

**THOMAS H. TERPSTRA**

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May 16, 2014

**Via Electronic Mail and U.S. Mail**

Mayor Brent Ives and City Council Members  
Tracy City Council  
333 Civic Center Plaza  
Tracy, California 95376

Re: **Appeal of Planning Commission Denial-Sutter Gould Medical Foundation**

Dear Mayor Ives and Members of the City Council:

This office represents several property owners in the vicinity of the above-referenced project. My clients were gratified to witness the Planning Commission's careful evaluation and application of the applicable General Plan policies and zoning standards, and its resulting unanimous denial of the project. This letter is intended both to reinforce the Planning Commission's analysis and disposition of the matter, but also to point out why mandatory General Plan policies compel the denial of the instant appeal.

In most respects, our analysis of the proposed project is similar to that of your professional staff, as set forth in the Staff Report and as summarized before the Planning Commission. In addition, however, while we acknowledge that implementing a General Plan often involves balancing various competing objectives, there are instances where compliance with General Plan policies is mandatory. Indeed, your General Plan (see page 1 – 19) very clearly specifies that when a policy is phrased using the word "shall" as opposed to "should" or "may", conformance is mandatory.

Such is the case with certain policies set forth in the Community Character Element of the General Plan. The Community Character Element of the General Plan contains basic urban design principles (which are discussed in more detail on pages 3-4 through 3-6) which includes "Building Siting to Hold Corners". According to the General Plan this refers to the practice of:

**"placing development on sites located at the corner lots of intersections built close to or at the lot line. Strategically placing development on corner sites gives better definition to the intersection, which makes pedestrians feel less exposed to the adjacent traffic. Ensuring that buildings in Tracy are designed to hold corners of key intersections will enhance the visual quality and the safety of the pedestrian environment as compared to developments that provide "a sea of asphalt" to passersby."**

Mayor Brent Ives and City Council Members

May 16, 2014

Page 2

After discussing the importance of these basic urban design principles, the Community Character Element goes on to incorporate specific Goals, Policies, Objectives and Action Steps which mandate adherence to the basic urban design principles, including the "Hold Corners" principle. Under Community Character Goal 1 and Objective 1.1, the City is charged with the responsibility to "preserve and enhance Tracy's unique character and hometown feel through high-quality urban design". Most important is Policy P2, which states as follows:

**"All new development and redevelopment shall adhere to the basic principles of high – quality urban design, architecture and landscape architecture including, but not limited to, human – scaled design, pedestrian – orientation, interconnectivity of street layout, siting buildings to hold corners, entryways, focal points and landmarks."**

Thus, while hospitals are permitted uses in the MO zone, the City must ensure compliance with the General Plan in processing the application required under Article 30 of the Zoning Ordinance. In this case, the applicant may raise any number of reasons why the building might more preferably (from their standpoint) be located elsewhere, but the General Plan simply does not allow for deviation. Policy P2 characterizes the concept of siting buildings to hold corners as a "basic principle of high quality urban design", and my clients agree. Their testimony, highlighting the intrusiveness and unavoidable land-use conflicts inherent in the current site plan, affirms the wisdom of these basic design principles. The City Council should do the same.

Thank you for your time and consideration of the views of these long-standing Tracy residents.

Very truly yours,

Law Office of Thomas H. Terpstra

A handwritten signature in black ink, appearing to be 'THT', with a horizontal line extending to the right.

Thomas H. Terpstra  
Attorney-at-Law

THT:rr

**From:** Rainey Smith [mailto:raindog212@yahoo.com]  
**Sent:** Tuesday, August 26, 2014 5:21 PM  
**To:** Council  
**Subject:** Sutter expansion

since I may not be able to make the 9/2/2014 meeting at which Sutter will appeal the Planning Commission's denial of their new office...I'm voicing my opinion on this from the internet. :-)

In no way should this proceed. With an enormous profit margin, money in the bank and the bankruptcy of the Gateway center caused by Sutter...they shouldn't be allowed to operate in a manner that detracts from the semi-historical neighborhoods of downtown Tracy. I say semi only because many would scoff at Tracy being historical...but the fact is, California Craftsman homes ARE historical and are not commonly intact. Sutter has already destroyed several homes recently...one of which WAS in an intact condition (at least partially...I looked through the windows).

We don't need more buildings, parking lots and urban blight in this town. We need neighborhoods and civic pride. Sutter has already proven it's "commitment to the community" by withdrawing from the Gateway center (not that I'm sad about not being greeted by high rises)...who's to say they won't get what they want where they are and then vacate for greener pastures elsewhere in town...leaving a big empty medical complex that would cover several city blocks and would detract from several neighborhoods.

Leave things the way they are...I have yet to see the parking at Sutter overloaded...enough already.

*Rainey Smith*  
*Chief Trafficking Officer*  
*On Call Ad Ops, Ltd*  
*(209) 814-7824*  
*[www.oncalladops.com](http://www.oncalladops.com)*

**Handout - Agenda Item 4  
September 2, 2014, Council Mtg**

August 07, 2014

Mayor Brent H. Ives  
Mayor Pro Tem Michael Maciel  
Council Members:  
Robert Rickman  
Nancy Young  
Charles Manne

333 Civic Center Plaza  
Tracy, CA 95376

**RE: Sutter Gould Medical Foundation - Tracy Care Center**

Members of the City Council, Mayor Pro Tem, and Mayor,

My name is Sandra Bayhi and I am known to you by my support of your elected office that you are currently holding, with the goal to aid in making the Tracy community a good, safe and happy place to live for all of us who live in Tracy.

In all good conscience, I had to sit down and write to you regarding Sutter Gould Medical Foundation representatives and team: David Thompson, David Camboia, Jacob Beury, David Romano, and Dr. Paul DeChant. They have done everything that could be expected to please the residents near to the Sutter Gould Medical Foundation's property. They have gone over and beyond, in fact bent over backwards for our residents.

I am a resident near the hospital, and the medical foundation representatives are trying to bring more doctors here to care for us when we are ill, injured and to save lives. "In Truth", we need to support the Sutter Tracy Community Hospital and Sutter Gould Medical Foundation to bring good medical services to our community.

I am going on almost 20 years as a Watch Captain with the Tracy Police Department. I have never missed holding a National Night Out event. Sutter Tracy Community Hospital has always worked well with the Police department to give good care to victims of crime and others in emergencies.

I am also a CERT volunteer, and FEMA with the Tracy Fire Department and when the fire and ambulance need to bring burn victims and other injured patients, they also need Sutter hospital and qualified doctors, nurses, and other specialist to immediately determine the injuries so lives can be saved. I could elaborate more, however the point is, Sutter Hospital should be granted their improvements because this is for us, and the wellbeing of our community.

I would like Sutter Gould Medical Foundation representatives to have all they need to accomplish their goals.

Sincerely,

*Preston Bayhi III* Preston Bayhi III

*Sandra G. Bayhi*

Sandra Bayhi

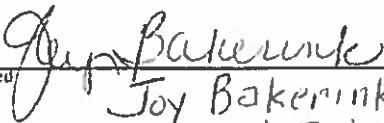
P.S. When my husband Preston, my daughter and I got into a car crash we were sent Sutter Tracy Community Hospital ER, where they gave us excellent emergency care.

## Sutter Gould Medical Foundation - Tracy Care Center

To Whom It May Concern:

~~As a resident~~  
owner of property

adjacent to Sutter Gould Medical Foundation's proposed new medical office building at 445 W. Eaton, I support their project and efforts. I would like the City and elected officials to extend the same support to this project and aid the Foundation in bringing continued quality health care services to the citizens of Tracy.

  
Signed: \_\_\_\_\_  
Joy Bakerink  
412 W. Eaton Ave  
Tracy, CA

8-18-2014  
Date

## Sutter Gould Medical Foundation - Tracy Care Center

To Whom It May Concern:

*owner of property*

As a resident adjacent to Sutter Gould Medical Foundation's proposed new medical office building at 445 W. Eaton, I support their project and efforts. I would like the City and elected officials to extend the same support to this project and aid the Foundation in bringing continued quality health care services to the citizens of Tracy.

*G. Arnter Bakerink*

Signed

G. ARNTER BAKERINK  
412 N. Eaton Avenue  
Tracy, CA

Date

*8-18-2014*

## Sutter Gould Medical Foundation - Tracy Care Center

To Whom It May Concern:

As a resident adjacent to Sutter Gould Medical Foundation's proposed new medical office building at 445 W. Eaton, I support their project and efforts. I would like the City and elected officials to extend the same support to this project and aid the Foundation in bringing continued quality health care services to the citizens of Tracy.

James Gutierrez Jr.  
Signed

8/18/14  
Date

412 W EATON AVE.



## Sutter Gould Medical Foundation - Tracy Care Center

To Whom It May Concern:

As a resident adjacent to Sutter Gould Medical Foundation's proposed new medical office building at 445 W. Eaton, I support their project and efforts. I would like the City and elected officials to extend the same support to this project and aid the Foundation in bringing continued quality health care services to the citizens of Tracy.

Signed Colin Gutierrez

412 W Eaton Ave.

Date 8/18/14

## Sutter Gould Medical Foundation - Tracy Care Center

Mayor and City Council:

I reside in property immediately adjacent to Sutter Gould's proposed new medical office building at 445 W. Eaton. I appreciate the 8' foot masonry wall and shielded lighting Sutter proposes. This will be substantially better for me than the current 6' wood fence. This project will bring continued quality health care services to the citizens of Tracy.

Judy Miller  
Signed

8/14/14  
Date

422 W Beverly Pl  
Address

## Sutter Gould Medical Foundation - Tracy Care Center

Mayor and City Council:

I reside in property immediately adjacent to Sutter Gould's proposed new medical office building at 445 W. Eaton. I appreciate the 8' foot masonry wall and shielded lighting Sutter proposes. This will be substantially better for me than the current 6' wood fence. This project will bring continued quality health care services to the citizens of Tracy.

Shannon C. Miller  
Signed

8/14/14  
Date

422 W. Beverly Pl. Tracy CA.  
Address

# MARK V. CONNOLLY

Attorney at Law

CONNOLLY LAW BUILDING  
121 E. 11<sup>th</sup> STREET  
TRACY, CALIFORNIA 95376

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E-mail: mconnolly@connollylaw.net  
www.connollylaw.net

September 2, 2014

Honorable Mayor and Members of the City Council  
City of Tracy  
City Hall  
333 Civic Center Plaza  
Tracy, CA 95376

**Re: Grand Jury Report 2013-2014 Case No. 1213-Tracy Municipal  
Airport: Development vs. Safety Zones**

Dear Mayor and Members of the City Council:

Attachment C, the proposed Response to the Grand Jury Report is not in compliance with Penal Code Section 933.05. Responses are evasive and factually incorrect. Not a single recommendation was implemented even when Government Code Sections cited in the proposed Response were not followed. The proposed Response should be rejected and revised to admit the failures and implement the recommendations of the Grand Jury.

The relevant parts of Penal Code Section 933.05 are as follows:

- (a) For purposes of subdivision (b) of Section 933, as to each grand jury Finding, the responding person or entity shall indicate one of the following:
  - (1) The respondent agrees with the Finding.
  - (2) The respondent disagrees wholly or partially with the Finding, in which case the Response shall specify the portion of the Finding that is disputed and shall include an explanation of the reasons therefor.
- (b) For purposes of subdivision (b) of Section 933, as to each grand jury recommendation, the responding person or entity shall report one of the following actions:
  - (1) The recommendation has been implemented, with a summary regarding the implemented action.
  - (2) The recommendation has not yet been implemented, but will be implemented in the future, with a timeframe for implementation
  - (3) The recommendation requires further analysis, with an explanation and the scope and parameters of an analysis or study, and a timeframe for the matter to be prepared for discussion by the officer or head of the

agency or department being investigated or reviewed, including the governing body of the public agency when applicable. This timeframe shall not exceed six months from the date of publication of the grand jury report.

(4) The recommendation will not be implemented because it is not warranted or is not reasonable, with an explanation therefor.

**Finding #1:**

Finding #1 was that "City Staff provided inaccurate and incomplete information to the City Council which could jeopardize the eligibility for the City receiving future grants."

The proposed Response disagrees, but then admits the Finding as true. The Response denies that the city staff "deliberately" provided false information. The Response admits that the city provided inaccurate and incomplete information. The Finding does not use the words deliberate, negligent or intentional. It just requires the City to admit the undeniable fact that the Council was supplied with inaccurate and incomplete information.

The proposed Response tries to justify supplying of inaccurate and incomplete information by claiming the City did not receive this information until October of 2013. The Response attempts to justify providing inaccurate and incomplete information based on staff's failure to obtain the correct facts. The City defense is that staff negligently provided inaccurate and incomplete information rather than deliberately did so. Since the standard of negligence or intention is not in the Finding. The accurate Response is to "Admit" the Finding, not deny something not in the Finding.

The proposed Response blames staff confusion about runway length on documents with different runway lengths, but it fails to state that it was only City generated documents that contain confusing information. In the historical timeline attached as Exhibit C to the proposed Response, all documents from FAA and all official documents since the 1990s show runway 12-30 over 4,000 in length. It is only City created documents that show a runway length of less than 4,002 feet. The timeline also misreads measurements trying to match apples to oranges to further create confusion.

**Recommendation #1:**

Recommendation #1: "City Council direct Staff to conduct a comprehensive review for the Council by September 30, 2014 of the FAA and Caltrans safety zone requirements related to the development and mandated requirements on runway lengths at the Tracy Airport to insure the City is in compliance for future grants."

Even though it is undisputed that staff provided incomplete and inaccurate information to the Council, the proposed letter states "This recommendation will not be implemented because it is not warranted." The Council and public has never publically been presented with accurate or complete information on this subject. As the Grand Jury

Report chronicles from June 6, 2013 to August 6, 2013 staff submitted and the Council approved multiple actions based on inaccurate and incomplete information. Had these actions succeeded, Federal grants would have been in jeopardy. A report to the Council and the public to clear up the record confused by past staff reports is warranted.

### **Finding F 2.1**

The proposed Response fails to comply with Penal Code Section 933.05. It simply refuses to respond to the Finding.

Finding 2.1 is as follows: **“The Tracy City Council did not enter into any written contractual agreement related to any of the contingencies contained in the Airport Agreement Memorandum. However, language in the AAM gave a clear perception that there was an agreement between City Staff and a local developer to undertake the contingencies in the memorandum.”**

The proposed Response refuses respond to the second part of the Finding saying **“The City cannot control documents submitted to the City or individual perceptions of those documents. Therefore, the City has no Response to this part of the Finding.”**

Penal Code Section 933.05 requires that if the City disagrees wholly or partially with the Finding, **the Response shall specify the portion of the Finding that is disputed and shall include an explanation of the reasons therefor.** Refusing to respond to a part of a Finding is a violation of Penal Code Section 933.05.

If the City agrees the AAM gave a clear perception that there was an agreement between City Staff and a local developer to undertake the contingencies in the memorandum, it can agree. If it disagrees, it can disagree and provide reasons. Refusing to respond is not an option allowed by Penal Code Section 933.05.

### **Finding F 3**

Here the City admits it has no policies or procedures about third party checks, but disagrees with the Finding that it has no such policies. It says it relies on Government Code Section 6157, but that Code Section allowed this \$50,000 check to be rejected as it should have been.

Finding F 3 was **“There are no adopted policies or procedures for the City to accept a third party check for a debt owed to the City under a contractual agreement with a private firm.”** The proposed Response disagrees with the Finding, but admits there are no policies or procedures. Seeking to deflect from its lack of policies and procedures, the proposed Response cites Government Code Section 6157 which reads:

**“The state, and each city, whether general law or chartered, county, and district, each subdivision, department, board, commission, body, or agency of the foregoing, shall accept personal checks, in addition to any other authorized form of payment, drawn in its favor or in favor of a designated**

official thereof, in payment for any license, permit, or fee, or in payment of any obligation owing to the public agency or trust deposit, **if the person issuing the check furnishes to the person authorized to receive payment satisfactory proof of residence in this state and if the personal check is drawn on a banking institution located in this state.**”

The issue is not whether the City had to accept the check. The issue is what should City staff have done when it received a large check from an out of state entity on an out of state bank for a contract between the City and another party which also included pages of memorandums and notations. The proposed Response and what Staff has said previously is that the City just deposits the check and does nothing else. Even this is not in compliance with the Government Code Section the City seeks to use as a shield. The \$50,000 check of June 19, 2013 for \$50,000 was written on Eagle Bank in Bethesda, Maryland by Surland Communities, LLC in Washington D.C. and signed by an unknown person. The June 19, 2014 check did not satisfy the requirements of Government Code Section 6157. **There was NO duty on the part of the City to accept this check.** It should have been rejected if the City was even following Government Code Section 6157. At a minimum the City should have a policy that complies with Government Code Section 6157 which would have required this check be rejected.

However, the proposed Response’s reference to Government Code Section 6157 is a diversion. Government Code Section 6157 merely requires some checks meeting certain requirements be accepted. It does not discourage proper reporting policies by agencies when large checks from out of state banks with strange notations by unrelated parties are received. The issue is not whether the City has to accept a check. The issue is whether the City has any policies and procedures, such as a notification procedure in a case such as this where a large \$50,000.00 check is delivered with a Transmittal memorandum reciting facts concerning why the payment is being made. Currently a party can submit a payment with any statement, true or false, about a contractual obligation and the City has no policies for reporting or responding to such matters.

In spite of the fact that Tracy accepted a check it was not required to accept the City proposes to reject recommendation R 3 that “The City Council adopt a policy by September 30, 2014 relating to the acceptance of third party payments for contractual obligations to the City of Tracy.” The proposed Response is that a policy is unwarranted. This is amazing as staff does not even follow Government Code Section 6157 or have a policy to follow Government Code Section 6157. A policy requiring the reporting to supervisors of significant checks, perhaps in excess of a certain sum, written by third parties, or when any check is received with a memorandum, letter, transmittal document or notations is reasonable and good practice. It should also be the policy to reject checks not in compliance with Government Code Section 6157. It was the City’s failure to respond and react not just to the check, but to the other documents that accompanied it, that are serious matters requiring a policy.

#### **Finding F 4:**

Finding F 4 was that "The change in the Tracy Airport runway length, requested in the Airport Agreement Memorandum, **could** have resulted in significant changes in the Ellis Specific Plan uses and densities allowed to be developed within the safety zone."

The Response is evasive and not responsive to the Finding. The Finding is that the change in runway length "could have resulted..." not alone and as a final step would have resulted in significant changes in the Ellis Specific Plan. The evasive Response is that runway length "is not the only factor." The change in runway length would have resulted in a change in airport classification which would have resulted in a change in the ALUP which would have resulted in significant changes in the Ellis project. The Response that there are "other factors" in the chain of events set in motion by the reduced runway length is non-responsive and evasive. The Response needs to be an admission that reducing the runway length **could** have followed the course outlined in detail in the AAM resulting in changes in the Ellis project.

#### **Recommendation R 5:**

The proposed Response admits the City entered into an agreement without checking the status of the operator's license. The City entered into a void contract. The recommendation was simply to prevent such problems in the future by adoption of a policy requiring review of a business' State license when any applicable City contract is proposed to be amended or renewed". Rather than check if it is entering into a contract or agreement with a party not qualified to enter into a contract, the Response is to refuse to check but instead enter into the contract even with a "suspended corporation" which by law is unable to contract but add some language to the contract. No city can or should enter into a contract with a suspended corporation. The recommendation is not only reasonable and warranted, it is common sense. The Response makes it clear that the City entered into a contract with a suspended corporation and would do the same tomorrow.

The proposed Response presented by Staff should be rejected with direction from Council to staff to provide responses that admit the failures that occurred and implement reasonable, common sense and clearly indicated policies that will help prevent such failures in the future. Given the response deadline by the Grand Jury, the Council should direct staff to write to the Grand Jury requesting an additional 30 days to revise the response if that additional time is needed.

The focus of the Grand Jury's report was in part on the City's lack of transparency in conducting the public's business. The proposed Response continues to provide evasive and inaccurate information, in addition to refusing to implement appropriate corrective actions. The Council should use this Grand Jury Report as a chance to correct errors and send a clear and unequivocal message that it will not tolerate evasive, misleading and inaccurate information any longer. Instead this proposed Response is misleading, evasive, incomplete and even in violation of the Penal Code in its refusal to respond to findings. The recommendations of the Grand Jury should be accepted. It is ridiculous to have no policy and even fail to follow the Government Code in accepting checks. It is even more



ridiculous to continue to enter into contracts that can be major security and safety issues such as the operation of an airport while refusing to check the status of the contracting party operating the airport. To admit that even Staff was confused about runway length, but then refuse to provide the public and Council with a correct factual summary in public cannot be supported. As a whole, the proposed Response is nothing more than a Staff attempt to continue terrible practices behind closed doors. It should be rejected by the Council.

Very truly yours,



MARK V. CONNOLLY



**MILLER STARR  
REGALIA**

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Walnut Creek, CA 94598

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Direct Dial: 925 941 3233  
arthur.coon@msrlgal.com

October 15, 2013

**VIA E-MAIL AND HAND DELIVERY**

Mayor Brent H. Ives and  
Members of the City Council  
City of Tracy  
333 Civic Center Plaza  
Tracy, CA 95376  
E-Mail: council@ci.tracy.ca.us



Re: Surland Communities LLC; Response to Recent and  
False and Scurrilous Attacks Regarding Tracy Airport

Honorable Mayor Ives and Members of the Tracy City Council:

Our office represents Surland Communities LLC and their managing member, Les Serpa, the developers of the Ellis project. In January, amended entitlements for the Ellis project were approved by the Council, allowing the development of up to 2,250 units on the Ellis property and committing Surland to a dedication of up to 16 acres of real property and the payment of \$10,000,000 toward the design and construction of a highly regarded and publicly supported Tracy Family Swim Center recreational facility for the community.

For more than a quarter of a century, Les Serpa and his Surland Companies have been among the most respected, civically conscious real estate developers and corporate citizens in the City of Tracy. Your City Hall as well as the Tracy Transit Station were designed and constructed with the pro bono help of Surland.

At the October 1 City Council meeting, Mark Connolly, an opponent of the Ellis project and Tracy Family Swim Center, made a series of false, fraudulent and defamatory allegations, about the Surland Companies. Mr. Connolly is well-known to the Council as the founder and legal representative of TRAQC, a no-growth activist group that has for years tried to frustrate the economic betterment of Tracy and deny the children, parents and seniors of the community the benefits of a family swim center and recreational facility. His false statements of alleged wrongdoing at the Tracy Airport both by City Staff and by Surland Companies are nothing short of scurrilous.

The purpose of this letter is to refute these defamatory, fraudulent and irresponsible statements, which attempt to impugn the integrity not only of Tracy's premier corporate citizen, but also Tracy's high-quality and dedicated City staff.

Mr. Connolly's last minute "dump" of documents on the City Council at its Oct. 1 meeting included a draft Airport Agreement Memorandum, dated April 26, 2013, sent from Les Serpa to the then airport manager. Mr. Connolly characterizes this draft memorandum as an "agreement" with the City in which the City agrees to shorten runway 12/30, process a specific plan amendment for Ellis and pay Surland a flowage fee for gas revenues at the airport. This charge is false, ludicrous and unsupported by his documentation and description. The memorandum references negotiations concerning a potential agreement to financially stabilize the fiscally-troubled Tracy Airport which never even was reduced to a draft agreement let alone submitted to Council for approval. Mr. Connolly states that the very existence of this draft memo violates the Tracy Municipal Code, constitutes a Brown Act violation, and violates the provisions of the California Environmental Quality Act. But there never has been such an agreement which is why it was never presented to the City Council for discussion and approval.

In short, Mr. Connolly has employed a classic propaganda technique to misdirect and mislead. This type of deception should have no place in the Tracy community.

The memorandum in question came about in early 2013 after the airport's fuel service operator approached Surland with suggestions for stabilizing the airport financially, and at the same time, allowing managed growth of the airport in harmony with surrounding land owners. Surland, along with any rational developer and property owner in the City, desires a stable, and smoothly operating airport. The fuel service operator was seeking a solution to the airport financial issues that would preserve the fuel service operator's business, benefit the airport in the long term, and accommodate the needs of land owners seeking to develop neighboring property. Surland offered the fuel provider assistance because it made sense for all parties to work towards a common goal – a stable airport. Surland recognized the benefit to the Ellis project of having all parties in harmony. This was a solution that would preserve the airport long term as a boutique airport focused on the quality of the infrastructure and services, rather than the length of the runway as a small group of individuals opposing the Ellis project seem to be. To suggest this was some sort of subversive collaboration to deceive the public is simply irresponsible on the part of Mr. Connolly and the people that hired him. Their objective is transparent and self serving, a smoke screen intended to delay approval of the Ellis project's development to further their own interests.

What the memorandum in question actually points out is that Surland was willing to subsidize the Airport's shortfall in revenue if six conditions relative to the operation of the airport were satisfied. These discussions were nothing more than objectives Surland hoped to achieve if it helped sustain airport operations. There was never any indication or determination that these objectives could be achieved, and they

certainly were not agreed upon by staff or the City Council in advance or outside the context of a duly-noticed formal public meeting. It became apparent after further discussions with staff that an agreement along these lines was not something the City could entertain, and any agreement would need to be between the private parties, Surland and the fuel provider. There was no agreement between the City and Surland.

Mr. Connolly attaches to his volume of duplicative and misleading material a transmittal from the Surland Companies to the City transmitting a check for \$50,000 "as payment for the minimum annual payment guaranty for calendar year 2013, for the fuel sales operator and fuel facility lease agreement between the City of Tracy and Turlock Air Center." This notation in and of itself makes clear that this check was sent on behalf of the fuel service operator and was not paid as a part of any agreement between the City and Surland. Why was this payment made? It was made because the fuel service operator approached Surland and told them that if the City was not willing to eliminate the minimum guarantee from the fuel service agreement, he could not continue to operate and provide fuel service at the airport. The fuel service operator had plans to develop additional services on the airport that include building a restaurant, hangars and other services that would improve the airport and help make it self-sufficient. The funds paid to the City by Surland were assistance to the fuel operator, a company Surland believes is a positive influence at the airport that needs to be preserved; this was not part of any supposed illegal agreement. What it is, is an example of Surland's continuing commitment to the City of Tracy, and an effort to ensure a viable, properly functioning airport.

Conclusion:

The allegations by Mr. Connolly are false and knowingly attempt to cast City Staff, the City itself, and Surland in a false light with the intent to deceive the public, the press and the citizens of Tracy. We hope this letter has answered any questions that were raised by this misleading, false and fraudulent effort to malign Surland and City Staff.

Mayor Brent H. Ives and Members of the City Council  
October 15, 2013  
Page 4

If you have any questions, Surland would value the opportunity to answer them.

Thank you.

Very truly yours,

MILLER STARR REGALIA



Arthur F. Coon

AFC/klw

cc: Les Serpa  
Chris Long  
Leon Churchill, City Manager  
Dan Sodergren, City Attorney  
William Dean  
Andrew Malik  
Wilson F. Wendt, Esq.

*Draft: April 18, 2013*

## **CITY OF TRACY**

### **MINIMUM ANNUAL PAYMENT GUARANTEE AGREEMENT**

More accurately the name of the agreement might be the following which may be more detailed than what we want:

### **ASSUMPTION OF FINANCIAL RESPONSIBILITY FOR SPECIFIED FUEL SERVICES OPERATOR PAYMENTS AGREEMENT**

Agreement

This Agreement is entered into on \_\_\_\_\_, 2013 between the City of Tracy, a municipal corporation ("City") and Surland Development Company ("Surland"). The parties agree as follows:

RECITALS

- A. The City owns and operates the Tracy Municipal Airport ("Airport") located in Tracy, San Joaquin County, California.
- B. Surland wishes to facilitate timely payment of the annually-recurring Minimum Annual Payment Guarantee described and shown generally in the Fuel Services Operator and Fuel Facility Lease Agreement between the City and Turlock AirCenter DBA Tracy Air Center ("FSO Agreement") approved by the Tracy City Council on October 31, 2011 and as amended on May 21, 2013???. See Exhibit A (the "FSO Agreement").
- C. The purpose of this Agreement is to facilitate payment by Surland of the Minimum Annual Payment Guarantee specified in the FSO Agreement during the term of this agreement, and to facilitate the disbursement to Surland of certain Fuel Facility Use Fees and Fuel Flowage Fees ("Fuel Fees") received periodically by the City from Tracy Air Center.

ARTICLE 1: GENERAL

**Section 1.1 Fuel Facility Fee and Fuel Flowage Fee.** The City leases to Turlock AirCenter DBA Tracy Air Center ("Tracy Air Center") the existing fuel facility at the Airport and the airport land depicted in the FSO Agreement. For the privilege of using the Fuel Facility and for the privilege of selling Aviation Fuel at the Airport, Tracy Air Center is required to pay Fuel Fees.

**Section 1.2 Minimum Annual Payment Guarantee.** The FSO Agreement requires Tracy Air Center to pay in advance, for each 12 month period starting January 1, 2012, a Minimum Annual Payment Guarantee of \$50,000. The Minimum Annual Payment is a prepayment of Fuel Fees described above in section 1.1.

**Section 1.3 Term.** This Agreement is for a term commencing on the date this agreement is approved by the Tracy City Council ("Commencement Date") and expiring on January 30, 2023.

ARTICLE 2: PAYMENT PROVISIONS

**Section 2.1 Payment by Surland.**

- 2.1.1 Beginning on the Commencement Date, Surland shall pay the Minimum Annual Payment Guarantee to the City in the amount of \$50,000 which is payable within 15 days.
- 2.1.2 Beginning January 1, 2014 and each January 1 thereafter up to and including January 1, 2022, Surland shall pay the Minimum Annual Payment to City in the amount of \$50,000. The Minimum Annual Payment is payable in advance and without demand on or before January 1 of each year.

2.1.3 Surland shall pay the Minimum Annual Payment Guarantee by personal check, certified check, or money order, payable to the City of Tracy. A payment must be received on or before the due date at the City of Tracy Finance Department, 333 Civic Center Plaza, Tracy, California 95376, or at such other place as the City may designate from time to time. There are no conditions or limitations in this agreement in which Surland's annual payments are not due and payable by the payment dates described above.

2.1.4 If a check written by Surland is returned for insufficient funds, City may impose a reasonable service charge in addition to any late charge and in addition to any charges imposed by the bank. City may require Surland to pay by certified check or money order if Surland's bank or banks have returned one or more personal checks in a 12-month period.

**Section 2.2 Payment of Fuel Fees by Tracy Air Center.**

2.2.1 Within 15 days of the inception date of this amendment, Tracy Air Center is obligated to pay the City the Fuel Flowage Fee for all Aviation Fuel sold by Lessee since December 31, 2012.

2.2.1 Thereafter, by the 15th day of each month, Tracy Air Center is obligated to pay the City the Fuel Flowage Fee for all Aviation Fuel sold by Tracy Air Center in the preceding month. The requirement to make such monthly payments of Fuel Flowage Fee ends on or before January 15, 2023 at which time Fuel Flowage Fees for December 2022 are due.

**Section 3.2 Disbursement to Surland of Fuel Fees.**

3.2.1 Within 15 days of receipt of Fuel Fees from Tracy Air Center, the City will pay Surland an amount equal to the total of Fuel Fees received by the City and not yet disbursed to Surland.

3.2.2 Under no circumstances shall the disbursements applicable to Fuel Fees paid by Tracy Air Center for Aviation Fuel sold in any calendar year exceed \$50,000.

**ARTICLE 4 DEFAULT; REMEDIES**

**Section 4.1 Default.** The occurrence of any of the following shall constitute a material breach and default by Surland:

4.1.1 Failure to pay the entire Minimum Annual Payment Guarantee amount when due.

4.1.2 Insolvency, or adjudication of Surland as bankrupt, if the bankruptcy proceedings are not terminated in Surland's favor within 60 days thereafter.

4.1.3 Assignment for the benefit of creditors.

4.1.4 Failure to perform any other provision of this Agreement, if the failure to perform is not cured within 30 days after written notice has been given to Surland. If, in City's reasonable judgment, the default cannot reasonably be cured within 30 days, Surland shall not be in default of this Agreement if Surland commences to cure the default within the 30-day period and diligently and in good faith continues to cure the default.



**Section 4.2** City's remedies. City shall have the following remedies if Surland commits a default. These remedies are not exclusive; they are cumulative and in addition to any remedies allowed by law.

- 4.2.1 If Surland is in default, City may terminate this Agreement. No act by City other than giving written notice to Surland is required to terminate this Agreement. On termination, City has the right to recover from Surland, the worth, at the time of the award, of the unpaid payments, and any other amount, and court costs, necessary to compensate City for all detriment proximately caused by Surland's default. "The worth, at the time of the award", as used in this Section 4.2.1, is to be computed by allowing interest at the rate of 10% per annum or the maximum rate permitted by law, whichever is greater.
- 4.2.2 The City's waiver of any breach of a term of this Agreement shall not constitute a continuing waiver or a waiver of any subsequent breach of the same or of any other term. City's receipt of any payment with knowledge of the breach of any term shall not be deemed to be a waiver by City, unless the waiver is specifically expressed in writing by the City Manager. No payment by Surland or receipt by City of a lesser amount than specified in this Agreement shall be deemed to be other than a payment on account of such amounts due and payable and shall not be deemed a waiver of notice of termination and of forfeiture of this Agreement.

#### ARTICLE 5 ASSIGNMENT; ESTOPPEL CERTIFICATE

**Section 5.1** Assignment. Surland shall not voluntarily assign its interest in this Agreement, without first obtaining City's written consent, which shall not unreasonably be withheld. No consent to any assignment shall constitute a further waiver of the provisions of this Section.

#### ARTICLE 6 MISCELLANEOUS

- 6.1 Time is of the essence. Time is of the essence for each provision of this Agreement.
- 6.2 Binding on successors. The covenants and conditions of this Agreement shall, subject to the provisions as to assignment, apply to and bind the heirs, successors, executors, administrators and assigns of the parties.
- 6.3 No third-party beneficiaries. Nothing in this Agreement, express or implied, is intended to confer on any person, other than City and Surland and their respective successors-in-interest, any rights or remedies.
- 6.4 Severability. It is expressly understood and agreed by the parties that if any provision is held to be invalid by a court of competent jurisdiction, such invalidity shall not invalidate any other provision of this Agreement provided the invalidity does not materially prejudice either City or Surland in their respective rights and obligations contained in the valid provisions of this Agreement.

**City of Tracy**  
**Minimum Annual Payment Guarantee Agreement**

**6.5 Cumulative rights and remedies.** The rights and remedies under this Agreement are cumulative and not exclusive and shall be in addition to all other rights and remedies at law or in equity. Each right or remedy shall be construed to give it the fullest effect allowed in law.

**6.6 Attorney's fees; Jurisdiction.** If suit is brought to enforce or interpret this Agreement, the prevailing party is entitled to recover as an element of his costs of suit, and not as damages, a reasonable attorney's fee to be fixed by the court. The "prevailing party" shall be the party who is entitled to recover its costs of suit, whether or not the suit proceeds to final judgment. A party not entitled to recover its costs shall not recover attorney's fees. No sum for attorney's fees shall be counted in calculating the amount of a judgment for purposes of determining whether a party is entitled to recover his costs or attorney's fees.

This Agreement shall be interpreted and enforced under the laws of the State of California, with venue in the Superior Court of San Joaquin County, California.

**6.7 Entire agreement.** This Agreement and all exhibits referred to in this Agreement constitute the entire agreement between the parties relating to the rights and the obligations and supersedes all prior understandings or agreements of the parties. No alterations or variations of this Agreement are valid unless they are in writing and signed by both parties.

**6.8 Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed a duplicate original, but all of which together shall constitute one and the same instrument.

**6.9 Construction.** The section headings and captions of this Agreement are, and the arrangement of this instrument is, for the sole convenience of the parties to this Agreement. The section headings, captions, and arrangement of this instrument do not in any way affect, limit, amplify, or modify the terms and provisions of this Agreement. The Agreement shall not be construed as if it had been prepared by one of the parties, but rather as if both parties have prepared it. The parties to this Agreement and their counsel have read and reviewed this Agreement and agree that any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply to the interpretation of this Agreement.

**6.10 Notices.** Notice shall be effective from the date of mailing. Notices to be given under this Agreement shall be sent via certified mail and first class mail with postage prepaid to the addresses shown below. Either party make changes to its notification addresses by providing written notice to the other party:

**City/ Lessor**

City Clerk  
City of Tracy  
333 Civic Center Plaza  
Tracy, CA 95376

**Surland**

XXXXXXXXXXXX  
XXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXXXX

with a copy to:

Director  
520 Tracy Boulevard  
Tracy, CA 95376

and an additional copy to:

City Attorney

**City of Tracy**

**Minimum Annual Payment Guarantee Agreement**

333 Civic Center Plaza  
Tracy, CA 95376

**11.14 Signatures.** The parties to this Agreement have caused it to be executed by their officers duly authorized so, on \_\_\_\_\_, 2013.

City OF TRACY, a municipal corporation of  
the State of California

XXXXXXXXXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXXXXXXX

By: \_\_\_\_\_  
Brent H. Ives, Mayor

By: \_\_\_\_\_

Attest:

XXXXXXXXXXXXXXXXXXXXXXX

\_\_\_\_\_  
City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
City Attorney