material change in the policy prior to the expiration shall be considered a cancellation.
- 11.7. **Authorized Insurers**. All insurance companies providing coverage to CONSULTANT shall be insurance organizations authorized by the Insurance Commissioner of the State of California to transact the business of insurance in the State of California.
- 11.8. **Insurance Certificate**. CONSULTANT shall provide evidence of compliance with the insurance requirements listed above by providing a certificate of insurance, in a form satisfactory to the City, no later than five (5) days after the execution of this Agreement.
- 11.9. **Substitute Certificates**. No later than thirty (30) days prior to the policy expiration date of any insurance policy required by this Agreement, CONSULTANT shall provide a substitute certificate of insurance.
- 11.10. **CONSULTANT's Obligation**. Maintenance of insurance by the CONSULTANT as specified in this Agreement shall in no way be interpreted as relieving the CONSULTANT of any responsibility whatsoever (including indemnity obligations under this Agreement), and the CONSULTANT may carry, at its own expense, such additional insurance as it deems necessary.
12. **ASSIGNMENT AND DELEGATION**. This Agreement and any portion thereof shall not be assigned or transferred, nor shall any of the CONSULTANT's duties be delegated, without the written consent of the CITY. Any attempt to assign or delegate this Agreement without the written consent of the CITY shall be void and of no force and effect. A consent by the CITY to one assignment shall not be deemed to be a consent to any subsequent assignment.

**CITY OF TRACY -- PROFESSIONAL SERVICES AGREEMENT
PROVING PROFESSIONAL STAFF SUPPORT SERVICES FOR
ENGINEERING DIVISION OF DEVELOPMENT SERVICES FOR DESIGN/DRAFTING
FOR CAPITAL IMPROVEMENT PROJECTS**

Page 5 of 8

13. NOTICES.

13.1 All notices, demands, or other communications which this Agreement contemplates or authorizes shall be in writing and shall be personally delivered or mailed to the respective party as follows:

To CITY:

Kuldeep Sharma
City of Tracy
333 Civic Center Plaza
Tracy, CA 95376

To CONSULTANT:

Stephen K. Sinnock
Kjeldsen & Sinnock & Neudeck, Inc.
711 N. Pershing Avenue
Stockton, CA 95201

13.2 Communications shall be deemed to have been given and received on the first to occur of: (1) actual receipt at the address designated above, or (2) three working days following the deposit in the United States Mail of registered or certified mail, sent to the address designated above.

14. MODIFICATIONS. This Agreement may not be modified orally or in any manner other than by an agreement in writing signed by both parties.

15. WAIVERS. Waiver of a breach or default under this Agreement shall not constitute a continuing waiver or a waiver of a subsequent breach of the same or any other provision of this Agreement.

16. SEVERABILITY. In the event any term of this Agreement is held invalid by a court of competent jurisdiction, the Agreement shall be construed as not containing that term, and the remainder of this Agreement shall remain in full force and effect.

17. JURISDICTION AND VENUE. The interpretation, validity, and enforcement of the Agreement shall be governed by and construed under the laws of the State of California. Any suit, claim, or legal proceeding of any kind related to this Agreement shall be filed and heard in a court of competent jurisdiction in the County of San Joaquin.

18. ENTIRE AGREEMENT. This Agreement comprises the entire integrated understanding between the parties concerning the services to be performed for this project. This Agreement supersedes all prior negotiations, representations, or agreements.

19. COMPLIANCE WITH THE LAW. CONSULTANT shall comply with all local, state, and federal laws, whether or not said laws are expressly stated in this Agreement.

**CITY OF TRACY -- PROFESSIONAL SERVICES AGREEMENT
PROVING PROFESSIONAL STAFF SUPPORT SERVICES FOR
ENGINEERING DIVISION OF DEVELOPMENT SERVICES FOR DESIGN/DRAFTING
FOR CAPITAL IMPROVEMENT PROJECTS**

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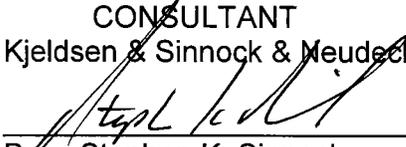
20. **STANDARD OF CARE.** Unless otherwise specified in this Agreement, the standard of care applicable to CONSULTANT's services will be the degree of skill and diligence ordinarily used by reputable professionals performing in the same or similar time and locality, and under the same or similar circumstances.
21. **SIGNATURES.** The individuals executing this Agreement represent and warrant that they have the right, power, legal capacity, and authority to enter into and to execute this Agreement on behalf of the respective legal entities of the CONSULTANT and the CITY. This Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

IN WITNESS WHEREOF the parties do hereby agree to the full performance of the terms set forth herein.

CITY OF TRACY

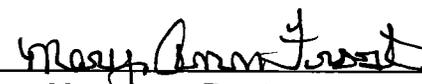
CONSULTANT
Kjeldsen & Sinnock & Meudeck, Inc.

By: Brent H. Ives
Title: MAYOR
Date: _____

By: 
Title: President
Date: 3-1-2013
Fed. Employer ID No. 94-2877535

Attest:

By: Sandra Edwards
Title: CITY CLERK
Date: _____


By: Mary Ann Frost
Title: Chief Financial Officer
Date: 3-1-13

Approved As To Form:

By: Daniel G. Sodergren
Title: CITY ATTORNEY
Date: _____

**CITY OF TRACY -- PROFESSIONAL SERVICES AGREEMENT
PROVIDING PROFESSIONAL STAFF SUPPORT SERVICES FOR
ENGINEERING DIVISION OF DEVELOPMENT SERVICES FOR DESIGN/DRAFTING
FOR CAPITAL IMPROVEMENT PROJECTS**

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**EXHIBIT A
SCOPE OF SERVICES**

TASK NO. 1

**I. PROJECT PRELIMINARY DOCUMENTATION, REVIEW AND COORDINATION
(PROJECT BY PROJECT BASIS):**

- A. Review the project scope, requirements, coordination and schedule with City staff and consultants.
 - 1. Review and confirm each project scope of services
 - 2. Confirm roles of project participants
 - 3. Discuss City's expectations and goals
 - 4. Establish and prepare project design/drafting schedule
- B. Review and coordinate with City for design/drafting and processing requirements.
- C. Complete necessary project research, obtain and review (with City staff) all available information, plans, reports and other documents (relevant to each assigned project.)
- D. The Project Preliminary Documentation, Review and Coordination services will be performed or completed at the City of Tracy Department of Engineering offices, or at other locations (as required or as needed.)

TASK NO. 2

II. DESIGN/DRAFTING TECHNICIAN SERVICES:

- A. The Design/Drafting Technician will provide design/drafting services to the City for the preparation of professional plans and details on a variety of Capital Improvement Projects, including roads, parks, utilities, off-site improvements, and all other projects as assigned.
- B. The Design/Drafting Technician will complete all work with minimum (or no) support and/or supervision provided by the City Engineer or other City staff. (Note: some administrative assistance may be provided by City staff for typing and procedural matters.)
- C. The Design/Drafting Technician will complete all computer-aided, design/drafting work (Plans and Details) at the offices of City of Tracy.

CITY OF TRACY -- PROFESSIONAL SERVICES AGREEMENT
PROVIDING PROFESSIONAL STAFF SUPPORT SERVICES FOR
ENGINEERING DIVISION OF DEVELOPMENT SERVICES FOR DESIGN/DRAFTING
FOR CAPITAL IMPROVEMENT PROJECTS

Page 8 of 8

- D. All Plans and Details shall be prepared using AutoCad 2009 or newer format (or as approved by the City Engineer.) Finished drawings (at stages and/or at final completion) shall be delivered by electronic file to the City for review, comments and/or approval.
- E. The Design/Drafting Technician shall report directly to the City's Senior Civil Engineer or his designated representative as authorized by the City Engineer.
- F. During all phases of each project, the Design/Drafting Technician shall maintain clear and open communications, coordination and cooperation with the City Engineer, other staff, and other City departments.
- G. During each project, periodic meetings (as required) may be held at the City offices for project and plan reviews and comments.
- H. Requested professional assistance will be provided in a timely manner.

KJELDEN, SINNOCK & NEUDECK, INC.

CIVIL ENGINEERS AND LAND SURVEYORS

711 NORTH PERSHING AVENUE
STOCKTON, CALIFORNIA 95203-2152

TELEPHONE (209) 946-0268

FAX (209) 946-0296

E-MAIL ksn@ksninc.com

STEPHEN K. SINNOCK

CHRISTOPHER H. NEUDECK

KENNETH L. KJELDEN
RETIRED

EXHIBIT B

HOURLY RATE SCHEDULE FOR STEVE BLANKENSHIP

Year	Hourly Rate for Design/Drafting Technician
2013	\$75.00 per hour
2014	\$77.25 per hour
2015	\$79.50 per hour

Note: For services and expenses other than the Design/Drafting Technician services provided by Steve Blankenship under this agreement, KSN will be compensated in accordance with KSN's standard Fee Schedule for Prevailing Wage Projects in effect at the time the services are provided. KSN's 2012 Fee Schedule for Prevailing Wage Projects (effective through June 30, 2013) is attached for reference.

KJELSDEN, SINNOCK & NEUDECK, INC.

CIVIL ENGINEERS AND LAND SURVEYORS

STEPHEN K. SINNOCK
CHRISTOPHER H. NEUDECK

711 NORTH PERSHING AVENUE
STOCKTON, CALIFORNIA 95203

TELEPHONE (209) 946-0268
FAX (209) 946-0296
E-MAIL ksn@ksninc.com

KENNETH L. KJELSDEN
RETIRED

2012 FEE SCHEDULE

PREVAILING WAGE PROJECTS

Effective through June 30, 2013

SERVICES

HOURLY RATES

Engineering and Consulting

Principal Engineer	\$200.00
Associate Engineer	\$180.00
Senior Assistant Engineer	\$150.00
Assistant Engineer	\$130.00
Junior Engineer	\$110.00
Senior Surveyor	\$170.00
Surveyor	\$140.00
Assistant Surveyor	\$115.00
Senior Technician/Draftsperson/CAD Operator	\$95.00
Junior Technician/Draftsperson/CAD Operator	\$85.00
Clerical	\$65.00

Inspector & Vehicle \$160.00

Survey Crew

One Man Field Crew & Vehicle	\$170.00
Two Man Field Crew & Vehicle	\$260.00

Special Consultants Cost Plus 10%

Reimbursable

Mileage	\$0.565 Per Mile
Special Printing, Photos, Copies, Travel, Telephone, Fax, Survey Materials, etc.	Cost Plus 10%
Trimble 4800/5700 GPS	\$25.00 Per Receiver Per Hour
Leica TCRA 1103 Robotic Total Station	\$35.00 Per Hour
Leica HDS Scanner	\$150.00 Per Hour
18' Boston Whaler	\$55.00 Per Hour

Note: Fees are due and payable within 30 days from the date of billing. Fees past due may be subject to a finance charge computed on the basis of 1½ % of the unpaid balance per month.

Hourly rates are subject to review and adjustment July 1, 2013.

RESOLUTION 2013-_____

APPROVE PROFESSIONAL SERVICES AGREEMENT (PSA) WITH SCHACK AND COMPANY, INC. TO PROVIDE TECHNICAL SUPPORT SERVICES FOR MULTIPLE CAPITAL IMPROVEMENT PROJECTS, AUTHORIZE THE MAYOR TO EXECUTE THE AGREEMENT, AND AUTHORIZE THE DIRECTOR OF DEVELOPMENT SERVICES TO EXTEND THE AGREEMENT FOR ANOTHER YEAR IF NEEDED

WHEREAS, Services of consultants are needed to provide computer aided drafting (CAD) to complete various capital improvement projects in a timely manner; and

WHEREAS, On December 18, 2012, in accordance with the Tracy Municipal Code Section 2.20.140, a "Notice of Request for Proposals" was posted on the City of Tracy's website; and

WHEREAS, In response to the "Notice of Request for Proposals," on January 13, 2013, the City received three (3) proposals from consultants; and

WHEREAS, After careful review and evaluation of proposals, Schack and Company, Inc. of Tracy, California was found to be one of the two most qualified consultants to provide the necessary services; and

WHEREAS, The scope of work for the proposed consultant agreement will be on an as-needed basis and shall not exceed \$399,360 over a three year period; and

WHEREAS, The cost of services will be charged to the Capital Improvement projects for which the consultant will be required to work, and

WHEREAS, There will be no impact to the General Fund.

NOW, THEREFORE, BE IT RESOLVED, That City Council approve, by resolution, a Professional Services Agreements with Schack and Company, Inc of Tracy California for a not-to-exceed amount of \$399,360, to provide professional support services in assisting with design/drafting of the Capital Improvement Projects for a period of three (3) years, authorize the Mayor to execute Professional Services Agreement and further, authorize the Development Services Director to extend the agreement for another year if needed.

The foregoing Resolution was adopted by the Tracy City Council on the 19th day of March, 2013 by the following vote:

AYES: COUNCIL MEMBERS:
NOES: COUNCIL MEMBERS:
ABSENT: COUNCIL MEMBERS:
ABSTAIN: COUNCIL MEMBERS:

MAYOR

ATTEST:

CITY CLERK

RESOLUTION 2013-_____

APPROVE PROFESSIONAL SERVICES AGREEMENTS (PSA) WITH KJELDSSEN, SINNOCK & NEUDECK, INC. (KSN) TO PROVIDE TECHNICAL SUPPORT SERVICES FOR MULTIPLE CAPITAL IMPROVEMENT PROJECTS, AUTHORIZE THE MAYOR TO EXECUTE THE AGREEMENT, AND AUTHORIZE THE DIRECTOR OF DEVELOPMENT SERVICES TO EXTEND THE AGREEMENT FOR ANOTHER YEAR IF NEEDED

WHEREAS, Services of consultants are needed to provide computer aided drafting (CAD) to complete various capital improvement projects in a timely manner; and

WHEREAS, On December 18, 2012, in accordance with the Tracy Municipal Code Section 2.20.140, a "Notice of Request for Proposals" was posted on the City of Tracy's website; and

WHEREAS, In response to the "Notice of Request for Proposals," on January 13, 2013, the City received three (3) proposals from consultants; and

WHEREAS, After careful review and evaluation of proposals, KSN, Inc. of Stockton, California was found to be one of the two most qualified consultants to provide the necessary services; and

WHEREAS, The scope of work for the proposed consultant agreement will be on an as-needed basis and shall not exceed \$374,400 over a three year period; and

WHEREAS, The cost of services will be charged to the Capital Improvement projects for which the consultant will be required to work, and

WHEREAS, There will be no impact to the General Fund.

NOW, THEREFORE, BE IT RESOLVED, That City Council approve, by resolution, a Professional Services Agreements with KSN, Inc. of Stockton, California for a not-to-exceed amount of \$374,400, to provide professional support services in assisting with design/drafting of the Capital Improvement Projects for a period of three (3) years, authorize the Mayor to execute Professional Services Agreement and further, authorize the Development Services Director to extend the agreement for another year if needed.

The foregoing Resolution was adopted by the Tracy City Council on the 19th day of March, 2013 by the following vote:

AYES: COUNCIL MEMBERS:
NOES: COUNCIL MEMBERS:
ABSENT: COUNCIL MEMBERS:
ABSTAIN: COUNCIL MEMBERS:

MAYOR

ATTEST:

CITY CLERK

March 19, 2013

AGENDA ITEM 1.E

REQUEST

AUTHORIZE AMENDMENT OF THE CITY'S CLASSIFICATION AND COMPENSATION PLANS AND POSITION CONTROL ROSTER BY APPROVING THE ESTABLISHMENT OF A CLASS SPECIFICATION AND PAY RANGE FOR A PART-TIME, LIMITED SERVICE DRUG ABUSE RESISTANCE EDUCATION (D.A.R.E.) OFFICER

EXECUTIVE SUMMARY

The requested action establishes a new part-time, limited service classification for a Drug Abuse Resistance Education (D.A.R.E.) Officer in the Police Department. This classification will teach drug abuse resistance education curriculum to elementary/middle school students within the Tracy City limits.

DISCUSSION

The City Council held two public discussions at the July 20, 2010 and March 1, 2011 Council meetings to discuss the effectiveness of the Drug Abuse Resistance Education (D.A.R.E.) program in Tracy and the appropriate funding level for the program going forward. The Council acknowledged the value of the D.A.R.E. program to the community and directed staff to allocate \$45,000 per fiscal year for authorized expenses, including materials and supplies for the non-profit "Tracy D.A.R.E.," which currently facilitates D.A.R.E. instruction to all 5th grade students within the City of Tracy city limits.

Recent discussions between the City of Tracy and the non-profit Tracy D.A.R.E. revealed that Tracy D.A.R.E. is having difficulties securing ongoing funding for the D.A.R.E. curriculum, potentially jeopardizing the program. Given that the community values the program, that the City Council has endorsed its continuation, the Police Department would like to move the program in-house and create a part-time, limited service classification. Creating a part-time D.A.R.E. Officer position would allow the Police Department more oversight over the program and ensure its continuation. Additionally, this action will enable the D.A.R.E. program to be combined with Tracy Police Department gang prevention education, which was successfully introduced through a pilot program in 2012. Last, the creation of the D.A.R.E. position will enhance the Police Department's partnership with Tracy Unified Schools and provide the support needed to positively engage Tracy youth.

This report recommends establishing a job classification and pay range for the new part-time, limited service position.

Establish Classification Specification and Pay Range: Drug Abuse Resistance Education (D.A.R.E.) Officer – (Part-Time, Limited Service):

Staff recommends the hourly rate of pay range for this part-time, limited service position range from \$20 to \$35 per hour. This classification will be responsible for presenting

drug and gang prevention curriculum to elementary/middle school students within the Tracy City limits.

STRATEGIC PLAN

This agenda item supports the organizational efficiency strategic plan and specifically implements the following goal:

Goal 4: Ensure long-term viability and enhancement of the City's workforce.

FISCAL IMPACT

There is no General Fund fiscal impact as a result of establishing this classification. Via Council resolution in FY 12/13, approximately \$45,000 was allocated to the Police Department operating budget to fund the D.A.R.E. program. It is anticipated that this amount will be included in the proposed FY 13/14 budget; \$35,000 will be apportioned for salary and \$10,000 for applicable D.A.R.E. materials. Any additional expenses incurred will be paid by the non-profit Tracy D.A.R.E.

RECOMMENDATION

That the City Council, by resolution, authorize the Administrative Services Director to amend the City's Classification and Compensation Plans, and the Budget Officer to amend the City's Position Control Roster by approving the establishment of the classification specification and pay range for a part-time, limited service D.A.R.E. Officer.

Prepared by: Judy Carlos, HR Analyst & Jeremy Watney, Police Captain

Reviewed by: Jenny Haruyama, Administrative Services Director & Gary R. Hampton, Chief of Police

Approved by: R. Leon Churchill, Jr., City Manager

Attachment: Drug Abuse Resistance Education (D.A.R.E.) Officer job description

DRUG ABUSE RESISTANCE EDUCATION (D.A.R.E) OFFICER

Class Title: D.A.R.E Officer
Department: Police
EEO Code: 69
FLSA Status: Non-exempt

Class Code: XXXXX
Bargaining Group: Limited Service
Effective Date: March 19, 2013

DESCRIPTION

Under general direction of the Chief of Police; provides Drug Abuse Resistance Education Curriculum to elementary/middle school students within the City of Tracy. Serves as liaison with the local schools; coordinates D.A.R.E program activities with local school administrators, teachers, parents and peers.

SUPERVISION RECEIVED AND EXERCISED

General supervision is provided by Police Captain or others as directed by the Police Chief.

EXAMPLES OF IMPORTANT AND ESSENTIAL DUTIES

Duties may include, but are not limited to, the following:

Instruct elementary/middle school students in a class-room environment of the D.A.R.E. curriculum including effects of drugs, building self-esteem, drug awareness, bullying, and gang avoidance; including lesson plans and grade school projects.

Interact with students, school administrators, teachers and parents outside of the classroom environment.

Prepare, organize, and facilitate presentations for various youth related activities, including the National Night Out and Public Safety Fairs.

Attend Parent-Teacher Association meetings; present information; discuss issues at schools related to student safety and law enforcement.

Coordinate school and community programs with other Police personnel including the School Resource Officers.

Promote the values and vision of the Tracy Police Department.

Maintain relations with school principals and other key school personnel.

Prepare teaching materials and aids including lessons plans, student handouts, visual aids, posters, and props.

Prepare and distribute student notebooks and folders, review homework assignments.

Perform related duties as assigned by the Chief of Police or designee.

MINIMUM QUALIFICATIONS

Knowledge of:

- D.A.R.E. curriculum and teaching techniques and procedures.
- Public relations procedures and techniques.
- Principles, practices, and methods of crime prevention and law enforcement.

Ability to:

- Effectively present materials and information to students and community groups.
- Identify and respond to sensitive community and organizational issues, concerns and needs.
- Communicate clearly and concisely, both orally and in writing.
- Maintain confidentiality.
- Interact with children, students and adults from diverse social and economic backgrounds.
- Interpret and explain city law enforcement policies and procedures.
- Effectively lead, instruct, and teach both peers and students.

EDUCATION AND EXPERIENCE

Any combination of experience and training that would likely provide the required knowledge and abilities is qualifying. A typical way to obtain the knowledge and abilities would be:

Education:

Equivalent to a High school diploma or GED equivalent.

Experience:

Two years teaching D.A.R.E. curriculum is desirable.

SPECIAL REQUIREMENTS

This job may require occasionally working evenings or weekends.

This job requires a Criminal Background check and fingerprinting.

LICENSES AND CERTIFICATES

Possession of, or ability to obtain an appropriate, valid California drivers' license.

Possession of a D.A.R.E. Officer Certification at time of appointment.

TOOLS AND EQUIPMENT USED

Requires frequent use of personal computer and related software programs; telephone, copy machine and fax machine.

PHYSICAL DEMANDS

The physical demands described here are representative of those that must be met by an employee to successfully perform the essential functions of this job. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.

Vision adequate to operate vehicles and office equipment, read instructions and follow directions; hearing adequate to converse on telephone and in person; body mobility adequate to drive and perform required office duties including reaching and bending for files and related items; use of hands and fingers adequate for operating vehicles, writing, typing, computer, copier, and fax machine and related functions; ability to lift office files, binders and small office equipment, as needed.

While performing the duties of this job, the employee is frequently required to walk, sit, talk, and/or hear. The employee is frequently required to use hands to finger, handle, feel, or operate objects, tools, or controls, and reach with hands and arms.

Position requires sitting and computer work part of the time, and traveling to and from locations in the community at other times.

WORK ENVIRONMENT

The work environment characteristics described here are representative of those an employee encounters while performing the essential functions of this job. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.

The employee performs duties both in an office environment as well as in the community at locations such as homes, businesses, schools.

The duties listed above are intended only as illustrations of the various types of work that may be performed. The omission of specific statements of duties does not exclude them from the position if the work is similar, related, or a logical assignment to the position.

This job description does not constitute an employment agreement between the City of Tracy and the employee and is subject to change by the City as the needs of the City and/or the requirements of the job change.

RESOLUTION _____

AUTHORIZE AMENDMENT OF THE CITY'S CLASSIFICATION AND COMPENSATION PLANS AND POSITION CONTROL ROSTER BY APPROVING THE ESTABLISHMENT OF A CLASS SPECIFICATION AND PAY RANGE FOR A DRUG ABUSE RESISTANCE EDUCATION (D.A.R.E.) OFFICER, A PART-TIME, LIMITED SERVICE POSITION IN THE POLICE DEPARTMENT

WHEREAS, The City has a Classification and Compensation Plan, and a Position Control Roster; and

WHEREAS, The City recognizes the value of administering the D.A.R.E. program to grade/middle school students and has allocated \$45,000 each fiscal year to cover authorized expenses, and

WHEREAS, The creation of a part-time, limited service D.A.R.E. Officer position will allow the Police Department more oversight of the program, and

WHEREAS, It is necessary to amend the City Classification and Compensation Plans and the Position Control Roster effective March 19, 2013 as follows:

Establish Classification and Compensation

Drug Abuse Resistance Education (D.A.R.E.) Officer: \$20 to \$35 per hour

NOW THEREFORE BE IT RESOLVED, that the City Council authorizes the Administrative Services Director to amend the City's Classification Plan for the established classification; and

BE IT FURTHER RESOLVED, that the Budget Officer is authorized to amend the Compensation Plan and the Position Control Roster to reflect the approved changes.

* * * * *

The foregoing Resolution _____ was adopted by the Tracy City Council the 19th day of March, 2013, by the following vote:

AYES: COUNCIL MEMBERS:

NOES: COUNCIL MEMBERS:

ABSENT: COUNCIL MEMBERS:

ABSTAIN: COUNCIL MEMBERS:

Mayor

ATTEST:

City Clerk

AGENDA ITEM 3

REQUEST

PUBLIC HEARING TO INTRODUCE AN ORDINANCE AMENDING TRACY MUNICIPAL CODE SECTIONS 10.12.060 AND 10.12.080 AND ADDING A NEW SECTION 10.12.065 RELATING TO COMPLIANCE WITH REGIONAL HOUSING NEEDS ALLOCATIONS AND STATE AND FEDERAL LAW RELATING TO DEED RESTRICTIONS – THE APPLICATION IS INITIATED BY THE CITY OF TRACY – APPLICATION NUMBER ZA12-0008

EXECUTIVE SUMMARY

This agenda item involves introducing an ordinance to amend the text of the Tracy Municipal Code to allow for the City to issue building permits in excess of those allowed through the City's Residential Growth Management Ordinance (GMO) in order to meet the City's Regional Housing Needs Allocation, as required by the State Department of Housing and Community Development.

DISCUSSION

Background

The State Department of Housing and Community Development (HCD) requires that Cities adopt Housing Elements for five-year cycles. The intent of the adoption of the document is to address the housing needs of all economic segments of the community, identifying how the housing needs of the existing and future residents of Tracy can be met. Tracy's Housing Element for the 2009-2014 cycle was adopted by City Council on May 15, 2012, and certified by HCD on July 26, 2012.

Part of the approval of the City's Housing Element is a Housing Plan that includes all of the implementing tools for the 2009-2014 Housing Element. Program 13 of this plan, under the category of "Remove Governmental Constraints" is a proposal to amend the City's Growth Management Ordinance (GMO) to remove the governmental constraint of annual limitations on Residential Growth Allotments (RGAs) and building permits (Attachment A). Specifically, the amendment would allow the City to issue building permits up to the Regional Housing Needs Allocation (RHNA) number to achieve its obligation in each income category. This program also requires that due to the inconsistency with state and federal housing programs, the deed restriction of 55 years on affordable units must be revised to a deed restriction of ten years.

Tracy's GMO allows for a maximum of 750 RGAs and building permits to be issued annually, with an average of 600 to be maintained (calculated from January 2000 to present day). These limits were established in 2000 by an initiative measure ("Measure A"). There are several exemptions to these annual caps, including home remodels, house replacements, secondary residential units (also referred to as mother-in-law units), and small projects such as single custom homes that meet certain requirements.

The City's RHNA obligation for this Housing Element Cycle (2009-2014) is 4,888 units total (divided among all four income categories: Very Low, Low, Moderate and Above Moderate). The numerical limits of the GMO (600 annual average) would not allow a rate of residential construction during this Housing Element cycle that would achieve the RHNA. With less than two years left in the cycle, that would allow only 1,800 new housing units – 2695 short of the RHNA.

Measure A contains the following language:

Nothing in this Initiative Ordinance shall be construed to preclude, prohibit or limit the City from complying with any requirements under state housing law. To the extent that any provision of this Initiative Ordinance can be read to conflict with state housing law, it shall be read to allow for compliance with state housing law, while honoring the intent and purpose of the Initiative Ordinance.

Therefore, in order to comply with state law while at the same time honoring the intent of Measure A, on March 1, 2011, City Council directed staff to propose to HCD an amendment to the City's GMO that would allow for building permits for housing units to be issued in order to meet the City's RHNA obligation. Staff proposed the amendment to HCD in the form of a revised draft Housing Element with such provisions, and HCD responded by certifying the Housing Element upon the condition that we amend the GMO accordingly. This amendment must be completed within one year from the certification of the Housing Element (by July of 2013). Additionally, the program requires the City to reduce the deed restriction on affordable units from 55 years to ten years.

Proposed Growth Management Ordinance Amendments

The proposed amendment to the GMO contains limited changes to the existing regulations in order to keep the scope of the changes as narrow as possible, while still meeting the requirements of State law.

The proposed amendment is contained in the draft Ordinance. The proposal would add a section discussing RHNA compliance that would allow for building permits for residential housing units to be issued in excess of the 600 average and 750 maximum in order to meet the RHNA for Tracy for the Housing Element cycle.

Although the Housing Element characterizes the proposed amendment to the GMO as an "exemption," what the proposed amendment actually does is clarify that the GMO does not apply to the extent that there is a conflict with state law RHNA requirements. The proposed amendment provides in relevant part that ". . . in any calendar year, once building permits have been issued for the number of residential units permitted by this chapter, the City shall issue additional building permits for residential dwelling units if they are necessary to achieve the RHNA goals in a particular income category (during each planning period)."

The proposed amendment also provides that, for the sole purpose of calculating the RGA and building permit averages contained in the GMO, any building permits issued under the authority of the proposed amendment shall be treated as if an RGA and a

building permit were issued under the GMO. This provision was clarified based on comments received at the Planning Commission hearing on the proposed amendment.

The discussion at the Planning Commission meeting involved why building permit, but not RGAs were proposed to be issued to meet the RHNA. RGAs and building permits are currently tracked in the same manner, and the same number of each are available each calendar year. At one time, the RGA process was used to ensure that infrastructure requirements (such as water, sewer, schools, parks, etc.) had been met prior to the issuance of a building permit. There are numerous other regulations and systems in place that cause these requirements to be met before any project application can even be considered complete and potentially approved. These include the Subdivision and Development Review processes in accordance with Tracy Municipal Code Chapter 12 and Sections 10.08.3290 through 10.08.4110. Therefore, because every residential development application is required to ensure that the appropriate infrastructure improvements are in place (or will be constructed with the project) prior to project approval (such as a tentative subdivision map or development review approval), the RGA process no longer serves as a tool to verify infrastructure improvements. Because of this, acquiring RGAs prior to building permits no longer serves any practical purpose. The sole reason RGAs remain within the Tracy Municipal Code is that Measure A is in place and requires them. It should also be noted that there are various exemptions from the GMO, such as single custom homes, secondary dwelling units, and dwelling unit replacements that do not require RGAs, but are otherwise evaluated for infrastructure compliance, and do obtain building permits.

The amendment also makes the timeframe for maintenance of housing affordability consistent with state and federal law requirements. Minor clarifications to Tracy Municipal Code Section 10.12.060 regarding exemptions are also proposed, and do not add, change or delete any exemptions, but rather create sub-titles to ease understanding and readability of the section.

CEQA Compliance

The proposed amendments to the Growth Management Ordinance are consistent with the Initial Study and Negative Declaration for the Housing Element adopted by the City Council on May 15, 2012. Pursuant to California Environmental Quality Act (CEQA) Guidelines Section 15183, no further environmental review is required.

Implementing a regulation to allow for the issuance of permits up to the RHNA does not have any environmental effects that were not already analyzed in the General Plan and in the Initial Study and Negative Declaration for the Housing Element. This amendment does not change any policies or regulations that have not already been analyzed in the existing environmental documentation.

There are no environmental effects that are peculiar to this project or that have not been previously analyzed because it does not affect a specific site, but rather implements a policy within the General Plan. Any future development that may result from this amendment will be subject to further site-specific environmental analysis. There are also no significant off-site or cumulative impacts that have not been previously discussed or any new information that was not known at the time of the Initial Study and Negative Declaration for the Housing Element.

Planning Commission Discussion

The Planning Commission held a public hearing to discuss the proposed ordinance on November 14, 2012 and voted 3-2 recommending that the Council not approve the proposed ordinance because it did not clearly state that RGAs would be counted as a part of building permit issuance (Attachment B). As mentioned earlier, this provision has been added to the ordinance.

FISCAL IMPACT

This agenda item will not require any expenditure from the General Fund other than staff time.

RECOMMENDATION

Staff recommends that the City Council introduce an Ordinance adding Tracy Municipal Code Section 10.12.065, and amending Tracy Municipal Code Sections 10.12.060, and 10.12.080, regarding building permit issuance for housing units to meet the RHNA for the Housing Element cycle and revising the timeline of affordable housing deed restrictions.

Prepared by: Victoria Lombardo, Senior Planner

Reviewed by: Bill Dean, Assistant Development Services Director
Andrew Malik, Development Services Director

Approved by: R. Leon Churchill, Jr., City Manager

ATTACHMENTS

Attachment A – Housing Element Excerpt related to RHNA GMO revision
Attachment B – Planning Commission minutes from November 14, 2012
Attachment C – Proposed Ordinance in strikethrough-underline format

Funding Sources: Departmental Budget

Program 13: Growth Management Ordinance (GMO)

Under the GMO, builders must obtain a Residential Growth Allotment (RGA) in order to secure a residential building permit. The GMO limits the number of RGA's and building permits to an average of 600 housing units per year for above moderate income housing with a maximum of 750 units in any single year. The City is proposing to amend the GMO to ensure that the RHNA can be entirely accommodated within each income category for the Housing Element planning period. Specifically, the City is proposing to amend the GMO which would allow issuance of building permits, up to the City's RHNA in each income category based on HCD criteria. Should the demand for building permits exceed Measure A limits in a calendar year, the City would issue building permits until the City's RHNA obligation in each income category for the planning period has been met. The GMO shall be revised to include a new "RHNA exemption". The number of RGAs and building permits issued under this exemption shall be included in the existing calculations for GMO averages. Additionally, in no RHNA planning period shall the City issue permits that exceed the higher of GMO maximums or RHNA by income category.

By Contrast, current exemptions in the GMO include the following: (1) rehabilitations or additions to existing structures; (2) conversions of apartments to condominiums; (3) replacement of previously existing dwelling units that had been demolished; (4) construction of "model homes" until they are converted to residential units; (5) development of a project with four or fewer dwelling units; and (6) secondary residential units.

With the exception of the new RHNA exemption, residential projects currently exempt from the GMO are not counted toward the 600 annual average or the 750 annual maximum. The RHNA exemption, in contrast to the other exemptions listed above, would be limited to the number of permits necessary to achieve the RHNA for each income category during each Housing Element planning period.

In addition, the current GMO requires that the affordable units utilizing the affordable housing exemption be deed restricted for 55 years. Recognizing that the 55-year deed restriction term is not consistent with several State and federal housing programs, the City will be amending the GMO to reduce the affordability restriction to ten years.

Objectives and Timeframe:

- Amend the GMO within one year of the adoption of the Housing Element.
- Annually monitor and evaluate the Growth Management Ordinance for the impacts on the cost, supply and timing of housing including seeking input from residential developers and affordable housing stakeholders in reviewing the effects of the GMO. The annual review will analyze the ability to accommodate the City's regional housing need, constraints on supply and affordability of housing and the process for applying and reviewing allocations. The review will reflect the RHNA as a minimum and consider impacts on overall housing supply in addition to accommodating the RHNA. Factors to be considered include:
 - New RHNA exemption program;
 - Overall impacts on housing supply based on the new RHNA exemption in addition to the annual limit;
 - Number of building permits issued under the exemption by income categories and housing type;
 - Number of total applications, applications approved or denied and developer interest in applications;
 - Timing for approving allocations; and
 - Potential uncertainty associated with scoring criteria used to evaluate application for allocations.

Information will be included and evaluated as part of the annual Growth Management Status report, published in the fourth quarter of each calendar year. Based on the outcomes of the evaluation and consideration of stakeholder input, the City will establish appropriate action such as revising the ordinance within one year of the evaluation.

Responsible Agency: Tracy Development and Engineering Services (DES) Department
Funding Sources: Departmental Budget

MINUTES
TRACY CITY PLANNING COMMISSION
MEETING MINUTES
NOVEMBER 14, 2012
7:00 P.M.
TRACY COUNCIL CHAMBERS
333 CIVIC CENTER PLAZA

Chair Ransom called the meeting to order at 7:00 p.m. and led the Pledge of Allegiance.

ROLL CALL: Roll call found Commissioners Johnson, Manne, Mitracos, Vice Chair Sangha and Chair Ransom present. Also present were staff members Andrew Malik, Bill Dean, Alan Bell, Scott Claar, Victoria Lombardo, Bill Sartor, Sandra Edwards and Jan Couturier.

MINUTE APPROVAL – None.

DIRECTOR'S REPORT REGARDING THIS AGENDA: Mr. Dean indicated items 2-C and 2-D were functionally the same and would be presented together.

ITEMS FROM THE AUDIENCE – None.

1. OLD BUSINESS – None.
2. NEW BUSINESS
 - A. PUBLIC HEARING TO CONSIDER AN ORDINANCE AMENDING VARIOUS SECTIONS OF TITLE 1 AND TITLE 10 OF THE TRACY MUNICIPAL CODE, AND AMENDMENTS TO THE I-205 CORRIDOR SPECIFIC PLAN, INDUSTRIAL AREAS SPECIFIC PLAN, AND RESIDENTIAL AREAS SPECIFIC PLAN RELATING TO EATING AND/OR DRINKING ESTABLISHMENTS WITH ENTERTAINMENT – CITY INITIATED – APPLICATION NUMBERS ZA12-0007, SPA12-0005, SPA12-0006, AND SPA12-0007

Scott Claar, Associate Planner, indicated that the City's Zoning Ordinance currently permits eating and drinking establishments in the Central business District zone, General Highway commercial zone, Community Shopping Center Zone and Highway Service Zone; and conditionally permits them in the Neighborhood Shopping Zone. Eating and drinking establishments are also permitted in certain areas of the I-205 Corridor Specific Plan, Industrial Areas Specific Plan and the Residential Areas Specific Plan.

Mr. Claar advised that on May 30, 2012, an application was submitted for a Conditional Use Permit (CUP) to expand the restaurant and bar operations of the Great Plate (714 Central Avenue) to include entertainment uses, such as live bands, disc jockeys, dancing and comedy shows, similar to what is commonly referred to as a nightclub.

City staff returned the application fees of the Great Plate and informed them that the City would initiate a Zoning Ordinance amendment to address this use. He added that in drafting the proposed amendment to the Zoning Ordinance, staff aimed to balance the

desire for encouraging nightlife and entertainment with the goals of minimizing impacts on public safety resources and ensuring compatibility between neighboring land uses.

Mr. Claar reviewed related ordinances including a recently approved ordinance in the City of Walnut Creek. The proposed draft would do the following:

- Eating and/or drinking establishments would be permitted to serve alcohol and provide entertainment up to 11:00 pm without requiring a conditional use permit.
- The definition of "entertainment" would be such uses as live music, disc jockeys, dancing, karaoke, comedy shows, modeling or live performances.
- A Conditional Use Permit (CUP) would be required for eating and/or drinking establishments that serve alcohol and provide entertainment after 11:00 pm
- Eating and/or drinking establishments not providing entertainment would be permitted to serve alcohol before and after 11:00 pm without requiring a CUP. This is the same as Tracy's existing Code.
- Eating and/or drinking establishments not serving alcohol would be permitted to provide entertainment before and after 11:00 pm without requiring a CUP

Conditions of approval could include:

- Security Guards based on the number of occupants
- Security Guards would be required to carry proof of valid registration through the Department of Consumer Affairs Bureau of Security and Investigative Services (BSIS)
- No dual roles for security (e.g. bartender/security)
- No person under 21 year of age allowed after 11:00 pm

The following Specific Plans will also require this amendment:

- I-205 Corridor Specific Plan
- Industrial Area Specific Plan
- Residential Area Specific Plan

Staff recommended that the Planning Commission recommend that the City Council approve the proposed amendments to the Tracy Municipal Code, I-205 Corridor Specific Plan, Industrial Areas Specific Plan and the Residential Area Specific Plan.

Mr. Claar added that applicants would have to apply for a Conditional Use Permit (CUP) and the Planning Commission would decide what conditions should be applied.

Chair Ransom opened the public hearing.

Commissioner Mitracos asked where the 11:00 p.m. time frame came from. Mr. Claar indicated that the City of Walnut Creek recently approved an ordinance with this time

restriction to encourage evening entertainment for dinner and post dinner activities; suggesting that anything after 11:00 p.m. was not necessarily related to dining.

Dale Cose, 17 E. Sixth Street, asked the Planning Commission to direct staff to answer questions directly related to the resolution.

Mr. Cose provided background information on establishments in Tracy that existed in previous years where this type of requirement was never required. Mr. Cose asked when staff saw the need for a CUP and if there were any items included such as security guard cards vs. Tracy Police enforcement.

Commissioner Mitracos asked for clarification regarding entertainment uses. Mr. Malik responded that currently nothing in the Tracy Municipal Code allows entertainment and that several jurisdictions have gone through this process.

Commissioner Mitracos asked Mr. Cose if the ordinance made sense. Mr. Cose stated he knows of a number of establishments that have had bands, stabbings, shootings and fights indicating it was a business issue.

Mr. Claar discussed the history regarding requiring CUPs for this type of business. Mr. Claar indicated it was time to develop an ordinance to address entertainment uses; to make it clear via an ordinance.

Mr. Dean stated that what was before the Commission was a way to achieve a more uniform code to enable different forms of entertainment/club usages as the City grows and a way to contemporize the ordinance for what is going on today.

Chair Ransom asked if there was a way to expedite the process for the present situation. Mr. Malik stated staff was looking into that, by trying to place the item on the next City Council agenda. He further advised the Commission that staff has asked other applicants to submit their building plans for a restaurant in the hopes that this will be finalized soon.

Chair Ransom asked when these restaurants could expect their businesses to open. Mr. Malik advised that in this case it would be 30 days after adoption of the ordinance or the middle of January. Mr. Dean indicated staff has been working closely with Mr. Cose during the past few months and that staff could co-process a CUP application while the ordinance was being considered.

Mr. Cose indicated he has been working with staff but the delays hurt businesses and their ability to flourish.

Gary Gardino, developer of the Frog Eatery, indicated he was very upset over the way the ordinance had been written and that the process has taken 7 months and because of that he won't be opening his business this year. Mr. Gardino provided a brief history of the successful businesses he has owned and operated. Mr. Gardino voiced his frustration over the fact that staff was using examples from cities such as Walnut Creek and Pleasanton. Mr. Gardino indicated their business is designed to attract individuals

35 years of age or older. Mr. Gardino stated he was here to operate a successful and safe business.

Commissioner Mitracos asked if Mr. Gardino was going to have entertainment. Mr. Gardino listed the different types entertainment and discussed a "slow close" which is done by raising the lights, turning the music down vs. "a last call for alcohol" Mr. Gardino voiced his frustration over the process of obtaining building permits and getting to this point.

Chair Ransom asked when they would be ready to open for business. Mr. Gardino indicated December 1. Mr. Gardino provided the Planning Commission with a handout.

Chair Ransom asked staff if an existing business came in and wanted to include entertainment, what the process would include. Mr. Dean indicated some of the businesses may or may not include the type of activity outlined in the Ordinance and that Code Enforcement and the Police Department address any uses not covered in the existing ordinance.

Chair Ransom asked about an existing business on Tracy Boulevard and Grant Line Road. Mr. Malik indicated that at the present time, Code Enforcement is reactive and responds on a complaint basis. Mr. Malik stated the proposed ordinance would be proactive by outlining what uses were acceptable.

David Rose, owner of Tracy Garage, addressed the Planning Commission stating no one wants to slow development, suggesting the process was the problem. Mr. Rose spoke in favor of Mr. Gardino's proposed business.

Dennis Miller, a resident of Lauriana Way, addressed the Planning Commission stating he was a bartender and bouncer and that he works with Mr. Gardino. Mr. Miller stated the process needs to move forward and that limiting owners to closing at 11:00 p.m. will hurt business. Mr. Miller suggested that Alcohol Beverage Control (ABC) already has limitations in place to help dictate requirements.

Jerimiah Monet, a new Tracy resident, stated he was looking for this type of establishment in Tracy. Mr. Monet stated he has never been in an establishment that has dancing that was limited to 11 p.m.

Mark Connolly, 121 E. Eleventh Street, stated he owns residential property behind the Shamrock Bar on Eleventh Street in Tracy. Mr. Connolly said the bar empties into a residential neighborhood, into an alley, and discussed the problems with having a bar near a residential neighborhood. Mr. Connolly indicated ABC would not limit their activities and indicated that the ordinance would apply to every existing bar and restaurant in the city limits. Mr. Connolly supported the CUP for entertainment. Mr. Connolly added that the following requirements should be considered: 1) doors and windows need to be closed during hours of operation 2) access to the facility should not be through residential neighborhoods; 3) specific decibel restrictions at the property boundary, all designed to protect residential neighborhoods.

Gary Hampton, Police Chief, provided the Police Department's perspective. Chief Hampton expressed surprise that Tracy didn't have an ordinance suggesting that by not having an ordinance Tracy was not availing the community the quality of life that other communities have. Chief Hampton stated this type of ordinance helps ensure that things do not get out of control and that such ordinances have conditions to hold individuals accountable.

Chief Hampton outlined staffing levels, highest call times, and peak call times between 11:00 p.m. and 2:00 a.m. Chief Hampton stated that allowing conditional uses after 11:00 p.m. would impact the Police Department. Chief Hampton also stated that ABC would not enforce local ordinances. Chief Hampton mentioned that "soft closings" are what the police department likes to hear from responsible owners and that if conditions are in place, then the Police Department can hold businesses accountable for those soft closings.

Robert Tanner, 1371 Rusher Street, asked if the ordinance would apply to private clubs. Scott Claar indicated no, just eating and drinking establishments. Mr. Tanner suggested that the ordinance didn't seem to be the issue, it was the timing. Chair Ransom said there is nothing in place now that will allow them to operate.

As there was no one further wishing to address the Commission, the public hearing was closed.

Commissioner Mitracos requested staff to clarify private clubs. Mr. Claar stated there was a category for private clubs, meeting halls (e.g. the Moose Lodge), that can be allowed through a CUP process. Mr. Malik stated staff was recommending that the City move forward with the CUP process. Staff recommended that the Planning Commission recommend approval to the City Council.

Chair Ransom asked staff to address the concern regarding customers exiting venues into residential neighborhoods. Mr. Claar indicated the conditions Mr. Connolly mentioned would be appropriately addressed in the Conditional Use Permit. Mr. Dean added that having access to residential properties would be made a part of the findings that Planning Commission reviews.

Commissioner Manne asked staff if Mr. Gardino would be before the Planning Commission again when he applied for a CUP. Mr. Claar stated yes.

Commissioner Johnson stated he was disappointed because of the frustrations the applicant has encountered.

Commissioner Mitracos indicated it was responsible to have this ordinance in place.

Commissioner Manne stated he had not heard any opposition from existing bars or businesses over the process and that he supported the ordinance.

Chair Ransom stated this was a step in the right direction as it addresses the need to increase the quality of life and safety and accommodates the businesses who want to open. Chair Ransom asked staff to be diligent and move the process forward.

B. PUBLIC HEARING TO CONSIDER AN AMENDMENT TO THE TRACY MUNICIPAL CODE AMENDING SECTIONS 10.210.060 AND 10.12.080 AND ADDING A NEW SECTION 10.12.065 RELATING TO COMPLIANCE WITH REGIONAL HOUSING NEEDS ALLOCATIONS AND STATE AND FEDERAL LAW RELATING TO DEED RESTRICTIONS – THE APPLICATION IS INITIATED BY THE CITY OF TRACY – APPLICATION NUMBER ZA12-0008

Victoria Lombardo, Senior Planner, provided the staff report. Ms. Lombardo stated that the State Department of Housing and Community Development (HCD) require that cities adopt House Elements for 5 year cycles. Tracy's Housing Element for 2009-2014 was adopted by City Council on May 15, 2012 and certified by HCD on July 26, 2012. Program 13 of the Housing Plan is the proposal to amend the City's Growth Management Ordinance (GMO) to remove the governmental constraint of annual limitations on Residential Growth Allotments (RGAs) and building permits. Specifically, the amendment would allow the City to issue building permits up to the Regional Housing Needs Allocation (RHNA) number to achieve its obligation in each income category.

The numerical limits of the GMO (600 annual average) would not allow a rate of residential construction during this Housing Element cycle that would achieve the RHNA. Additionally, the program requires the City to reduce the deed restriction on affordable units from 55 years to 10 years. The proposed amendments are consistent with the Housing Element adopted by the City Council on May 15, 2012 and with the California Environmental Quality Act.

Staff recommended that the Planning Commission recommend that the City Council approve the proposed ordinance.

Commissioner Mitracos asked if the City had any units that were restricted at 55 years. Ms. Lombardo stated there were a number of building permits issued over the last 10-15 years that comply with the low housing requirements.

Chair Ransom opened the public hearing.

Mr. Connolly, on behalf of TRAQC, provided the Planning Commission with a handout and suggested that the Planning Commission not approve the resolution as written. Mr. Connolly suggested that the proposed action conflicts with the Housing Element and Measure A and creates a new exemption for Residential Growth Allotments (RGAs).

Commissioner Mitracos asked Mr. Connolly if he had a problem with the proposed change because RGAs and permits were treated differently. Mr. Connolly stated the proposal does not include RGAs and bypasses entitlements.

Commissioner Sangha asked under which condition could a building permit be issued without a RGA. Mr. Connolly referred to section 10.12.065 in the

proposed ordinance suggesting that the Planning Commission was being asked to abandon the current system.

Chair Ransom asked staff to address the concerns that were raised. Mr. Dean indicated that RGAs were put in place in 1987 and codified by voters in 2000; the purpose of RGAs was to have a mechanism in place to issue permits which also ensured that infrastructure was in place for development. Mr. Dean stated staff would like to do away with RGAs completely, indicating that it was impossible to bring a project forward without having addressed the infrastructure based on existing ordinances, the Map Act, etc. Mr. Dean added that staff would add an exemption to meet Regional Housing Needs Allocation, and that in absolutely no circumstance can a permit be issued in conflict with the Regional Housing Needs Allocation numbers.

Chair Ransom stated that there was a concern that once the numbers were revamped that the RHNA numbers may be much lower.

Celeste Garamendi addressed the Planning Commission stating that what was in the Housing Element was issuing building permits above RHNA for affordable housing. Ms. Garamendi asked the Planning Commission to not approve or continue consideration of the item to allow time to work with staff or to make the corrections in what was proposed.

Chair Ransom called for a recess at 9:15 p.m. reconvening at 9:24 p.m.

Chair Ransom referred to Tracy Municipal Code section 10.12.110 on the overhead.

Mr. Dean outlined how RGAs are calculated and averaged and how building permits are calculated and averaged. Mr. Dean suggested that what was at issue was to clarify subsection D to reference 10.12.100.

Chair Ransom asked if the City Attorney drafted this language. Mr. Dean stated that if there was a disagreement, that the Planning Commission had the full pleasure to do what it deemed appropriate.

Bill Sartor, Deputy City Attorney explained that RGAs were a discretionary process and the only thing exempted are RHNA. Mr. Sartor stated you can't exempt something through a discretionary process and then require it. Mr. Sartor further stated that the way the ordinance was written indicates that building permits always count toward the average.

It was moved by Chair Ransom to continue consideration of the item. The motion died due to the lack of a second.

Commissioner Mitracos stated he could not support the proposed ordinance.

It was moved by Commissioner Mitracos and seconded by Vice Chair Sangha to not recommend approval of the Ordinance as written. Voice vote found

Commissioner Mitracos, Vice Chair Sangha and Chair Ransome in favor;
Commissioners Johnson and Commissioner Manne opposed.

- C. PUBLIC HEARING TO CONSIDER A 60-UNIT RESIDENTIAL APARTMENT PROJECT (MACDONALD APARTMENTS), INCLUDING PARKING AND RELATED ON-SITE IMPROVEMENTS ON APPROXIMATELY 2.87 ACRES LOCATED ON THE NORTH SIDE OF VALPICO ROAD NORTHWEST OF THE INTERSECTION OF VALPICO ROAD AND GLENBRIAR DRIVE, 2605 S. MACARTHUR DRIVE, ASSESSOR'S PARCEL NUMBER 246-140-12. THE PROJECT INCLUDES REZONING THE SITE FROM MEDIUM DENSITY RESIDENTIAL TO HIGH DENSITY RESIDENTIAL (R12-0002), ZONING REGULATIONS AMENDMENT REGARDING THE MINIMUM NUMBER OF REQUIRED OFF-STREET PARKING SPACES (TRACY MUNICIPAL CODE SECTION 10.08.3470) (ZA12-0005), AND DEVELOPMENT REVIEW APPROVAL FOR THE APARTMENT PROJECT (D12-0006). THE APPLICANT IS PETER MACDONALD.
- D. PUBLIC HEARING TO CONSIDER A 184-UNIT RESIDENTIAL APARTMENT PROJECT (VALPICO APARTMENTS), INCLUDING PARKING AND RELATED ON-SITE IMPROVEMENTS ON APPROXIMATELY 8.75 ACRES LOCATED ON THE NORTH SIDE OF VALPICO ROAD, NORTHEAST OF THE INTERSECTION OF VALPICO ROAD AND GLENBRIAR DRIVE, 501 E. VALPICO ROAD (FORMERLY 2795 S. MACARTHUR DRIVE), ASSESSOR'S PARCEL NUMBERS 246-140-13 AND 14. THE PROJECT INCLUDES A GENERAL PLAN AMENDMENT FROM COMMERCIAL TO RESIDENTIAL HIGH (GPA12-0001), REZONING FROM COMMUNITY SHOPPING CENTER TO HIGH DENSITY RESIDENTIAL (R12-0001), ZONING REGULATIONS AMENDMENT REGARDING THE MINIMUM DISTANCE BETWEEN MAIN BUILDINGS ON A SITE (TRACY MUNICIPAL CODE SECTION 10.08.1610(D)) (ZA12-0004), AND DEVELOPMENT REVIEW APPROVAL FOR THE APARTMENT PROJECT (D12-0004). A MITIGATED NEGATIVE DECLARATION AND MITIGATION MONITORING PROGRAM, PREPARED IN ACCORDANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT, ARE PROPOSED FOR ADOPTION. THE APPLICANT IS ERIC TAYLOR, SOMIS INVESTMENTS.

Staff asked that both projects be considered together but voted on separately.

Alan Bell, Senior Planner, provided the staff report. Mr. Bell stated that agenda item 2C proposed to construct a 60 unit multi-family residential project on approximately 2.87 acres. The existing single-family home on the site will be removed as part of the Project. The Project consists of three, three-story apartment buildings: two buildings containing 24 units each and one building containing 12 units. No subdivision is proposed at this time; all units will be rental apartments. Two different exterior building elevations are proposed. Both versions include tile roofs, decorative window trim and shutter, building articulation, mass variations and are integrated with landscaping to create a high quality architectural design. The grade of the site is significantly lower than the adjacent Valpico Road grade and although fill will be brought on to the site to

raise its grade several feet, the finished grade at Building 1 will be approximately 15 feet below the Valpico Road grade.

Mr. Bell indicated that agenda item 2D proposed to construct a 184 unit, multi-family residential project on approximately 8.75 acres. The project consists of seven, three-story apartment buildings with 24 units each, plus 16 townhouse-style units in six buildings of two stories each. No subdivision is proposed at this time; all units will be rental apartments. This project will also include a leasing office in the tri-plex townhouse building near the mailbox kiosk. The seven apartment buildings will consist of one and two bedroom units, and the townhouse units will contain one-bedroom and three bedroom units. Altogether, there will be 89 one-bedroom units; 84 two-bedroom units and 11 three bedroom units. The apartments range in size from just over 800 square feet to nearly 2,000 square feet for the largest townhouse units. The applicant has submitted two different exterior elevations of the buildings. Both versions include tile roofs, decorative window trim and shutters, and vertical and horizontal relief to create a high-quality architectural design.

City parking standards require 1.5 off-street parking spaces per one bedroom unit, 2 spaces per unit with two bedrooms and one guest space for every five units. This 60 unit project, therefore, would require 117 off-street parking spaces. This project proposes 99 off-street spaces 15% fewer than is required by city parking standards. City staff's recommended solution is to amend City parking standards to allow the project to be constructed as proposed. The number of off-street parking spaces required for multi-family projects by the City of Tracy is higher than many other jurisdictions. Following is a proposed addition to the City's off-street parking ordinance 10.08.370(e):

"The number of off-street parking spaces required in Section 10.08.3480 may be reduced by up to 20 percent if the owner of the property submits a parking study documenting that such off-street parking spaces will not be necessary to mitigate parking demands for a use or project."

Staff recommended approval of both the addition to the Tracy Municipal Code and to the determination that 99 parking spaces is adequate for this Project. In 2006 the subject property's General Plan designation was changed to Residential High. The 2011 General Plan update confirmed the Residential High General Plan designation. This request is a follow up item to the General Plan update, one that would have been initiated by the City if it were not requested as part of both projects.

Both projects are located within the Tracy Unified School District which was noticed and which does not anticipate any issues in being able to accommodate students from both projects.

On September 12, 2012 the developer conducted a neighborhood meeting to introduce both projects. 170 notices were sent to nearby property owners and the Hidden Lake property owners association. The City published notices

regarding the Planning Commission November 14, 2012 meeting to nearby property owners and published to the newspaper and other normal notices.

In accordance with the California Environment Quality Act (CEQA) Guidelines, an Initial Study/Mitigated Negative Declaration (IS/MND) was prepared to evaluate potential environmental effects of both projects. The IS/MND along with the Mitigation Monitoring and Reporting Program were completed. Part of the project approval includes a recommendation for adoption of the CEQA documentation.

The site is viable for high density General Plan and zoning considerations due to a number of factors: the site's depressed grade (which reduces visual impacts of the project), high density residential General Plan designation to the west (increasing opportunity for land use compatibility), frontage and direct access onto Valpico Road, proximity to the Altamont Commuter Express Station is less than two miles away, and adjacent and nearby shopping opportunities.

Tracy's HDR zone requires that minimum distance between main buildings on a site must equal the average height of the two buildings. Therefore, taller buildings are required to be further apart from each other than shorter buildings. The HDR Zone contains no height limit and as the city encourages more compact development for efficient land use; future projects of this nature might experience challenges to meet the present requirement. Staff recommended that the Tracy Municipal Code Section 10.08.1610(d) be amended as follows:

"Distance between buildings: Six feet between accessory buildings and between an accessory and main building; and the minimum distance between main buildings shall be the average height of the two (2) main buildings six feet."

Mr. Bell advised that six feet (although not proposed for this project) is the recommended replacement for the minimum distance between main buildings. This distance is used in residential zones throughout the City to prevent inaccessible or unusable corridors between buildings.

In accordance with the California Environment Quality Act (CEQA) Guidelines, an Initial Study/Mitigated Negative Declaration (IS/MND) was prepared to evaluate potential environmental effects of the project. The IS/MND along with the Mitigation Monitoring and Reporting Program were completed. Part of the project approval includes a recommendation for adoption of the CEQA documentation.

Staff recommended that the Planning Commission recommend that the City Council take the following action for Agenda Item 2C:

1. Adopt the Mitigated negative Declaration and the Mitigation Monitoring and Reporting Program.
2. Approve the General Plan Amendment from Commercial to Residential High
3. Approve the rezoning of the site from Community Shopping Center to Hi-Density Residential.

4. Approve the Tracy Municipal Code Amendment regarding distance between buildings.
5. Approve the Development Review application for the 184 unit residential apartment project.

Staff recommended that the Planning Commission recommend that City Council take the following action for Agenda Item 2D:

1. Approve the rezoning of the site from Medium Density Residential to High Density Residential.
2. Approve the Tracy Municipal Code Amendment regarding off-street parking space reduction.
3. Determine that 99 off-street parking spaces is sufficient to mitigate parking demands of the project.
4. Approve the Development Review application for the 60 unit residential apartment project.

Commissioner Manne identified that he lives in the Glenbriar subdivision, but outside the required distance which would require him to abstain for voting on the item. Commissioner Manne stated he believed he could be impartial.

Commissioner Johnson identified that he works with consultants and could also be fair and impartial.

Commissioner Johnson asked for clarification regarding the distance between buildings. Mr. Bell indicated the change would only apply to High Density Residential and requires discretionary review by the Planning Commission.

Commissioner Mitracos asked if the off-street parking could be added when the zoning code update was complete. Mr. Bell stated that staff was recommending that a parking study be completed, including a survey of other jurisdictions. Mr. Bell added that there were characteristics of the project that support this change since half of the units are 1 or 2 bedroom and it was not believed that there would be a need for more than 1 or 2 parking spaces per unit.

Commissioner Mitracos asked why the trench infiltration couldn't be permanent. Criseldo Mina, Senior Civil Engineer, suggested that the final solution would be to connect to the existing storm drain system. Commissioner Mitracos asked about permeable surfaces. Mr. Mina advised that the current policy requires that storm water has to be disposed of through the existing system.

Chair Ransom opened the public hearing.

Peter MacDonald, owner of the MacDonald property, provided a brief history of the property. Mr. MacDonald indicated his project was ready to build and that both projects would probably be built together.

Mr. MacDonald outlined special features of the units which included computer alcoves, enclosed staircases, extra storage, and walk-in closets.

Erik Taylor, owner of the Valpico Apartment site stated his firm tried to come up with a project that makes it a better neighborhood and a higher end project that fit Tracy. Mr. Taylor outlined some of the features of the project which included pedestrian and bicycle access to Valpico and to the neighboring Rite Aid site, masonry walls across specific properties, and sustainable features in the project.

John Phillips, a resident of DeBord Drive, (Ashley Park) addressed the Planning Commission indicating he found out about the project by accident and suggested that the noticing requirements needed to be changed. Mr. Phillips voiced concerns about impacts to unfinished roads (MacArthur and Valpico) drainage, the number of birds on-site, over populated schools, and Measure A.

Gabriel Leal, DeBord Drive, addressed the Planning Commission indicating he agreed with Mr. Phillip's comments and asked that the Planning Commission postpone any decisions and notify residents within one mile of the project.

Chair Ransom asked staff to clarify the number of notices that were mailed. Mr. Bell indicated that state law requires property owners within 300 feet of the proposed site be notified. Mr. Bell added that the city expanded the list to approximately 900 feet which added approximately 200 additional residents being notified

Mr. Phillips voiced concerns regarding traffic, the nearby plastics plant, another major processing plant and the tremendous number of 18 wheeled vehicles that go down Valpico and MacArthur.

Mr. Taylor indicated they would be willing to meet with the residents before proceeding to City Council.

Commissioner Mitracos stated he understood that neighborhoods change, and that he has met with the applicants and staff and was confident that the project would improve the neighborhood.

Chair Ransom indicated several commissioners have met with the applicant to understand the project completely. Chair Ransom indicated the speakers could be asked to be placed on the noticing list and that the applicants had also agreed to meet with everyone in attendance.

Commissioner Mitracos indicated he supported the projects. Commissioner Manne indicated he also met with the applicants and believed they had met all the requirements.

Commissioner Johnson stated he attended the community meeting and heard very little, if any, concerns from the neighbors. Commissioner Johnson thanked staff for addressing all concerns.

It was moved by Commissioner Johnson and seconded by Vice Chair Sangha to:

1. Adopt the Mitigated negative Declaration and the Mitigation Monitoring and Reporting Program.
2. Approve the General Plan Amendment from Commercial to Residential High
3. Approve the rezoning of the site from Community Shopping Center to Hi-Density Residential.
4. Approve the Tracy Municipal Code Amendment regarding distance between buildings.
5. Approve the Development Review application for the 184 unit residential apartment project.

Voice vote found all in favor; passed, and so ordered.

It was moved by Commissioner Manne and seconded by Commissioner Johnson to

1. Approve the rezoning of the site from Medium Density Residential to High Density Residential.
2. Approve the Tracy Municipal Code Amendment regarding off-street parking space reduction.
3. Determine that 99 off-street parking spaces is sufficient to mitigate parking demands of the project.
4. Approve the Development Review application for the 60 unit residential apartment project.

Voice vote found all in favor; passed, and so ordered.

3. ITEMS FROM THE AUDIENCE – None.
4. DIRECTOR'S REPORT – Bill Dean introduced Jan Couturier, a new addition to the team and the new recording secretary.
5. ITEMS FROM THE COMMISSION – None.
6. ADJOURNMENT

It was moved by Commissioner Manne and seconded by Chair Ransom to adjourn.

Time: 11:16 p.m.


CHAIR


STAFF LIAISON

ORDINANCE _____

AN ORDINANCE OF THE CITY OF TRACY AMENDING TRACY MUNICIPAL CODE SECTIONS 10.12.060 and 10.12.080 AND ADDING A NEW SECTION 10.12.065 RELATING TO COMPLIANCE WITH REGIONAL HOUSING NEEDS ALLOCATIONS AND STATE AND FEDERAL LAW RELATING TO DEED RESTRICTIONS WITHIN THE RESIDENTIAL GROWTH MANAGEMENT PLAN

WHEREAS, The City Council adopted the Housing Element for the 2009-2014 cycle on May 15, 2012 and the state Department of Housing and Community Development accepted that Housing Element on the condition that the City amend the Growth Management Ordinance to allow for compliance with the Regional Housing Needs Assessment and to amend deed restrictions for affordable housing units to gain compliance with state and federal laws, and

WHEREAS, The City Council held a public hearing to consider the proposed ordinance amendments on December 4, 2012,

The city council of the City of Tracy does ordain as follows:

SECTION 1: Section 10.12.060, Exemptions, of Chapter 10.12 (Residential Growth Management Plan) of the Tracy Municipal Code, is amended to read as follows:

“10.12.060 - Exemptions.

A project shall be exempt from further compliance with this chapter if the developer includes (in addition to the requirements of this chapter and the GMO guidelines) documentation, to the satisfaction of the Development and Engineering Services Director, which establishes that the development project which is the subject of the application meets the requirements of one of the following subsections:

(a) Remodel; minor addition; conversion. The development project is a rehabilitation or remodeling of, or a minor addition to, an existing structure, or a conversion of apartments to condominiums; or

(b) Replacement. The development is replacing legally established dwelling units that have been demolished and do not exceed the number of legally established dwelling units demolished. Where the number of new dwelling units exceeds the number of legally established dwelling units demolished, an allocation of RGAs must be obtained for the additional dwelling units; or

(c) Model homes. To the extent the development project includes "model homes" (structures used as an advertisement for housing sales and not used as dwellings), the model homes shall not be required to obtain an allocation of RGAs; provided, however;

(1) the number of model homes shall be limited to the lesser of 20% of the total dwelling units identified in the application, or seven dwelling units per project;

(2) prior to the issuance of each building permit, the subdivider shall pay all required fees, including impact fees required by Title 13 of this Code; and

(3) model homes may be converted and occupied as dwellings only after RGAs are allocated for each dwelling unit as required by this chapter; or

Deleted: twenty percent (
Deleted:)
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- (d) Four units or fewer on a single lot. The development project is either a four-plex or lesser number of dwelling units on a single existing lot; provided, however;
 - (1) the dwellings are not part of a larger eligible parcel that will result in more than four dwelling units at build-out of the project;
 - (2) the exemption is limited to no more than a total of four such dwelling units per subdivider per calendar year; and
 - (3) prior to the issuance of each building permit, the subdivider shall pay all required fees, including impact fees required by title 13 of this Code.

Deleted: (4)

- (e) Second unit. The development is a secondary residential unit.
(See also Residential Housing Allocations at TMC Section 10.12.065 and Exceptions at TMC section 10.12.080.)

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SECTION 2: A new Section 10.12.065, Residential Housing Allocations, is added to Chapter 12.10 (Residential Growth Management Plan) of the Tracy Municipal Code to read as follows:

“Section 10.12.065, Compliance with the Regional Housing Needs Assessment

(a) Authority. This section is enacted under the authority of and is intended to comply with and implement Government Code section 65584.

(b) RHNA. The State Department of Housing and Community Development requires that each city adopt a housing element as part of its general plan. That Department also establishes a “Regional Housing Needs Allocation” (RHNA) for all cities, setting forth the target number of dwelling units to be constructed during any planning period. (The “planning period” is defined in each housing element. The planning period in effect at the time this code amendment was adopted is July 1, 2009 through June 30, 2014.) The RHNA housing unit allocations are established by income categories: very low-, low-, moderate, and above-moderate-income.

(c) Requirement. Notwithstanding other provisions of this chapter, in any calendar year, once building permits have been issued for the number of residential units permitted by this chapter, the City shall issue additional building permits for residential dwelling units if they are necessary to achieve the RHNA goals in a particular income category (during each planning period). The number of building permits may not exceed the RHNA goals in each income category. Any building permits issued in accordance with this provision shall not require an RGA.

(d) For the sole purpose of calculating the RGA and building permit averages contained in Sections 10.12.100 and 10.12.110, any building permits issued under the authority of this section shall be treated as if an RGA and a building permit were issued under the GMO.”

SECTION 3. Section 10.12.080, Exceptions, of Chapter 10.12 (Residential Growth

Management Plan) of the Tracy Municipal Code, is amended to read as follows:

“10.12.080 - Affordable housing project exceptions.

An application for an RGA shall be considered an affordable housing project exception if the application includes (in addition to the application requirements of this chapter and the GMO guidelines) documentation, to the satisfaction of the Board, which establishes that the housing unit which is the subject of the application meets the following requirements:

- (a) The housing unit meets the income level requirements for low, very low, or moderate income levels, as defined by section 10.12.030
- (b) The housing unit is formally dedicated to provide affordable dwelling units in accordance with a locally recognized program.
- (c) The applicant provides documentation that the requirements of this section will be met and maintained for a minimum of ~~ten~~ years.”

Deleted: fifty-five (55)

SECTION 4. This Ordinance shall take effect 30 days after its final passage and adoption.

SECTION 5. This Ordinance shall be published once in the Tri Valley Herald, a newspaper of general circulation, within 15 days from and after its final passage and adoption.

* * * * *

The foregoing Ordinance _____ was introduced at a regular meeting of the Tracy City Council on the _____ day of _____, 2013, and finally adopted on the _____ day of _____, 2013, by the following vote:

- AYES: COUNCIL MEMBERS:
- NOES: COUNCIL MEMBERS:
- ABSENT: COUNCIL MEMBERS:
- ABSTAIN: COUNCIL MEMBERS:

Mayor

ATTEST:

City Clerk

ORDINANCE _____

AN ORDINANCE OF THE CITY OF TRACY AMENDING TRACY MUNICIPAL CODE SECTIONS 10.12.060 and 10.12.080 AND ADDING A NEW SECTION 10.12.065 RELATING TO COMPLIANCE WITH REGIONAL HOUSING NEEDS ALLOCATIONS AND STATE AND FEDERAL LAW RELATING TO DEED RESTRICTIONS WITHIN THE RESIDENTIAL GROWTH MANAGEMENT PLAN

WHEREAS, The City Council adopted the Housing Element for the 2009-2014 cycle on May 15, 2012 and the state Department of Housing and Community Development accepted that Housing Element on the condition that the City amend the Growth Management Ordinance to allow for compliance with the Regional Housing Needs Assessment and to amend deed restrictions for affordable housing units to gain compliance with state and federal laws, and

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“Section 10.12.065, Compliance with the Regional Housing Needs Assessment

- (a) Authority. This section is enacted under the authority of and is intended to comply with and implement Government Code section 65584.
- (b) RHNA. The State Department of Housing and Community Development requires that each city adopt a housing element as part of its general plan. That Department also establishes a “Regional Housing Needs Allocation” (RHNA) for all cities, setting forth the target number of dwelling units to be constructed during any planning period. (The “planning period” is defined in each housing element. The planning period in effect at the time this code amendment was adopted is July 1, 2009 through June 30, 2014.) The RHNA housing unit allocations are established by income categories: very low-, low-, moderate, and above-moderate-income.
- (c) Requirement. Notwithstanding other provisions of this chapter, in any calendar year, once building permits have been issued for the number of residential units permitted by this chapter, the City shall issue additional building permits for residential dwelling units if they are necessary to achieve the RHNA goals in a particular income category (during each planning period). The number of building permits may not exceed the RHNA goals in each income category. Any building permits issued in accordance with this provision shall not require an RGA.
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- (b) The housing unit is formally dedicated to provide affordable dwelling units in accordance with a locally recognized program.
- (c) The applicant provides documentation that the requirements of this section will be met and maintained for a minimum of ten years.”

SECTION 4. This Ordinance shall take effect 30 days after its final passage and adoption.

SECTION 5. This Ordinance shall be published once in the Tri Valley Herald, a newspaper of general circulation, within 15 days from and after its final passage and adoption.

* * * * *

The foregoing Ordinance _____ was introduced at a regular meeting of the Tracy City Council on the _____ day of _____, 2013, and finally adopted on the _____ day of _____, 2013, by the following vote:

- AYES: COUNCIL MEMBERS:
- NOES: COUNCIL MEMBERS:
- ABSENT: COUNCIL MEMBERS:
- ABSTAIN: COUNCIL MEMBERS:

Mayor

ATTEST:

City Clerk

AGENDA ITEM 4

REQUEST

FOLLOW UP DISCUSSION AND DIRECTION TO STAFF RELATED TO EXPANDING THE PROVISIONS OF THE EXISTING BOARDING UP OF BUILDINGS WITH UNSECURED OPENINGS ORDINANCE

EXECUTIVE SUMMARY

On February 21, 2012, Code Enforcement presented Council with a discussion item regarding the effects of long-term vacant, boarded properties in the City of Tracy. At that time, staff presented Council with the concept of expanding the provisions of the existing Boarded Buildings Ordinance to control the length of time vacant buildings are boarded, with the goal of eliminating the problems of boarded buildings, and the blight associated with these properties. At the end of the discussion, Council directed staff to solicit additional community input regarding the concept of amending the Boarded Buildings Ordinance. Tonight's discussion includes input from a community meeting held on November 20, 2012.

DISCUSSION

Since February 21, 2012, discussions have been held with Council regarding Council Member Rickman's request for information regarding vacant buildings in the City of Tracy. Code Enforcement staff presented Council with a discussion item regarding the effects of long-term vacant, boarded properties in the City of Tracy and the concepts of:

- Amend the Tracy Municipal Code's (TMC) Boarded Buildings Ordinance to control the length of time vacant boarded buildings in an effort to eliminate decade-long problems of boarded buildings and associated blight.
- Establish a vacant building registry requiring property owners to register vacant buildings with the City. This plan would be fee-based, requiring property owners to submit a maintenance plan outlining security and maintenance schedules to ensure vacant buildings are secured and maintained in accordance with applicable state and local codes.

Problems Associated with Vacant Boarded Buildings

- Longstanding, boarded buildings – neglected maintenance

Boarded buildings tend to become neglected buildings which develop into both the cause and source of blight in both residential and non-residential neighborhoods. This situation holds true especially when the owner of the building fails to actively maintain and manage the building to ensure it does not become a liability to the neighborhood. Neglected buildings and/or substandard or unkempt buildings discourage economic development and hinder the appreciation of property values. It is the responsibility of property owners to prevent buildings from becoming a nuisance to the neighborhood and community as well as a threat to the public health, safety, and welfare. A neglected

building that is not well maintained and managed can be the source of spreading blight. As such, these buildings constitute a nuisance. To adequately protect public health, safety and welfare, Section 9.60 of the Tracy Municipal Code was adopted, which provides for the manner in which open, unsecure buildings and are addressed. This ordinance has been an effective tool by providing staff with the enforcement means by which such nuisance conditions may be abated. Since enacting the Ordinance in 2006, approximately 17 buildings have gone through the boarding up process. These properties largely remain boarded today. (See Attachment A for a map of these properties.)

Vacant Boarded Buildings vs. Vacant/Boarded/Dilapidated/Substandard Buildings

There are two continuums of boarded buildings: (a) vacant, boarded buildings and (b) vacant, boarded buildings which are dilapidated and in dangerous, substandard condition. Since the latter part of 2012, staff has repositioned its priorities and has proactively inspected all boarded buildings in Tracy. Following these inspections, staff discovered that of the 13 boarded buildings; five are in a dilapidated state and structurally unsound; therefore qualify for abatement under the Abatement of Dangerous Buildings Code. In addition to these proactive inspections, staff has substantially accelerated its enforcement efforts to (1) address the life safety problems associated with their condition, and (2) to prevent further neighborhood decline and begin the process of rebuilding surrounding neighborhoods.

Existing Code Enforcement Approach

As outlined in Attachment "B" of this staff report, open and unsecured buildings, and other violations that may exist on these properties, may be addressed by use of the following tools:

- Administrative Citations
- Criminal Penalties
- A combination of both administrative and civil penalties
- City-initiated abatement proceedings (when voluntary compliance measures are not achieved)
- City-initiated Receivership

In extreme cases, the City may consider using the option of a Receivership process to address boarded, derelict properties when property owners fail to comply with other enforcement measures. Receivership is a specialized civil remedy that allows a judge to appoint a special agent of the court or a non-profit corporation as the Receiver of the property to correct the code violations and manage the property. California Health and Safety Code sections 17980.6 and 17980.7 set forth criteria as to whether a property qualifies for this receivership option. Copies of those code sections are included as Attachment C this staff report.

Properties eligible for Receivership include properties that show evidence of the following:

- The building is residential; and

- The building is deemed unsafe or dangerous; or
- The building is an attractive nuisance (e.g. drug or gang house, homeless people squatting in the building and engaging in unsafe practices, minors using the building and engaging in unsafe practices, etc.).

Receivership cases are uncommon, because this process is only available under certain conditions. Also, the cases can be costly and the up-front costs to pay for a Receiver's services would come from the City's General Fund. Recovering these costs could ultimately be a lengthy process.

In addition to the above-referenced remedies, vacant property owners may post "No Trespassing" signs on the property and file a "No Trespassing" letter with the Tracy Police Department, pursuant to California Criminal "Trespass & Trespassing" Laws. Violators of this trespassing warning may be arrested and charged with a misdemeanor for violating Section 602 of the California Penal Code.

Tracy's Outcomes (under existing codes)

Property owners have been responsive to code enforcement actions relative to nuisance issues that are found to exist in these properties using the above remedies. To date, enforcement of violations on these boarded buildings and the land they reside on have been abated on a voluntary basis by the property owner(s) without the use of forced compliance measures.

It is important to note that while these properties have complied with Tracy existing vacant and abandoned building codes, they remain in a boarded up condition which may impact the aesthetics and value of the neighborhood.

Calls for Service

According to City records, of the 13 boarded buildings, the following have had calls for service:

3379 N. Tracy Boulevard - Long John Silver's closed approx. 2007. The Fire Department has had no responses at this address since it closed.

48 E. Ninth Street

11/29/05 – Structure Fire (it was occupied at the time of this fire, the occupant suffered burns). Building has been boarded ever since.

64 W. Fourth Street

4/8/03 – Rubbish Fire
2/11/07 – Structure Fire

27 W. Third Street

6/16/03 – Rubbish Fire

The existing 13 properties identified as vacant and boarded currently meet existing City codes. In other words, they are properly secured and boarded. These properties could remain vacant and boarded indefinitely provided they continue to meet code standards.

Since the last Council discussion on this matter, Code Enforcement has been made aware of a new product that secures vacant property without exposing its vacancy to onlookers and provides an aesthetically pleasing alternative to traditional plywood boarding. The product material consists of recyclable/recycled polycarbonate materials, which protect vacant buildings from intrusion, as well as providing the appearance of common glass windows.

Traditional plywood boarding discloses a property as being vacant. As such, the surrounding homes and commercial real estate may drop in value, and invite vandalism, additional crime, squatting, graffiti, etc. In consideration of the expenses incurred by property owners when securing property with glass windows and/or plywood boarding, the City has identified an alternative material for permanently securing a property that is both less expensive than glass windows, and has greater resistance to inclement weather than traditional plywood boarding. This alternative material is a polycarbonate product. It is a viable, long-term alternative to plywood boarding. The material is made of 100% recycled polycarbonate material and is virtually unbreakable. Additionally, when securing the property, it gives the building a visually appealing appearance to surrounding neighbors as well as preserving the quality of those neighborhoods.

In addition to securing the structure, this see-through material is a safer alternative to traditional plywood boarding for first responders, because they can have a clear vision into the building prior to entry. Unlike plywood, the polycarbonate material does not warp or mold during inclement weather and only needs to be installed once, as opposed to plywood boarding which can require multiple replacements due to deterioration caused by inclement weather.

The following cities are currently running pilot programs using this new polycarbonate material for boarding vacant buildings:

- Baltimore
- Broward County
- Chicago
- Cleveland
- Cincinnati
- Detroit
- Dallas
- Kansas City
- Phoenix

TMC Section 9.60.040 (b), Standards for securing open and unsecured buildings, states alternative methods of securing doors, windows or other openings of any building or structure must be approved by the Building Official. In the Building Official's determination, consideration is given to aesthetics and other impacts of such method on the immediate neighborhood and the extent to which such method provides adequate and long-term security against the unauthorized entry to the property.

Outreach Results

Community meetings have been held with the Tracy Association of Realtors and most recently, with owners of property living near or adjacent to the boarded buildings. The goal of these meetings was to obtain comments, opinions and concerns regarding neighborhood impacts associated with these vacant buildings, in addition to obtaining feedback regarding possible amendments to the Boarded Buildings Ordinance. During a June 5, 2012 meeting with the Tracy Association of Realtors, the Association was not supportive of any changes to the existing Boarding of Buildings ordinance. Further, the topic of residential resale inspections was discussed, which had been mentioned by a member of the real estate community at the February 21, 2012 Council Meeting. Such a program would require owners of single family residences and duplexes to pay a fee and submit to a city inspection in order to receive certification that the home contains no unpermitted construction, particularly extra rooms or secondary units prior to selling properties. This program was also rejected by the Association.

Based on the staff's knowledge of resale inspection programs and in researching other cities' practices regarding these programs, there were substantial variances among the approaches taken by each jurisdiction relative to resale inspections. While such a program would have an imposed fee as a partial funding mechanism, the staff hours necessary to perform such inspections would far exceed the intake fees for such a program. Therefore, current staffing levels and budgetary constraints would make such a program infeasible to implement at this time.

On November 20, 2012, a community meeting was conducted in the Tracy Transit Building to hear concerns and comments from owners of vacant and abandoned properties as well as residents of property within 400 feet of boarded buildings. Over 200 letters were sent notifying owners and residents of the meeting. Seven people attended the meeting with five being owners of boarded buildings. The property owners were opposed to any amendments to the Boarding of Unsecured Buildings, especially as they pertain to establishing a timeline for these buildings to be boarded.

Downtown Revitalization Efforts and the City's Investment toward Improving the Downtown Area

The now abolished Community Development Agency adopted a Downtown Agency Plan in July, 1990, with the specific goal of eliminating or reducing the instances of blight and blighting conditions within the Community Development Project Area (see attached map, Attachment D). The goals of the Agency were developed to illustrate the broad range of concerns that the Agency intended to address over the life of the Plan.

As identified on the attached map (Attachment A), the vast majority of the boarded buildings in the City of Tracy are located within the downtown area, one of the oldest parts of the community. The blighted conditions of this area were identified in the Plan as being in need of attention. Property values and building maintenance appeared to have improved at that time; however, there was still substantial evidence of deferred maintenance, lack of general upkeep, litter, graffiti, inappropriate signage and other

blighted conditions; including vacant, undeveloped railroad property that was used by transients for sleeping and loitering.

The Community Development Agency and the City Council placed a major emphasis on the revitalization of the downtown area. Projects in excess of \$50 million have been completed or are in various stages of development. They include the Downtown Streetscape Project, the Grand Theater, the Downtown Plaza, the Transit Station and the restructured Fire Administration Building.

To ameliorate improvement efforts in the Downtown area, the Community Development Agency approved a series of programs which staff implemented that are designed to assist with revitalization efforts within the boundaries of the Downtown Redevelopment Program area. These programs consist of three small grant programs to assist owner/occupied homeowners with needed property improvements, two low interest loan programs for substantial health and safety property rehabilitation, and a down payment assistance program for to assist first time homebuyers in buying owner/occupied residences. In addition, a graffiti abatement program was established to help property owners purchase paint and materials to remove graffiti on private property. These programs were created as an additional incentive for property owners and to enhance property values in the downtown.

Since the abolishment of redevelopment agencies in 2011, all but one program has been eliminated. The one remaining program currently in place is the City's Free Tow program for inoperable vehicles on private property. This is a voluntary program with funding from the City's General Fund.

Unfortunately, the loss of redevelopment funds has removed an essential tool for combating blight.

Options for Council Consideration

The following are options for Council consideration relative to expanding existing codes regarding vacant and abandoned buildings.

Option 1. Continue enforcement of Tracy's existing codes.

- Continue enforcing Tracy's existing codes to ensure open, unsecured buildings comply with the Boarded of Unsecured Buildings Ordinance. Staff will maintain monthly, proactive inspections of these buildings to ensure they meet all code provisions and properties are maintained nuisance-free.

This would likely result in maintaining the existing status of the vacant and boarded properties.

Option 2. Amend the Tracy Municipal Code regarding vacant and abandoned buildings (residential and commercial).

- Establish a timeframes for how long a vacant building can remain in a boarded state (must replace boards with windows or suitable substitute within

90 days of notice (suitable substitute could be this polycarbonate product) and allow existing boarded buildings no longer than 120 days to remove plywood and replace with a more permanent material, such as glass or polycarbonate product.

This option would ensure open, unsecured buildings comply with the Boarded of Unsecured Buildings Ordinance while providing a viable, long-term alternative to plywood boarding. This option would also provide visual appeal to surrounding neighbors and to neighborhoods in general.

*Option 3. Same as Option 2, but **limited to commercial establishments** regarding vacant and abandoned buildings.*

- Establish timeframes that include only commercial properties (must replace boards with windows or suitable substitute within 90 days of notice (suitable substitute could be polycarbonate product)) both because they are generally more susceptible to unwanted intrusions and to aid with economic development in the community. This option takes into account the visibility of commercial properties which are more evident to residents and guests entering the City, as they are typically located on major streets.

STRATEGIC PLAN

This staff report supports the following objective of the Public Safety Strategy:

- Goal 4, Objective 4a – Address blighted and dangerous building conditions throughout community with a focus on safety, blight, and quality of life issues.

FISCAL IMPACT

The Resale Inspection Program would require additional staff hours to carry out the labor intensive functions of such a program. Existing staffing levels and budgetary constraints constitute such a program unfeasible to implement at this time. Furthermore, the local real estate associations have voiced opposition to such a program.

Should Council direct staff to pursue Option 2, there may be impacts to the General Fund if the City takes action to pay for window replacement from non-responsive property owners. These funds could be recovered when the affected property is sold or through other legal means such as through small claims court proceedings. This, however, would require a reprioritization of staff time to focus on these vacant and abandoned properties. Alternatively, staff could continue to fine these property owners through its administrative penalties until compliance is achieved.

RECOMMENDATION

Staff recommends Council consider Option 2 as a means to proactively address the problem of long-standing vacant and abandoned buildings, and provide staff direction accordingly.

Agenda Item 4
March 19, 2013
Page 8

Prepared by: Ana Contreras, Community Preservation Manager

Reviewed by: Andrew Malik, Development Services Director

Approved by: R. Leon Churchill, Jr., City Manager

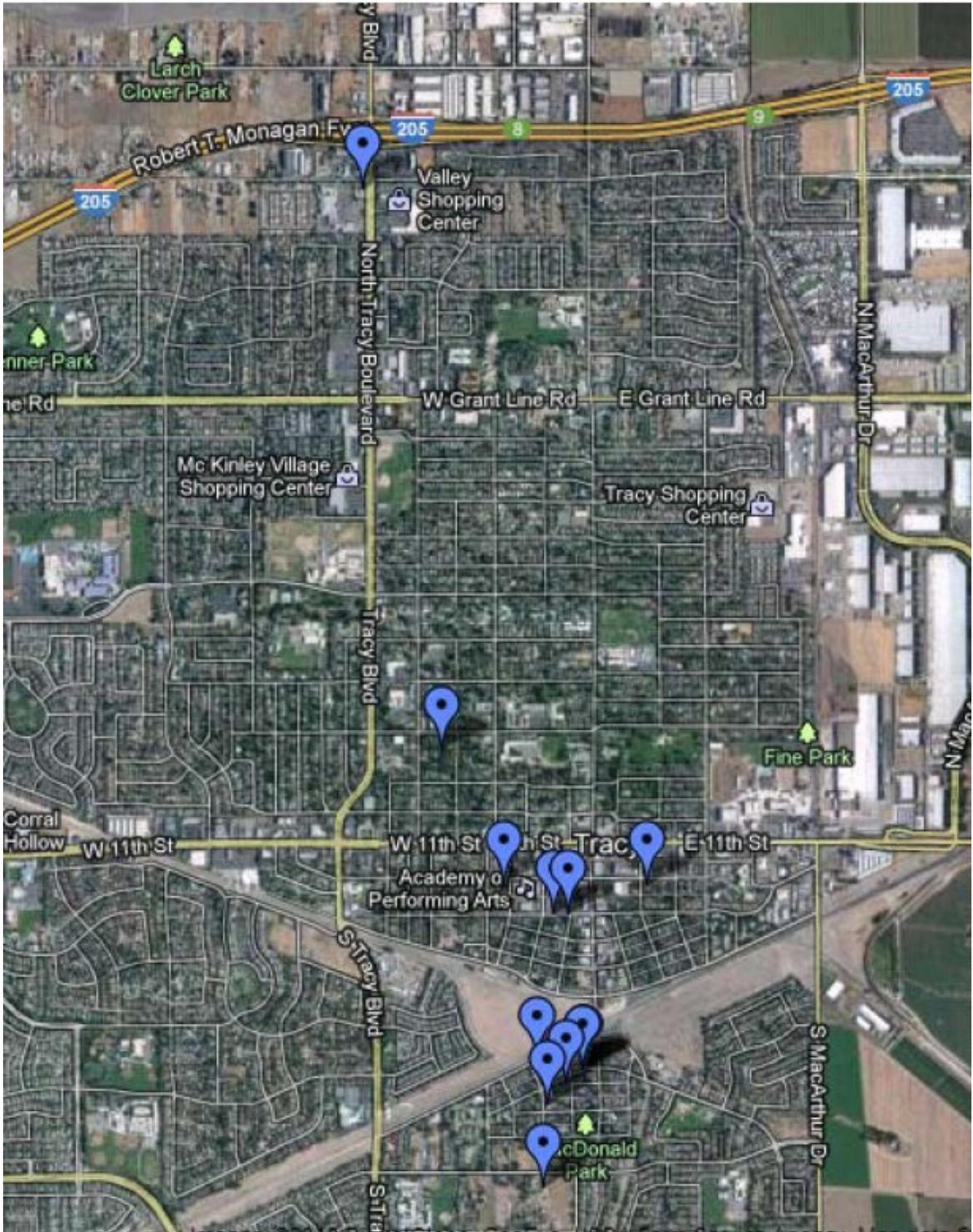
ATTACHMENTS:

Attachment A - Map of Existing Boarded and Vacant Properties

Attachment B - TMC Sec. 9.60, Boarding of Buildings with Unsecured Openings

Attachment C - California Health and Safety Code Sections 17980.6 and 17980.7

Attachment D - Downtown Housing Rehabilitation Program Boundary Map



**IDENTIFIED
PROPERTIES**

27 W 3rd Street
 29 W 3rd Street
 31 W 3rd Street
 48 E 9th Street

64 W 4th Street
 79 E 9th Street
 90 W Mt. Diablo
 91 W 1st Street

104 E 10th Street
 424 W Eaton Avenue
 951 A Street
 3379 N Tracy Blvd

Code Enforcement Addressing Vacant and Unsecured Buildings

The City's involvement in dealing with open and unsecured buildings begins when a complaint is filed with Code Enforcement. The complaint is then entered into its database, a case is opened, and a site inspection is performed to validate the complaint. Many of the violations found on these properties cross departmental and agency lines. For instance, abandoned vehicles and overgrown weeds are referred to the Fire Department. Issues involving vandalism and abandoned animals are reported to the Police Department, while unkempt swimming pools (which can become a breeding ground for West Nile Virus) are referred to the San Joaquin County Mosquito Abatement District for abatement of mosquito larvae.

Once the complaint has been confirmed, Code staff notifies the property owner by phone, in person, or by mailing a Notice and Order with a specified time frame for correcting the violations in according with Section 9.60.040, Standards for securing building (attached). A follow-up investigation is then conducted shortly after the deadline contained in the Order to verify whether or not corrective action has been taken. If the violation(s) still exist at the time of the follow-up inspection, the City will move forward with a Notice to Abate or Show Cause, including a deadline for compliance and appeal dates. If the violations are still not corrected, the City can move forward with more punitive action, such as administrative citations, and/or criminal or civil injunctions. Upon correction of all cited violations, the case is closed and no further action is required.

Code Enforcement's goal is to gain timely, voluntary compliance on all code enforcement cases; however, in situations of imminent public danger requiring immediate action, the City has legal authority to abate the nuisance and attempt to recover its expenses through small claims judgments.

Community partnerships with residents surrounding boarded buildings have and continue to be established through existing Neighborhood Watch Meetings. Code Enforcement attends these meetings on a regular basis to educate residents with tips on how they can help keep the property from negatively impacting their neighborhoods and how to report violations. Collaboration and assistance is also obtained from the Board of Realtors to help address the problems associated with open and unsecured properties. These alliances have had a positive impact on the condition of the community's property stock and have demonstrated a united commitment on the part of all stakeholders in the community, both public and private alike.

TMC Sec. 9.60, Boarding of Buildings with Unsecured Openings

California Health and Safety Code Section 17980.6

17980.6. If any building is maintained in a manner that violates any provisions of this part, the building standards published in the State Building Standards Code relating to the provisions of this part, any other rule or regulation adopted pursuant to the provisions of this part, or any provision in a local ordinance that is similar to a provision in this part, and the violations are so extensive and of such a nature that the health and safety of residents or the public is substantially endangered, the enforcement agency may issue an order or notice to repair or abate pursuant to this part. Any order or notice pursuant to this subdivision shall be provided either by both posting a copy of the order or notice in a conspicuous place on the property and by first-class mail to each affected residential unit, or by posting a copy of the order or notice in a conspicuous place on the property and in a prominent place on each affected residential unit. The order or notice shall include, but is not limited to, all of the following:

- a) The name, address, and telephone number of the agency that issued the notice or order.
- b) The date, time, and location of any public hearing or proceeding concerning the order or notice.
- c) Information that the lessor cannot retaliate against a lessee pursuant to Section 1942.5 of the Civil Code.

California Health and Safety Code Section 17980.7

17980.7. If the owner fails to comply within a reasonable time with the terms of the order or notice issued pursuant to Section 17980.6, the following provisions shall apply:

(a) The enforcement agency may seek and the court may order imposition of the penalties provided for under Chapter 6 (commencing with Section 17995).

(b) (1) The enforcement agency may seek and the court may order the owner to not claim any deduction with respect to state taxes for interest, taxes, expenses, depreciation, or amortization paid or incurred with respect to the cited structure, in the taxable year of the initial order or notice, in lieu of the enforcement agency processing a violation in accordance with Sections 17274 and 24436.5 of the Revenue and Taxation Code.

(2) If the owner fails to comply with the terms of the order or notice to correct the condition that caused the violation pursuant to Section 17980.6, the court may order the owner to not claim these tax benefits for the following year.

(c) The enforcement agency, tenant, or tenant association or organization may seek and the court may order, the appointment of a receiver for the substandard building pursuant to this subdivision.

In its petition to the court, the enforcement agency, tenant, or tenant association or organization shall include proof that notice of the petition was served not less than three days prior to filing the petition, pursuant to Article 3 (commencing with Section 415.10) of Chapter 4 of Title 5 of Part 2 of the Code of Civil Procedure, to all persons with a recorded interest in the real property upon which the substandard building exists.

(1) In appointing a receiver, the court shall consider whether the owner has been afforded a reasonable opportunity to correct the conditions cited in the notice of violation.

(2) The court shall not appoint any person as a receiver unless the person has demonstrated to the court his or her capacity and expertise to develop and supervise a viable financial and construction plan for the satisfactory rehabilitation of the building. A court may appoint as a receiver a nonprofit organization or community development corporation. In addition to the duties and powers that may be granted pursuant to this section, the nonprofit organization or

community development corporation may also apply for grants to assist in the rehabilitation of the building.

(3) If a receiver is appointed, the owner and his or her agent of the substandard building shall be enjoined from collecting rents from the tenants, interfering with the receiver in the operation of the substandard building, and encumbering or transferring the substandard building or real property upon which the building is situated.

(4) Any receiver appointed pursuant to this section shall have all of the following powers and duties in the order of priority listed in this paragraph, unless the court otherwise permits:

(A) To take full and complete control of the substandard property.

(B) To manage the substandard building and pay expenses of the operation of the substandard building and real property upon which the building is located, including taxes, insurance, utilities, general maintenance, and debt secured by an interest in the real property.

(C) To secure a cost estimate and construction plan from a licensed contractor for the repairs necessary to correct the conditions cited in the notice of violation.

(D) To enter into contracts and employ a licensed contractor as necessary to correct the conditions cited in the notice of violation.

(E) To collect all rents and income from the substandard building.

(F) To use all rents and income from the substandard building to pay for the cost of rehabilitation and repairs determined by the court as necessary to correct the conditions cited in the notice of violation.

(G) To borrow funds to pay for repairs necessary to correct the conditions cited in the notice of violation and to borrow funds to pay for any relocation benefits authorized by paragraph (6) and, with court approval, secure that debt and any moneys owed to the receiver for services performed pursuant to this section with a lien on the real property upon which the substandard building is located. The lien shall be recorded in the county recorder's office in the county within which the building is located.

(H) To exercise the powers granted to receivers under Section 568 of the Code of Civil Procedure.

(5) The receiver shall be entitled to the same fees, commissions, and necessary expenses as receivers in actions to foreclose mortgages.

(6) If the conditions of the premises or the repair or rehabilitation thereof significantly affect the safe and sanitary use of the substandard building by any tenant, to the extent that the tenant cannot safely reside in his or her unit, then the receiver shall provide relocation benefits in accordance with subparagraph (A) of paragraph (3) of subdivision (d).

(7) The relocation compensation provided for in this section shall not preempt any local ordinance that provides for greater relocation assistance.

(8) In addition to any reporting required by the court, the receiver shall prepare monthly reports to the state or local enforcement agency which shall contain information on at least the following items:

(A) The total amount of rent payments received.

(B) Nature and amount of contracts negotiated relative to the operation or repair of the property.

(C) Payments made toward the repair of the premises.

(D) Progress of necessary repairs.

(E) Other payments made relative to the operation of the building.

(F) Amount of tenant relocation benefits paid.

(9) The receiver shall be discharged when the conditions cited in the notice of violation have been remedied in accordance with the court order or judgment and a complete accounting of all costs and repairs has been delivered to the court. Upon removal of the condition, the owner, the

mortgagee, or any lien or of record may apply for the discharge of all moneys not used by the receiver for removal of the condition and all other costs authorized by this section.

(10) After discharging the receiver, the court may retain jurisdiction for a time period not to exceed 18 consecutive months, and require the owner and the enforcement agency responsible for enforcing Section 17980 to report to the court in accordance with a schedule determined by the court.

(11) The prevailing party in an action pursuant to this section shall be entitled to reasonable attorney's fees and court costs as may be fixed by the court.

(12) The county recorder may charge and collect fees for the recording of all notices and other documents required by this section pursuant to Article 5 (commencing with Section 27360) of Chapter 6 of Division 2 of Title 3 of the Government Code.

(13) This section shall not be construed to limit those rights available to tenants and owners under any other provision of the law.

(14) This section shall not be construed to deprive an owner of a substandard building of all procedural due process rights guaranteed by the California Constitution and the United States Constitution, including, but not limited to, receipt of notice of the violation claimed and an adequate and reasonable period of time to comply with any orders which are issued by the enforcement agency or the court.

(15) Upon the request of a receiver, a court may require the owner of the property to pay all unrecovered costs associated with the receivership in addition to any other remedy authorized by law.

(d) If the court finds that a building is in a condition which substantially endangers the health and safety of residents pursuant to Section 17980.6, upon the entry of any order or judgment, the court shall do all of the following:

(1) Order the owner to pay all reasonable and actual costs of the enforcement agency including, but not limited to, inspection costs, investigation costs, enforcement costs, attorney fees or costs, and all costs of prosecution.

(2) Order that the local enforcement agency shall provide the tenant with notice of the court order or judgment.

(3) (A) Order that if the owner undertakes repairs or rehabilitation as a result of being cited for a notice under this chapter, and if the conditions of the premises or the repair or rehabilitation thereof significantly affect the safe and sanitary use of the premises by any lawful tenant, so that the tenant cannot safely reside in the premises, then the owner shall provide or pay relocation benefits to each lawful tenant. These benefits shall consist of actual reasonable moving and storage costs and relocation compensation. The actual moving and storage costs shall consist of all of the following:

(i) Transportation of the tenant's personal property to the new location. The new location shall be in close proximity to the substandard premises, except where relocation to a new location beyond a close proximity is determined by the court to be justified.

(ii) Packing, crating, unpacking, and uncrating the tenant's personal property.

(iii) Insurance of the tenant's property while in transit.

(iv) The reasonable replacement value of property lost, stolen, or damaged (not through the fault or negligence of the displaced person, his or her agent or employee) in the process of moving, where insurance covering the loss, theft, or damage is not reasonably available.

(v) The cost of disconnecting, dismantling, removing, reassembling, reconnecting, and reinstalling machinery, equipment, or other personal property of the tenant, including connection charges imposed by utility companies for starting utility service.

(B) (i) The relocation compensation shall be an amount equal to the differential between the contract rent and the fair market rental value determined by the federal Department of Housing

and Urban Development for a unit of comparable size within the area for the period that the unit is being repaired, not to exceed 120 days.

(ii) If the court finds that a tenant has been substantially responsible for causing or substantially contributing to the substandard conditions, then the relocation benefits of this section shall not be paid to this tenant. Each other tenant on the premises who has been ordered to relocate due to the substandard conditions and who is not substantially responsible for causing or contributing to the conditions shall be paid these benefits and moving costs at the time that he or she actually relocates.

(4) Determine the date when the tenant is to relocate, and order the tenant to notify the enforcement agency and the owner of the address of the premises to which he or she has relocated within five days after the relocation.

(5) (A) Order that the owner shall offer the first right to occupancy of the premises to each tenant who received benefits pursuant to subparagraph (A) of paragraph (3), before letting the unit for rent to a third party. The owner's offer on the first right to occupancy to the tenant shall be in writing, and sent by first-class certified mail to the address given by the tenant at the time of relocation. If the owner has not been provided the tenant's address by the tenant as prescribed by this section, the owner shall not be required to provide notice under this section or offer the tenant the right to return to occupancy.

(B) The tenant shall notify the owner in writing that he or she will occupy the unit. The notice shall be sent by first-class certified mail no later than 10 days after the notice has been mailed by the owner.

(6) Order that failure to comply with any abatement order under this chapter shall be punishable by civil contempt, penalties under Chapter 6 (commencing with Section 17995), and any other penalties and fines as are available.

(e) The initiation of a proceeding or entry of a judgment pursuant to this section or Section 17980.6 shall be deemed to be a "proceeding" or "judgment" as provided by paragraph (4) or (5) of subdivision (a) of Section 1942.5 of the Civil Code.

(f) The term "owner," for the purposes of this section, shall include the owner, including any public entity that owns residential real property, at the time of the initial notice or order and any successor in interest who had actual or constructive knowledge of the notice, order, or prosecution.

(g) These remedies shall be in addition to those provided by any other law.

(h) This section and Section 17980.6 shall not impair the rights of an owner exercising his or her rights established pursuant to Chapter 12.75 (commencing with Section 7060) of Division 7 of Title 1 of the Government Code.

AGENDA ITEM 5

REQUEST

DIRECT STAFF TO CEASE NEGOTIATIONS WITH SPIRIT OF CALIFORNIA ENTERTAINMENT GROUP, INC. FOR A NEW EXCLUSIVE NEGOTIATING RIGHTS AGREEMENT; ADOPT A RESOLUTION TERMINATING THE EXISTING EXCLUSIVE NEGOTIATING RIGHTS AGREEMENT WITH TRACY'S CALIFORNIA BLAST, LLC AND FIRST AMENDMENT WITH TRACY BLAST DEVELOPMENT, LLC; AND DIRECT STAFF TO RETURN AT A LATER DATE WITH OPTIONS FOR POSSIBLE USES OF THE CITY-OWNED PROPERTIES OUTSIDE OF THE CITY LIMITS ON THE WEST SIDE OF TRACY BOULEVARD ADJACENT TO LEGACY FIELDS AND ON THE EAST SIDE OF TRACY BOULEVARD NORTH OF ARBOR ROAD AND NORTH OF THE CITY'S WASTEWATER TREATMENT PLANT ("HOLLY SUGAR PROPERTY")

EXECUTIVE SUMMARY

On April 29, 2011, the City entered into an Exclusive Negotiating Rights Agreement ("ENRA") with Tracy's California Blast, LLC regarding City-owned properties outside of the City limits on the west side of Tracy Boulevard adjacent to Legacy Fields and on the east side of Tracy Boulevard north of Arbor Road and north of the City's Wastewater Treatment Plant ("Holly Sugar Property"). On September 18, 2012, the City entered into the First Amendment to the ENRA with Tracy Blast Development, LLC (Tracy's California Blast, LLC and Tracy Blast Development, LLC are collectively referred to as "Tracy Blast").

On November 7, 2012, the City Council directed staff to enter into negotiations with the Spirit of California Entertainment Group, Inc. ("Spirit of California") for a new ENRA regarding the Holly Sugar Property. At that time, the City Council also directed that the ENRA with Tracy Blast should remain in place until a new ENRA with Spirit of California was approved.

Since November 7, 2012, it has come to staff's attention that the Chief Executive Officer of Spirit of California, James B. Rogers, may be or may have been associated with a number of other companies, lawsuits, bankruptcy proceedings, and judgment liens. Mr. Rogers has failed to provide staff with sufficient information on these matters to allow staff to negotiate and recommend entering into a new ENRA with Spirit of California. Therefore, staff is recommending that the City Council: direct staff to cease negotiations with Spirit of California for a new ENRA; adopt a resolution terminating the existing ENRA with Tracy Blast; and direct staff to return at a later date with options for possible uses of the Holly Sugar Property.

DISCUSSION

On April 29, 2011, the City entered into an Exclusive Negotiating Rights Agreement ("ENRA") with Tracy's California Blast, LLC regarding City-owned properties outside of the City limits on the west side of Tracy Boulevard adjacent to Legacy Fields and on the east side of Tracy Boulevard north of Arbor Road and north of the City's Wastewater

Treatment Plant ("Holly Sugar Property"). On September 18, 2012, the City entered into the First Amendment to the ENRA with Tracy Blast Development, LLC (Tracy's California Blast, LLC and Tracy Blast Development, LLC are collectively referred to as "Tracy Blast").

On November 7, 2012, the City Council directed staff to enter into negotiations with the Spirit of California Entertainment Group, Inc. ("Spirit of California") for a new ENRA regarding the Holly Sugar Property. At that time, the City Council also directed that the ENRA with Tracy Blast should remain in place until a new ENRA with Spirit of California was approved. As background, the November 7, 2012 staff report is attached as Attachment A.

Since November 7, 2012, it has come to staff's attention that James B. Rogers may be or may have been associated with a number of other companies, lawsuits, bankruptcy proceedings, and judgment liens. Mr. Rogers is listed as the Chief Executive Officer, Secretary, and Chief Financial Officer of the Spirit of California in forms Mr. Rogers has filed with the Secretary of State. He is listed as the sole Director as well. Mr. Rogers also identified himself as the Chief Executive Officer of Tracy Blast. Therefore, on February 7, 2013, staff sent Mr. Rogers a letter requesting additional information on these matters, specifically requesting that all responses be of sufficient detail to allow staff to independently verify the information. A copy of staff's letter is attached as Attachment B.

On February 20, 2013, Mr. Rogers sent a letter to staff in response to staff's request. Attached to his letter are three reference letters from: James P. Nichols, Attorney at Law; Sheryl Madison Lancaster; and Phillip L. McKitterick, with the Artisan Company. A copy of Mr. Roger's letter, with attachments, is attached as Attachment C.

Many of the responses in Mr. Roger's letter were general in nature and were not supported by any documentation that staff could rely on to independently verify the information. Also, some of the responses seem to conflict with court documents.

For example, in his letter, Mr. Rogers describes one lawsuit he is involved in (*Bennett v. Superior Court*) as relating to ". . . a private lender who is suing another private lender in a transaction I was involved in 4 years ago. Because I was a party to the transaction I was sued as well." The following is a description of the facts from the Court of Appeal's opinion in the case:

Bennett filed this action on May 6, 2010, naming only James B. Rogers, the primary source of the alleged fraud. According to the original complaint as well as his subsequent pleadings, in August 2007 Bennett loaned Rogers \$2 million. Rogers had represented that he planned to construct a home and "Guest House" on a parcel of land in Los Gatos and then sell the property to recoup Bennett's investment. In exchange for the loan, Rogers gave Bennett a promissory note, secured by a deed of trust on the property. The deed of trust allowed Bennett to "call the loan due in full" if Rogers transferred any or all of the property.

On April 1, 2008 Rogers persuaded Bennett to “go off title” to the Guest House, ostensibly so he could refinance that part of the loan. The papers Bennett signed, however, transferred to Rogers all of Bennett's title to and interest in the *main property* as well as the Guest House. In his first amended complaint Bennett alleged that he had mistakenly signed these documents in reliance on Rogers's representation that only title to the Guest House was being transferred.

On August 7, 2008, Rogers conveyed the property to Lexington Consulting, Rogers's solely owned entity. Less than two weeks later, Lexington Consulting filed for bankruptcy protection. According to Bennett, Rogers had made no payments on the note since September 2007.

When Bennett discovered that he had been removed from title to the main property, he contacted Rogers, who first blamed the title company for incorrectly drafting the documents, but then explained that he needed Bennett's name and deed of trust removed from the main property to facilitate the transfer to Lexington Consulting and the bankruptcy filing. Rogers allegedly also told Bennett that Bennett had to be removed from the title to the main property because Rogers needed another \$250,000 to complete construction on the main property in order to sell it. In addition, Rogers explained, the second lienholders reportedly would not provide the additional funding unless Bennett was removed from title, because he had not signed a subordination agreement. These second lienholders were real parties in interest Magnate Fund # 2, LLC; Lodgepole Investments, LLC; and LHJS Investments, LLC (collectively, real parties).

(*Id.* at p. 2.)

In the *Bennett* case, the question before the court was a procedural one -- whether the plaintiff's lis pendens he filed on the property should be expunged. A lis pendens is a recorded document giving constructive notice that an action has been filed affecting title or right to possession of the property. The Court of Appeal concluded that the lis pendens should not be expunged because the plaintiff adequately pleaded a claim for fraudulent conveyance. A copy of the Court's opinion is attached as Attachment D.

In his letter, Mr. Rogers also describes two other federal lawsuits he was involved in (*Security Pacific National Trust Company (New York) v. Preferred Financial Group, Inc.* and *James B. Rogers, et al. v. Federal Bureau of Investigation*) as follows: “In most cases when a lawsuit with a federal institution is initiated, the FBI has to be involved due to its federal insurance. I prevailed in both of these joint cases. I was awarded 350k dollars in damages. This case was closed 15 years ago.”

According to a federal District Court's opinion in the case involving the FBI (*James B. Rogers v. Federal Bureau of Investigation*), Mr. Rogers and the other plaintiffs were

alleging, among other things, that the FBI and IRS violated their civil rights during the course of the criminal investigation into a company they operated, Preferred Financial Group, Inc. The company purported to provide securities brokerage services to cater to European clients. It appears as if this case was dismissed by the federal District Court. Copies of opinions from the federal District Court are attached as Attachment E.

Mr. Rogers has failed to provide staff with sufficient information on the matters outlined in its February 13, 2013 letter to allow staff to negotiate and recommend entering into a new ENRA with Spirit of California. Therefore, staff is recommending that the City Council direct staff to cease negotiations with Spirit of California for a new ENRA.

Staff is also recommending that the City Council adopt a resolution terminating the existing ENRA with Tracy Blast. As outlined in the November 7, 2012 staff report, Tracy Blast is currently in default under the ENRA, in part because Tracy Blast failed to provide required financial information. At the November 7, 2013 City Council meeting, Mr. Rogers did not dispute the fact that Tracy Blast was in default under the existing ENRA.

Finally, staff is recommending that City Council direct it to return at a later date with options for possible uses of the Holly Sugar Property.

STRATEGIC PLAN

This agenda item is not directly related to the City's Strategic plans.

FISCAL IMPACT

There is no impact to the general fund.

RECOMMENDATION

It is recommended that the City Council:

- (1) direct staff to cease negotiations with Spirit of California for a new ENRA;
- (2) adopt a resolution terminating the existing ENRA with Tracy Blast; and
- (3) direct staff to return at a later date with options for possible uses of the Holly Sugar Property.

Prepared by: Andrew Malik, Development Services Director
Rod Buchanan, Interim Public Works Director
Bill Dean, Assistant Director, Development Services

Approved by: R. Leon Churchill Jr., City Manager

ATTACHMENTS:

- A – November 7, 2012 staff report with attachments
- B – Letter from staff to James B. Rogers dated February 7, 2013
- C – Letter from James B. Rogers to staff dated February 20, 2013 with attachments
- D – Bennett v. Superior Court
- E – James B. Rogers v. Federal Bureau of Investigation

ATTACHMENT A

November 7, 2012

AGENDA ITEM 7

REQUEST

COUNCIL DETERMINATION THAT TERMS OF THE EXCLUSIVE NEGOTIATING RIGHTS AGREEMENT WITH TRACY'S CALIFORNIA BLAST LLC HAVE NOT BEEN MET BY TRACY'S CALIFORNIA BLAST LLC, DIRECTION TO TERMINATE THE EXCLUSIVE NEGOTIATING RIGHTS AGREEMENT WITH TRACY'S CALIFORNIA BLAST, DISCUSS AND PROVIDE DIRECTION TO STAFF REGARDING POSSIBLE USES OF THE HOLLY SUGAR PROPERTY

EXECUTIVE SUMMARY

The City entered into an Exclusive Negotiating Rights Agreement (ENRA) with Tracy's California Blast, LLC, on April 29, 2011, following City Council direction on April 11, 2011. The purpose of the ENRA was to provide both Tracy's California Blast, LLC (TCB), an opportunity to undertake evaluation of the development potential of the property, to submit development applications for a motorsports park and recreation oriented development. The ENRA contains specific terms required of TCB, some of which have not been met within the required time periods. This agenda item relates to (1) terminating the existing ENRA based on TCB's failure to meet performance measures of the ENRA and (2) to address a new request to negotiate a new ENRA with a new development entity called Spirit of California for an expanded proposed project on the City-owned former Holly Sugar property and other lands.

DISCUSSION

Background on Exclusive Negotiating Rights Agreements with Jeff Macey and Tracy's California Blast, LLC

On March 3, and July 7, 2009, City Council approved two separate ENRA's with Jeff Macey to develop a motorsports park on approximately 300 acres of the City-owned Holly Sugar property north of the Sports Complex. The first ENRA was for 120 days and the second ENRA was for 180 days, which was extended twice and expired on December 31, 2010. The purpose of these ENRAs was to allow Mr. Macey to form a development team and legal entity capable of developing the project and the opportunity to further refine his development proposal. Those ENRAs expired. However, during that timeframe Mr. Macey formed a new legal entity, Tracy's California Blast, LLC (TCB). In response to this, the City Council approved a third ENRA on April 19, 2011, with TCB.

TCB proposed to expand on the original motorsports park concept by approximately 300 additional acres. Development ideas included expanding commercial and other recreational uses on a total of 628 acres, with a continued focus on a motorsports park. The location of the 628 acres under consideration within this ENRA is located in the vicinity of Corral Hollow Road and Holly Drive, as shown on Attachment A.

After the formation of TCB, City staff was informed that the president of TCB was no longer Jeff Macey and that Jim Rogers would be the project proponent. Over the last couple of years, during the timeframes of all three ENRAs, City staff has participated in

dozens of internal meetings as well as meeting with Jeff Macey and Jim Rogers in an effort to render the project feasible.

Term of ENRA with TCB

The current ENRA with TCB has a term of three years (to April 29, 2014) subject to completion of certain actions or milestones agreed to by the City and TCB. TCB is in default on Sections 4 and 6 of the ENRA relative to submitting complete development applications and providing financial information to verify their ability to fund the entitlement process and to fund construction of the first phase of the 628 acre project, which included the motorsports component on approximately 400-acres of the site. Requiring early-stage developer financial review and verification for such a project, particularly when the project involves the potential sale or lease of public land, is common practice. In cases where the project may involve subsidies or other public financial obligations, and significant staff time, as may be the case with this project, financial verification becomes even more critical as an essential, first step in the process.

On February 17, 2012, Jim Rogers, on behalf of TCB submitted a letter requesting that the City grant a 6 month extension of time to satisfy the sections of the ENRA that were in default. On March 20, 2012, the City Council approved Amendment One to the ENRA with TCB to allow an extension of 6 months (to September 20, 2012) to cure the default Sections 4 and 6. Additionally, staff made clarifying amendments to the ENRA to address changes to the authorized representative signatory and noticing parties. More specifically, the original TCB ENRA listed Jeff Macey as president and authorized signatory. As mentioned earlier, Jim Rogers is now listed as the CEO of TCB and the ENRA was amended to reflect these changes. Amendment 1 to the ENRA with Tracy's California Blast, LLC, is included as Attachment B.

Current Status of ENRA with TCB

Although the City has granted two extensions of time, TCB remains in default under Sections 4 and 6 of the ENRA.

Section 6 of the ENRA states as follows:

Financial Verification

Before September 20, 2012, TCB shall allow the City's financial consultant to review sufficient information to verify the financial statements of TCB to complete the entitlement process (Specific Plan, General Plan, Annexation, Environmental Review etc.) and the financial statements for the first phase (motorsports park on approximately 400 acres). The standard due diligence information and required documents include:

- a) *Each principal of TCB shall provide personal financial statements, federal tax returns for the current year and for the prior three years and a signed credit release form.*

- b) *Each investor providing cash on hand shall provide their company bank account number as evidence of the cash on hand and a signed general financial release of account information.*
- c) *Each investor providing certain cash commitment shall provide a legally binding letter of commitment for the amount, backed up by personal financial statements, federal tax returns and a signed credit release form.*

While Jim Rogers did submit some financial statements to the City's financial consultant for review prior to the September 20, 2012 deadline, Sections 6 of the current ENRA with TCB remains in default. All financial documents submitted to the City's consultant reference the new entity Spirit of California and not TCB. It should be noted that Jim Rogers did indicate to staff that he was not going to pursue the proposed project under the TCB LLC but rather a newly formed entity called Spirit of California. A copy of a letter dated September 19, 2012 from Michael Hakeem on behalf of Jim Rogers and Tracy's California Blast, LLC stating that TCB is not going to continue with the ENRA project is attached to this report. In order to address this issue, the existing ENRA with TCB would need to be terminated and a new ENRA with Spirit of California would be required.

Notwithstanding the ENRA default relative to which entity submitted statements, the requirement was to verify financial capability to complete the project entitlements and construction of the first phase to include the motorsports track. The City's consultant was able to verify financial expressions of interest for \$1.5 million; however, the investor financial statements submitted had no apparent legally binding commitments to fund the new entity. Furthermore, while construction estimates for off-site infrastructure and the first phase of development has not been identified, staff does not believe that \$1.5 million is sufficient to entitle the 628 acre project and construct the first phase of development as required under the existing ENRA.

The financial verification also required that each principal of TCB submit personal financial statements and federal tax returns. According to the City's financial consultant, no financial information was submitted relative to the principals of either TCB (or Spirit of California).

Section 4 of the ENRA states as follows:

Development Applications

By September 20, 2012, Tracy Blast agrees to prepare and submit, development applications for various entitlements for the Property, including but not limited to the following:

- *Specific Plan*
- *General Plan Amendment*
- *Rezoning*
- *Annexation*
- *Environmental review under the California Environmental Quality Act*

Jim Rogers did submit some preliminary applications for the above referenced actions by the September 20, 2012 deadline. The applications are a good starting point,

however, they are not complete applications at this time. Jim Rogers did indicate to staff that the project has grown in size and scope from the original concept and that he would like to present the expanded project to Council as well as request a new ENRA in the name of Spirit of California.

Request to terminate ENRA with Tracy's California Blast, LLC.

On September 19, 2012, the City received a letter from Jim Rogers' attorney stating that Jim Rogers and Tracy's California Blast, LLC, will not continue with the ENRA project. A copy of the letter is included as Attachment C.

Request for a new ENRA with Spirit of California

On September 19, 2012, the City received a letter from Jim Rogers' attorney requesting that the City Council consider entering into a new ENRA with the Spirit of California (SOC) for a sports and entertainment theme park on the same acreage as the existing ENRA with TCB (the City-owned former Holly Sugar property). It also includes lands currently under an ENRA with Combined Solar Technologies (CST), as well as lands outside of the City's adopted Sphere of Influence. A copy of that letter is included as Attachment D.

According to Jim Rogers, the size and scope of the newly proposed project has been expanded from previous concepts focused around just motor sports. The expanded project includes amenities such as:

- Motocross Dirt Track
- Drag Strip
- Community Center
- RV Park
- Film Studio
- Golf Course
- Vintner Center
- Hotels
- Marina
- Casino
- Amusement Park
- Convention Center
- Arena
- And various retail and dining establishments

The proposed applicant, Jim Rogers, will be presenting the new expanded project as part of the Council agenda item. He will also be available for questions. A copy of the new Master Development Concept is attached as Attachment E.

Options for Council Consideration

Given the history of this project over the years and the new and expanded scope of the proposed project, staff has identified several options for Council consideration.

1. Regarding the failure to comply with the ENRA. Regardless of the Council's decision on options (below), staff strongly recommends that the City Council find the former applicant in default and terminate the existing ENRA. A Resolution terminating the ENRA is attached. Given the defaults, the change in the proposed project, the change in the proposed acreage, and the change in the entity proposing the project, there is no basis to continue with the existing ENRA.
2. Regarding the request to enter into a new ENRA, now with Spirit of California, the Council may wish to consider three options:

OPTION 1: Do Not Proceed with new ENRA

Given the magnitude of the new expanded project and the lack of complete financial information related to the SOC and its Principal, James Rogers, Council should not proceed with the new ENRA. Since the land is located in the flood plain, it should remain undeveloped and/or used for expanded recreational facilities (ball fields etc.) in the future.

OPTION 2: Do Not Proceed with ENRA with Spirit of California; send out Request for Proposals (RFP) to develop property

Under this option the SOC would have an opportunity to submit a proposal along with any other developers that might be interested in developing the site. There is no guarantee that the City would receive any other proposals. The location does have development challenges regarding high ground water, being in the flood plain, etc.

There may also be additional staff resources required to pursue this option given other Council priorities. Staff is currently working on a number of Council priorities (Infrastructure Master Plans, Cordes Ranch Specific Plan/DA, Ellis Specific Plan/DA, Tracy Hills Specific Plan/DA, and major industrial development in our NEI area, etc.) that may be impacted if this project were to fully proceed at this time.

OPTION 3: Direct Staff to Negotiate a New ENRA with Spirit of California

If Council directs staff to negotiate a new ENRA with the SOC, staff would bring back details and potential milestones as part of the new ENRA.

If Council selects either Option 2 or 3, there would be a significant amount of staff time required to proceed with a project of this size. Additional staff resources may be needed to ensure that other Council priorities are not impacted.

This agenda item is not directly related to the City's Strategic plans.

FISCAL IMPACT

There would be no impact to the general fund if Council selects Option 1. With regard to Options 2 and 3, a new cost recovery agreement with SOC or a new developer would need to be executed to move forward. All staff and consultant costs would be recovered through this new agreement.

RECOMMENDATION

It is recommended that the City Council:

- (1) direct staff to proceed with terminating the ENRA with Tracy's California Blast LLC;
and
- (2) provide direction to staff to pursue Option 2 to see if there are other developers interested in the property. SOC can re-submit a proposal under this option.

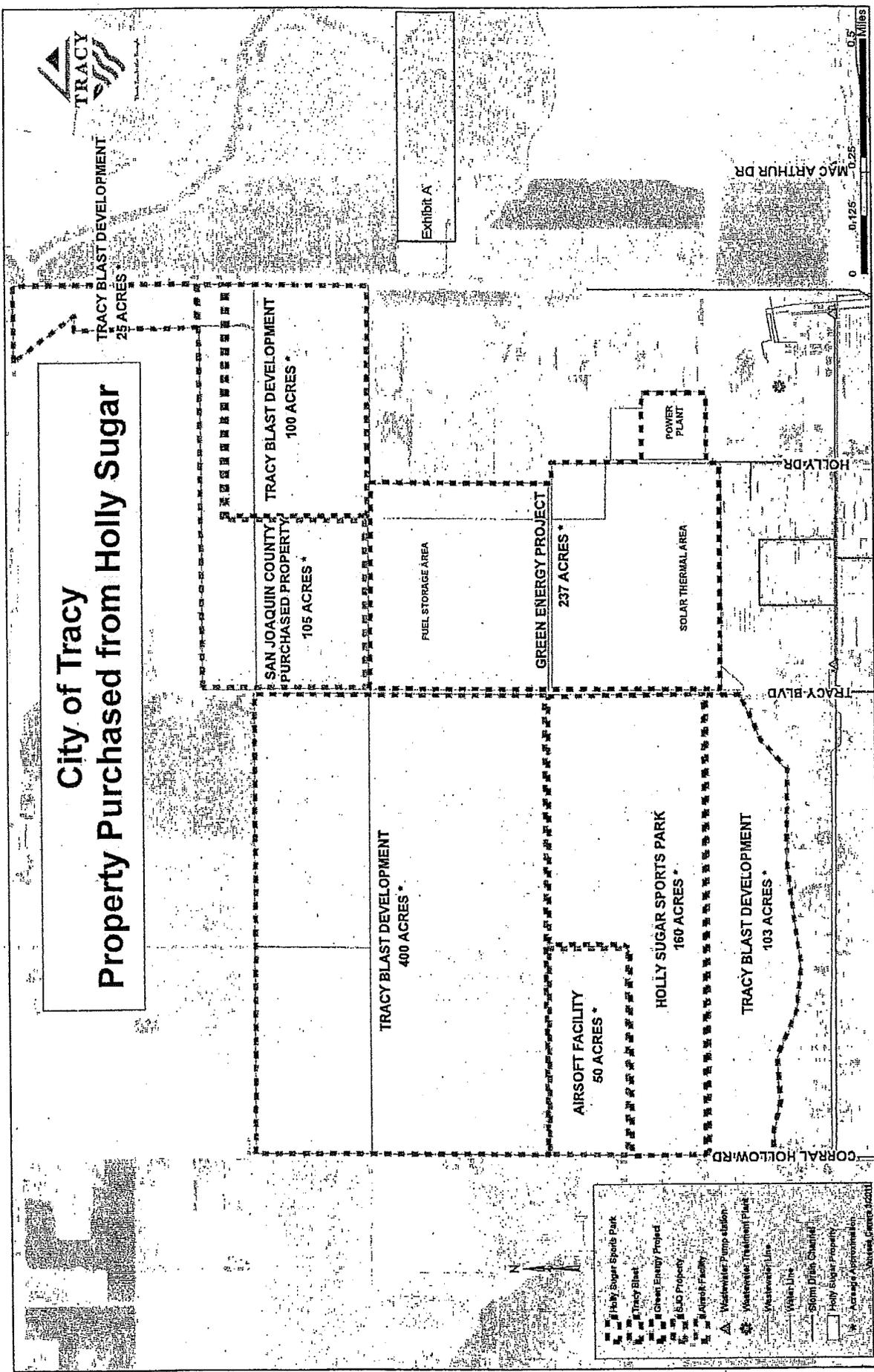
Prepared by: Andrew Malik, Development Services Director
Rod Buchanan, Parks and Community Services Director
Bill Dean, Assistant Director, Development Services

Approved by: Leon Churchill Jr., City Manager

Attachments:

- A – Vicinity Map
- B – Amendment 1 to the ENRA w/TCB, LLC
- C – Letter dated September 19, 2012 from Jim Rogers' attorney
- D – Letter dated September 19, 2012 requesting a new ENRA w/Spirit of California
- E – Master Development Concept

City of Tracy Property Purchased from Holly Sugar



Legend

- Holly Sugar Sports Park
- Tracy Blast
- Green Energy Project
- SJO Property
- Airsoft Facility
- ▲ Wastewater Pump Station
- ▲ Wastewater Treatment Plant
- Wastewater Line
- Water Line
- Storm Drain Channel
- Holly Sugar Property
- Acreage Approximation

Source: Census 2000

Exhibit A

MAC ARTHUR DR

HOLLY DR

TRACY BLVD

CORRAL HOLLOW RD

**FIRST AMENDMENT TO
EXCLUSIVE NEGOTIATING RIGHTS AGREEMENT
BETWEEN TRACY BLAST DEVELOPMENT, LLC.
AND THE CITY OF TRACY**

This First Amendment to the Exclusive Negotiating Rights Agreement ("Amendment") is entered into between the City of Tracy ("City"), a California Municipal Corporation, and Tracy Blast Development, LLC ("Tracy Blast").

RECITALS

- A. On April 19, 2011, City and Tracy Blast entered into an Exclusive Negotiating Rights Agreement (ENRA) regarding development of the City-owned Holly Sugar property.
- B. The current CEO of Tracy Blast, James Rogers, has requested an extension of time to satisfy two of the milestones set forth in the ENRA.
- C. The parties wish to enter into this Amendment regarding that extension.

AGREEMENT

NOW, THEREFORE, the parties agree as follows:

- 1. **Amendment to ENRA Section 4.** Section 4 of the ENRA is amended to read as follows:

"4. Development applications. Tracy Blast agrees to undertake evaluation of the development potential of the Property, to submit appropriate and required applications to the City in a timely manner, and to actively pursue and continue processing those applications.

By September 20, 2012, Tracy Blast agrees to prepare and submit development applications for various entitlements for the Property, including but not limited to the following:

- Specific Plan
- General Plan Amendment
- Rezoning
- Annexation
- Environmental review under the California Environmental Quality Act (CEQA)."

- 2. **Amendment to ENRA Section 6.** Section 6 of the ENRA is amended to read as follows:

“6. Financial verification. Before September 20, 2012, Tracy Blast shall allow National Development Council to review sufficient information to verify the financial statements of Tracy Blast, to complete the entitlement process (Specific Plan, General Plan, Annexation, environmental review) and the financial statements for the first phase (motorsports park on approximately 400 acres north of the proposed City sports park). The standard due diligence information and required documents include, but are not limited to:

- (a) for each principal of Tracy Blast:
 - personal financial statement; and
 - federal tax return for the current year and for the prior three years; and
 - a signed credit release form.
- (b) for investors who may be providing cash:
 - their company bank account number as evidence of the cash on hand; and
 - a signed general financial release of account information form.
- (c) for investors who are not providing cash on hand:
 - a legally-binding letter of commitment for the amount, backed up by
 - personal financial statements; and
 - federal tax returns for the current year and the last three years; and
 - a signed credit release form.
- (d) Follow-up information as may be required by National Development Council.

There is a 60-day period during which the City performs its financial due diligence regarding the viability of Tracy Blast to undertake the entitlement process, and the first phase, based on the review of financial information in a confidential manner by National Development Council.”

3. Amendment to ENRA Section 9. Section 9 of the ENRA is amended to read as follows:

“9. Responsibilities of Tracy Blast: Summary. Following is a list of milestones which Tracy Blast agrees to perform:

ACTIONS/MILESTONES	DEADLINE	ENRA SECTION REFERENCE
Payment of \$1500/month (prorated the first month) as consideration for this	5 days after signing ENRA	3

ENRA		
Evaluate and propose feasible alternative sites to CST and to City.	60-90 days after signing ENRA	Recital D 8 14
Payment of \$25,000 for City's costs	90 days after signing ENRA	7
Providing requested financial data to National Development Council to verify the financial statements of Tracy Blast for the entitlement process and the first phase. (Confirmation from National Development Council regarding financial viability within 30 days after information provided.)	Before September 20, 2012	6
City Council to consider modification of properties under ENRAs, if reduced CST acreage and/or feasible alternative site(s) exist for CST.	90-120 days after signing ENRA for City approved reduction in CST acreage. For relocated site(s), when the alternative site(s) has been approved by City, acquired, entitled and ready for use.	Recital D 8 14
Demonstrating to City the composition and qualifications of consultant team	120 days after signing ENRA	5
Entering into Cost Recovery Agreement with City	120 days after signing ENRA	7
Submit <u>complete</u> applications to the City for all required entitlements	By September 20, 2012	4
Actively pursue and process the submitted applications	Evaluation every 6 months from signing of ENRA	4
Make payments and deposits under the Cost Recovery Agreement when due.	Ongoing after signing Cost Recovery Agreement.	7

“

4. Amending ENRA Section 11. Section 11 of the ENRA is amended to read as follows:

“11. Notices. Any and all notices or other communication required or permitted by this Agreement or by law to be served on or given to either party by the other party shall be in writing and shall be deemed duly served and given when personally delivered to the party to whom it is directed, or in lieu of personal service, when deposited in the United States mail, first class, postage prepaid, addressed to:

City of Tracy
Attn: Maria Hurtado, Assistant City Manager
333 Civic Center Plaza Drive
Tracy, CA 95376

With copy to: City Attorney
333 Civic Center Plaza Drive
Tracy, CA 95376

Tracy Blast Development, LLC

James B. Rogers, CEO
180 La Montagne Court
Los Gatos, CA 95032

5. Signatures. The individuals executing this Amendment represent and warrant that they have the right, power, legal capacity, and authority to enter into and to execute this Amendment on behalf of Tracy Blast and the City.

<p>City of Tracy By: _____ Brent H. Ives, Mayor</p> <p>Date: _____</p> <p>Attest: By: _____ Sandra Edwards Title: City Clerk Date: _____</p> <p>Approved As To Form: By: _____ Daniel G. Sodergren Title: City Attorney Date: _____</p>	<p>Tracy Blast Development, LLC By: _____ James B. Rogers, CEO</p> <p>Date: _____</p>
--	--



City of Tracy
Mayor/Brent Ives
City Manager/Leon Churchill
Council Members
333 Civic Dr.
Tracy, Ca. 95376

Re: ENRA Tracy's California Blast Inc., (TCBI)

Mayor Ives, Leon Churchill, and Council Members

I wanted to review and restate the thoughts Leon and Brent shared with us last week. The meeting was related to certain terms concerning the TCBI, ENRA.

The extension and terms discussed requested are noted in this letter

EXTENSION

The City will Grant to: TCBI, a 6-month extension of time as it pertains to Item #4 and #6 of the current ENRA. The current ENRA was signed on or about April 29th 2011, by and Between the City and TCBI. The 6-month extension period will begin once the City council ratifies the extension.

NEW ENRA

Upon Satisfactory proof that Items #4 and #6 of the current ENRA are in compliance, the City will agree to grant a new 3-year ENRA to the new Entity that will be formed on behalf of the new investors.

The name of the Development will be changed to reflect the all-new Entity.

The amount of property will be adjusted to include the City owned 105-acre passive recreational park adjoining the Sports field.

The same language concerning the replacement of the CST property will also be included in this new ENRA.

The New ENRA will have a provision to obtain a 3-year farm lease on the subject property.

The new ENRA will also address entering into a long-term lease of the subject property. This lease would commence once the entitlements are in place, to construct and operate the anticipated improvements.

We would also like the City to write a "Welcome letter" to the TCBI team.

This new terms and "Welcome letter" are critical for the success of the project. It helps make investors comfortable with the many studies and financial models of each venue. It will also instill confidence with the investors that they are in a friendly business environment.

It would be unethical for us to risk investor funds; in a project the City does not support.

Specific language will be drafted that will not violate CEQA guidelines.

The Development team has met with many local business owners, farmers, and citizens of Tracy. We have not found anyone not in support of this entire project.

Thank you for your support.

Respectfully,

James B. Rogers, CEO
Tracy's California Blast Inc.
180 La Montagne Ct.
Los Gatos, Ca. 95032

Date 2-13-12

RESOLUTION 2012-049

APPROVING THE FIRST AMENDMENT TO THE EXCLUSIVE NEGOTIATING RIGHTS AGREEMENT WITH TRACY'S CALIFORNIA BLAST REGARDING PROPERTY IN THE HOLLY SUGAR AREA

WHEREAS, On April 19, 2011, City and Tracy Blast entered into an Exclusive Negotiating Rights Agreement (ENRA) regarding development of the City-owned Holly Sugar property.

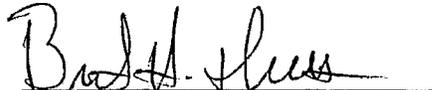
WHEREAS, The current CEO of Tracy Blast, James Rogers, has requested an extension of time to satisfy two of the milestones set forth in the ENRA March 20, 2012 was provided to Tracy's California Blast (Attn: James Rogers, current CEO and Jeff Macey, former President) as provided in the ENRA.

NOW, THEREFORE, The Tracy City Council resolves as follows:

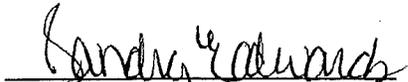
1. Approval of First Amendment. The First Amendment to the Exclusive Negotiating Rights Agreement between Tracy Blast Development, LLC and the City of Tracy is approved.
2. Direction to Staff. The City Staff is directed not to expend staff time on applications, submittals or meetings for the Tracy Blast project until Section 6, Financial Verification, of the Amended ENRA is satisfied.

The foregoing Resolution 2012-049 was passed and adopted by the Tracy City Council on the 20th day of March, 2012, by the following vote:

AYES: COUNCIL MEMBERS: ABERCROMBIE, ELLIOTT, MACIEL, RICKMAN, IVES
NOES: COUNCIL MEMBERS: NONE
ABSENT: COUNCIL MEMBERS: NONE
ABSTAIN: COUNCIL MEMBERS: NONE


MAYOR

ATTEST:


CITY CLERK

Law Offices Of
HAKHEEM, ELLIS & MARENGO
A Professional Law Corporation

Michael D. Hakeem
Albert M. Ellis
Renee M. Marengo
Peter W. Manion
Catherine L. Huston
Adam A. Ramirez

3414 Brookside Road
Suite 100
Stockton, CA 95219
TEL 209 474-2800
FAX 209 474-3654

September 19, 2012

VIA FIRST CLASS MAIL

BRENT H. IVES, MAYOR
CITY OF TRACY
333 Civic Center Plaza
Tracy, CA 95376

RE: SPIRIT OF CALIFORNIA ENRA

Dear Mr. Mayor:

On behalf of Mr. James Rogers, and Tracy's California Blast, LLC ("Blast"), this correspondence will serve notice that Blast is not going to continue with the ENRA project. Please return any and all existing deposits and/or credits for same to James B. Rogers. Thank you.

If there are any questions, please do not hesitate to call.

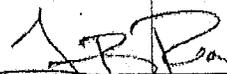
Very truly yours,

HAKHEEM, ELLIS & MARENGO
A Professional Corporation

By: 
MICHAEL D. HAKEEM

MDH:em

cc: Michael Maciel, Mayor Pro Tem
Council Member Steve Abercrombie
Council Member Bob Elliott
Council Member Robert Rickman
Leon Churchill, City Manager
Dan Sodergren, City Attorney

 10-2-12
APPROVED BY: JAMES B ROGERS/CEO

ATTACHMENT D

Law Offices Of
HAKEEM, ELLIS & MARENGO
A Professional Law Corporation

Michael D. Hakeem
Albert M. Ellis
Renee M. Marengo
Peter W. Manion
Catherine L. Huston
Adam A. Ramirez

September 19, 2012

3414 Brookside Road
Suite 100
Stockton, CA 95219
TEL 209 474-2800
FAX 209 474-3654

VIA FIRST CLASS MAIL

BRENT H. IVES, MAYOR
CITY OF TRACY
333 Civic Center Plaza
Tracy, CA 95376

RE: SPIRIT OF CALIFORNIA ENRA

Dear Mr. Mayor:

On behalf of Mr. James Rogers and the Spirit of California, Inc. ("SOC"), this correspondence will formally request that the City Council consider entering into a new Exclusive Negotiating Rights Agreement ("ENRA") with SOC for a sports and entertainment theme park as outlined in the enclosed draft ENRA. My understanding is that SOC has proven its financial liability to entitle the property and has forwarded the appropriate documentation to the City's agent, Mr. Scott Rodde.

In addition, I have been advised that the assembled consulting team is acceptable to City Staff and that SOC has made the appropriate application(s) for the project development to the City Planning Department.

We respectfully request your review and consideration of our proposal and would request the opportunity to present this project to the City Council on October 16, 2012.

Thank you for your consideration.

Very truly yours,

HAKEEM, ELLIS & MARENGO
A Professional Corporation

By:



MICHAEL D. HAKEEM

MDH:em
Enclosure

cc: Michael Maciel, Mayor Pro Tem
Council Member Steve Abercrombie
Council Member Bob Elliott
Council Member Robert Rickman
Leon Churchill, City Manager
Dan Sodergren, City Attorney

EXCLUSIVE NEGOTIATING RIGHTS AGREEMENT BETWEEN THE SPIRIT OF CALIFORNIA AND THE CITY OF TRACY

This Exclusive Negotiating Rights Agreement ("ENRA") is entered into between the City of Tracy ("City"), a California Municipal Corporation, and the Spirit of California, Inc. ("SOC").

RECITALS

A. SOC is proposing to study the feasibility of developing certain property currently owned by the City, and located to the north of the City limits in the vicinity of Corral Hollow Road and Holly Drive. This area generally is commonly known as the Holly Sugar property. The City-owned sites under consideration include approximately 628 acres and consist of the following parcels (the Property), as shown in the diagram at Exhibit A, attached:

1. APN 212-140-06
2. APN 212-140-07
3. APN 212-150-01 (portion)
4. APN 212-160-09 (portion)
5. APN 212-130-12 (portion)
6. APN 212-130-13 (portion)
7. *(include additional parcels?)*

City and SOC will enter into a separate Cost Recovery Agreement to implement this Agreement.

B. Tracy's California Blast, LLC and the City previously entered into ENRAs for 300 acres of the property for the development of a motorsports and bike park. All of the ENRA's have expired.

C. SOC wishes to continue exploring the potential development of the Property as a sports and entertainment theme park; and

D. The parties wish to enter into this exclusive negotiating rights agreement.

AGREEMENT

NOW, THEREFORE, the parties agree as follows:

1. Purpose. The purpose of this Agreement is to:

- (a) authorize SOC to prepare and submit applications for various entitlements for the Property; and
- (b) provide for cost recovery for the City's time and resources spent; and
- (c) provide for exclusive negotiations between the parties regarding the Property; and
- (d) explore a sale and/or lease of the Property or portions of the Property. This ENRA does not obligate either party to acquire, convey, lease or develop the Property.

2. Term. This Agreement shall commence when signed by both parties and shall have a term of 3 years, subject to the milestones and, termination provisions set forth in Sections 4 through 9 and 12.

3. Consideration. SOC agrees to provide \$1,500.00 per month to the City as consideration for this ENRA, due on the first of each month (and prorated for a partial month).

4. Development applications. SOC agrees to undertake evaluation of the development potential of the Property, to submit appropriate and required applications to the City in a timely manner, and to actively pursue and continue processing those applications.

SOC has prepared and submitted applications for various entitlements for the Property, including, but not limited to, the following:

- Specific Plan
- General Plan Amendment
- Rezoning
- Annexation
- Development Agreement
- Environmental review under the California Environmental Quality Act (CEQA).

5. SOC Consultant Team. Because of the complexity of the proposed Project, the City has a responsibility to assure that it will be working with a sufficiently experienced, sophisticated consultant team of planners, engineers, environmental and financial experts, and attorneys. SOC presented a list of its consultants to the City and has also provided the appropriate documentation to demonstrate and verify its contractual relationship with consultants having the experience and expertise to undertake this Project, as determined by the Director of Development and Engineering Services.

6. Financial verification. SOC has submitted specific information to allow National Development Council to review sufficient information to verify the

financial statements of SOC, to complete the entitlement process (Specific Plan, General Plan, Annexation, Development Agreement, environmental review) and the financial statements for the first phase.

7. Costs and Expenses. SOC has entered into a standard Cost Recovery Agreement with the City, the purpose of which is to provide for SOC's payment of all costs incurred by City and its consultants in the implementation of this ENRA and the processing of the required land use entitlements and CEQA review. (See Section 4.)

8. Additional Areas for Resolution. SOC has requested and the City has agreed that the following additional areas for resolution shall be negotiated between the parties at the earliest opportunity.

- (a) In the event that the existing ENRA with Combined Solar Technologies, Inc. is terminated, then, and in such event, SOC shall be afforded first position to enter into an ENRA with the City regarding a project to demonstrate how thermal desalinization can be used to remove salt from Tracy's wastewater.
- (b) SOC shall be afforded a first position to evaluate and recommend to the City an alternate approval to use the City's wastewater as irrigation for the Property and as a mechanism to reduce the City's cost to operate the existing City Sewer Plant for wastewater treatment and discharge.
- (c) The establishment of current land values for acquisition and/or exchange as herein provided for.
- (d) Appropriate financial incentives and concessions on development costs and fees in consideration of the economic value to City from the development as herein provided for.
- (e) Agricultural leases at current prices shall be provided to SOC for the purpose of SOC's due diligence and forward planning on any of the property owned by the City to be evaluated for development by SOC.
- (f) Appropriate and effective multiple signage, including, but not limited to, digital billboards shall be approved for the property.

9. Responsibilities of SOC: Summary. Following is a list of milestones which SOC agrees to perform:

ACTIONS/MILESTONES	DEADLINE	ENRA SECTION REFERENCE

ACTIONS/MILESTONES	DEADLINE	ENRA SECTION REFERENCE
Payment of \$25,000 for City's costs	Paid	3
Payment of \$1500/month (prorated the first month) as consideration for this ENRA	Currently being paid	7
Providing requested financial data to National Development Council to verify the financial statements of SOC for the entitlement process and the first phase. (Confirmation from National Development Council regarding financial viability within 30 days after information provided.)	Complied with	6
Demonstrating to City the composition and qualifications of consultant team	Complied with	5
Entering into Cost Recovery Agreement with City	Complied with	7
Submit complete applications to the City for all required entitlements	Complied with	4
Actively pursue and process the submitted applications	Evaluation every 3 months	4
Make payments and deposits under the Cost Recovery Agreement when due.	Ongoing after signing Cost Recovery Agreement	7

10. Exclusive Negotiations. During the term of this ENRA, the City shall not negotiate with any entity other than SOC regarding the sale, lease, or development of the Property. City and SOC shall negotiate diligently and in good faith during the term of this ENRA.

11. Notices. Any and all notices or other communication required or permitted by this Agreement or by law to be served on or given to either party by the other party shall be in writing and shall be deemed duly served and given when personally delivered to the party to whom it is directed, or in lieu of personal service, when deposited in the United States mail, first class, postage prepaid, addressed to:

City of Tracy
Attn: Maria Hurtado, Assistant City Manager
333 Civic Center Plaza Drive
Tracy, CA 95376

With copy to:
City Attorney
333 Civic Center Plaza Drive
Tracy, CA 95376

Spirit of California, Inc.
Attention: James Rogers
180 La Montagne
Los Gatos, CA 95032

12. Termination; Defaults and Remedies. In the event of a default, the non-defaulting party shall give written notice to the defaulting party, specifying the nature of the default and the required action to cure the default. If a default remains uncured 60 days after receipt by the defaulting party of such notice, the non-defaulting party may terminate this ENRA. However, a default involving payment to the City must be cured within 10 days.

13. Attorneys' Fees. The prevailing party in any action to enforce this Agreement shall be entitled to recover reasonable attorney's fees and costs from the other party.

14. Governing Law. This ENRA shall be governed by and construed in accordance with the laws of the State of California.

15. Entire Agreement; Amendments. This ENRA constitutes the entire agreement of the parties regarding the subject matters of this Agreement.

The parties may amend this ENRA by mutual consent agreed to in writing.

If the applications submitted under Section 4 include areas which are outside of, or differ from, the Property as described in this ENRA, and which are owned by the City, the City staff shall ask the City Council to consider an amendment to this ENRA to include the additional or changed acreage.

16. Counterparts. This ENRA may be executed in counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same Agreement.

17. Assignment. SOC may not transfer or assign any or all of its rights or obligations hereunder except with the prior written consent of the City, which consent shall be granted or withheld in the City's sole discretion, and any such attempted transfer or assignment without the prior written consent of the City shall be void.

18. No Third Party Beneficiaries. This ENRA is made and entered into solely for the benefit of the City and SOC and no other person shall have any right of action under or by reason of this ENRA.

19. Signatures. The individuals executing this ENRA represent and warrant that they have the right, power, legal capacity, and authority to enter into and to execute this ENRA on behalf of SOC and the City.

City of Tracy:	Spirit of California
By: _____ Brent H. Ives, Mayor	By: _____ James Rogers, President
Date: _____	Date: _____
Attest:	
By: _____ Sandra Edwards	
Title: City Clerk	
Date: _____	
Approved as to Form:	
By: _____ Daniel G. Sodergren	
Title: City Attorney	
Date: _____	



ATTACHMENT B



City of Tracy
333 Civic Center Plaza
Tracy, CA 95376

DEVELOPMENT SERVICES
DEPARTMENT

MAIN 209.831.6400
FAX 209.831.6439
www.ci.tracy.ca.us

February 7, 2013

Mr. James B. Rogers
180 La Montagne
Los Gatos, California 95032

Re: Spirit of California, Inc.

Dear Mr. Rogers:

As staff was preparing a draft Reimbursement and Cost Recovery Agreement ("Agreement") for this project, it came to our attention that you may be or may have been associated with a number of companies, lawsuits, bankruptcy proceeding, and judgment liens.

Therefore, in order for staff to complete the due diligence needed to recommend the Agreement to the City Council, please provide the following in writing no later than Thursday, February 21, 2013. All responses should be of sufficient detail to allow staff to independently verify the information.

For each corporation listed below, please provide: (1) the status of the corporation; (2) the officers of the corporation; (3) the purpose of the corporation; and (4) your involvement in the corporation:

- Spirit of California Entertainment Group, Inc.
- California Blast Solar, LLC
- Lexington Consulting, Inc.
- Chase Builders, Inc, San Jose
- Stone Valley Property, Inc.
- West Hills Investment, Inc.
- Preferred Financial Group, Inc.

For each of the following matters, please provide: (1) a more detailed description of the matter; (2) the status of the matter; and (3) your involvement in the matter.

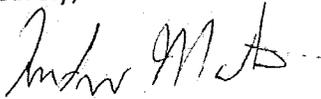
- Judgment lien 5/12/2009
\$78,721 owed to Richard Strock as Trustee

- State tax lien 3/9/2010
\$23,295 owed to State of California
- Judgment Lien 1/6/2009
\$8,920 owed to Cianciarolo Construction
- Judgment Lien 9/15/2008
\$1,090 owed to Matt Edwards
- Judgment Lien 10/30/2008
\$58,890 owed to Lydia Tai
- Judgment Lien 2/15/2008
owed to Brutlag Trust, San Mateo
- Federal Tax Lien 2/26/07
\$6,955 owed to IRS
- State Tax Lien 7/18/2011
\$11,902 owed to State of California
- Judgment Lien 10/26/2009
owed to Hayden Sarji, San Jose
- Judgment Lien 3/2/09
\$22,581 owed to Art Correa
- Lawsuit 3/6/07
James B. Rogers and Lexington Builders
\$2,285 Plaintiff: Northern California Collection Service, Inc. of Sacramento
- Lawsuit 6/15/04
James B. Rogers and E&F Financial Services, San Mateo
\$258,945 Plaintiff: Jude Barnes, J. Barnes Construction
- Lawsuit (*Bennett v. Superior Court* (Dec. 1, 2011, HO36470))
- Lawsuit (*Security Pacific National Trust Company (New York) v. Preferred Financial Group, Inc.*) (United States District Court Case No. 91-20344 WA)
- Lawsuit (*James B. Rogers, et al. v. Federal Bureau of Investigation* (United States District Court Case No. 94-20446 SW))

- Bankruptcy filing 4/26/12
Lexington Consulting, Inc., Santa Clara.
James Rogers, Debtor

Finally, please provide information on any other lawsuits or bankruptcy proceedings you may have been involved in within the last five years.

Sincerely,



Andrew Malik
Development Services Director

cc: Mayor and City Council
R. Leon Churchill, City Manager
Maria Hurtado, Assistant City Manager
Dan Sodergren, City Attorney
Rod Buchanan, Public Works Director



City of Tracy

February 20, 2013

Andrew Malik

333 Civic Center Plaza

Tracy, Ca. 95376

RE: Spirit of California Entertainment Group Inc.

Dear Mr. Malik

I wanted to respond to your letter dated Feb. 7, 2013 whereby you requested certain information and or explanations on various corporations and liens.

I wanted to first mention that my primary business has been Real Estate Development. It has been my custom and the requirement of many of my lenders to form separate corporations and or LLC's to develop and construct my real estate development projects.

I will address your list of questions in the order you provided:

Spirit of California Entertainment Group Inc. is the entity spoken about in the November 7th City council meeting, whereby council directed staff to enter into a new cost recovery and ENRA agreements. This is an active corporation.

Tracy Blast Solar LLC. was previously incorporated for the express purpose of building a solar power plant within the Tracy entertainment project. It was determined this was not the best use of land, and that solar was not a viable means of creating economical sustainable electricity. This is an inactive corporation.

Lexington Consulting Inc. was a corporation that was used a few years ago to construct high-end custom homes. This is now an inactive corporation.

Chase Builders Inc. was a corporation formed years ago for the express purpose of building large mini storage facilities. This corp. is now inactive.

Stone Valley Properties Inc. was a corporation formed for the express purpose of developing a few high-end residential properties. This corp. is now inactive.

West Hill Investment Inc. was a corporation formed years ago for the expressed purpose of developing residential properties. This corp. has been inactive for many years.

Preferred Financial Group Inc. was formed for the express purpose of investing in securities. I was not a managing officer of this corporation. This corp. has been inactive for over 15 years.

Rich Strook. Judgment 5-12-09 I was involved with a partner about 6 years ago that needed money. He borrowed funds using a jointly owned property. I was on title and had to sign as a co borrower. When my partner was unable to pay off the loan in 2008. I negotiated a payoff plan whereby the lender required us both to agree to a judgment. I did this with the understanding that when its paid off I would receive a vacate on my behalf. The final loan payoff is scheduled for August of this year. Rich and I have done many deals together and we are still doing business with each other currently.

The three state and federal tax liens have repeats and were placed against me due to a tax return being filed late. No money is owed at this time. I just need to have my accountant file the necessary documents to obtain, a release of lien certificate.

The **Cianciarolo, Edwards, Lydia Tai, Hayden Sarfi, Art Correa** liens were all lien lawsuits pursued on one property due to a lender becoming insolvent and no longer able to fund the construction loan that began in 2006. I currently have a written signed agreement with that lender to pay these liens and a few others upon them selling a certain property. I expect this to be cleared up in the next few months. The property is now in escrow.

The **Lawsuit of 3-6-07 and 6-15-04** were settled years ago. They were construction lien related.

The **Bennett Lawsuit** is still pending. Bennett is a private lender who is suing another private lender in a transaction I was involved with 4 years ago. Because I was a party to the transaction I was sued as well. It is a desperate attempt by Bennett to extort funds from the other lender on a certain construction project. Part of this case has already been settled. My attorney has studied the case as it pertains to my involvement, and has informed me that the Bennett case is without merit. My lender and I are working together to conclude a final settlement on this case in the next few months. I would only settle due to the legal expense, not due to any fault on my part.

Security Pacific and FBI lawsuits In most cases when a lawsuit with a federal institution is initiated, the FBI has to be involved due to its federal insurance. I prevailed in both these joint cases. I was awarded 350k dollars in damages. This case was closed 15 years ago.

The Filing of Bankruptcy of Lexington Consulting Inc. was initiated for the express purpose of creating a negotiating platform for the benefit of one of my investors. They were previously involved in their own bankruptcy. The investor had invested money via a loan agreement with Lexington Consulting Inc. The individuals that lent money to my company had been discharged from bankruptcy just 4 months prior to the loan's conclusion. It was determined by the investor's bankruptcy trustee that newly acquired assets belonged to the estate and requested the assets be returned. Since Lexington had no unsecured creditors, it was decided with the advice of council to file a Bankruptcy and allow the two trustees from each jurisdiction to settle the legal issues. We have come to the point after completion of discovery whereby the parties are able to agree to a partial pay down on the subject loan. I believe this proposal will be accepted and the case resolved within 60 days.

Just to bring to light for the City on this case, I did not need to file a bankruptcy for any purpose other than to assist one of my investors. I did not bankrupt away one single penny of debt. This was not intended to be self-serving.

None of the issues over the last 15 years have any effect on my ability to manage the Tracy project.

In fact, my conflict resolution experience will only enhance my ability to bring the Tracy project to completion. My consultants are some of the best in the world. They are the ones that will make this project a success. I will assure you that anyone of my expert consultants will admit to, (on occasion) experiencing some form of litigation and or liens through out their professional careers.

The City of Tracy is and has been, in numerous lawsuits as well. The City of Stockton is in bankruptcy. Most cities and counties in California are in a state of bankruptcy. The difficult economy has caused extensive litigation and disruption in the business world.

I have attached letters from my attorney and other concerned parties.

If you have any questions, please do not hesitate to call. 408 335-9564

Sincerely,



James B. Rogers/President

Spirit of California Entertainment Group Inc.

jamesrogers58@gmail.com

James P. Nichols
Attorney at Law
411 Borel Avenue, Suite 500
San Mateo, Ca. 94402-3520
Phone (650) 345-0600
Fax (650) 345-9875

February 21, 2013

Andrew Malik
Development Services Director
City of Tracy
333 Civic Center Plaza
Tracy Ca. 95376

Dear Mr. Malik,

I write this letter at James B. Rogers' request to outline my professional relationship with him and my knowledge of his various projects.

First of all, I have provided legal representation to him and his related business entities for over 25 years. In that time, my participation included representation for various business matters, including legal representation in litigation, advice regarding transactional matters and negotiations with third parties relation to his various projects.

His primary business is in real estate development and promotion, including creation of subdivisions, custom residential construction, planning development of business parks and commercial construction.

In several cases involving his construction activities, there have been issues relating to work of contractors and subcontractors. As he knows, there is a very short time period for a contractor to protect his rights relating to liens, including the filing of a mechanics lien, and a subsequent short time for filing of a legal actions to preserve the right to enforce the lien.

In almost every instance of my involvement regarding lien claims, these have all been resolved by way of agreed settlement of the parties.

As to the various projects he have been involved in, I have worked with him regarding the Orchard Meadow subdivision and custom home development in Saratoga, some involvement in the eight building office complex in Roseville, development and sale of the Lincoln Avenue Self Storage in San Jose, racetrack development project in Merced, any many custom home projects in Santa Clara County.

I have also worked with him regarding the formation of business entities including partnerships, corporations and limited liability companies.

Throughout my representation, I have not been involved in any litigation with him regarding any material dispute between him and his associates in any matter involving disputes as to direction of the projects, disputes among partners nor at any time any claim of any breach of fiduciary duty in the operation of his entities. In fact , many of his ventures have been very successful and valuable to his investors and partners.

In addition, there has never been raised any issue as to his integrity or honesty in his business ventures.

In many cases, litigation has been brought in order to force resolution of issues, usually by some form of mediation or arbitration with ultimate resolution of a satisfied settlement of the parties to the issue at hand.

I am more that willing to discuss, with his consent, any legal issues he have been involved in that I also participated, but I clearly need his consent to do so.

Please let me know if any further information is requested or required.

Sincerely yours,

James P.
Nichols

Digitally signed by James P. Nichols
DN: cn=James P. Nichols, o=
Attorney at Law,
email=jnicholslaw@aol.com, c=US
Date: 2013.02.21 09:55:48 -0800

James P. Nichols

JPN/jp

Sheryl Madison Lancaster
250 West 20th St.
Tracy, CA 95376
Mobile: 209 814-1994

To: City of Tracy
Dan Sondergren
333 Civic Center Plaza
Tracy, CA 95032

February 20, 2013

Ref: James Rogers/ Lexington Consulting Inc.

Dear Mr. Sondergren,

Mr. Rogers has brought it to my attention that the City is looking at his past and present dealings.

As to the Lexington bankruptcy, Mr. Rogers was gracious enough to take on my problem as his own. He has done an outstanding job of dealing with the situation in a very professional manner.

His extensive knowledge and ability to work through any situation is why I trust him with my money.

I have invested with him, thousands of dollars with absolutely no reservations.

I have always been treated with respect and honesty.

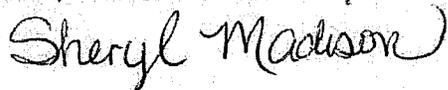
Mr. Rogers has worked on this situation for some months free of charge and has developed a solid proposal that will probably be settled in a matter of weeks.

He sacrificed his corporation, Lexington Consulting, Inc. and his own money to help me solve a very horrific problem of mine. This is his character.

If you have any further questions, please do not hesitate to call.

Sincerely,

Sheryl Madison Lancaster



Artisan Company

2/20/13

Mr. Andrew Malik
Development Services Director
City of Tracy
333 Civic Center Plaza
Tracy, CA 95376

Dear Andrew,

Ref: James Rogers

I have worked on development and construction projects with Jim Rogers since June, 2006. During that time we successfully built and completed several projects in Palo Alto and Los Gatos, California. We also evaluated development projects in Los Gatos, San Jose and Fresno.

I have found working with Jim that he is a creative visionary developer and fair to his employees and subcontractors. He is an ardent negotiator contractually and expects everyone to adhere to the contract provisions for performance and quality. He has an incredible eye for design and expects the highest quality standards and workmanship.

He has an educated and inherent understanding of the development process from raw land through entitlements and construction of the projects. He again is a visionary and resolution / problem solver with the development process and desires to meet the goals of all parties involved in the process; owners, architects, engineers, contractors and governing agencies.

In my experiences he has always stood by the subcontractors that perform the work in a project, protecting their rights and payments for services. He has defended them to the financial lenders, often paying for their services personally while awaiting construction loan draws procedures to reimburse him for these services. He has made it a point to subcontractors to file their lien rights with pre-lien notices to perfect their position when working on projects in order to protect themselves with the lending institutions.

I am again working with Jim Rogers on the Spirit of California project in Tracy, CA. I respect his vision for the development and his concern for the proper legal position he has taken for its multiple shareholders. Jim has hired / contracted the services of land development attorneys, accountants, an SEC attorney for the Private Placement Memorandum and a Certified Public Accounting Firm for auditing all financial reporting. He is respectful of all investors input and questions often deferring to his advisors for the proper procedures to be taken to the benefit of the shareholders and the corporation.

Mr. Andrew Malik
City of Tracy
Page 2

I believe that Jim Rogers has the unique experience and capabilities to create and develop the Spirit of California Mega Entertainment Park in its entirety. His vision and design expertise, business acumen, development background and financial investment understanding position him to fulfill the dream that will forever redefine the meaning of amusement park!

Respectfully,

Phillip L. McKitterick
skeetermckitterick@sbcglobal.net
831-251-9061

130 Dunes Place, Aptos, CA 95003 • phone 831-251-9061

ATTACHMENT D

Not Reported in Cal.Rptr.3d, 2011 WL 6365125 (Cal.App. 6 Dist.)

Not Officially Published

(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)

Briefs and Other Related Documents

Judges and Attorneys

Only the Westlaw citation is currently available.

California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts:

Court of Appeal, Sixth District, California.

Gary **BENNETT**, Petitioner,

v.

The SUPERIOR COURT of Santa Clara County, Respondent,

Magnate Fund # 2, LLC, et. al., Real Parties in Interest.

No. H036470.

(Santa Clara County Super. Ct. No. 110CV171320).

Dec. 1, 2011.

Jonathan Grant Chance, JC Law Offices, Redwood City, CA, for Petitioner.

Richard Thomas Bowles, Walnut Creek, CA, for Real Party in Interest.

ELIA, J.

*1 Petitioner Gary Bennett is the plaintiff in a suit for fraudulent and negligent misrepresentation, fraudulent conveyance, and other causes of action related to investment property in Los Gatos. The trial court granted a motion by three of the defendants to expunge the lis pendens Bennett had filed, based on two cases cited by those defendants in their motion. Bennett then brought this petition for a writ of mandate or prohibition to overturn the expungement order. We issued an order to show cause why the requested relief should not be granted, and we now grant the petition.

Background

Bennett filed this action on May 6, 2010, naming only James B. Rogers, the primary source of the alleged fraud. According to the original complaint as well as his subsequent pleadings, in August 2007 Bennett loaned Rogers \$2 million. Rogers had represented that he planned to construct a home and "Guest House" on a parcel of land in Los Gatos and then sell the property to recoup Bennett's investment. In exchange for the loan, Rogers gave Bennett a promissory note, secured by a deed of trust on the property. The deed of trust allowed Bennett to "call the loan due in full" if Rogers transferred any or all of the property.

On April 1, 2008 Rogers persuaded Bennett to "go off title" to the Guest House, ostensibly so he could refinance that part of the loan. The papers Bennett signed, however, transferred to Rogers all of Bennett's title to and interest in the *main property* as well as the Guest House. In his first amended complaint Bennett alleged that he had mistakenly signed these documents in reliance on Rogers's representation that only title to the Guest House was being transferred.

On August 7, 2008, Rogers conveyed the property to Lexington Consulting, Rogers's solely owned entity. Less than two weeks later, Lexington Consulting filed for bankruptcy protection. According to Bennett, Rogers had made no payments on the note since September 2007.

When Bennett discovered that he had been removed from title to the main property, he contacted Rogers, who first blamed the title company for incorrectly drafting the documents, but then explained that he needed Bennett's name and deed of trust removed from the main property to facilitate the transfer to Lexington Consulting and the bankruptcy filing. Rogers allegedly also told Bennett that Bennett had to be removed from the title to the main property because Rogers needed another

\$250,000 to complete construction on the main property in order to sell it. In addition, Rogers explained, the second lienholders reportedly would not provide the additional funding unless Bennett was removed from title, because he had not signed a subordination agreement. These second lienholders were real parties in interest Magnate Fund # 2, LLC; Lodgepole Investments, LLC; and LHJS Investments, LLC (collectively, real parties).

Real parties subsequently acquired the property in a foreclosure sale. According to Bennett, however, they were not bona fide purchasers because they knew about Bennett's claims to the main property. In his first amended complaint, Bennett added real parties as defendants.^{FN1} In that pleading he alleged fraud, fraudulent conveyance, mistake, civil conspiracy between Rogers and real parties, and unjust enrichment by Rogers. He sought declaratory relief, damages, restitution, and cancellation of the instruments transferring his own interests to Rogers and those of Rogers to Lexington Consulting.

FN1. Bennett filed a second amended complaint adding Lexington Consulting as a defendant, but real parties demurred and moved to strike the pleading on the ground that Bennett had not sought leave to file it. Real parties submitted a letter to this court asking that we "take notice" of the court's tentative ruling. Although Bennett has provided a copy of the actual written order, which strikes the complaint without prejudice to a noticed motion to amend—we deny real parties' informal, ex parte request. (See Cal. Rules of Court, rule 8.252.) We will take judicial notice, however, of the documents submitted in Bennett's formal motion of September 7, 2011, including a motion for leave to file the second amended complaint. We further grant his more recent motion for judicial notice of the superior court's order granting leave to file the second amended complaint. Nevertheless, in our view the only operative pleading before us is the first amended complaint.

*2 Bennett filed a "Notice of Pend[er]ncy of Action," (lis pendens), and real parties filed their motion to expunge. The court heard the parties' arguments at a hearing on October 19, 2010, and on December 17, 2010, it filed the order granting defendants' motion. On March 2, 2011, upon receiving Bennett's petition for writ relief, this court issued a stay of the expungement order.

Discussion

A notice of pendency of action, or lis pendens, is "a recorded document giving constructive notice that an action has been filed affecting title or right to possession of the real property described in the notice." (Kirkeby v. Superior Court (2004) 33 Cal.4th 642, 647 (Kirkeby), quoting Urez Corp. v. Superior Court (1987) 190 Cal.App.3d 1141, 1144.) "The purpose of a lis pendens is to give constructive notice of an action affecting real property to persons who subsequently acquire an interest in that property, so that the judgment in the action will be binding on such persons even if they acquire their interest before the judgment is actually rendered." (Bishop Creek Lodge v. Scira (1996) 46 Cal. App.4th 1721, 1733; see also Code Civ. Proc., § 405.24 [recording operates as constructive notice to transferees].)

A lis pendens may be filed by any party who asserts a "real property claim." (Code Civ. Proc., § 405.20.) As pertinent here, the term "real property claim" is defined as "the cause or causes of action in a pleading which would, if meritorious, affect ... title to, or the right to possession of, specific real property...." (Code Civ. Proc., § 405.4.)

Code of Civil Procedure section 405.30^{FN2} allows a party to move to expunge the lis pendens. It is then the opposing claimant's burden to show that he or she has a real property claim. (§ 405.30.) The court must grant the motion if it finds that "the pleading on which the notice is based does not contain a real property claim." (§ 405.31.) Even if the claimant shows the existence of such a claim, the notice must still be expunged if the "claimant has not established by a preponderance of the evidence the probable validity of the real property claim." (§ 405.32.)

FN2. All further statutory references are to the Code of Civil Procedure except as

otherwise indicated.

The central issue before us in this proceeding is whether Bennett has pleaded a "real property claim" under section 405.31, because the absence of such a claim was the sole basis of the respondent court's ruling. The trial court did not articulate specific factual findings on the probable validity of the claims asserted in the pleadings, other than to express its view that Bennett had asserted a "credible claim" against Rogers, and that there was "admissible testimony" that "the moving parties are profiting from plaintiff's exclusion from the secured interest in the subject property." We therefore decide only whether Bennett's pleadings state a real property claim under section 405.31. (*Kirkeby, supra*, 33 Cal.4th at p. 648.)

We review the court's ruling de novo; like the trial court, we engage in a "demurrer-like analysis." (*Id.* at pp. 647–648.) The Supreme Court has emphasized that it is the pleading, not any supporting or defeating evidence, that determines whether expungement is required. "The analysis required by this section is analogous to, but more limited than, the analysis undertaken by a court on a demurrer.... [T]he court must undertake the more limited analysis of whether the pleading states a real property claim." (*Id.* at p. 650, quoting code comment to statute.)

*3 In their motion to expunge, real parties contended that Bennett's action would not qualify as a real property claim because it did not affect title to or possession of the property; that is, if Bennett obtained the requested relief, he "would not then own the property or have a possessory interest" in it, but would have only a security interest. Real parties further argued that Bennett would not be able to establish the probable validity of his causes of action. Citing *Urez v. Superior Court, supra*, 190 Cal.App.3d 1141 (*Urez*) and *Campbell v. Superior Court* (2005) 132 Cal.App.4th 904, they maintained that Bennett's cause of action for fraudulent conveyance against them was unsustainable because, unlike Rogers, they were never debtors of Bennett. They again argued that the most Bennett could obtain as relief would be restoration of his status as a lienholder, "which would still be destroyed by a foreclosure of a senior lienholder." At the hearing defense counsel asserted that the claims against real parties "aren't fraudulent conveyance allegations, those are fraud allegations."

In his opposition Bennett maintained that his fraudulent conveyance claim was a valid real property claim which precluded expungement. He relied on *Kirkeby, supra*, 33 Cal.4th 642, where the Supreme Court overturned an order granting a motion to expunge a lis pendens predicated in part on a claim of fraudulent conveyance. In that case Cynthia Kirkeby, a minority shareholder in a company that manufactured pet identification tags, alleged that the majority shareholders—her brother, Frederick, and his wife—had looted the company. Her fraudulent conveyance claim related to her allegation that the defendants had borrowed money from the company, ostensibly for a building in which to house the company's operations; but instead, they bought a residential home and then transferred their interest in that property to their family partnership. The previous year Frederick had transferred his interest in the family residence to his family trust, and from there to their family partnership.

Kirkeby recorded a lis pendens on each of the two properties, but the trial court granted the defendants' motion to expunge, reasoning that Kirkeby had claimed no ownership or possessory interest in the property. The appellate court agreed and upheld that ruling. The Supreme Court, however, reversed the expungement order, explaining that fraudulent conveyance, as defined in the Uniform Fraudulent Transfer Act (UFTA), necessarily is a real property claim within the meaning of the lis pendens statutes.

In its order in this case, the respondent court cited *Urez* and *BGJ Associates v. Superior Court* (1999) 75 Cal.App.4th 952. *Urez* was a fraud action in which the plaintiff sought a constructive trust and declaratory relief. The appellate court, characterizing the action as "a collateral means to collect money damages," held that the plaintiff's claims, even if colorable, would not support a lis pendens. (190 Cal.App.3d at p. 1149.) In *BGJ Associates* the plaintiff asserted 11 causes of action arising out of the defendants' alleged breach of fiduciary duty in a joint venture to buy real property. Most of these claims called for compensatory and punitive damages, separately or together with a constructive trust; only two "focus[ed] narrowly on imposition of a constructive trust." (75 Cal.App.4th at p. 971.)

After reviewing with approval its prior decision in *Urez*, the Second District, Division Four, held that "where the pleading combines theories of liability for monetary damages and for a constructive trust, ... plaintiffs should not be able to maintain a lis pendens. The danger is too great that a lis pendens, which effectively renders the property unmarketable, will have the coercive effects condemned by the cases." (*Id.* at p. 972.)

*4 This concern for the abuse of the lis pendens process was addressed in *Kirkeby, supra*, 33 Cal.4th 642. The court specifically acknowledged the potential for abuse highlighted by the appellate court in *BGJ Associates*; but the language of the UFTA, particularly Civil Code section 3439.07, "clearly establishes that fraudulent conveyance claims may support a lis pendens where the plaintiff seeks to void a fraudulent transfer." (*Id.* at p. 651.) Moreover, the court pointed out, protections against abuse are intrinsic to section 405.32, which requires expungement if the claimant has not established the probable validity of the real property claim.

Unlike the plaintiffs in either *Urez* or *BGJ Associates*, Cynthia Kirkeby alleged fraudulent conveyance as well as 26 other causes of action. The Supreme Court focused on that claim, and in particular the Legislature's broad definition of "transfer" ^{FN3} and its view of "fraudulent conveyance" as "a transfer by the debtor of property to a third person undertaken with the intent to prevent a creditor from reaching that interest to satisfy its claim." (*Kirkeby, supra*, 33 Cal.4th at p. 648, quoting *Yaesu Electronics Corp. v. Tamura* (1994) 28 Cal.App.4th 8, 13.) The Supreme Court also called attention to Civil Code section 3439.04, which liberally describes the fraudulent nature of a debtor's conveyance of assets or obligation undertaken with reference to the debtor's intent to "hinder, delay, or defraud" a creditor or the debtor's receipt of an insufficient value in exchange for the transfer or obligation. (*Kirkeby, supra*, 33 Cal.4th at p. 648; see also *Yaesu Electronics Corp. v. Tamura, supra*, 28 Cal.App.4th at p. 13 [fraudulent transfer is intended to prevent a creditor from reaching debtor's interest to satisfy its claim].)

^{FN3}. The UFTA defines a "transfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance." (Civ.Code, § 3439.01, subd. (i).)

The court in *Kirkeby* acknowledged that section 405.31 mandates expungement of a lis pendens if the pleading does not contain a real property claim. Because the plaintiff had adequately pleaded fraudulent conveyance by alleging a transfer of title with the intent to defraud, she had stated a real property claim, because it would, if successful, "affect title to specific property." (*Id.* at pp. 650-651.) That Kirkeby had asserted multiple claims and sought damages as well as declaratory and injunctive relief did not contravene or attenuate the conclusiveness of the Supreme Court's holding.

Cited with approval in *Kirkeby* was *Hunting World, Inc. v. Superior Court* (1994) 22 Cal.App.4th 67 (*Hunting World*), another case involving a claim of fraudulent conveyance. There the plaintiff alleged that the defendant, whom it was simultaneously suing in federal court for trademark infringement, had fraudulently quitclaimed his interest in his residence to his wife as a way of protecting his assets against the suit. The trial court expunged the lis pendens because the plaintiff was not seeking title to the property but only wished to reach the assets of the transferor. The First District, Division Three, issued a peremptory writ in the plaintiff's favor, thereby overturning the expungement order. The court refused to extend the line of cases represented by *Urez*, *La Paglia v. Superior Court* (1989) 215 Cal.App.3d 1322, and *Wardley Development Inc. v. Superior Court* (1989) 213 Cal.App.3d 391, which preceded the Legislature's 1992 revision of the lis pendens procedure. In those cases, the court explained, causes of action for constructive trust or an equitable lien were "appended to lawsuits centering on money damages. Those courts could conclude that the actions covered by those notices of lis pendens primarily sought money damages and did not affect title to real property." (*Hunting World, supra*, 22 Cal.App.4th at p. 74; see also *Campbell v. Superior Court, supra*, 132 Cal.App.4th 904, 916 [continuing to follow *Urez/La Paglia* reasoning in equitable lien and constructive trust claims, as Legislature expressly left the viability of lis pendens in these cases to judicial development].) By contrast, a cause of action for fraudulent transfer, as defined in the UFTA, is a real property claim in

light of the "clear wording of the 'real property claim' prong" of the current lis pendens law. (*Hunting World, supra*, 22 Cal.App.4th at p. 73.) Moreover, the court noted, the requirement that the recording party show by a preponderance of evidence that the action is probably valid was a sufficient safeguard against abuse of the lis pendens procedure. Any burden on the property owner is alleviated by the opportunity for demurrer, summary judgment, another expungement motion, or prompt trial, and sanctions are available for meritless or harassing lis pendens notices. (*Id.* at p. 74.)

*5 In *Hunting World* a fraudulent transfer was apparently the only claim in the state action. The court there found it significant that the plaintiff's action affected only title to real property, unlike the actions in the *Urez/La Paglia* cases, in which the courts "could conclude that the actions covered by those notices of lis pendens primarily sought money damages and did not affect title to real property." (22 Cal.App.4th at p. 74.) The same procedural posture was not present in *Kirkeby*, however. The plaintiff in that case asserted 27 causes of action and requested damages as well as declaratory and injunctive relief. The existence of these other claims made no difference to the outcome; the court could not "ignore the plain language of [section 405.31], which clearly establishes that fraudulent conveyance claims may support a lis pendens where the plaintiff seeks to void a fraudulent transfer." (*Kirkeby, supra*, 33 Cal.4th at p. 651.)

In this case Bennett has clearly pleaded fraudulent conveyance in addition to other wrongs. His position is indistinguishable in any material way from the situation presented in *Kirkeby*. Real parties nonetheless maintain that *Kirkeby* is not controlling because Bennett does not have any "colorable claims" under the UFTA. More specifically, they argue, (1) a transfer from Bennett to Rogers could not qualify as a fraudulent transfer under the UFTA; (2) the transfer from Rogers to Lexington Consulting was not alleged to have prevented Bennett from recovering his loss from Rogers; and (3) the trustee's sale cannot be deemed a fraudulent transfer because it was authorized by the bankruptcy court. These arguments go to the probable validity of Bennett's claim, which the superior court did not reach; its only comments on the prospect of Bennett's successfully proving his case were in Bennett's favor, recognizing that (a) his testimony "present[ed] a credible claim against the actions of defendant Rogers," and (b) there was "admissible testimony that the moving parties [i.e., real parties] are profiting from [Bennett's] exclusion from the secured interest in the subject property." Should the trial court be called upon to rule on the probable validity of Bennett's claim after remand, it will no doubt eschew hypertechnical views of "transfer" and "fraudulent transfer," and instead apply the Legislature's expansive definition of those terms in Civil Code sections 3439.01^{FN4} and 3439.04.^{FN5}

FN4. As noted earlier, the term "transfer" is broadly defined in Civil Code section 3439.01 to encompass all means of parting with an asset "or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance." (Italics added.)

FN5. The scope of a fraudulent transfer or obligation under Civil Code section 3439.04 is extensive. This provision states: "(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows: [¶] (1) With actual intent to hinder, delay, or defraud any creditor of the debtor. [¶] (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either: [¶] (A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction. [¶] (B) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due. [¶] (b) In determining actual intent under paragraph (1) of subdivision (a), consideration may be given, among other factors, to any or all of the following: [¶] (1) Whether the transfer or obligation was to an insider. [¶] (2) Whether the debtor retained possession or control of the property transferred after the transfer. [¶] (3) Whether the transfer or obligation was disclosed or concealed. [¶] (4) Whether before the transfer was made or obligation was incurred, the

debtor had been sued or threatened with suit. [¶] (5) Whether the transfer was of substantially all the debtor's assets. [¶] (6) Whether the debtor absconded. [¶] (7) Whether the debtor removed or concealed assets. [¶] (8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred. [¶] (9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred. [¶] (10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred. [¶] (11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor."

We thus conclude that Bennett's cause of action for fraudulent conveyance cannot be disposed of by predicating the expungement on the inadequacy of his pleading under section 405.31. Whether probable validity attends this claim is beyond the scope of this proceeding, which requires only the "limited analysis of whether the pleading states a real property claim." (*Kirkeby, supra*, 33 Cal.4th at p. 648.) The viability of Bennett's action may ultimately turn on the facts as they are developed in the course of any further proceedings.

Disposition

*6 Let a peremptory writ of mandate issue, directing the respondent court to vacate its December 17, 2010 order granting real parties' motion to expunge petitioner Bennett's lis pendens, and to enter a new order denying that motion. Upon finality of this opinion, the temporary stay issued on March 2, 2011 is vacated. Costs in this original proceeding are awarded to the petitioner.

WE CONCUR: PREMO, Acting P.J. and DUFFY, J.^{FN*}

^{FN*} Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Cal.App. 6 Dist., 2011.

Bennett v. Superior Court

Not Reported in Cal.Rptr.3d, 2011 WL 6365125 (Cal.App. 6 Dist.)

Not Officially Published

(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)

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Judges

- **Duffy, Hon. Wendy Clark**

State of California Court of Appeal, 6th Appellate District

San Jose, California 95113

[Litigation History Report](#) | [Judicial Reversal Report](#) | [Profiler](#)

- **Elia, Hon. Franklin Daniel**

State of California Court of Appeal, 6th Appellate District

San Jose, California 95113

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- **Premo, Hon. Eugene Milton**

State of California Court of Appeal, 6th Appellate District
San Jose, California 95113

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[Litigation History Report](#) | [Profiler](#)

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ATTACHMENT E

Not Reported in F.Supp., 1994 WL 715652 (N.D.Cal.)

Motions, Pleadings and Filings
Judges and Attorneys

Only the Westlaw citation is currently available.

United States District Court, N.D. California.
James B. ROGERS and Steven L. Lombardo, Plaintiffs,
v.
FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.

Civ. No. 94-20446 SW.
Dec. 15, 1994.

ORDER DENYING PLAINTIFFS' APPLICATION FOR DEFAULT JUDGMENT; GRANTING THE FEDERAL DEFENDANTS' CROSS-MOTION TO DISMISS; REQUIRING PLAINTIFFS TO SHOW CAUSE WHY THEIR CLAIMS AGAINST FIDELITY & DEPOSIT COMPANY SHOULD NOT BE DISMISSED; STRIKING PLAINTIFFS' MOTION TO BIFURCATE ISSUES OF LIABILITY AND DAMAGES

SPENCER WILLIAMS, District Judge.

*1 Plaintiffs **James B. Rogers** and Steven L. Lombardo, proceeding *pro se*, filed this complaint against the Federal Bureau of Investigation, the Internal Revenue Service, various employees of these agencies (collectively referred to as "the Federal Defendants") and several financial institutions, alleging causes of action under the Civil Rights Act, 42 U.S.C. § 1983, the Racketeer Influenced and Corrupt Organizations Act, ("RICO"), 18 U.S.C. §§ 1961, et seq., and the Federal Tort Claims Act, 28 U.S.C. §§ 2671, et seq. Before the Court are Plaintiffs' Application for a default judgment against the Federal Defendants and Fidelity & Deposit Company, the Federal Defendants' cross-motion to dismiss and Plaintiffs' motion to bifurcate issues of liability and damages. For the reasons expressed below, Plaintiffs' application for a default judgment is DENIED; the Federal Defendants' motion to dismiss is GRANTED; and Plaintiffs' motion to bifurcate issues of liability and damages is STRICKEN.

BACKGROUND

The following background information is taken from Plaintiffs' complaint as well as other documents in the file and documents in a related case, *Security Pacific National Trust Company (New York) v. Preferred Financial Group, Inc., et al.*, Civil No. 91-20344 WAI. Plaintiffs, along with a third person, Steve Fontaine, operate Preferred Financial Group, Inc. They also operate a partnership under the same name. Both organizations purport to provide securities brokerage services and cater to European clients. In 1991, Preferred entered into a "Clearing Custody and Financing Agreement" with Security Pacific National Trust Company (SPNTC), under which SPNTC agreed to act as clearing agent for Preferred. Specifically, SPNTC agreed to purchase securities for Preferred's account and to sell such securities to Preferred's customers, at Preferred's direction, and to extend credit to Preferred.

Several weeks after executing the agreement, SPNTC, acting on instructions from Preferred, purchased bonds from Jefferies & Co. and delivered them to National Financial Services (NFS). Based on these transactions, SPNTC loaned Preferred \$4.3 million and paid it \$253,338 of the profit it expected Preferred would earn when the trade was finalized. The next trading day, NFS returned the bonds contending that it had no instructions from any client to accept and pay for the bonds. After SPNTC telephoned Preferred about the returned bonds, Preferred instructed SPNTC to redeliver them. The next day, Preferred instructed SPNTC to deliver additional bonds to NFS for the account of Cowles, Sabol & Co. Within a few days of each transaction, Cowles cancelled the trades and returned the bonds to SPNTC. It is unclear why Cowles cancelled the transaction. However, the documents in the file suggest that Preferred was also a customer of Cowles and was buying the bonds. If that is the case, Preferred was both the buyer and seller of the securities.

Subsequently, SPNTC brought an action against Preferred, Fontaine, Rogers and Lombardo,

alleging that their scheme violated section 10b of the Securities and Exchange Act of 1934 and that they were liable for fraud and breach of contract. *Security Pacific National Trust Company (New York) v. Preferred Financial Group, Inc., et al.*, Civil No. 91-20344 WAI. While that action was pending, Fontaine disappeared, Rogers and Lombardo filed for protection under Chapter 7 of the Bankruptcy Code and the FBI began a criminal investigation. Given the stay imposed by the bankruptcy proceeding, Judge Ingram statiscally closed that case on July 18, 1994.

*2 Plaintiffs filed this action on June 29, 1994, alleging, among other things, that the FBI and IRS have violated their civil rights during the course of the criminal investigation. Specifically, Plaintiffs claim that the FBI and IRS agents unlawfully searched and seized their business records, are questioning others about the Plaintiffs and their business activities and are engaging in intimidating investigative activities without there being a criminal charge or indictment. According to Plaintiffs, government agents involved in the investigation have been harassing and stalking Plaintiffs' friends and associates and slandering Plaintiffs. Plaintiffs further allege that the defendant financial institutions breached contracts Plaintiffs entered with them.

DISCUSSION

I. PLAINTIFFS' APPLICATION FOR A DEFAULT JUDGMENT AGAINST THE FEDERAL DEFENDANTS

Plaintiffs' application for a default judgment is based on their claim that Defendants have not made an appearance. In response, the Federal Defendants argue that the Court should dismiss Plaintiffs' claims against them for lack of subject matter and personal jurisdiction, insufficiency of process and insufficiency of service of process.

Plaintiffs' claims under the Federal Tort Claims Act ("FTCA") must be dismissed because the proper defendant is not named in the complaint. The proper defendant for a claim under the FTCA is the United States. 28 U.S.C. § 2679. Rather than bringing their claims against the United States, Plaintiffs claims are against federal agencies. However, naming federal agencies is not sufficient to establish subject matter jurisdiction over Plaintiffs' FTCA claim. See Galvin v. Occupational Safety & Health Admin., 860 F.2d 181, 183 (5th Cir.1988) (United States, rather than Occupational Safety and Health Administration, is proper party for FTCA claim); Valluzzi v. United States Postal Service, 775 F.Supp. 1124, 1125 (N.D.Ill.1991) (United States, not United States Postal Service, is proper party for FTCA claim).

Plaintiffs' constitutional claims must also be dismissed. A damage action lies against federal officers in their individual capacities for violations of a plaintiff's constitutional rights. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). However, *Bivens* -type actions may not be brought against federal agencies. FDIC v. Meyer, 114 S.Ct. 996, 1005, 127 L.Ed.2d 308 (1994). Thus, the Court lacks subject matter jurisdiction over Plaintiffs' constitutional claims against the FBI and IRS.

The individual Federal Defendants argue that they have not been properly served. After reviewing the record, the Court concludes that they are correct.

When service of process is challenged, the party on whose behalf service was made has the burden to establish its validity. Aetna Business Credit, Inc. v. Universal Decor & Interior Design, Inc., 635 F.2d 434, 435 (5th Cir.1981). To bring an action against a federal official in his or her individual capacity, the plaintiff must satisfy the normal rules for establishing personal jurisdiction. Gilbert v. DaGrossa, 756 F.2d 1455, 1459 (9th Cir.1985). Thus, service must be made in accordance with Rule 4 of the Federal Rules of Civil Procedure. Hutchinson v. United States, 677 F.2d 1322, 1328 (9th Cir.1982). In particular, the officer must be personally served in accordance with Rule 4(e)(1) or 4(e)(2). The plaintiff must also comply with Rule 4(i), which requires that a copy of the summons and complaint be (1) served on the United States attorney for the district in which the action is brought and (2) sent by certified mail to the Attorney General of the United States in Washington, D.C. Ecclesiastical Order of the Ism of Am, Inc. v. Chasin, 845 F.2d 113, 116 (6th Cir.1988).

*3 The Federal Defendants do not dispute that Plaintiffs satisfied Rule 4(e). However, they contend that Plaintiffs failed to comply with Rule 4(i). Nothing in the record demonstrates that Plaintiffs satisfied Rule 4(i). Therefore, their claims against the individual Federal Defendants must be

dismissed.^{FN1}

II. PLAINTIFFS' APPLICATION FOR A DEFAULT JUDGMENT AGAINST FIDELITY & DEPOSIT COMPANY

Plaintiffs have also requested that the Court enter a default judgment against Fidelity & Deposit Company. Fidelity & Deposit Company filed no opposition to Plaintiffs' application.

Since there is no evidence in the record that Plaintiffs perfected service on Fidelity & Deposit Company, Plaintiffs are not entitled to a default judgment against that defendant. In fact, Plaintiffs' failure to serve Fidelity & Deposit Company within 120 days of filing the complaint subjects their claims against that defendant to dismissal under Rule 4(m) of the Federal Rules of Civil Procedure. Thus, Plaintiffs will be ordered to show cause why their claims against Fidelity & Deposit Company should not be dismissed.

III. PLAINTIFFS' MOTION TO BIFURCATE ISSUES OF LIABILITY AND DAMAGES

Plaintiff also filed a motion to bifurcate issues of liability and damages. However, the motion was not noticed for a hearing date in accordance with Local Rule 220-2. Furthermore, there is no certificate of service, see Rule 5(d), or other indication that Plaintiffs served the motion on the remaining parties. Therefore, the motion is STRICKEN.

CONCLUSION

In light of the foregoing, the Court ORDERS as follows:

1. Plaintiffs' *Bivens* and FTCA claims against the FBI and IRS are DISMISSED WITH PREJUDICE for lack of subject matter jurisdiction.
2. Plaintiffs' *Bivens* claims against Special Agent Lee Stark, Special Agent Richard W. Held, Supervisory Special Agent William E. Smith, Special Agent Kevin S. Williamson and Special Agent Jeff Novitsky are DISMISSED WITHOUT PREJUDICE for lack of personal jurisdiction. Should Plaintiffs wish to pursue their claims against these defendants, they must perfect service in accordance with Rules 4(e) and 4(i) of the Federal Rules of Civil Procedure by January 27, 1994.
3. Plaintiffs' application for a default judgment against the Federal Defendants and Fidelity & Deposit Company is DENIED.
4. Plaintiffs shall, by December 30, 1994, show cause why their claims against Fidelity & Deposit Company should not be dismissed under Rule 4(m).
5. Plaintiffs' motion to bifurcate issues of liability and damages is STRICKEN.

IT IS SO ORDERED.

^{FN1}. The Federal Defendants suggest that Plaintiffs are pursuing claims against United States Attorney Michael J. Yamaguchi and Assistant United States Attorney Leo Cunningham. However, neither of these individuals is listed in the caption of the complaint and nothing in the record suggests that they have been served with a summons and a copy of the complaint.

N.D.Cal., 1994.
Rogers v. F.B.I.
Not Reported in F.Supp., 1994 WL 715652 (N.D.Cal.)

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- **Williams, Hon. Spencer M.**

United States District Court, Northern California
San Jose, California 95113

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Not Reported in F.Supp., 1995 WL 219431 (N.D.Cal.)

Motions, Pleadings and Filings

Judges and Attorneys

Only the Westlaw citation is currently available.

United States District Court, N.D. California.
James B. ROGERS and Steven L. Lombardo, Plaintiffs,
v.
FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.

Civ. No. 94-206446 SW.

April 10, 1995.

ORDER GRANTING DEFENDANT COMERICA BANK-CALIFORNIA'S MOTION TO DISMISS PLAINTIFFS'
FIRST AMENDED COMPLAINT

SPENCER WILLIAMS, District Judge.

*1 Plaintiffs James B. Rogers and Steven L. Lombardo, proceeding *pro se*, filed this complaint against the Federal Bureau of Investigation, the Internal Revenue Service, various employees of these agencies (collectively referred to as "the Federal Defendants") and several financial institutions, alleging causes of action under the Civil Rights Act, 42 U.S.C. § 1983, the Racketeer Influenced and Corrupt Organizations Act, ("RICO"), 18 U.S.C. §§ 1961, et seq., and the Federal Tort Claims Act, 28 U.S.C. §§ 2671, et seq. On October 26, 1994, the Court dismissed Plaintiffs' claims against Defendant Comerica Bank-California ("Comerica") with leave to amend. Plaintiffs filed an amended complaint on November 23, 1994. Comerica now moves to dismiss pursuant to Rules 12(b)(1) (lack of subject matter jurisdiction) and 12(b)(6) (failure to state a claim upon which relief can be granted) of the Federal Rules of Civil Procedure. For the reasons expressed below, Plaintiffs' claims against Comerica Bank are DISMISSED for lack of subject matter jurisdiction.

BACKGROUND

Plaintiffs filed the amended action alleging, among other things, that Comerica Bank violated their civil rights during the course of a FBI criminal investigation. Plaintiff Rogers is a customer of Comerica Bank. Plaintiffs also claim that Comerica breached the covenant of good faith and fair dealing by disclosing confidential information to the FBI, turning over all bank records to the FBI, and failing to notify Rogers of the investigation. Additionally, Plaintiffs allege that Comerica made slanderous and defamatory statements to Rogers' business partner that Comerica would not do business or communicate with Rogers because he was the subject of a grand jury investigation. Finally, Plaintiffs allege that Comerica was negligent when it expunged all of Rogers' bank records without notifying him.

DISCUSSION

I. LEGAL STANDARD

Under the liberal federal pleading policies, a plaintiff need only give defendant fair notice of the claims against it. Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). A complaint should only be dismissed where, assuming all allegations as true in the light most favorable to plaintiff, it appears beyond doubt that no set of facts could support plaintiff's claim for relief. *Id.*; Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir.1987), cert. denied, 484 U.S. 944, 108 S.Ct. 330, 98 L.Ed.2d 358 (1987). Therefore, all factual questions in doubt are resolved in favor of plaintiff on this motion.

II. COMERICA'S MOTION TO DISMISS

A. Subject matter jurisdiction

Plaintiffs assert that their causes of action under the Federal Tort Claims Act, various amendments to the United States Constitution, the Civil Rights Act, 42 U.S.C. §§ 1983, 1985, 1986 and 1988, and

the federal Declaratory Judgment Act, 28 U.S.C. §§ 2201, et seq. all give rise to federal question jurisdiction. The Court disagrees. None of these are a sufficient basis for federal question jurisdiction in this case.

*2 First, the Federal Tort Claims Act authorizes claims against the United States, not private individuals. 28 U.S.C. § 2674; Federal Deposit Ins. Corp. v. Blackburn, 109 F.R.D. 66, 75 (E.D.Tenn.1985). Second, none of Plaintiffs' claims against Comerica are grounded in the United States Constitution. They are all state common law claims. Thus, the Civil Rights Act provisions that Plaintiffs rely on are inapplicable. Finally, a plaintiff seeking a declaratory judgment must have an independent basis of jurisdiction. Stock West, Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221, 1225 (9th Cir.1989). There is no independent basis of jurisdiction here.

Since Plaintiffs have alleged only state law claims against Comerica and have not established that this Court otherwise has jurisdiction over those claims, their amended complaint is DISMISSED for lack of subject matter jurisdiction.

B. Failure to state a claim upon which relief can be granted

Since the Court lacks subject matter jurisdiction over Plaintiffs' claims against Comerica, the Court need not reach Comerica's argument that Plaintiffs have failed to state a claim.

III. DISPOSITION OF OTHER PARTIES

A. Individual Federal Defendants

In its Order of December 15, 1994, this Court dismissed the following Defendants for insufficient service: Special Agent Lee Stark; Special Agent Richard W. Held; Supervisory Special Agent William E. Smith; Special Agent Kevin S. Williamson; and Special Agent Jeff Novitsky. The Order of December 15, 1994 also granted Plaintiffs leave until January 27, 1995 to perfect service on these agents. Plaintiffs have not done so. Therefore, Plaintiffs' claims against these agents are dismissed.

B. Fidelity & Deposit Company

On December 15, 1994, this Court ordered Plaintiffs, by December 30, 1994, to show cause why their claims against Fidelity & Deposit Company should not be dismissed under Rule 4(m) of the Federal Rules of Civil Procedure. Plaintiffs have not done so. Therefore, their claims against Fidelity & Deposit Company are dismissed.

CONCLUSION

For the foregoing reasons, Plaintiffs' claims against Comerica Bank are DISMISSED for lack of subject matter jurisdiction. In addition, Plaintiffs' claims against the individual Federal Defendants and Fidelity & Deposit Company are DISMISSED for insufficient service. The Clerk shall close this file.

IT IS SO ORDERED.

N.D.Cal., 1995.
Rogers v. F.B.I.
Not Reported in F.Supp., 1995 WL 219431 (N.D.Cal.)

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- **Williams, Hon. Spencer M.**
United States District Court, Northern California
San Jose, California 95113

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RESOLUTION _____

TERMINATING BOTH THE EXCLUSIVE NEGOTIATING RIGHTS AGREEMENT WITH TRACY'S CALIFORNIA BLAST, LLC AND THE FIRST AMENDMENT TO EXCLUSIVE NEGOTIATING RIGHTS AGREEMENT WITH TRACY BLAST DEVELOPMENT, LLC REGARDING CITY-OWNED PROPERTIES OUTSIDE OF THE CITY LIMITS ON THE WEST SIDE OF TRACY BOULEVARD ADJACENT TO LEGACY FIELDS AND ON THE EAST SIDE OF TRACY BOULEVARD NORTH OF ARBOR ROAD AND NORTH OF THE CITY'S WASTEWATER TREATMENT PLANT ("HOLLY SUGAR PROPERTY") AND AUTHORIZING THE CITY MANAGER TO SEND A NOTICE OF TERMINATION

WHEREAS, on April 29, 2011, the City entered into an Exclusive Negotiating Rights Agreement ("ENRA") with Tracy's California Blast, LLC regarding City-owned properties outside of the City limits on the west side of Tracy Boulevard adjacent to Legacy Fields and on the east side of Tracy Boulevard north of Arbor Road and north of the City's Wastewater Treatment Plant ("Holly Sugar Property");

WHEREAS, on September 18, 2012, the City entered into the First Amendment to the ENRA with Tracy Blast Development, LLC (Tracy's California Blast, LLC and Tracy Blast Development, LLC are collectively referred to as "Tracy Blast"); and

WHEREAS, Tracy Blast is in default of sections 4 and 6 of the ENRA relating to submittal of development applications and financial verification;

WHEREAS, Tracy Blast has failed to cure these defaults after written notice from the City;

WHEREAS, Section 12 of the ENRA provides in relevant part that "[I]f a default remains uncured 60 days after receipt by the defaulting party of such notice, the non-defaulting party may terminate this ENRA."; and

WHEREAS, the City desires to terminate the ENRA.

NOW, THEREFORE, the Tracy City Council resolves that the ENRA with Tracy Blast is hereby terminated and authorizes the City Manager to send Tracy Blast notice of such termination.

* * * * *

The foregoing Resolution _____ was passed and adopted by the Tracy City Council on the 19th day of March, 2013, by the following vote:

AYES: COUNCIL MEMBERS:

NOES: COUNCIL MEMBERS:

ABSENT: COUNCIL MEMBERS:

ABSTAIN: COUNCIL MEMBERS:

Mayor

ATTEST:

City Clerk

AGENDA ITEM 6

REQUEST

SECOND READING AND ADOPTION OF ORDINANCE 1182 AN ORDINANCE OF THE CITY OF TRACY APPROVING AN AMENDED AND RESTATED DEVELOPMENT AGREEMENT WITH THE SURLAND COMMUNITIES, LLC APPLICATION DA11-0002

EXECUTIVE SUMMARY

Ordinance 1182 was introduced at the special Council meeting held on March 5, 2013. Ordinance 1182 is before Council for a second reading and adoption.

DISCUSSION

On January 22, 2013, City Council approved applications submitted by Surland Communities, LLC., for an amended and restated Development Agreement (DA11-0002), General Plan Amendment (GPA11-0005), and annexation and approval of the Modified Ellis Specific Plan (Applications A/P11-0002, SPA11-0002), all of which are necessary for, and allows for development of a mix of residential, commercial, office/professional, institutional, and recreational uses, parklands, and a swim center at the 321-acre Ellis Project site. The Ellis Project site is located at the Northwest Corner of Corral Hollow Road and Linne Road. Ordinance 1182 was introduced at the March 5, 2013, Council meeting to approve the Amended and Restated Development Agreement with the Surland Communities, LLC.

Ordinance 1182 is before Council for a second reading and adoption.

FISCAL IMPACT

None.

RECOMMENDATION

That Council adopts Ordinance 1182 following its second reading.

Attachment

Prepared by: Adrienne Richardson, Deputy City Clerk
Reviewed by: Sandra Edwards, City Clerk
Approved by: R. Leon Churchill, Jr., City Manager

ORDINANCE 1182

AN ORDINANCE OF THE CITY OF TRACY APPROVING AN AMENDED AND RESTATED DEVELOPMENT AGREEMENT WITH THE SURLAND COMMUNITIES, LLC APPLICATION DA11-0002

WHEREAS, In December 2011, the Surland Communities applied for a development agreement (DA11-0002) which would provide real property and funding towards the creation of a swim center; and

WHEREAS, In May 1, 2012, the City Council, in accordance with Resolution No. 2012-074, directed staff to enter into negotiations with the Surland Communities for a modified and restated development agreement; and

WHEREAS, A Final Environmental Impact Report ("FEIR") for the Surland Communities Amended and Restated Development Agreement and Ellis Specific Plan Applications (SCH No. 2012022023), was prepared in compliance with the requirements of the California Environmental Quality Act ("CEQA"), and

WHEREAS, Pursuant to California Government Code Section 65867, the Planning Commission reviewed the Development Agreement, in conjunction with other Surland Communities applications, including the Ellis Specific Plan and General Plan Amendment, including consistency with the General Plan, and

WHEREAS, On December 5, 2012, the Planning Commission, following duly noticed and conducted public hearing, in accordance with state law, recommended approval of the Amended and Restated Development Agreement to the City Council and hereby transmits the Resolution, including the proposed findings, to the City Council; and

WHEREAS, The proposed Development Agreement is consistent with the General Plan, and the Ellis Specific Plan, for the reasons set forth in the Recitals in the proposed Amended and Restated Development Agreement dated November, 2012; and

WHEREAS, The Planning Commission conducted a public hearing on December 19, 2012, and recommended that the City Council approve the Modified and Restated Development Agreement with The Surland Communities, LLC.

The city council of the City of Tracy does ordain as follows:

1. Recitals. The foregoing recitals are true and correct and are incorporated herein as findings.
2. Compliance with CEQA. The Final Environmental Impact Report ("FEIR") for the Modified Ellis Project, approved by Resolution No. PC 2012-026, and incorporated herein by reference, was prepared in compliance with the requirements of the CEQA. The City undertook environmental review of the potential direct and indirect environmental impacts of the Ellis Specific Plan and this Agreement pursuant to the California Environmental Quality Act and Guidelines (hereinafter "CEQA") analyzing both the Ellis Specific Plan (including the Swim Center), and the proposed Amended and Restated Development Agreement.

3. Findings regarding Development Agreement. The City Council finds that the proposed Amended and Restated Development Agreement, for those reasons more specifically set forth in the Recitals of the proposed Development Agreement:
 - a. is consistent with the objectives, policies, general land uses and programs specified in the City General Plan and any applicable community and specific plan;
 - b. is in conformity with public convenience, general welfare, and good land use practices;
 - c. will not be detrimental to the health, safety, and general welfare of persons residing in the immediate area, nor be detrimental or injurious to property or persons in the general neighborhood or to the general welfare of the residents of the City as a whole;
 - d. will not adversely affect the orderly development of property or the preservation of property values; and
 - e. is consistent with the provisions of Government Code Sections 65864 *et seq.*
4. Development Agreement Approval. The City Council approves the Amended and Restated Development Agreement with Surland Communities, LLC attached hereto as Exhibit "1".
5. Effective Date. This Ordinance takes effect 30 days after its final passage and adoption.
6. Publication. This Ordinance shall be published once in the Tri-Valley Herald, a newspaper of general circulation, within fifteen days from and after its final passage and adoption.

* * * * *

Ordinance 1182

Page 3

The foregoing Ordinance 1182 was introduced at a regular meeting of the Tracy City Council on the 5th day of March, 2013, and finally adopted on the _____ day of _____, 2013, by the following vote:

AYES: COUNCIL MEMBERS:

NOES: COUNCIL MEMBERS:

ABSENT: COUNCIL MEMBERS:

ABSTAIN: COUNCIL MEMBERS:

ATTEST:

Mayor

City Clerk

EXHIBIT 1

**AMENDED AND RESTATED
DEVELOPMENT AGREEMENT
BY AND BETWEEN
THE CITY OF TRACY
AND
SURLAND COMMUNITIES, LLC**

**AMENDED AND RESTATED
DEVELOPMENT AGREEMENT
BY AND BETWEEN
THE CITY OF TRACY
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**AMENDED AND RESTATED
DEVELOPMENT AGREEMENT
BY AND BETWEEN
THE CITY OF TRACY
AND
SURLAND COMMUNITIES, LLC**

This "**Agreement**," dated this ____ day of ____, 2013 ("Agreement Effective Date"), is entered into by and between the CITY OF TRACY, a municipal corporation ("**City**"), and SURLAND COMMUNITIES, LLC, a California limited liability company ("**Owner**"), pursuant to Government Code sections 65864 *et seq.* ("**Development Agreement Statute**"), City Resolution No. 2004-368 (establishing rules, regulations, procedures and requirements, including fees, for the processing and approval of a development agreement ("**Enabling Resolution**")), and Article XI, section 7 of the California Constitution ("**Police Powers**"). From time to time, City and Owner are individually referred to in this Agreement as a "**Party**," and are collectively referred to as the "**Parties**."

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein and other considerations, the value and adequacy of which is hereby acknowledged, the Parties hereby agree as follows:

RECITALS

A. The preceding Preamble, and the following Recitals, are true and correct, are a part of this Agreement, and the terms defined in both are used throughout this Agreement.

B. To strengthen the public planning process, to encourage private participation in the provision, dedication and funding of community benefits and amenities that could not otherwise be required under controlling law (such as the below-described swim center), to set forth the procedures and processes to be employed in the processing of subsequent development requests, to ensure compliance with all state and federal procedural and substantive laws prior to action on such development requests, and to ensure compliance with all City laws, including without limitation the City's Growth Management Ordinance (except as provided to the contrary herein), City and Owner enter into this Agreement. This Agreement has been drafted and processed pursuant to the Development Agreement Statute, Enabling Resolution and the City's Police Powers.

C. The establishment of a family-oriented swim center is one of the City's priorities, has been contemplated for years, and is overwhelmingly supported by the Tracy community. Yet City funding for such an effort is lacking. Owner, a local developer with a long track record of award-winning development in the City, made a proposal to City whereby Owner would offer to dedicate to City (at no cost to City) 16 acres of land, would conceptually design, would assist City with project oversight, and would fund \$10 million toward the construction of a swim center, as described in this Agreement, for the Tracy community; and provide certain other benefits to the City, in return for being eligible for a set number of "**Residential Growth Allotments**" (also referred to in this Agreement as "**RGAs**") This Owner proposal has secured

remarkable community support. All of these swim center-related Owner commitments are specifically described in this Agreement and its exhibits and are collectively referred to in this Agreement as the "**Swim Center Obligations.**"

D. Owner first filed land use applications in 2007 to entitle the Ellis Project. Those applications included applications for the Ellis Specific Plan, General Plan Amendment and an annexation and rezoning of the Ellis Property. In addition, Owner filed an application for negotiation and approval of the original Development Agreement by and between the City of Tracy and Surland Communities LLC (the "**Original Development Agreement**"). The City processed the various applications and commissioned the preparation of an environmental impact report for the Original Development Agreement and the 2007 land use applications (the "**Original EIR**"). On December 16, 2008, the City certified the Original EIR and approved the various applications for the entitlements for the Ellis Project, including the 2008 Ellis Specific Plan, 2008 General Plan amendment, approval of rezoning and annexation, and the Original Development Agreement (collectively the "**Original Ellis Entitlements**"). Following the approval of the Original Ellis Entitlements, opponents to the Ellis Project filed litigation challenging the sufficiency of the Original EIR and the legality of the Original Ellis Entitlements in a mandamus action filed in San Joaquin County Superior Court, *Tracy Regional Alliance for a Quality Community v. City of Tracy, et al.* On October 31, 2011, the trial court issued its Statement of Decision and Judgment finding the Original EIR and the Original Ellis Entitlements to be inadequate and ordering that they be set aside. The Statement of Decision and Judgment specifically found certain defects in the Original Development Agreement that the trial court believed needed to be amended and modified in order to comply with the law. In November 2011, the Original Owner and the City each filed appeals from the trial court's judgment; as a result of which appeals, the trial court's judgment ordering that the certification of the Original EIR and adoption of the Original Development Agreement be set aside is stayed pending the outcome of the appeals.

E. In February, 2011 the Tracy City Council approved and adopted an updated General Plan (the "**2011 General Plan**"). The General Plan now acknowledges the Ellis Specific Plan area and establishes a land use category of Traditional Residential-Ellis (TR-Ellis) which, on page 2-20, is designated as the majority of former Urban Reserve 10. In order for development of the property designated as TR-Ellis to go forward, the General Plan requires the adoption of a specific plan implementing certain designated criteria.

F. In December, 2011, Owner filed applications with the City for an amendment and restatement of the Original Development Agreement as well as amendments and modifications to the other Original Ellis Entitlements (collectively, the "**Revised Ellis Entitlements**"). The City has commissioned a revised Environmental Impact Report for the project proposed by the December 2011 applications (the "**Revised EIR**") which was prepared in response to the trial court's Statement of Decision and Judgment, addressing and remedying those things that the trial court found insufficient. This Agreement has been negotiated and shall be implemented so as to address, revise and remedy those portions of the Original Development Agreement found by the trial court's Statement of Decision and Judgment to be legally deficient by amending and restating the Original Development Agreement, while at the same time the parties continue to pursue their judicial remedies by prosecution of their appeals of the trial court's Judgment.

G. The 2011 General Plan envisions that development within TR-Ellis shall be done by Specific Plan. The revised Ellis Specific Plan ("**2013 Ellis Specific Plan**") which is a part of the Revised Ellis Entitlements, contemplates a unique community of distinct character, with well-planned homes, small-scale businesses, major public amenities, including a proposed swim center, and an integrated, multi-use village center that promotes businesses that are small, local, and neighborhood-serving. The swim center is proposed to be located adjacent to the village center. The character of development within the 2013 Ellis Specific Plan evokes the wonderful historic neighborhoods of Tracy. Traditional planning techniques and architecture true to the local vernacular capture the essence of Tracy and are intended to create timeless neighborhoods that fit seamlessly into the City. All these planning goals and ideals have been considered and acted upon by City (in its sole and exclusive discretion) after a lengthy public process.

H. Over time, the City has completed environmental review of the potential direct and indirect environmental impacts of development in the area subject to the 2013 Ellis Specific Plan and this Agreement pursuant to the California Environmental Quality Act and its implementing regulations, known as the CEQA Guidelines (collectively, "**CEQA**") as follows:

(1) As a part of its General Plan efforts, and prior to adopting the General Plan, City undertook environmental review of the potential direct and indirect environmental impacts of the General Plan pursuant to CEQA, certified the Final Environmental Impact Report for the General Plan, State Clearinghouse #2008092006 ("**General Plan EIR**"), and adopted findings, mitigation measures and a statement of overriding considerations in connection therewith. As set forth in greater detail herein, this Agreement is consistent with the General Plan EIR.

(2) As a part of the original South Schulte Specific Plan efforts, City prepared and certified an EIR ("**South Schulte EIR**"). The South Schulte EIR was challenged in court and a settlement was arrived at ("**South Schulte EIR Settlement**") that required City to conduct additional studies and analysis. Initially, the City began to process a Supplemental EIR to address the South Schulte EIR Settlement. However, with the General Plan Update and its new approach to the area formerly known as the South Schulte Community Area, and with the City desire to conduct a thorough analysis of the new Urban Reserve 10, City decided to cause to be prepared an entirely new Environmental Impact Report.

(3) As part of the General Plan Amendment of 2011, the City Council certified as adequate a Final Supplemental Environmental Impact Report to address and mitigate the impacts of the General Plan, including without limitation the creation of the TR-Ellis land use designation.

(4) As part of its review of Owner's December 2011 development applications, City caused to be prepared the Revised EIR, analyzing both the 2013 Ellis Specific Plan (including a swim center) and this Agreement. This Agreement does not impede, impair or otherwise seek to truncate or limit future CEQA review. Future CEQA review shall take place as required by applicable law.

I. As of the execution of this Agreement by the Parties, various land use regulations, entitlements, grants, permits and other approvals have been adopted, issued, and/or granted by City relating to the 2013 Ellis Specific Plan, including, without limitation, all of the following:

- (1) Revised EIR (City Council Resol. No. 2013-011)
- (2) 2013 Ellis General Plan Amendment (City Council Resol. No. 2013-012)
- (3) 2013 Ellis Specific Plan (City Resol. No. 2013-012)
- (4) This Agreement (City Ordinance No. 1182)

The above-listed approvals are collectively referred to herein as the “**Ellis Project Approvals**” and are more particularly described in the Revised EIR and the resolutions adopting those approvals. The development of the Property described in and permitted by the Revised EIR, the 2013 Ellis Specific Plan, the 2013 General Plan Amendment and this Agreement, is referred to herein as the “**Ellis Project.**” Except as provided to the contrary herein, the 2011 General Plan as amended by the 2013 Ellis General Plan Amendment (hereafter, the “**General Plan**”, and the 2013 Ellis Specific Plan are hereby incorporated by reference in to this Agreement.

J. Given the community character and quality of the 2013 Ellis Specific Plan, its compliance with CEQA and applicable planning and zoning laws, and its approval by the City, and given Owner's significant land dedication, financial obligations and personnel commitment to a swim center (as set forth in this Agreement), the City wishes to allow Owner to be eligible to apply for and potentially receive up to 2,250 RGAs and Building Permits, as more specifically provided in this Agreement. Owner shall record this Agreement against the property comprising and subject to the 2013 Ellis Specific Plan (the “**Property**”) (shown on *Exhibit A* to this Agreement).

K. City's issuance of RGAs under this Agreement complies with City's Growth Management Ordinance and the City's Growth Management Ordinance Guidelines (collectively, “**GMO**”) except as specifically provided herein, and the maximums they set for annual RGA and building permit issuance for development agreements (referred to in this Agreement as the “**GMO Maximums**” and further defined below in this Agreement).

L. Owner represents and warrants to the City that Owner either owns, or holds legally enforceable contracts to purchase, all of the Property (as defined in Exhibit A). In preparing this Development Agreement, the City and Owner are guided by and follow the legal authority of *National Parks and Conservation Association v. County of Riverside* (1996) 42 Cal. App.4th 1505, 1520-1523. Further, Owner represents and warrants to City that Owner has a legal or equitable interest in the Property for the development contemplated by the Ellis Project Approvals sufficient to satisfy the requirements of the Development Agreement Statute.

M. The Property that is the subject of this Agreement is all of the property comprising and subject to the Ellis Specific Plan, which is depicted and legally described on *Exhibit A* to this Agreement (the “**Property**”). The covenants and/or servitudes contained in this Development Agreement are intended to run with the land.

N. It is in this unique setting - - a strong community desire to construct a swim center and Owner's willingness to provide such an extraordinary commitment in return for future eligibility to apply for RGAs - - that the Parties have drafted this Agreement, ensuring that all of the requirements of controlling law are satisfied. This Agreement meets all of the requirements of law: it meets the contents requirements of the Development Agreement Statute and applicable law, and it establishes a protocol for the processing of future approvals. City and Owner are entering into this Agreement now in this fashion because of the unique community interest in a swim center and the benefits it will bring to Tracy and the unique opportunity the City presently has with the Owner's willingness to make substantial land dedication, design creation and financial contribution commitments to make a swim center a reality. The consideration by City of a swim center, the offer by Owner and this Agreement have been underway for more than ten years. In 2001, a survey of the Tracy community and public workshops were held that identified the need for community aquatic facilities. In 2003, NTD Architects completed the Tracy Aquatic Center Feasibility Study. In July 2005, the City Council directed Tracy Tomorrow and Beyond to make recommendations for a swim center. In the summer of 2005, Tracy Tomorrow and Beyond conducted additional public workshops. In October of that year, the City Council received the recommendations of Tracy Tomorrow and Beyond. Also in October 2005, Owner proposed Ellis as a location to be considered for a swim center. Between October 2005 and January 2006, the City studied a number of possible sites for a swim center including the existing Tracy ballpark. In January 2006, the City Council selected the Ellis Specific Plan as a potential site for a swim center. In April 2006, the City Council authorized City Staff to begin negotiations with Owner for a Development Agreement with provisions for the granting of funds and land by Owner for a swim center. In August 2006, the City Council, Planning Commission, and Parks Commission approved a conceptual design for a swim center at Ellis. In May 2007, the City Council directed City Staff to prioritize the Original Development Agreement for Ellis, including a swim center. In January 2008, a joint Planning Commission/City Council workshop was held to discuss the Original Development Agreement, the 2008 Ellis Specific Plan, and the swim center. Between April and December of 2008, the Planning Commission held a series of public meetings to discuss the Original EIR, the 2008 General Plan Amendment, the 2008 Ellis Specific Plan and the Original Development Agreement. The City Council and the Planning Commission provided direction and the public provided comment throughout this process.

O. For all of the reasons stated above, this Agreement is consistent with the General Plan and the 2013 Ellis Specific Plan. For example, as required by the General Plan, this Agreement envisions proper environmental analysis and a proper planning process in compliance with controlling law before any approval allowing development can take place. No additionally required Owner Approvals, as defined herein, are granted through, nor guaranteed by, this Agreement, and this Agreement ensures that the City's future consideration and decision on such approvals shall be in the sole and exclusive discretion of the City. (General Plan Goal LU-1 and Objective LU-1.1 (and its Policy P1); Objective LU-1.2 (and its Policy P3); Goal LU-6; and Goal LU-7.) Further, this Agreement requires that any distribution of RGAs under this Agreement comply with all applicable City regulations, including the General Plan (Objective LU-1.4, Policies P1-P5 and Action A1). While this Agreement preserves the City's full and unfettered discretion with respect to whether or not it will approve the development of a swim center, it is nonetheless intended to help bring to fruition a swim center as envisioned by the General Plan (Objective OSC-4.1, Policy P3), should the City exercise its discretion accordingly. In fact, the General Plan recognizes this Agreement as a potential vehicle by which the City and

Owner could reach agreement relative to such a swim center in a manner that City could not otherwise require Owner to do, that Owner may receive RGAs only if and after all requirements of controlling law have been satisfied, and that such risk shall be placed on Owner alone. Finally, this Agreement is not contrary to nor contradictory of any General Plan text or diagrams.

P. On December 19, 2012, following duly noticed and conducted public hearings, the Planning Commission, a hearing body for purposes of the Development Agreement Statute, took appropriate action under CEQA, the Planning and Zoning Law, and the Tracy Municipal Code, and made recommendations regarding this Agreement to the City Council. On January 22, 2013, following duly noticed and conducted public hearings, the City Council certified the Revised EIR, took appropriate action under the Planning and Zoning Law, and introduced and conducted the first reading of Ordinance No. 1182, an ordinance approving this Agreement, and directing this Agreement's execution by City ("**Approving Ordinance**"). On February 19, 2013, the City Council conducted the second reading and adopted the Approving Ordinance.

ARTICLE 1
APPLICABLE DEVELOPMENT TERMS

1.01 The Swim Center Obligations.

(a) Owner hereby commits to make two non-refundable payments totaling ten million dollars (\$10,000,000.00) ("**Owner Swim Center Contribution**") to the City, as set forth in this Section 1.01(a), to fund the design, construction, operation and maintenance of a swim center. Owner shall deposit into a segregated and interest-bearing City account the Owner Swim Center Contribution, for use by the City for the construction and operation of a swim center as provided herein. Upon completion of the Owner Swim Center Contribution, Owner shall be deemed to have satisfied any and all fees applicable to the Property or the Ellis Project for a swim center or pool.

(1) Not later than sixty (60) days after the "**Annexation Effective Date**", as defined herein, Owner shall deposit into a segregated and interest-bearing account designated by the City (the "**Swim Center Funds Account**") two million dollars (\$2,000,000.00) ("**Owner's First Swim Center Payment**") for use by the City in the development, construction, operation and maintenance of a swim center.

(2) Not later than three (3) years following the date of Owner's First Swim Center Payment, Owner shall deposit into the Swim Center Funds Account eight million dollars (\$8,000,000.00) for use by the City in the development, construction, operation and maintenance of a swim center.

(3) Owner's obligations under this section are separate and independent of Owner's obligations under Subsection (b), and are binding upon Owner regardless of whether or not City accepts Owner's Dedication Offer as provided in Subsection (b).

(4) In addition to any other remedies available to the City under this Agreement, and any and all other provisions of this Agreement or the City's Growth

Management Ordinance and Guidelines to the contrary notwithstanding, if Owner fails to make either or both of the two non-refundable payments as required by Sections 1.01(a)(1) and (2) above, then the City may, in its sole and exclusive discretion, withhold from Owner such Residential Growth Allotments or building permits as Owner would otherwise be entitled to receive under this Agreement or the City's Growth Management Ordinance or Guidelines, and may continue to withhold the issuance of such Residential Growth Allotments or building permits until all such overdue payment or payments due under this Agreement have been made in full.

(b) Owner shall offer to dedicate to the City approximately sixteen (16) acres of land as described generally in the Revised EIR and the Ellis Specific Plan as the location of the "Potential Swim Center" (the "**Ellis Swim Center Site**"), subject to the following:

(1) Within thirty (30) days of the Annexation Effective Date, Owner shall offer to dedicate to the City, at no cost to the City, the Ellis Swim Center Site ("**Land Dedication Offer**"). City shall have one (1) year from the Annexation Effective Date to accept the Land Dedication Offer ("**Dedication Acceptance Period**"), subject to such extensions as may be mutually agreed by the Parties. If City does not accept the Land Dedication Offer within the Dedication Acceptance Period, then one day after the conclusion of the Dedication Acceptance Period, the Land Dedication Offer shall be considered rejected by the City and shall expire without any further action of the Parties. Thereafter, the Ellis Swim Center Site shall be available for development by Owner pursuant to the 2013 Ellis Specific Plan. Additionally, at any time prior to the end of the Dedication Acceptance Period, City may, by resolution of the City Council, reject the Land Dedication Offer and upon such City rejection, the Ellis Swim Center Site shall be available to Owner for development pursuant to the 2013 Ellis Specific Plan.

(2) The minimum on-site park requirements of the Ellis Specific Plan are addressed in Section 1.15 of this Agreement. If the City accepts the Land Dedication Offer, the swim center constructed on the Ellis Swim Center Site shall be considered a City "Community Park", as defined in the General Plan and other City laws. Upon City acceptance of the Land Dedication Offer, Owner shall be deemed to have satisfied its applicable community park obligation for the 2013 Ellis Specific Plan maximum entitlement of up to 2,250 residential units.

(c) If the City elects to construct a publicly-operated swim center anywhere in the City, City shall contribute toward the swim center that amount of money (plus interest earned) that City has already collected (and will continue to collect) from the Plan C FIP designated for an aquatic center ("**City Swim Center Contribution**"). The Owner Swim Center Contribution and the City Swim Center Contribution are collectively referred to in this Agreement as the "**Swim Center Funds**." Additionally, City shall consider establishing and imposing against new development a fee, charge, assessment or other financial obligation to be used toward the costs of the design, construction, operation and maintenance of a swim center ("**New Development Swim Center Contribution**"). Any and all New Development Swim Center Contributions collected by City prior to the construction of a swim center should be added to the Swim Center Funds.

(d) Owner already has provided a design team to City, and Owner has already conducted an outreach program that led to the completion of the "**Conceptual Design**" of a swim center. The Conceptual Design provides detail for a swim center project description contemplated by this Agreement. Owner has also funded various studies and analyses relating to the required infrastructure for, and potential environmental impacts from, a swim center on the Ellis Swim Center Site, including but not limited to the Revised EIR for the 2013 Ellis Specific Plan. Owner hereby agrees that all costs associated with conducting the outreach program and developing the Conceptual Design, all costs associated with preparation of the Revised EIR and the various infrastructure studies, and all other costs incurred by Owner and paid to City in connection with City's consideration of Owner's proposal to develop a swim center at the Ellis Swim Center Site, shall constitute an additional contribution by Owner to the City's development of a swim center, which contribution is independent of and in addition to the Swim Center Payments and Swim Center Land Dedication described in Sections 1.01(a) and (b) above, and Owner shall not seek credit for or reimbursement of any such costs.

(e) If the City elects to construct a publicly-operated swim center using the Owner Swim Center Contribution anywhere in the City, the swim center shall be named the "Serpa Swim Center." After acceptance of such publicly-operated swim center by the City, but prior to the opening of such swim center to the public, City shall allow Owner to use and occupy such swim center for one (1) day without charge. Owner shall provide adequate insurance coverage for such use and occupancy.

(f) The amenities included in the Conceptual Design for a publicly-operated swim center have been selected through a public outreach program, are subject to the constraints of the City's swim center budget and compliance with controlling law, and may include the following:

- (1) 50 Meter (approximately) Competition Pool
- (2) Recreation Pool (separate from Competition Pool)
- (3) Spray ground
- (4) Water Slide
- (5) Wet Play Structure
- (6) Lazy River
- (7) Flow Rider
- (8) Showers and Locker Rooms
- (9) Ticket Facilities
- (10) Pool Equipment Room and Storage

(11) On Site Development (parking, ancillary structures, landscaping, etc.).

(g) If a funding shortfall should exist, the work for each phase of the swim center may be prioritized for that particular phase at the time that City seeks bids for the particular phase, so that work receiving a higher priority could be completed first so as to ensure its completion. As a result, if work cannot be completed due to a budget shortfall, that work receiving a lower priority could potentially be deferred.

(h) This Agreement provides a framework for City and Owner to work cooperatively to develop a swim center, as described herein. However, all provisions and language herein to the contrary notwithstanding, including but not limited to Sections 1.01 and 1.02, nothing in this Agreement is intended to or shall be construed to require City to construct a swim center on the Ellis Swim Center Site or anywhere else.

(i) If a publicly-operated swim center is approved and constructed on the Ellis Swim Center Site, then during the design and construction phases, Owner representatives shall be invited to participate and provide input to City regarding the design and construction processes for such swim center, which participation may include attending design and construction meetings with City's design consultants, construction managers and contractors; provided, however, that the Parties hereby acknowledge and agree that Owner's input on such swim center project shall be provided to City and City staff, Owner shall not be entitled or permitted to direct City's consultants, construction managers, contractors or other employees or agents, and City retains its full discretion to accept or not to accept Owner's input regarding the design and construction of such swim center.

(j) Monies withdrawn from the Swim Center Funds Accounts shall be for the sole purpose of funding the design, construction, operation, and/or maintenance costs of a swim center. City shall make withdrawals from the Swim Center Fund Account in the amounts and at the times it deems necessary in order to pay those costs authorized hereunder.

1.02 Other Processing.

(a) Nothing in this Agreement shall be construed to limit the authority or obligation of City to hold necessary public hearings, nor to limit the discretion of City or any of its officers or officials with regard to those "**Owner Approvals**" (defined below) that require the exercise of discretion by City, provided that such discretion shall be exercised consistent with the laws contained within the Applicable Law.

(b) At its approval and execution, this Agreement does not provide Owner with any right to develop or construct any project or to secure any Owner Approval; instead, it simply provides certain rights and responsibilities regarding approvals already given for the Ellis Specific Plan, provides certain vested rights to laws and approvals already in place, provides a protocol by which later Owner Approvals may be processed by Owner and later included into this Agreement, if and only if such Owner Approvals are compliant with all controlling California law (including proper Planning and Zoning Law and CEQA compliance), have secured approval of the Parties, and are adopted/approved by the City (who shall retain all

discretion in this regard) – and provides the process by which this Agreement will be recorded against the Property. The public review process envisioned by this Agreement is ongoing, and following City's adoption of this Agreement, that public review process shall continue.

(c) City shall inform Owner, upon request, of the necessary submission requirements for a complete application for each Owner Approval. Owner Approval shall include, without limitation, a City resolution of application to the San Joaquin County Local Agency Formation Commission (“LAFCO”) seeking all LAFCO approvals relative to the annexation of the Property into the City. Provided Owner has paid all appropriate Processing Fees, City shall accept, process, review and act upon all applications for Owner Approvals pursuant to this Agreement and the Applicable Law it describes with "**Good Faith and Fair and Expeditious Dealing.**" Likewise, City shall commence, continue and diligently process any and all initial studies, assessments, EIRs and other relevant CEQA compliance documents regarding the Owner Approvals with Good Faith and Fair and Expeditious Dealing. For the purposes of this Agreement, "Good Faith and Fair and Expeditious Dealing" shall mean that that the Parties shall act toward each other and the tasks necessary or desirable to the processing contemplated by this Agreement pursuant to the Applicable Law and in a fair, diligent, expeditious and reasonable manner (except in those cases where a Party is given sole discretion under this Agreement), and that no Party or Parties shall take any action that will prohibit, impair or impede any other Party's or Parties' exercise or enjoyment of its rights and obligations secured through this Agreement.

(d) If Owner requests, City shall meet with Owner prior to Owner's submission of applications for Owner Approvals for the purpose of ensuring all requested information is understood by Owner so that Owner's applications, when submitted, will be accurate and complete. Upon submission by Owner of an application for an Owner Approval, together with appropriate Processing Fees, City shall process such application for Owner Approval with Good Faith and Fair and Expeditious Dealing. If City is unable to so process any such application, or upon request by Owner, City shall engage mutually acceptable outside consultants to aid in such processing. Owner shall be required to pay all of City's actual costs related to such outside consultants. Owner, in a timely manner, shall provide City with all documents, applications, plans and other information necessary for City to carry out its obligations hereunder, and Owner shall cause the Owner's planners, engineers and all other consultants to submit in a timely manner all required materials and documents. If City denies an application for an Owner Approval, City shall specify in detail the modifications, changes, or improvements that are required to obtain approval. City and Owner shall cooperate, with the goal being to obtain and issue Owner Approvals that are consistent with the modifications, changes, or improvements that are required by City. City shall with Good Faith and Fair and Expeditious Dealing consider any subsequently submitted Owner Approval application that complies with the City-specified modifications.

1.03 Applicable Law.

(a) As used in this Agreement, "**Applicable Law**" shall exclusively mean all of the following:

(1) As relates to the development of any or all of the Property, the terms and conditions of this Agreement.

(2) The Revised EIR, the General Plan, the Ellis Specific Plan and its zoning regulations, Finance Implementation Plan adopted for the Ellis Project (the "Ellis FIP") and all other land use regulations, entitlements, grants, permits, plans and other approvals (collectively, the "Owner Approvals") that City has already or will in the future specifically approve, adopt, issue, and/or grant relative to Owner requests relating to the use and development of the Property, provided such Owner Approvals are:

(A) Compliant with all controlling California law (e.g., Planning and Zoning Law, CEQA, etc.);

(B) Mutually agreed to by the Parties;

(C) Adopted by the City; and

(D) Take "Legal Effect."

(3) As relates to the development of any or all of the Property, the City rules, regulations, ordinances, policies, standards, specifications, practices and standard operating procedures of City (whether adopted by the City Council, the Planning Commission, the City staff or the voters of the City) in force and effect on the Effective Date ("Existing City Laws"), including, without limitation the GMO and GMO Guidelines.

(4) As relates to the development of any or all of the Property, the City "Processing Fees" for land use approvals, including without limitation, fees for processing zoning, subdivision maps, building permits and other similar permits and entitlements which are charged for processing applications and which are in force and effect on a Citywide basis at the time the application for the Owner Approval is presented to the City.

(5) As relates to the development of any or all of the Property, the California Building Code (as modified by City), and those other State-adopted construction, fire and other codes, including "Green Codes" (as all may be modified by City) applicable to improvements, structures and development, and the applicable version or revision of said codes by local City action (collectively referred to as "Construction Codes") in place at that time (date) that building plans subject to such Construction Codes are submitted by Owner to City for an Owner Approval, provided that such Construction Codes have been adopted by City and are in effect on a Citywide basis.

(6) As relates to the development of any or all of the Property, the "Mandated New City Law(s)," pursuant to Section 1.05(e) of this Agreement.

(7) As relates to the development of any or all of the Property, the "New City Law(s)" that Owner elects to be subject to pursuant to Section 1.05(d).

(b) This Agreement complies with laws regarding the Development Agreement Statute (including without limitation section 65865.2), which require this Agreement to specify the duration (Term) of the Agreement, the permitted uses of the Real Property, the density or intensity of use, the maximum height and size of proposed buildings, and provisions for reservation or dedication of land for public purposes. The duration of this Agreement is set

forth in Section 1.06 of this Agreement, and this Agreement sets forth provisions for the permitted uses, the density and intensity of use, the maximum height and size of proposed buildings, and the dedication of land for public purposes in the Applicable Law provisions of this Agreement, either by its terms or through its incorporation of the General Plan and the 2013 Ellis Specific Plan. For example, the 2013 Ellis Specific Plan is part of the Applicable Law for the Property, and the 2013 Ellis Specific Plan sets forth the permitted uses, the density and intensity of use, the maximum height and size of proposed buildings, and the dedication of land for public purposes for the Property.

(c) The Parties acknowledge that Owner Approvals likely will be processed in stages and, therefore, one or more Owner Approvals may take Legal Effect before other Owner Approvals. Provided Owner submits applications as provided herein, the City shall process such applications and applications for other entitlements as are necessary to allow development of 2,250 residential units as part of the 2013 Ellis Specific Plan in implementation of the TR Ellis land use designation in the General Plan.

1.04 Vested Right to Applicable Law.

(a) By this Agreement, the Property shall have a vested right to the Applicable Law.

(b) During the Term of this Agreement, any development of the Property and any discretion exercised by City on an Owner Approval shall occur pursuant to only the law that comprises the Applicable Law. During the Term of this Agreement, City regulation of the development of the Property shall occur pursuant to only the Applicable Law.

1.05 New City Law(s).

(a) Any City ordinance, resolution, minute order, rule, motion, policy, standard, specification, or a practice adopted or enacted by City, its staff or its electorate (through their powers of initiative, referendum, recall or otherwise) that is not part of the Applicable Law and that takes effect on or after the Agreement Effective Date is hereby referred to as a "New City Law(s)." The parties recognize the City may, from time to time, modify its GMO Ordinance and Guidelines and none of these modifications shall apply to the development of the Property, which shall be governed by the GMO Ordinance and Guidelines in effect on the Effective Date, except as otherwise provided herein. Except as otherwise provided in this Agreement, a New City Law shall be deemed to be in conflict with this Agreement or the Applicable Law or to reduce the development rights provided hereby if the application to the Ellis Project would accomplish any of the following results, either by specific reference to the Ellis Project or as part of a general enactment which affects or applies to the Ellis Project:

(1) Change any land use designation or permitted use of the Property allowed by the Applicable Law or limit or reduce the density or intensity of the Property or any part thereof, or otherwise require any reduction in the total number of residential dwelling units, square footage, floor area ratio, height of buildings, or number of proposed non-residential buildings, or other improvements;

(2) Limit or control the availability of public utilities, services, or facilities otherwise allowed by the Applicable Law;

(3) Limit or control the rate, timing, phasing or sequencing of the approval, development, or construction of all or any part of the Property and/or Owner Approvals in any manner, or take any action or refrain from taking any action that results in Owner's having to substantially delay construction on the Property or require the acquisition of additional permits or approvals by the City other than those required by the Applicable Law;

(4) Limit or control the location of buildings, structures, grading, or other improvements of the Property in a manner that is inconsistent with or more restrictive than the limitations in the Ellis Approvals and Applicable Law;

(5) Limit the processing of Owner Approvals.

(6) Except for uniform adjustments formulated according to an inflation or cost of construction index, City changes in development, infrastructure or building standards, policies or ordinances that increase the cost of or impose new costs to develop and construct the project according to the Ellis Project Approvals.

(b) City shall not apply any New City Law(s) to the Property that is in conflict with this Agreement or that is excessive under controlling law (collectively, "in conflict with" or "inconsistent with"). If City believes that it has the right under this Agreement to impose/apply a New City Law on the Property/project, it shall send written notice to Owner of that City position ("**Notice of New Law(s)**"). Upon receipt of the Notice of New City Law, if Owner believes that such New City Law is in conflict with this Agreement, Owner may send written notice to City within thirty (30) days of Owner's receipt of City's Notice of New Law ("**Objection to New City Law(s)**"). Owner's notice to City of its Objection to New City Law(s) shall set forth the factual and legal reasons why Owner believes City cannot apply the New City Law(s) to the Property. City shall respond to Owner's Objection to New City Law(s) ("**City Response**") within thirty (30) days of receipt of said Owner Objection to New City Law(s). Thereafter, the Parties shall meet and confer within thirty (30) days of the date of Owner's receipt of the City Response and shall continue to meet over the next sixty (60) days ("**Meet and Confer Period**") with the objective of arriving at a mutually acceptable solution to this disagreement. The New City Law(s) shall not be applied to the Property until the dispute over the applicability of the New City Law(s) is resolved. Within fifteen (15) days of the conclusion of the Meet and Confer Period, City shall make its determination, and shall send written notice to Owner of that City determination. If City determines to impose/apply the New City Law(s) to the Property in question, then Owner shall have a period of ninety (90) days from the date of receipt of such City determination within which to file legal action challenging such City action. In other words, a 90-day statute of limitations regarding Owner's right to judicial review of the New City Law(s) shall commence upon the conclusion of the Meet and Confer Period. If upon conclusion of judicial review of the New City Law(s) (at the highest judicial level sought and granted), the reviewing court determines that Owner is not subject to the New City Law(s), such New City Law(s) shall cease to be a part of the Applicable Law, and City shall return Owner to the position Owner was in prior to City's application of such New City Law(s) (e.g., City return fees, return dedications, etc.). Notwithstanding any of the preceding language in this Section 1.05(b) to the

contrary, upon the City's issuance to Owner of a Notice of New Law(s), any Party may opt out of the subsequent objection and resolution process described in this Section 1.05(b) provided that the opting out Party notifies the other Party(ies) that the opting out Party agrees to meet and confer regarding any disputes over New City Laws.

(c) The above-described procedure shall not be construed to interfere with City's right to adopt or apply any New City Law(s) with regard to all other areas of City (excluding the Property and Owner Approvals).

(d) Owner, in its sole and absolute discretion, may elect to be subject to a New City Law(s) that is/are not otherwise a part of the Applicable Law. In the event Owner so elects, Owner shall provide notice to City of that election and thereafter such New City Law(s) shall be part of the Applicable Law.

(e) City shall not be precluded from applying any New City Law(s) to the extent that such New City Law(s) are specifically mandated to be applied to developments such as the development of the Property by changes in State or Federal laws or regulations (and implemented through the Federal, State, regional and/or local level) ("**Mandated New City Law(s)**"). In the event such Mandated New City Law(s) prevent or preclude compliance with one or more provisions of this Agreement or require changes in plans, maps or permits approved by City for the Property, this Agreement shall be modified, extended or suspended as may be necessary to comply with such Mandated New City Law(s). Immediately after enactment of any such Mandated New City Law(s) that will materially affect the terms and conditions of this Agreement, the Parties shall meet and confer in good faith to determine the feasibility of any such modification, extension or suspension based on the effect such modification, extension or suspension would have on the purposes and intent of this Agreement. In the event that an administrative challenge and/or legal challenge (as appropriate) to such Mandated New City Law(s) preventing compliance with this Agreement is brought and is successful in having such Mandated New City Law(s) determined to not apply to this Agreement, this Agreement shall remain unmodified and in full force and effect.

1.06 Term.

(a) The term of this Agreement shall commence thirty (30) days after the adoption of the Approving Ordinance ("**Agreement Effective Date**"), and shall continue twenty five (25) years plus one day ("**Term**"), unless said Term is otherwise terminated, modified or extended as provided in this Agreement or any amendment thereto.

(b) If any administrative, legal and/or equitable action and/or other proceeding instituted by any person, entity or organization (that is not a Party to this Agreement) challenging the validity of this Agreement, the Ellis Project, the Ellis Project Approvals, the Owner Approvals and their respective projects, or the sufficiency of any environmental review under CEQA ("**Third Party Challenge**") is filed, then the Term of this Agreement shall be tolled for the period of time from the date of the filing of such Third Party Challenge until the conclusion of such litigation by dismissal or entry of a final judgment, provided such tolling period does not exceed five (5) years. The filing of any such Third Party Challenge(s) against City and/or Owner shall not delay or stop the development, processing or construction of the Ellis Project or

issuance of any Owner Approvals, unless enjoined or otherwise controlled by a court of competent jurisdiction. The Parties shall not stipulate to the issuance of any such order unless mutually agreed to.

(c) Notwithstanding any other part of this Section 1.06, as it relates to a residential unit, this Agreement shall terminate and be of no further force and effect for each individual residential unit on the Property on that date a "**Certificate of Occupancy**" is issued by City for such residential unit if such residential unit is transferred and conveyed to a third party intending to use the unit for residential purposes.

(d) Pursuant to Government Code section 66452.6(a) (or its successor section in substantially the same form) and this Agreement, and subject to the provisions of subdivision (f) of this Section 1.06, the term of any tentative map, vesting tentative map, parcel map, vesting parcel map or final map, or any re-subdivision or any amendment to any such map (collectively referred to as "**Subdivision Document**") relating to the Property shall automatically be extended to and until the later of the following: (1) the end of the term of this Agreement; or (2) the end of the term or life of any such Subdivision Document otherwise given pursuant to the Subdivision Map Act or local regulation not in conflict with the Subdivision Map Act. Any improvement agreement entered into pursuant to the Subdivision Map Act or other State or local regulation shall have a term no shorter than 365 days from execution of the improvement agreement and no longer than that term decided by City.

(e) If this Agreement terminates for any reason prior to the expiration of vested rights otherwise given under the Subdivision Map Act to any vesting tentative map, vesting parcel map, vesting final map or any other type of vesting map on the Property (or any portion of the Property) (collectively, "**Vesting Map**"), such termination of this Agreement shall not affect Owner's right to proceed with development under such Vesting Map in accordance with the ordinances, policies and standards so vested under the Vesting Map. Notwithstanding the foregoing or any other provision of this Agreement or the Applicable Law it describes, no Vesting Map shall extend the Applicable Law beyond the stated Term of this Agreement (and the rules, regulations and official policies of City applicable to that portion of the Property covered by such Vesting Map shall become those in effect as of the expiration of such Term), except as otherwise agreed to by City and Owner; provided, however, that City and Owner may agree to an extension of the Term of this Agreement with respect to the area covered by any such Vesting Map.

(f) The term of any Owner Approvals, including without limitation, all development plans, development permits, design review approvals, or other permit, grant, agreement, approval or entitlement for the general development of all or any part of their respective projects and properties, shall automatically be extended to and until the later of the following: (1) the end of the Term of this Agreement; or (2) the end of the term or life of the Owner Approval otherwise given pursuant to controlling law.

(g) The Parties hereby agree that, as of the Effective Date, this Agreement supersedes the effectiveness of the Original Development Agreement and all of the Parties' respective rights and obligations thereunder while this Agreement remains in effect; provided, however, that if the validity of this Agreement is overturned or set aside by a decision of a court

of competent jurisdiction, then the suspension of the Original Development Agreement and superseding effect of this Agreement set out in this section shall, likewise, be overturned and of no further force and effect, and the Original Development Agreement and all of the parties' respective rights and obligations thereunder shall be restored.

1.07 Residential Growth Allotments.

(a) City shall reserve, and Owner shall be eligible for, the allocation of up to 2,250 Residential Growth Allotments ("RGAs") for residential development on the Property, as provided in this Agreement. City and Owner agree that the RGAs allocated under this Agreement apply only to the Property and may not be applied or transferred to any other property.

(b) In no event shall Owner be eligible for more than 2,250 RGAs over the Term of this Agreement ("**Overall RGA Maximum**"). Further, each year Owner shall be eligible for RGAs as provided in the GMO and the GMO Guidelines in effect on the Effective Date, but in no event more than 225 RGAs per year ("**Annual RGA Eligibility**").

(c) Owner shall make application to City for RGAs ("**RGA Application(s)**") according to the requirements of the GMO Guidelines in effect on the Effective Date using the RGA Application form attached hereto as Exhibit B or the form then stipulated in the GMO Guidelines then in effect, at the option of the Owner.

(d) Owner shall provide a separate RGA Application for each calendar year in which Owner seeks RGAs. The total RGAs sought by Owner in any calendar year shall not exceed the total Annual RGA Eligibility for that calendar year set by this Agreement.

(e) Owner shall be eligible for building permits according to the requirements of the GMO and the GMO Guidelines in effect on the Agreement Effective Date.

1.08 Significant Actions by Third Parties.

(a) Owner shall be responsible for the acquisition of permits, approvals, easements and services required to serve the Property from all non-City providers of utilities at Owner's cost. Owner shall also be responsible for coordinating with any non-City providers of utilities to ensure the proper installation and construction of non-City utilities in accordance with the Applicable Law. The provision of all such services shall be subject to City approval, which City approval shall be subject to Good Faith and Fair and Expeditious Dealing.

(b) At Owner's sole discretion and in accordance with Owner's construction schedule, Owner shall apply for such other permits and approvals as may be required by other private and public and quasi-public entities in connection with the development of, or the provision of services to, the Property. City shall cooperate with Owner in Good Faith and Fair and Expeditious Dealing, at no cost to City, in Owner's efforts to obtain such permits and approvals and City shall, from time to time (at the request of Owner), use its Good Faith and Fair and Expeditious Dealing to enter into binding agreements with any such other entity as may be necessary to ensure the timely availability of such permits and approvals to Owner, provided such permits and approvals are mutually determined by City and Owner to be reasonably

necessary or desirable and are consistent with Applicable Law. In the event that any such permit or approval as set forth above is not obtained within three (3) months from the date application is deemed complete by the appropriate entity, and such circumstance materially deprives Owner of the ability to proceed with development of the Property or any portion thereof, or materially deprives City of a bargained-for public benefit of this Agreement, then, in such case, and at the election of Owner, Owner and City shall meet and confer with the objective of attempting to mutually agree on alternatives, Owner Approvals, and/or an amendment to this Agreement to allow the development of the Property to proceed with each Party substantially realizing its bargained-for benefit there from.

(c) City and Owner acknowledge and agree that City may from time to time enter into (with Good Faith and Fair and Expeditious Dealing) joint exercise of power agreements or memoranda of understanding with other governmental agencies consistent with and to further the purposes of this Agreement.

1.09 Amendment of this Agreement; Inclusion of Owner Approvals into this Agreement.

(a) This Agreement may be amended from time to time in accordance with California Government Code section 65868 and the Enabling Resolution, and upon the mutual written consent of City and Owner, with City costs payable by the Owner. Owner may seek City interpretation regarding one or more of the terms and conditions of this Agreement to determine whether or not an amendment is needed.

(b) This Agreement anticipates and provides the process and rules governing subsequent Owner Approvals. No amendment of this Agreement shall be required in connection with City processing and/or approval of any such Owner Approval for the Property. Any such Owner Approval that is approved by City and becomes part of the Applicable Law pursuant to the requirements of this Agreement shall be vested into by Owner and City, and shall become a part of this Agreement as if set forth herein in full. City shall not process or approve any Owner Approval unless Owner requests such process and approval.

1.10 Annexation.

(a) Within ninety (90) days after the Effective Date, or as soon thereafter as a "Plan for the Provision of Services" (as that phrase is defined by the law controlling the San Joaquin County Local Agency Formation Commission ("LAFCO") and all other materials required by controlling law and/or requested by LAFCO can be prepared and completed relating to the Property, City shall consider a "Resolution of Application" to LAFCO requesting annexation of the Property. City shall submit such Resolution of Application, Plan for the Provision of Services and other material required by controlling law and/or requested by LAFCO. City may process any such annexation of the Property concurrently with other Owner Approvals.

(1) City shall use Good Faith and Fair and Expeditious Dealing to cause the completion of such annexation of the Property subject to all applicable requirements of law. If such annexation of the Property cannot be accomplished without conditions that are

unacceptable to Owner then, at Owner's request, City shall terminate or request termination of the proceedings, as appropriate.

(2) Owner shall pay City's reasonable costs relating to all City actions taken pursuant to this Section 1.11, including reasonable consultant costs, and including such LAFCO fees, costs and charges relating to such annexation(s) that LAFCO charges to City.

(3) If City's first Resolution of Application to LAFCO requesting annexation of the Property is denied by LAFCO, then the Parties shall continue to work together to secure such annexation in such a manner as they may mutually agree, including annexing only portions of the Property at different times until such time as all of the Property is annexed to City. To the extent that the law requires a date to be set forth within this Agreement by which annexation of Annexation Property must be accomplished, that date shall be two (2) days prior to the termination of the Term of this Agreement.

(b) Owner shall be responsible for the City's processing costs regarding actions taken by City pursuant to this Section.

1.11 Adequate Water Supply.

(a) Pursuant to the water supply assessment ("WSA") by City relating to the potential development this Agreement addresses, adequate water supplies are known and will be available during the Term of this Agreement for the potential maximum development that may occur pursuant to this Agreement. Therefore, City shall make such water supplies available to Owner for such potential development during the Term of this Agreement. Except as provided herein, there shall be no cost to Owner for such water supply. Neither City nor Owner shall take any actions, including without limitation, approval by City of any new development after the Effective Date, that would impair or impede the City's ability to make such water supplies available to Owner during the Term of this Agreement for the potential maximum development that may occur pursuant to this Agreement. Water supply verifications shall take place at the subdivision map approval stage for all development of the Property as required by such law. If for any reason, despite the City's best efforts, such water supplies are not available from surface water supplies for Owner's use on such development when needed, then the following shall apply:

(1) City shall pursue interim measures to satisfy such water supply requirements, including without limitation, City's use of groundwater.

(2) If for any reason, despite City's best efforts, such interim measures are either not available, or are available but not in quantities necessary to fully satisfy such water supply requirements, then Owner may, at Owner's sole and exclusive discretion, advance to City such funds as are necessary to design, construct, operate and maintain one (1) ground water well, and such ancillary facilities as are necessary to provide potable water service to the Property until such time as City-provided permanent surface water supplies are available. Such ground water well and ancillary facilities, including without limitation water treatment facilities, as are necessary, as determined by City, to provide potable water service to the Property, shall collectively be referred to herein as the "Additional Well." Such Additional Well shall not be

implemented unless and until Owner, in Owner's sole and exclusive discretion, elects to advance to City all costs associated with its design, construction, operation and maintenance, and Owner's development will not be served from the Additional Well until construction of the Additional Well is completed and accepted by the City. After sufficient City-provided, permanent surface water supplies are made available to serve the Property, such that the Additional Well is no longer necessary, as determined by City, to serve the Property, City may use the Additional Well for emergency water supply purposes in accordance with the City's water Master plan, provided City reimburses Owner for all costs to Owner of the design, construction, operation and maintenance of the Additional Well that exceed Owner's fair share of such costs. Such reimbursement to Owner shall be made from appropriate development impact fees subsequently collected by City from other properties determined by City to benefit from the Additional Well, in the normal course of development of such properties. If any ancillary improvements to the Additional Well are required for the benefit of Ellis Project or are the part of the Ellis FIP, the cost of such facilities will not qualify for reimbursements from other developments.

The costs related to the transmission of the water supplies provided to the Property shall be paid by those impact fees that are established in the Ellis FIP .

1.12 Recycled Water Program.

All other provisions in this Agreement to the contrary notwithstanding, Owner hereby agrees that the Property and the Ellis Project shall be subject to such City recycled water fee requirements as may be set forth in the Ellis FIP . In addition to complying with such requirements, Owner hereby agrees that, as a condition of approval for any subdivision map for the Property or the Ellis Project, the subdivider shall design and construct, in conformance with applicable City standards, such recycled water infrastructure and facilities on collector streets as are sufficient to provide recycled water for irrigation of Ellis parks, and as are sufficient to provide recycled water for irrigation of such other landscaped public spaces on the Property and within the Ellis Specific Plan area as are mutually agreed on by the Parties.

1.13 Wastewater Treatment and Conveyance Capacity.

(a) Wastewater Treatment Capacity.

(1) Upon the Effective Date, City shall make available capacity from the existing City wastewater treatment plant sufficient to provide the Ellis Project with adequate wastewater treatment capacity for eight hundred (800) single-family detached residential units, a swim center and Storage Uses ("**Ellis Initial Capacity**"). There shall be no cost to Owner for the Ellis Initial Capacity

(2) Beyond the Ellis Initial Capacity referenced above, the Ellis Project shall receive that wastewater treatment capacity ("**Additional Capacity**") needed to adequately service the Property, with said Additional Capacity coming from the City's existing capacity at the existing wastewater treatment plant or "**Expansion**" of the existing wastewater treatment plant. For the purposes of this Agreement, "**Expansion**" shall mean that expansion of the existing treatment capacity of the existing wastewater treatment plant, which Expansion will increase the treatment capacity of the plant from the existing approximately 9.0 million gallons

per day of treatment capacity to approximately 20 million gallons per day of treatment capacity. Such Expansion may be done in incremental phases. Owner shall pay in accordance with the Ellis FIP, the costs of the Expansion (taking into account all users that will use the Expansion) through a form of municipal financing or other mechanism acceptable and agreeable to the Parties. City shall take such measures as needed to ensure that other public and private development projects proposing to utilize the Expansion shall pay their fair share of the funding needed to construct, maintain and operate the Expansion. Owner's above-described funding obligations shall be coordinated with the other public and private development projects to ensure that such monies are collected from Owner and other public and private development projects at approximately the same time. If the required funding from other users or development projects is not available for the phase of Expansion needed to provide the Additional Capacity Owner needs when Owner needs it, or if some funding from others is available but is not adequate to fund the phase of Expansion needed to provide said Additional Capacity Owner needs when Owner needs it, then, at Owner's sole and exclusive discretion, Owner may pay the balance of the cost of such phase of Expansion needed to provide such Additional Capacity ("**Owner Funded Phase**"). In such a case, Owner shall be reimbursed for that portion of the Owner Funded Phase that exceeds Owner's Additional Capacity needs. Except for responsibilities provided for in applicable FIPs, CIPs and/or other developments to pay their fair share, City shall not be obligated to advance funds for Additional Capacity Expansion.

(b) Conveyance Capacity.

(1) Initial Capacity in Corral Hollow System: Owner is afforded the right to use 330 residential units of existing capacity in the Corral Hollow Sewer Conveyance System on a permanent basis. There shall be no cost to Owner for transmission for up to 550 units. Conveyance capacity shall be increased in accordance with any City-adopted Wastewater Master Plan and the Ellis FIP.

(2) Additional Capacity in Corral Hollow System: In addition to the 330 units of capacity mentioned above, there is an additional two hundred twenty (220) units of permanent sewer conveyance capacity in the existing Corral Hollow conveyance system. Commencing on January 31, 2016, Owner may secure for its use such additional existing capacity as has not been reserved and secured by other developers or land owners by paying or otherwise securing payment to the City of their "fair share" portion (as determined by the City) of the Corral Hollow Sewer Conveyance System expansion cost by paying or otherwise securing payment of its "fair share" portion of said cost. Provided that Owner has complied with all of its obligations under this Agreement and is not otherwise in default under this Agreement, then between January 31, 2016 and April 30, 2016, City shall reserve exclusively for Owner all such remaining additional capacity in the existing Corral Hollow conveyance system, which Owner may secure by paying or otherwise securing payment to the City of Owner's "fair share" portion (as determined by the City) of the Corral Hollow Sewer Conveyance System expansion cost. Commencing on May 1, 2016, to the extent that Owner has not secured such remaining additional capacity in the existing Corral Hollow Conveyance System as provided in this Section 1.13(b)(2), the City's obligation to reserve such remaining additional capacity for Owner shall terminate.

(3) Interim Capacity in Eastside Sewer Conveyance System: In addition to the permanent sewer conveyance capacity mentioned above, the Property shall be

allocated an additional two hundred fifty (250) units of sewer conveyance capacity currently existing in the Eastside Sewer Conveyance System on an interim basis until phase one of the Corral Hollow Sewer Conveyance System upgrade is completed. There shall be no charge to Owner for said interim capacity.

(4) City shall take such measures as needed to ensure that other public or private development projects proposing to use the Conveyance Expansion shall pay their fair share (proportional) of the costs of such Conveyance Expansion. If additional funding from such other development projects is not available prior to Owner's need for the Conveyance Expansion, Owner, in its sole and exclusive discretion, may request City to construct all or a portion of the Conveyance Expansion using funds to be provided by Owner. On the date that the City determines that the Conveyance Expansion funded by Owner becomes available, Owner shall be entitled to such capacity as is necessary to meet Owner's needs, which needs shall be equal to the conveyance capacity for which owner has funded. To the extent that such Owner-funded capacity exceeds Owner's needs, such excess capacity shall be available on a first-come, first-served basis to property owners within the service area of the capacity, and Owner shall be entitled to reimbursement for funding provided by Owner in excess of Owner's fair share of the costs of the Owner-funded Conveyance Expansion, and such reimbursement shall occur prior to use by other property owners. All wastewater conveyance connections will be available to Owner only after the required improvements are completed and accepted by City. Wastewater conveyance capacity expansion to serve the Project shall be provided from the Corral Hollow sewer line and other western sewer lines as set forth in the Ellis FIP for the maximum development authorized by this Agreement. Except for responsibilities provided for in applicable CIPs and/or other developments to pay their fair share, City shall not be obligated to advance funds for conveyance improvements.

1.14 Schools.

(a) Owner has entered into Memorandums of Understanding with the Tracy Unified School District and with the Jefferson School District.

(b) Prior to the first residential building permit issuance, Owner shall execute a school facilities mitigation agreement with the Jefferson School District to mitigate the impact of the Ellis Specific Plan on Jefferson School District facilities.

1.15 Ellis Specific Plan Parks.

(a) Owner shall provide and dedicate to City neighborhood and community parks pursuant to the four (4) acres per thousand formula required by the Ellis Specific Plan and Applicable Law ("**Park Requirements**"). Owner shall construct all improvements for neighborhood parks, consistent with the description of such parks in the Ellis Specific Plan, prior to dedication to City. Owner's compliance with community park obligations shall be subject to and consistent with Section 1.01 of this Agreement. No additional park dedications, in lieu fees or other park-related requirements shall be imposed by City on Owner or the Property beyond the Park Requirements of this Agreement.

(b) The timing of the dedication to City of Ellis Specific Plan parks and the construction of Ellis Specific Plan park improvements shall be determined by City at the time of City approval of subdivision maps for the Property.

1.16 Future Impact Fees; Nexus.

(a) During the Term of this Agreement, only those impact fees that are included in the Ellis FIP shall apply to the development of the Property.

(b) Except as provided in this Agreement, this Agreement is not intended to change or affect either Parties' rights or obligations regarding the over-sizing of improvements, services and/or facilities beyond the impacts of the Property.

ARTICLE 2
ASSIGNMENT, DEFAULT, ANNUAL REVIEW,
TERMINATION, LEGAL ACTIONS

2.01 Covenants Run With The Land.

(a) This Agreement and all of its provisions, agreements, rights, powers, standards, terms, covenants, obligations, benefits and burdens shall be binding upon and inure to the Parties and their respective heirs, successors (by merger, consolidation, or otherwise), assigns, devisees, administrators, representatives, lessees, and all other persons or entities acquiring the Property, or any part thereof, whether by sale, operation of law or in any manner whatsoever, and shall inure to the benefit of the Parties and their respective heirs, successors (by merger, consolidation or otherwise) and assigns (collectively, "Assignee").

(b) Upon assignment, in whole or in part, and the express written assumption by the Assignee of such assignment, of Owner's rights and interests under this Agreement, Owner shall be released from its obligations with respect to the Property, or any lot, parcel, or portion thereof so assigned to the extent arising subsequent to the date of such assignment. A default by any Assignee shall only affect that portion of the Property owned by such Assignee and shall not cancel or diminish in any way Owner's rights hereunder with respect to the assigned portion of the Property not owned by such Assignee. The Assignee shall be responsible for the reporting and annual review requirements relating to the portion of the Property owned by such Assignee, and any amendment to this Agreement between City and Assignee shall only affect the portion of the Property owned by such Assignee. Any and all provisions of this Agreement to the contrary notwithstanding, Owner shall not be released from any of its obligations under this Agreement, whether by assignment, conveyance, or any other means, unless and until Owner has fully satisfied its obligations under Section 1.01 of this Agreement

2.02 Defaults.

(a) Any failure by City or Owner to perform any material term or provision of this Agreement, which failure continues uncured for a period of sixty (60) days following written notice of such failure from the other Party (unless such period is extended by written mutual consent), shall constitute a default under this Agreement. Any notice given pursuant to the preceding sentence shall specify the nature of the alleged failure and, where appropriate, the

manner in which such alleged failure satisfactorily may be cured. If the nature of the alleged failure is such that it cannot reasonably be cured within such 60-day period, then the commencement of the cure within such time period, and the diligent prosecution to completion of the cure thereafter, shall be deemed to be a cure within such 60-day period.

(b) No failure or delay in giving notice of default shall constitute a waiver of default; provided, however, that the provision of notice and opportunity to cure shall nevertheless be a prerequisite to the enforcement or correction of any default.

(c) During any cure period specified under this Section and during any period prior to any delivery of notice of failure or default, the Party charged shall not be considered in default for purposes of this Agreement. If there is a dispute regarding the existence of a default, the Parties shall otherwise continue to perform their obligations hereunder, to the maximum extent practicable in light of the disputed matter and pending its resolution or formal termination of the Agreement as provided herein.

(d) City will continue to process in good faith development applications during any cure period, but need not approve any such application if it relates to a development proposal on the Property with respect to which there is an alleged default hereunder.

(e) In the event either Party is in default under the terms of this Agreement, the non-defaulting Party may elect, in its sole and absolute discretion, to pursue any of the following courses of action: (i) waive such default; (ii) pursue administrative remedies, and/or (iii) pursue judicial remedies. In no event shall City modify this Agreement as a result of a default by Owner except in accordance with the provisions of Section 1.14 above.

(f) Except as otherwise specifically stated in this Agreement, either Party may, in addition to any other rights or remedies, institute legal action to cure, correct, or remedy any default by the other Party to this Agreement, to enforce any covenant or agreement herein, or to enjoin any threatened or attempted violation hereunder or to seek specific performance. For purposes of instituting a legal action under this Agreement, any City Council determination under this Agreement shall be deemed a final agency action.

(g) The Parties hereby acknowledge that the City would not have entered into this Agreement if doing so would subject it to the risk of incurring liability in money damages, either for breach of this Agreement, anticipatory breach, repudiation of the Agreement, or for any actions with respect to its negotiation, preparation, implementation or application. The Parties further acknowledge that money damages and remedies at law generally are inadequate, and specific performance is the most appropriate remedy for the enforcement of this Agreement and should be available to all Parties for the following reasons:

(1) Money damages are excluded as provided above;

(2) Due to the size, nature, and scope of the Project, it may not be practical or possible to restore the Property to its original condition once implementation of this Agreement has begun. After such implementation, Owner may be foreclosed from other choices it may have had to utilize the Property or portions thereof. Owner has invested significant time and resources and performed extensive planning and processing of the Project in agreeing to the

terms of this Agreement and will be investing even more significant time and resources in implementing the Project in reliance upon the terms of this Agreement, and it is not possible to determine the sum of money which would adequately compensate Owner for such efforts.

Therefore, the Parties hereby acknowledge and agree that it is a material part of Owner's consideration to City that City shall not be at any risk whatsoever to liability for money damages relating to or arising from this Agreement, and except for non-damages remedies, including the remedy of specific performance, Owner, on the one hand, and the City, on the other hand, for themselves, their successors and assignees, hereby release one another's officers, trustees, directors, agents and employees from any and all claims, demands, actions, or suits of any kind or nature arising out of any liability, known or unknown, present or future, including, but not limited to, any claim or liability, based or asserted, pursuant to Article I, Section 19 of the California Constitution, the Fifth and Fourteenth Amendments of the United States Constitution, or any other law or ordinance which seeks to impose any money damages, whatsoever, upon the Parties because the Parties entered into this Agreement, because of the terms of this Agreement, or because of the manner of implementation or performance of this Agreement.

2.03 Annual Review.

(a) The Enabling Resolution provides for annual review of Owner's good faith compliance with the terms of this Agreement. Each year during the term of this Agreement, City shall initiate the annual review by written notice to Owner. Upon receipt of such written notice, Owner shall comply with such requirements of the Enabling Resolution and shall furnish to City a report demonstrating good faith compliance by Owner with the terms of this Agreement.

(b) Following any such annual review, if Owner is determined to be in good faith compliance with the terms of this Agreement, City shall furnish Owner, upon Owner's request, a certification of compliance in recordable form.

(c) Following any such annual review, if Owner is determined to not be in good faith compliance with the terms of this Agreement, City shall furnish to Owner a notice of noncompliance, which shall be deemed a notice of default and shall commence the cure period set forth in Section 2.02 above.

(d) In addition to the annual review provided for in this Section, City may investigate or evaluate from time to time during the course of any given year, and regardless of whether such investigation or evaluation takes place as part of the annual review, any subject matter that is properly the subject of an annual review.

2.04 Force Majeure Delay, Extension of Times of Performance.

(a) In addition to specific provisions of this Agreement, performance by either Party hereunder shall not be deemed to be in default where delays or defaults are due to war, insurrection, strikes, walkouts, riots, floods, earthquakes, fires, casualties, acts of God, governmental entities other than City, its departments, agencies, boards and commissions, enactment of conflicting State or Federal laws or regulations, or litigation (including without limitation litigation contesting the validity, or seeking the enforcement or clarification of this

Agreement whether instituted by Owner, City, or any other person or entity) (each a "**Force Majeure Event**").

(b) Either Party claiming a delay as a result of a Force Majeure Event shall provide the other Party with written notice of such delay and an estimated length of delay. Upon the other Party's receipt of such notice, an extension of time shall be granted in writing for the period of the Force Majeure Event, or longer as may be mutually agreed upon by the Parties, unless the other Party objects in writing within ten (10) days after receiving the notice. In the event of such objection, the Parties shall meet and confer within thirty (30) days after the date of objection to arrive at a mutually acceptable solution to the disagreement regarding the delay. If no mutually acceptable solution is reached, either Party may take action as permitted under this Agreement.

2.05 Third Party Legal Actions.

(a) If there are any third party administrative, legal or equitable actions challenging any of the Project Approvals or the Subsequent Approvals, including without limitation this Agreement and all CEQA processes and actions by City relating to the Project, Owner shall defend and indemnify the City against any and all fees and costs arising out of the defense of such actions, including the fees and costs of City's own in-house or special counsel retained to protect the City's interests. Each Party is entitled to legal counsel of its choice, at Owner's expense. The Parties and their respective counsel shall cooperate with each other in the defense of any such actions, including in any settlement negotiations. If a court in any such action awards any form of money damages to such third party, or any attorneys' fees and costs to such third party, Owner shall bear full and complete responsibility to comply with the requirements of such award, and hereby agrees to timely pay all fees and costs on behalf of the City.

(b) If any part of this Agreement, any Project Approval or Subsequent Approval, is held by a court of competent jurisdiction to be invalid, the Parties shall cooperate to use their best efforts, to the extent permitted by law, to cure any inadequacies or deficiencies identified by the court in a manner consistent with the express and implied intent of this Agreement.

ARTICLE 3 GENERAL PROVISIONS

3.01 Definitions.

(a) To the extent that any capitalized terms contained in this Agreement or its Exhibits are not defined below, then such terms shall have the meaning otherwise ascribed to them in this Agreement and its Exhibits and/or the Applicable Law.

(b) As used in this Agreement and its Exhibits, the following terms, phrases and words shall have the meanings and be interpreted as set forth in this Section:

(1) "**Agreement**" shall mean this Amended and Restated Development Agreement between City and Owner.

(2) **"Agreement Effective Date"** shall have the meaning set forth in Section 1.06(a) of this Agreement.

(3) **"Annexation Effective Date"** shall mean that date upon which all of the following have occurred: the Ellis Project Approvals have been approved by the City and the annexation of the Property has been approved by LAFCO, the Ellis Project Approvals and LAFCO's annexation approvals have taken effect under controlling law, the applicable statute of limitations has run on the Ellis Project Approvals and LAFCO annexation approvals without a lawsuit being filed within that statutory limitations period, or if a lawsuit has been filed within that statutory limitations period, that the defendant and real party have prevailed in the lawsuit, or the Ellis Project Approvals and LAFCO annexation approvals are otherwise determined legal and effective.

(4) **"Annual RGA Eligibility"** shall have the meaning set forth in Section 1.07(b) of this Agreement.

(5) **"Applicable Law"** shall have that meaning set forth in Section 1.03 of this Agreement.

(6) **"Approving Ordinance"** shall have the meaning set forth in Recital paragraph P of this Agreement.

(7) **"Assignee"** shall have the meaning set forth in Section 2.01(a) of this Agreement.

(8) **"CEQA"** shall have that meaning set forth in Recital paragraph H of this Agreement.

(9) **"Certificate of Occupancy"** shall mean a certificate issued or final inspection approved by the City authorizing occupancy of a residential unit.

(10) **"City"** shall have that meaning set forth in the preamble of this Agreement.

(11) **"City Swim Center Contribution"** shall have the meaning set forth in Section 1.01(c) of this Agreement.

(12) **"Claims"** shall have the meaning set forth in Section 3.04 of this Agreement.

(13) **"Conceptual Design"** shall have the meaning set forth in Section 1.01(d) of this Agreement.

(14) **"Construction Codes"** shall have the meaning set forth in Section 1.03(a) (5) of this Agreement.

(15) **"Development Agreement Statute"** shall have the meaning set forth in the preamble of this Agreement.

(16) "Ellis FIP" shall have the meaning set forth in Section 1.03(a)(2) of this Agreement.

(17) "Ellis Initial Capacity" shall have the meaning set forth in Section 1.14(a) (1) of this Agreement.

(18) "Ellis Project" shall have the meaning set forth in Recital paragraph I of this Agreement.

(19) "Ellis Project Approvals" shall have the meaning set forth in Recital paragraph I of this Agreement.

(20) "Ellis Swim Center Site" shall have the meaning set forth in Section 1.01(b) of this Agreement.

(21) "Enabling Resolution" shall have the meaning set forth in the preamble of this Agreement.

(22) "Existing City Laws" shall have the meaning set forth in Section 1.03(a) (3) of this Agreement.

(23) "Force Majeure Event" shall have the meaning set forth in Section 2.04(a) of this Agreement.

(24) "General Plan" shall mean the City of Tracy General Plan as amended by the City Council on January 22, 2013, by Resolution No. 2013-012, as described in Recital paragraph I of this Agreement.

(25) "GMO" shall mean the City of Tracy Residential Growth Management Plan set forth in Chapter 10.12 of Title 10 of the City of Tracy Code of Ordinances, as may be amended from time to time.

(26) "GMO Guidelines" shall mean the GMO Guidelines adopted by the City Council of the City of Tracy pursuant to Title 10, Chapter 10.12, Section 10.12.050 of the City of Tracy Code of Ordinances, that are in effect on the Agreement Effective Date.

(27) "Good Faith and Fair and Expeditious Dealing" shall have the meaning set forth in Section 1.02(c) of this Agreement.

(28) "LAFCO" shall have the meaning set forth in Section 1.02(c) of this Agreement.

(29) "Land Dedication Offer" shall have the meaning set forth in Section 1.01(b) (1) of this Agreement.

(30) "Legal Effect" shall mean that the ordinance, resolution, permit, license or other grant of approval (collectively, "permit") in question, has been adopted by City and that all applicable administrative appeal periods and statutes of limitations have run and that

the permit has not been overturned or otherwise rendered without legal and/or equitable force and effect by a court of competent jurisdiction or other tribunal with final and binding decision authority.

(31) "**Mandated New City Law(s)**" shall have the meaning set forth in Section 1.05(e) of this Agreement.

(32) "**New City Law(s)**" shall have the meaning set forth in Section 1.05(a) of the Agreement.

(33) "**Notice of New Law(s)**" shall have the meaning set forth in Section 1.05(b) of this Agreement.

(34) "**Original Development Agreement**" shall mean that development agreement by and between the City of Tracy and Surland Communities, LLC, approved by the City of Tracy on December 16, 2008, executed by the City of Tracy and Surland Communities, LLC, between January 28, 2009 and February 5, 2009, and recorded in the San Joaquin County Recorder's office on February 5, 2009 as Document Number 2009-022386.

(35) "**Original EIR**" shall have the meaning set forth in Recital paragraph D of this Agreement.

(36) "**Overall RGA Maximum**" shall have the meaning set forth in Section 1.07(b) of this Agreement.

(37) "**Owner**" shall have that meaning set forth in the preamble of this Agreement.

(38) "**Owner Approvals**" shall have the meaning set forth in Section 1.03(a)(2) of this Agreement.

(39) "**Owner Funded Phase**" shall have that meaning set forth in Section 1.13(a)(2) of this Agreement.

(40) "**Owner Swim Center Contribution**" shall have the meaning set forth in Section 1.01(a) of this Agreement.

(41) "**Park Requirements**" shall have the meaning set forth in Section 1.15(a) of this Agreement.

(42) "**Party**" and "**Parties**" shall have the meaning set forth in the preamble of this Agreement.

(43) "**Police Powers**" shall have the meaning set forth in the preamble of this Agreement.

(44) "**Processing Fees**" shall mean fees charged by the City which represent the costs to City for City staff (including consultants) time and resources spent

reviewing and processing applications for Owner Approvals, as governed by Government Code section 66014.

(45) "**Property**" shall have the meaning set forth in Recital paragraph M of this Agreement.

(46) "**Residential Growth Allotments**" or "**RGAs**" shall have the meaning set forth in the GMO.

(47) "**Revised EIR**" shall have the meaning set forth in Recital paragraph F of this Agreement.

(48) "**Subdivision Document**" shall have the meaning set forth in Section 1.06(d) of this Agreement.

(49) "**Swim Center Funds**" shall have the meaning set forth in Section 1.01(c) of this Agreement.

(50) "**Swim Center Funds Account**" shall have the meaning set forth in Section 1.01(a) (1) of this Agreement.

(51) "**Term**" shall have the meaning set forth in Section 1.06(a) of this Agreement.

(52) "**Third Party Challenge**" shall have the meaning set forth in Section 1.06(b) of this Agreement.

(53) "**Vesting Map**" shall have the meaning set forth in Section 1.06(e) of this Agreement.

(54) "**WSA**" shall have the meaning set forth in Section 1.11(a) of this Agreement.

3.02 Requirements of Development Agreement Statute.

(a) The permitted uses, density and/or intensity of use, maximum height and size of buildings and other structures, provisions for reservation or dedication of land, and other terms and conditions applicable to any development and construction on the Property shall be those set forth in the General Plan and the Ellis Specific Plan, as incorporated by reference herein, and all other provisions of the Applicable Law, as provided for and consistent with the provisions of Section 1.03(b) above.

(b) During the Term of this Agreement, and pursuant to Government Code section 65866, the rules, regulations, official policies and all other controlling criteria shall be the Applicable Law, which Applicable Law may expand pursuant to this Agreement to include New City Law(s), Owner Approvals, and other subsequent actions that this Agreement includes in the Applicable Law.

(c) As stated above, this Agreement complies with laws regarding Development Agreement Statute (including without limitation Government Code section 65865.2), which requires this Agreement to specify the duration (Term) of the Agreement, the permitted uses of the Property, the density or intensity of use, the maximum height and size of proposed buildings, and provisions for reservation or dedication of land for public purposes. The duration of this Agreement is set forth herein, and this Agreement sets forth provisions for the permitted uses, the density and intensity of use, the maximum height and size of proposed buildings, and the dedication of land for public purposes in the Applicable Law provisions of this Agreement.

3.03 Development Timing.

The Parties acknowledge that the timing, sequencing, and phasing of any later-approved development is solely the responsibility of Owner. In particular, the Parties desire to avoid the result of the California Supreme Court's holding in *Pardee Construction Co. v. City of Camarillo*, 37 Cal.3d 465 (1984), where the failure of the parties therein to consider and expressly provide for the timing of the development resulted in a later-adopted initiative restricting the timing of development to prevail over such parties' agreement.

3.04 Hold Harmless and Indemnification.

Owner shall indemnify, defend, and hold harmless City (including its elected officials, officers, agents, and employees) from and against any and all claims, demands, damages, liabilities, costs, and expenses (including court costs and attorney's fees) (collectively, "Claims") resulting from or arising out of the development contemplated by this Agreement, other than a liability or claim based upon City's gross negligence or willful misconduct. The indemnity obligations of this Agreement shall not extend to Claims arising from activities associated with the maintenance or repair by the City or any other public agency of improvements that have been accepted for dedication by the City or such other public agency.

3.05 Miscellaneous.

(a) Applicable Law and Attorneys' Fees. This Agreement shall be construed and enforced in accordance with the laws of the State of California. Owner acknowledges and agrees that City has approved and entered into this Agreement in the sole exercise of its legislative discretion and the standard of review of the validity and meaning of this Agreement shall be that accorded legislative acts of the City. Should any legal action be brought by a Party for breach of this Agreement or to enforce any provision herein, the prevailing Party of such action shall be entitled to reasonable attorneys' fees, court costs, and such other costs as may be fixed by the court.

(b) Development Is a Private Undertaking. The development contemplated by this Agreement is a separately undertaken private development. No partnership, joint venture, or other association of any kind between the Owner, on the one hand, and City on the other, is formed by this Agreement. The only relationship between City and Owner is that of a governmental entity regulating the development of private property and the owners of such private property.

(c) Construction. As used in this Agreement, and as the context may require, the singular includes the plural and vice versa, and the masculine gender includes the feminine and neuter and vice versa.

(d) Notices.

(1) All notices, demands, or other communications which this Agreement contemplates or authorizes shall be in writing and shall be personally delivered or mailed to the respective Party as follows:

If to the City:

City Manager
City of Tracy
333 Civic Center Plaza
Tracy, CA 95376
Telephone: (209) 831-6000
Facsimile: (209) 831-6120

With a copy to:

City Attorney
City of Tracy
333 Civic Center Plaza
Tracy, CA 95376
Telephone: (209) 831-6130
Facsimile: (209) 831-6137

If to Owner:

Les Serpa
Chris Long
Surland Communities, LLC
1024 Central Avenue
Tracy, CA 95376
Telephone: (209) 832-7000
Facsimile: (209) 833-9700

With a copy to:

Wilson F. Wendt
Miller Starr Regalia
1331 N. California Boulevard
Walnut Creek, CA 94596
Telephone: (925) 935-9400
Facsimile: (925) 933-4126

(2) Either Party may change the address stated herein by giving notice in writing to the other Party, and thereafter notices shall be addressed and transmitted to the new address. Any notice given to Owner as required by this Agreement shall also be given to all other signatory Parties hereto and any lender which requests that such notice be provided. Any signatory Party or lender requesting receipt of such notice shall furnish in writing its address to the Parties to this Agreement.

(e) Recordation. No later than ten (10) days after the Effective Date, the Clerk of the City shall record a copy of this Agreement in the Official Records of the Recorder's Office of San Joaquin County. Owner shall be responsible for any recordation fees.

(f) Jurisdiction and Venue. The interpretation, validity, and enforcement of the Agreement shall be governed by and construed under the laws of the State of California. Any suit, claim, or legal proceeding of any kind related to this Agreement shall be filed and heard in a court of competent jurisdiction in the County of San Joaquin.

(g) Waivers. Waiver of a breach or default under this Agreement shall not constitute a continuing waiver or a waiver of a subsequent breach of the same or any other provision of this Agreement.

(h) Execution/Entire Agreement. This Agreement may be executed in two (2) duplicate originals, each of which is deemed to be an original. This Agreement, including these pages and all the exhibits inclusive, and all documents incorporated by reference herein, constitute the entire understanding and agreement of the Parties.

(i) Signatures. The individuals executing this Agreement represent and warrant that they have the right, power, legal capacity, and authority to enter into and to execute this Agreement on behalf of the respective legal entities of Owner and City. This Agreement shall inure to the benefit of and be binding upon the Parties hereto and their respective successors and assigns.

(j) Severability. Should any part, term or provision of this Agreement or any document required herein to be executed or delivered be declared invalid, void or unenforceable, all remaining parts, terms and provisions hereof shall remain in full force and effect and shall in no way be invalidated, impaired or affected thereby.

(k) Exhibits. The following exhibits are attached to this Agreement and are hereby incorporated herein by this reference for all purposes as if set forth herein in full:

Exhibit A Property Legal Description

Exhibit B RGA Transmittal and Application Form

[SIGNATURES ON FOLLOWING PAGE]

IN WITNESS WHEREOF, the Parties do hereby agree to the full performance of the terms set forth herein.

"City"
CITY OF TRACY, a municipal corporation

"Owner"
SURLAND COMMUNITIES, LLC, a California limited liability company

By: Brent Ives
Title: Mayor
Date: _____

By: _____
By: _____
Les Serpa
Title: _____
Date: _____

Attest:

By:
Title: CITY CLERK
Date: _____

Approved As To Form:

By: Daniel Sodergren
Title: City Attorney
Date: _____

Exhibit A

Property Description

The land situated in the unincorporated area of the County of San Joaquin, State of California, and described as follows:

PARCEL NO. 1:

A portion of Section 6, Township 3, South, Range 5 East, Mount Diablo Base and Meridian according to the Official Plat thereof, more particularly described as follows: Beginning at an iron pipe in the East line of the Southwest 1/4 of said Section 6, bearing South 0° 17' East 4220.90 feet from the iron bolt at the Northeast corner of the Northwest 1/4 of said Section 6; thence along the East line of the Southwest 1/4 of said Section 6, South 0° 17' East, 964.50 feet to iron pipe in the North line of right of way the Western Pacific Railroad; thence along the North line of said right of way being 50 feet North of the center line of the main line tract of said railroad, South 89° 49' West 1796.43 feet to an iron rod at the Southeast corner of the tract of land conveyed to the United States of America by Deed recorded in Book of Official Records of San Joaquin County, Vol. 1061, Page 45, San Joaquin County Records; thence along the Northeasterly boundary line of said property conveyed to the United States of America, as follows: North 74° 58' West 550.5 feet to an iron rod; North 16° 08' West 317.4 feet to an iron rod; North 58° 09' West 1563.2 feet to an iron rod; South 89° 41' West 437.8 feet to an iron rod in the East line of the Lammers Road which is 25 feet East of the West line of said Section 6; thence along the East line of the Lammers Road, North 0° 11' West 40 feet to an iron pipe; thence 89° 41' East 449.24 feet to an iron pipe; thence South 58° 09' East 677.57 feet to an iron pipe; thence North 89° 43' 30" East 3152.53 feet to the point of beginning.

APN: 240-140-18

PARCEL NO. 2:

A tract of land situated in the County of San Joaquin, State of California in the Southwest 1/4 of Section 6, Township 3 South, Range 5 East, Mount Diablo Base and Meridian, more particularly described as follows:

Parcel 2 as shown upon Parcel Map recorded December 31, 1992 in Book of Parcel Maps, Vol. 18, Page 167, San Joaquin County Records.

APN: 240-140-22

PARCEL NO. 3:

A tract of land situate in the Southwest 1/4 of Section 6 Township 3 South, Range 5 East, Mount Diablo Base and Meridian, more particularly described as follows: Beginning at an iron pipe in the East line of the Northwest 1/4 of said Section 6 bearing South 0° 17' East, 2977.36 feet from the iron bolt at the Northeast corner of the Northwest 1/4 of Section 6; thence along the East line of the Southwest 1/4 of said Section 6, South 0° 17' East 590.08 feet to an iron pipe; thence South 89° 43' 30" West, 4175.03 feet to an iron pipe in the East line of the Lammers Road which is 25 feet East of the West line of said

Section 6; thence along the East line of said Lammers Road, North 0° 11' West 590.08 feet to an iron pipe; thence North 89° 43' 30" East, 4174 feet to the point of beginning. EXCEPT THEREFROM a portion of the Southwest 1/4 of Section 6, Township 3 South, Range 5 East, Mount Diablo Base and Meridian, more particularly described as follows:

Beginning at a 1 inch iron pipe at the Northwest corner of that certain tract of land described in a Deed to Roy Tusso and Margaret Tusso, husband and wife, recorded June 8, 1949, in Book of Official Records, Vol. 1213, Page 30, San Joaquin County Records, said point of beginning being on the East line of Lammers Road (a 50 foot road); thence along the North line of said Tusso property North 89° 44' 00" East 710.00 feet to a 3/4 inch iron pipe; thence South 0° 11' East 17.00 feet to a 3/4 inch iron pipe; thence South 89° 44' 00" West, and parallel to the North line of said Tusso property, a distance of 710.00 feet to a 3/4 inch iron pipe on the East line of said Lammers Road; thence along the East line of Lammers Road North 0° 11' West, 17.00 feet to the point of beginning.

APN: 240-140-16

PARCEL NO. 4:

A portion of the Southwest Quarter of Section 6, Township 3 South, Range 5 East, Mount Diablo Base and Meridian, more particularly described as follows:

Parcel 1, as shown on that certain Parcel Map filed for record December 31, 1992, in Book 18 of Parcel Maps, at Page 167, San Joaquin County Records.

APN: 240-140-23

PARCEL NO. 5:

Parcel One, as shown on that certain Parcel Map entitled "PA-0800181, Parcel Map", filed January 27, 2009, in Book 25 of Parcel Maps, at Page 33, in the Office of the Recorder of San Joaquin County.

APN: 240-140-30

PARCEL NO. 6:

The Southeast Quarter of Section 6, Township 3 South, Range 5 East, Mount Diablo Base and Meridian.

EXCEPT THEREFROM that portion in County Road along the Easterly boundary of said Quarter Section, as said road existed on July 17, 1901.

ALSO EXCEPT THEREFROM that portion thereof conveyed to the Western Pacific Railway Company, a railroad corporation, by Deed recorded June 13, 1906 in Book "A" of Deeds, Vol. 145, Page 528, San Joaquin County Records.

ALSO EXCEPT THEREFROM that portion conveyed to Carol Joan Maridon, aka Carol J. Maridon in Deed recorded January 28, 1989 Instrument No. 89057861 and described as follows:

A portion of the Southeast one quarter of the Southeast one quarter of Section 6, Township 3 South, Range 5 East, Mount Diablo Base and Meridian, described as follows:

BEGINNING at an iron rod at the intersection of the West line of a County Road (Corral Hollow Road) and the North line of that certain parcel of real property as originally conveyed to Western Pacific Railroad Company by Deed recorded June 13, 1906 in Book A of Deeds, Vol. 145, Page 528, San Joaquin County Records; said point of beginning being North 0° 12' 00" East, along the Section line, 138.28 feet and North 89° 44' 22" West 30 feet from the Southeast corner of said Section 6, Township 3 South, Range 5 East, Mount Diablo Base and Meridian; and running thence North 89° 44' 22" West along said North line, parallel with, and 50.0 feet distant from the centerline of the existing Union Pacific Railroad tracts, 500.00 feet to an iron road; thence North 0° 12' 00" East, parallel with Corral Hollow Road and the East line of said Section 6, 174.24 feet to an iron rod; thence South 89° 44' 22" East, parallel with said North boundary conveyed to Western Pacific Railroad Company, 500.00 feet to an iron rod on the West line of Corral Hollow Road; thence South 0° 12' 00" West along said West line, 174.24 feet to the point of beginning.

EXCEPT THEREFROM that portion conveyed to the County of San Joaquin in Deed recorded January 27, 1989, Document No. 89007328, Official Records.

ALSO EXCEPT THEREFROM all of Parcel One as shown on that certain Parcel Map entitled "PA-0800181, Parcel Map", filed January 27, 2009, in Book 25 of Parcel Maps, at Page 33, in the Office of the Recorder of San Joaquin County.

Note: The above described parcel of land is also shown as the "Designated Remainder" on that certain Parcel Map entitled "PA-0800181, Parcel Map", filed January 27, 2009, in Book 25 of Parcel Maps, at Page 33, in the Office of the Recorder of San Joaquin County.

APN: 240-140-31

Exhibit B

RGA Application

RGA Transmittal Form

SURLAND DEVELOPMENT AGREEMENT RESIDENTIAL GROWTH ALLOTMENT APPLICATION

This is a Residential Growth Allotment (RGA) application as provided for in the Development Agreement between THE CITY OF TRACY and SURLAND COMMUNITIES, LLC dated _____ ("Agreement").

Submitted by: _____
Date: _____

Received by: _____
Date: _____

APPLICATION FOR RESIDENTIAL GROWTH ALLOTMENTS

Purpose Of Application

RGA's: _____

Exception (For Affordable Housing Units): _____

Applicant's Information

Name: _____ Telephone No.: _____

Company: _____ Fax No.: _____

Mailing Address: _____

City/State/Zip Code: _____

Property Owner's Information

Name: _____ Telephone No.: _____

Company: _____ Fax No.: _____

Mailing Address: _____

City/State/Zip Code: _____

(if necessary, please attach a sheet listing additional property owner information)

Project Information

Recorded Subdivision Name: _____

Tract No.: _____ Total No. of Lots: _____ Total Acreage: _____

Specify Planning Area (ex: Ellis, etc.): _____

Project (Ownership) Area for which RGA's are applied

Project Area name (if different from above): _____

Project Area ownership: _____

Project Area acreage: _____ Total number of Project Area lots: _____

Assessor's Parcel No(s): _____

Project (Ownership) Area for which RGA's are applied (continued)

Total number of RGA's previously awarded to Project Area: _____

Total number of building permits issued: _____

Total number of unused RGA's (RGA's previously awarded less the total number of RGA's used for building permit issuance): _____

Total number of RGA's requested in this application: _____

Identify the relevant plan approval(s) that have been obtained for the Project Area: _____

Applicant's Signature

I, the undersigned, have complied with all the requirements of the Agreement relevant to this application:

Applicant's Signature

Date

March 19, 2013

AGENDA ITEM 8.A

REQUEST

APPOINTMENT OF CITY COUNCIL SUBCOMMITTEE TO INTERVIEW APPLICANTS FOR VACANCIES ON THE TRANSPORTATION ADVISORY COMMISSION

EXECUTIVE SUMMARY

Request appointment of subcommittee to interview applicants for vacancies on the Transportation Advisory Commission.

DISCUSSION

There is currently one vacancy on the Transportation Advisory Commission due to the resignation of Joseph Orcutt. There will be an additional three vacancies due to term expirations on April 30, 2013. The vacancies have been advertised and the recruitment is scheduled to close on March 19, 2013. As of March 14, four applications were received.

In accordance with Resolution 2004-152, a two-member subcommittee needs to be appointed to interview the applicants and make a recommendation to the full Council.

STRATEGIC PLAN

This item is a routine operational item and does not relate to any of the Council's strategic plans.

FISCAL IMPACT

None.

RECOMMENDATION

That Council appoints a two-member subcommittee to interview applicants for vacancies on the Transportation Advisory Commission.

Prepared by: Sandra Edwards, City Clerk

Reviewed by: Maria Hurtado, Assistant City Manager

Approved by: R. Leon Churchill, Jr., City Manager