

ORDINANCE _____

AN ORDINANCE OF THE CITY OF TRACY APPROVING THE SECOND AMENDMENT TO THE AMENDED AND RESTATED DEVELOPMENT AGREEMENT BY AND BETWEEN THE CITY OF TRACY AND SURLAND COMMUNITIES, LLC (APPLICATION DA16-0001)

WHEREAS, On March 5, 2013, the City Council approved that certain Amended and Restated Development Agreement by and between the City of Tracy and Surland Communities, LLC, executed by the City of Tracy (the "City") and Surland Communities, LLC ("Surland"), and recorded in the official records of San Joaquin County as Document Number 2013-119548 (the "DA"); and

WHEREAS, On June 5, 2014, the City and Surland executed that certain First Amendment to Amended and Restated Development Agreement by and between the City of Tracy and Surland Communities, LLC, recorded in the official records of San Joaquin County as Document Number 2014-064062; and

WHEREAS, On July 12, 2016, Surland submitted a request to the City asking the City Council to authorize staff to negotiate a second amendment to the DA (the "Second Amendment") to extend the time periods in the DA for (a) the City to accept Surland's land dedication offer, and (b) Surland to make its second swim center payment of \$8 million . In exchange for the City's agreement to extend these time periods, Surland offered to design and construct certain infrastructure improvements relating to the proposed public swim center described in the DA, at Surland's sole cost; and

WHEREAS, On August 16, 2016, the City Council approved Surland's request and directed staff to prepare the proposed Second Amendment to extend the above-described time periods and provide for Surland's design and construction of the above-described infrastructure improvements; and

WHEREAS, On May 25, 2017, Surland submitted a request to the City asking the City Council to authorize staff to expand the scope of the negotiations for the Second Amendment to, among other things, also address the concepts of (a) having Surland construct the proposed public swim center and fund the first \$8 million of construction costs in lieu of making its second swim center payment, and (b) potentially expanding the property subject to the DA to lands outside of the current Ellis Specific Plan area, subject to future discretionary approvals; and

WHEREAS, On July 5, 2017, the City Council approved Surland's request and authorized staff to expand the scope of the negotiations for the Second Amendment; and

WHEREAS, The City and Surland have completed their negotiations for the Second Amendment; and

WHEREAS, On February 14, 2018, the City's Planning Commission held a duly noticed public hearing on Surland's application for the Second Amendment, during which the Planning Commission took appropriate action under the California Environmental Quality Act (Public Resources Code § 21000 et seq.) ("CEQA") and its implementing regulations (California Code of Regulations § 15000 et seq.), the Planning and Zoning Law, the Tracy Municipal Code, and

City of Tracy City Council Resolution Number 2016-115, and made recommendations to the City Council regarding the proposed Second Amendment; and

WHEREAS, on _____, 2018, the City Council of the City of Tracy held a duly noticed public hearing on Surland's application for the Second Amendment, during which the City Council heard public comments and testimony on the proposed Second Amendment.

THE CITY COUNCIL OF THE CITY OF TRACY HEREBY ORDAINS AS FOLLOWS:

1. Recitals. The foregoing recitals are true and correct and are incorporated herein as findings.
2. Compliance with CEQA. The City Council hereby finds the following:
 - a. Pursuant to Section 15168 of the CEQA Guidelines, the proposed Second Amendment is within the scope of the project evaluated in that certain Final Environmental Impact Report for the Surland Communities Amended and Restated Development Agreement and Ellis Specific Plan Applications (State Clearinghouse # 2012022023) certified by the City Council on January 22, 2013, by Resolution No. 2013-011 (the "FEIR"), and will not result in any new significant environmental effects that were not identified and adequately addressed in the FEIR; and
 - b. None of the conditions described in Section 15162 of the CEQA Guidelines calling for preparation of a subsequent EIR have occurred or will occur due to the adoption and implementation of the proposed Second Amendment, and an addendum to the FEIR is the appropriate form of compliance with CEQA and the CEQA Guidelines for the City's action on the proposed Second Amendment.
3. Findings regarding Second Amendment to the Development Agreement. The City Council hereby finds that the proposed Second Amendment to the Amended and Restated Development Agreement by and between the City of Tracy and Surland Communities, LLC,
 - a. is consistent with and intended to be implemented in accordance with the objectives, policies, general land uses and programs specified in the City General Plan and any applicable community and specific plan in effect on the date of its approval, and will comply with the provisions of Government Code Section 66473.7;
 - 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. Second Amendment to Development Agreement Approval. The City Council hereby approves the Second Amendment to 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 either (1) be published once in a newspaper of general circulation, within 15 days after its final adoption, or (2) be published in summary form and posted in the City Clerk's office at least five days before the Ordinance is adopted and within 15 days after adoption, with the names of the Council Members voting for and against the Ordinance. (Gov't. Code §36933.).

* * * * *

The foregoing Ordinance _____ was introduced at a regular meeting of the Tracy City Council on the _____ day of _____, 2018, and finally adopted on the _____ day of _____, 2018, by the following vote:

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

Mayor

ATTEST:

City Clerk

SECOND AMENDMENT TO AMENDED AND RESTATED DEVELOPMENT
AGREEMENT BY AND BETWEEN THE CITY OF TRACY AND
SURLAND COMMUNITIES, LLC

This SECOND AMENDMENT TO AMENDED AND RESTATED DEVELOPMENT AGREEMENT BY AND BETWEEN THE CITY OF TRACY and SURLAND COMMUNITIES, LLC (the “Second Amendment”) is made and entered into as of this ____ day of _____, 2018 (the “Effective Date”) 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. and City Resolution No. 2004-368 which establishes the rules, regulations and procedures for the approval, operation and modification of development agreements and the provisions of that certain Amended and Restated Development Agreements By and Between The City of Tracy and Surland Communities, LLC dated April 18, 2013 and recorded on September 17, 2013 under Recorder’s Serial No. 2013-119548, Official Records of San Joaquin County, California (the “Development Agreement”).

RECITALS

A. The City and Owner entered into the Development Agreement in order to strengthen the public planning process and encourage private participation and the funding of community benefits and amenities that could not otherwise be required under controlling law. Among other things, the Development Agreement provides for Owner to (i) provide \$10,000,000 (the “Owner Swim Center Contribution”) to be used to design and fund the construction of a public swim center (the “Swim Center”), and (ii) offer to dedicate approximately 16 acres of land to the City, which will be used for the proposed Swim Center (the “Land Dedication Offer”). The Development

Agreement also provides that, in exchange for the Owner Swim Center Contribution and Land Dedication Offer, the City shall reserve and Owner shall be eligible for the allocation of up to 2,250 Residential Grown Allocations (“Subsection F.3. RGAs”) to be used exclusively on the Property.

B. On October 14, 2014 (Recorders Serial # 2014-097799), Owner timely made Owner’s Land Dedication Offer. Under the Agreement to Extend (Recorder’s Serial # 2015-073934), the City had until September 15, 2016, to accept the Land Dedication Offer or the City would be deemed to have rejected the Land Dedication Offer and the land would be available for development by Owner consistent with the Ellis Specific Plan. Following Owner’s submittal of the Land Dedication Offer, the City and Owner agreed that there is an alternate location in the Ellis Specific Plan area that may be preferable as the location for the proposed Swim Center, and Owner agreed to prepare and submit to the City a revised land dedication offer (the “Revised Land Dedication Offer”) to replace the original Land Dedication Offer.

C. Under the Development Agreement, the Owner Swim Center Contribution was due in two (2) installment payments. Owner timely made Owner’s First Swim Center Payment on September 5, 2014. Owner’s second installment payment of \$8,000,000 (“Owner’s Second Swim Center Payment”) is a subject of this amendment.

D. On August 16, 2016, the City Council approved Owner’s request to negotiate a second amendment to the Development Agreement to extend the deadline for Owner’s Second Swim Center Payment and the deadline for the City’s acceptance of the Land Dedication Offer, in exchange for Owner’s providing to the City certain infrastructure improvements relating to the proposed Swim Center.

E. To give the Parties time to prepare and process Owner's requested Development Agreement amendment, the City and Owner executed that certain Agreement To Toll And Extend The Dedication Acceptance Period And The 60-Day Cure Period Respecting The Second Swim Center Payment Under Amended And Restated Development Agreement By And Between The City Of Tracy And Surland Communities, LLC (the "First Tolling Agreement"), by which the City and Owner agreed to: (i) extend the sixty-day cure period for Owner's Second Swim Center Payment to September 5, 2017; (ii) extend the time period for the City's acceptance of the Land Dedication Offer to November 24, 2017; and (iii) require Owner to deliver the Revised Land Dedication Offer not later than September 15, 2017.

F. In December of 2016, the City and Owner began discussions to expand the scope of the proposed Development Agreement amendment to provide for Owner to assume the obligation to design and construct the proposed Swim Center, and to describe a process by which other real property could become subject to the Development Agreement, subject to future Owner applications and future City approvals. The City and Owner agreed that such expanded negotiations would require additional time to prepare and process the expanded second amendment to the Development Agreement, and on August 15, 2017, the City Council approved that certain Second Agreement To Toll And Extend The Dedication Acceptance Period And The 60-Day Cure Period For The Second Swim Center Payment Under The Amended And Restated Development Agreement By And Between The City Of Tracy And Surland Communities, LLC (the "Second Tolling Agreement"), by which the City and Owner agreed to: (i) extend the sixty-day cure period for Owner's Second Swim Center Payment to December 5, 2017; (ii) extend the time period for the City's acceptance of the Land Dedication Offer to December 5, 2017, provided that the City shall not accept the Land Dedication Offer before November 15, 2017; and (iii) require Owner to

deliver the Revised Land Dedication Offer not later than December 5, 2017. Subsequently in November 2017 the parties entered into a third tolling agreement that extends the time for the parties to perform their obligations until April 4, 2018.

G. On **[date]**, the City Planning Commission, following a duly noticed public hearing, recommended approval of this Second Amendment. On **[date]**, 2017, the City Council following a duly noticed public hearing, adopted Ordinance No. ____ approving this Second Amendment and authorizing its execution. That Ordinance took effect on **[date]**, the Effective Date of the Second Amendment.

H. Pursuant to the provisions of the Development Agreement Enabling Resolution, Government Code section 65868 and Section 1.09 of the Development Agreement, Owner has filed with the City an application for an amendment to the Development Agreement. The City found that the Owner was not in default under the Development Agreement, has considered the application and reviewed the substance of the proposed changes, modifications, and amendments contained in this Second Amendment. By entering into and executing this Second Amendment, the parties hereto agree that the Development Agreement shall hence forward be modified and amended as contained herein.

I. This Agreement is consistent with the General Plan and the 2013 Ellis Specific Plan as further amended in 2014. Owner has filed further amendments to the Ellis Specific Plan which are scheduled to be considered by the City Council in December 2017. 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.

J. The parties understand and agree that:

(i) In order to achieve area wide consistency in planning and design achieve General Plan goals, policies objectives to efficiently use land and public infrastructure, and for community consistency Owner intends to annex to the Ellis Property Owners Association all real property which is subsequently subject to the Development Agreement; and, (ii) such other real property may adopt the Ellis Specific Plan design and planning standards for all infrastructure and site improvements.

K. This Development Agreement for all purposes in naming and otherwise shall be referred to as the “Surland Development Agreement”.

NOW, THEREFORE, the parties hereto agree as follows:

1. Incorporation of Recitals: The recitals set forth above are incorporated into this Second Amendment as though set forth in full herein.

2. Section 1.01(j). The Swim Center Obligations, is added as follows. Section 1.01 **The Swim Center Obligations**.

(j) (i) Owner agrees to retain and compensate consultants to design the Swim Center with input from the community and City staff and with direction from the City Council. All true and correct expenses paid by Owner concerning the design and construction of the Swim Center shall be a credit against the Owner’s contribution identified in Recital A. In anticipation of this Development Agreement amendment and at the request of City, Owner retained consultants prior to the approval and execution of this Development Agreement amendment, and funds expended by Owner during the period before the Second Amendment is executed shall be eligible for credits. The parties acknowledge that the studies, reports and designs prepared by

Owner's consultants shall be the property of Owner and shall not without prior written consent of Owner be used by City in any manner. The studies, reports and designs shall be jointly owned by Owner and City after Owner is fully reimbursed for Owner's costs of obtaining the studies, reports and designs through reimbursements and/or credits unless City is subsequently in default under this Agreement in which case City shall not longer be treated as a co-owner. All studies, reports and designs shall be assigned to City upon Owner's transfer of ownership of the Swim Center to City.

(ii) Before Owner prepares construction improvement plans the City Council shall approve a final conceptual plan. City and Owner shall agree upon a list of design, construction and/or improvements that Owner shall design and/or construct. If, after the City Council approves a final conceptual plan, it decides to modify the plan or add additional features or amenities then the cost of changing the conceptual plan or any design or construction plans relying on the original conceptual plan shall be additive funding provided by the City above the initial Swim Center funding.

(iii) Previously Owner has provided Two Million Dollars of a Ten Million Dollar contribution to the City for the Swim Center. City, in a manner consistent with the performance, funding and construction agreement mentioned subsequently, shall cause the Two Million Dollars initial contribution to be applied to the Swim Center's design and construction activities. If the Swim Center is relocated to a location other than a location within the Ellis Specific Plan area then Owner shall pay the remaining Eight Million Dollar future contribution to the City. However, if the Swim Center continues to be sited within the Ellis Specific Plan area then, since the Two Million Dollar initial contribution has previously been paid by Owner to City, the remaining Eight Million future contribution shall be satisfied in full by Owner providing Swim

Center design and construction of improvements equal to Eight Million Dollars in costs incurred by Owner. The initial contribution of Two Million Dollars shall be used to pay for Swim Center design and construction. The parties shall enter into a design, funding and construction agreement contemporaneously with the approval of this Second Amendment. The City Council has requested Owner facilitate additional design, construction, operations, and improvements beyond the Owner contribution. Owner has agreed and shall facilitate completion of additional design improvements and construction of approved plans beyond Eight Million Dollars with funding provided by City in an amount equal to Thirty Five Million Dollars with a supplementary contingency amount of twenty percent of the total estimated costs of Forty Five Million Dollars (Swim Center Funding). The City shall have the right to review and approve the design and improvement plans and City shall not unreasonably withhold approval. This additional construction of approved plans shall represent Owner's entire obligation to facilitate design and construction improvements for the Swim Center improvements and once the additional agreed upon improvements are constructed Owner's obligation to facilitate design and construction improvements for the Swim Center under this Agreement shall terminate. If the parties agree that Owner shall construct Swim Center improvements in addition to the final conceptual plan approved by City Council and the list of design, construction and/or improvements then the parties shall meet in good faith to negotiate and execute agreements concerning the method of City paying for additional constructed improvements. All subsequent costs shall be paid by the City and not the Owner, and Owner shall have no further financial obligation toward the design, construction, development, operation or maintenance of the Swim Center.

(iv) As required by and according to the manner established by the CFD, each residential lot and Commercial parcel (as defined in subsection v) within the Ellis Property Owners

Association (which is defined to mean for purposes of this Agreement a property owners association established by Owner) shall pay an annual fee of \$110 per lot/parcel toward Swim Center maintenance, which fee shall be adjusted annually according to the applicable community facility district formula.

(v) The residents of each residential dwelling shall receive from the City an annual all access family pass administered by the EPOA, and the Ellis Commercial Association shall receive one all access family pass for each legally created lot designated village center or commercial (Commercial) located within the Ellis Property Owners Association boundary to the Swim Center at no additional cost.

(vi) Owner has made an irrevocable offer to dedicate approximately sixteen acres for a swim center and subsequently the City Council has determined that the Swim Center shall be located at the property offered for dedication, therefore, Owner's contribution of land for the Swim Center shall be equal to and be treated as the dedication of sixteen (16) acres of community park land under the City's parkland dedication ordinance and this credit of sixteen (16) acres of park land and shall be available by Owner and shall be applied at the option of Owner to the Property and/or to such other real property which is subsequently subject to the Development Agreement (DA Property). (The criteria for Owner applying this Agreement to DA Property is explained in subsection 1.07(h) of this Agreement.) After Owner's irrevocable offer of dedication and the City's determination that this land shall be used for the swim center then there shall be no more dedications and/or community park fees collected or paid by any residential or commercial real property within the Property, and any land offered for dedication or community park fees previously collected shall be reimbursed to Owner within thirty (30) days of approval of this agreement which is date of the decision to locate the Swim Center at Ellis. However, the decision

of when to accept the dedication of land may be made at any time until the City accepts the Swim Center improvements constructed by Owner.

(vii) If the City elects to construct or authorize Owner to construct the Swim Center using the Owner Swim Center Contribution then the Swim Center shall be named the “Serpa Aquatic Park” for all naming and identification purposes, as further described in Exhibit A, including but not limited to digital, print and signage, the designation of “Les and Carol Serpa Aquatic Park” may also be used. If the City elects to construct or authorize the Owner to construct the Swim Center at the Ellis Swim Center Site, the site shall only be used for a public swim center with only those uses as formally agreed upon by the City and Owner or Owner’s designee. In making the dedication of the real property for the Swim Center it was the intent of the parties that the real property shall only be used for an aquatic park and no other use and the City shall not sell the real property. This term shall survive the term of this Development Agreement.

(viii) City shall promptly and immediately take reasonable actions necessary to expeditiously process all required plans, City Council approval of improvement plans, acquire all land necessary, (including by not limited to easements, real property, entitlements, project approval(s), San Joaquin County approval (s), railroad easements, any other agency approvals), and completion of all actions necessary shall be perfected without unreasonable delay whatsoever, for the approval and start of construction of Storm Basin 3A by Owner or Owner’s designee as soon as practical. Owner or Owner’s designee shall promptly and immediately take reasonable actions necessary to finalize an off-site improvement agreement with City Council approval, and following those actions expeditiously to prepare all required plans, process improvement plans for City Council approval, and commence construction once all permits, easements and other approvals have been provided by the City. The parties agree that in performing this obligation time

is of the essence. Unless expressly prohibited by law or expressly required by a condition of a grant, City shall not charge any development, planning or construction fees or charge (including overhead, plan checking, building permit, project management, or any other fee) for the Swim Center. Any and all regulatory agency fees, or actual special outside plan review costs, including but not limited to the SJCOG conservations easement costs, shall be paid by the City. If improvements are funded by a CFD and funds are available to the City of Tracy from the CFD, no bonding shall be required as part of an improvement agreement or any public improvements.

3. Section 1.07, Residential Growth Allotments, shall be deleted from the Development Agreement and the following inserted in its place:

1.07 **Residential Growth Allotments; Building Permits.**

(a) Treatment of Development Agreement Residential Growth Allocations.

(i) Through this Development Agreement City shall reserve and vest in favor of Owner, and Owner shall be eligible for, the allocation of 2,250 Development Agreement Residential Growth Allotments and building permits (Subsection F.3 RGAs) for residential development on the Property as may be revised from time to time, minus any Subsection F.3 RGAs already issued by City to Owner. As explained subsequently Owner is eligible to receive Subsection F.4 RGAs (Subsection F.4. RGAs or RGAs) and building permits from any available source of allocating RGAs or building permits other than through this Development Agreement. This amendment to the Development Agreement does not exempt building permits from being subject to plan check, building code requirements, and other permit related requirements in effect as of the Effective Date of the amendment to the Development Agreement.

(ii) At Owner's option, Subsection F.3 RGAs may be applied to a project as defined in the GMO on the Development Agreement Effective Date (Project) within the Property's boundary and all Subsection F.3 RGAs perfected (a RGA is perfected when a residential building permit is issued according to the allocated RGA) for which a building permit is issued shall be deducted from the 2,250 DA RGAs allocated by this Agreement and to DA Property which become part of the Property in accordance with section 1.07(f)(i) through and including (iv), below. For a calendar year where Owner applies Subsection F.3 RGAs to a Project, or more than one Project in that calendar year the Project(s) may not receive more than 225 Subsection F.3 RGAs and building permits. At the end of the calendar year this limitation of receiving no more than 225 Subsection F.3 RGAs and being unable to receive RGAs from other sources for those Projects shall automatically lapse. The Subsection F.3 RGAs applied to the Project(s) and for which building permits are issued shall be deducted from the 2,250 Subsection F.3 RGA allocation derived from and vested by this Development Agreement.

(iii) Except as otherwise provided herein, in no event shall Owner be allocated more than 2,250 Subsection F.3 RGAs from this Development Agreement over the Term of this Agreement ("Overall RGA Maximum") (the 2,250 Subsection F.3 RGAs includes any Subsection F.3 RGAs allocated by the City to Owner and perfected prior to the Effective Date of this Amendment) which may be applied to the Property.

(b) Treatment of RHNA or unused RGAs that may become available for re-issuance from subsequent rounds of RGA allocations under the GMO or other sources other than this Development Agreement.

(i) This Development Agreement vests Owner with the absolute right to obtain Subsection F.4 RGAs and building permits from any and all other sources. Thus each year Owner shall be eligible for Subsection F.4 RGAs as provided in the GMO and the GMO Guidelines in effect on the Effective Date (“Annual RGA Eligibility”).

(ii) This amendment is designed to permit additional property to be added to and incorporated in to the Development Agreement and therefore become Property of the Development Agreement, and Owner may apply for RGAs for Projects and home builders within the Property (whether or not annexed to the ESP) area. Owner shall not apply RGAs subject to this Agreement to other real property unless this property has been added to the Development Agreement as Property pursuant to subsection 1.07(h). Owner may allocate RGAs, building permit or both, derived from any source, including the Growth Management ordinance, this Development Agreement, the RHNA or any other sources not specifically identified herein to Projects or homebuilders within the property subject to this Agreement and building permits in certain circumstances may be acquired without an RGA such as through RHNA, and as subsequently provided by this section.

(iii) RGAs secured by Owner by means of any provision of the GMO Guidelines other than subsection F.3, RHNA, subsequent rounds of the allocation of RGAs under the GMO or from any other source other than from Section F.3 RGAs through this Development Agreement shall not be deducted from the Overall RGA Maximum and shall not be subject to a limitation of 225 subsection F.3 RGAs in a single calendar year. The parties acknowledge and agree that Owner has a vested right to receive no more than 2,250 RGAs and building permits through this Development Agreement; however, this limitation of receiving 2,250 RGAs and building permits at a rate of no more than 225 Subsection F.3 RGAs and building permits during

a calendar year does not operate in any manner to prevent or frustrate Owner's efforts to obtain RGAs and building permits from all other sources and applying those RGAs and building permits to Projects within the Property that do not receive Section F.3 RGAs and building permits during the applicable calendar year.

(c) Owner shall apply to City for Subsection F.3.RGAs and/or Subsection F.4 RGAs ("RGA Application(s)") according to the Development Agreement and the requisite applicable requirements of the GMO Guidelines in effect on the Development Agreement Effective Date using the 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. The form shall designate the Project receiving the Subsection F.3 RGAs/Subsection F.4 RGAs and shall identify whether the application is for Subsection F.3 RGAs or Subsection F.4 RGAs.

(d) Owner shall provide a separate Application for each calendar year in which Owner seeks Subsection F.3 RGAs/Subsection F.4 RGAs. There shall be a separate application for each type of RGA applied for. Pursuant to Section F.4(c) of the GMO Guidelines, Owner shall have the first right and shall be entitled to apply for at any time during the year and obtain for the Property any RGAs not applied for, applied for but not granted, unclaimed, or unassigned to the Tracy Hills project, or granted RGAs which have been rescinded from the Tracy Hills project, according to the maximum amount of RGAs available or prioritized for Tracy Hills through the GMO in any calendar year, during any calendar year during the term of this Agreement and all RGAs obtained through this process and applied to the Project shall not be deducted from the annual Overall RGA Maximum. Owner shall have the right to apply RGAs obtained under this subsection (d) to any DA Properties and these RGAs shall not be subject to the total or annual limitation of Subsection F.3 RGA allocations or be a deduction against the Overall Subsection F.3 RGA Total.

Only Owner may apply for Subsection F.3 RGAs/Subsection F.4 RGAs for property subject to this Agreement, unless Owner notifies City in writing of an exception and designates another entity to apply for RGAs. Pursuant to Section F.4(c) of the GMO Guidelines, City shall notify Owner within ten (10) days of any RGAs not applied for, applied for but not granted, unclaimed, or unassigned to the Tracy Hills project, or granted RGAs which have been rescinded from the Tracy Hills project according to the maximum amount of RGAs available or prioritized for Tracy Hills through the GMO in any calendar year. City agrees to make RGAs available to Owner pursuant to Section F.4(c) of the GMO Guidelines at the earliest possible date such RGAs become available after the time for Tracy Hills to request a RGA has passed or at the earliest possible time to acquire an allocated RGA after the time for Tracy Hills to perfect the allocated RGA has lapsed without Tracy Hills perfecting the allocated RGA pursuant to GMO rules. If RGAs are available Owner shall have the right to apply for Tracy Hills RGAs and the Growth Management Board shall allocate Tracy Hills RGAs to the Project(s) identified by Owner within fifteen (15) days of the date the Growth Management Board received the Owner's application(s).

(e) With the expressed exception of subsection F.1 "Vested Projects", in instances where all RGAs are not claimed or claimed but are not perfected (collectively unclaimed RGAs) such unclaimed RGAs shall be allocated using the following procedure, priority and percentages. RGAs shall be allocated according to each category's percentage of the total number of eligible RGAs until all RGAs are claimed or the City conducts an entire round of RGA allocations and no RGAs are claimed by any category. The priority of categories shall follow the order the subcategories are listed in subsection F of the GMO Guidelines. Hence the priority shall be Primary Growth Areas, Development Agreements, Tracy Hills and Ellis Specific Plan Projects, and then Other Projects. Since subsection F.1, Vested Projects, is not assigned a total number of RGAs by

the GMO Guidelines it does not participate in subsequent rounds of RGA allocations. Vested Project as defined in Subsection F.1 of the GMO at the time of this amendment approval shall retain all rights as provided by the GMO immediately prior to this amendment being effective.

For purposes of clarification, Owner's right to seek RGAs allocated by the GMO Guidelines to subsections F.2, F.3, and F.5 does not extend to instances where eligible property owners within the designated subsection claim the GMO Guideline allocated RGAs. Rather Owner's right to seek RGAs allocated by the GMO Guidelines to subsections F.2, F.3, and F.5 only extends to instances where these eligible property owners within the designated subsection do not claim the GMO Guideline allocated RGAs. In addition, the parties do not intend this Amendment to the Development Agreement to change the current City practice of issuing RHNA permits on a "first come/first serve" basis nor do the parties intend for this Agreement to grant to Owner a priority to receive RHNA permits over any other applicant for RHNA permits.

(f)(1) However, after first excluding RHNA or other similar sources of building permits, Owner agrees it will not apply for Tracy Hills RGAs or other Available RGAs in a manner that is responsible for the City allocating more than the maximum possible RGAs in a given calendar year.

(f)(2) This Agreement does not intend to prohibit or prevent the City from granting RGAs in the future to any other person or entity in a manner consistent with the GMO and GMO Guidelines, so long as a future city decision does not impair Owner's right and ability to obtain RGAs as provided by this Agreement.

(g) Owner shall be eligible for building permits according this Development Agreement and to the applicable requirements of the GMO and the GMO Guidelines in effect on

the Development Agreement Effective Date and the building permits issued hereunder shall be in accordance with the following:

(i) Building permits issued hereunder shall be deemed to have been secured by Owner upon the meeting of applicable plan check review requirements to issue a building permit and payment to the City of the building permit plan check inspection fee, due under the Municipal Code;

(ii) Despite any provision of the Municipal Code to the contrary, building permits issued hereunder shall continue in existence for a period of not less than twenty-four (24) months or until a certificate of occupancy for the structure is issued, whichever first occurs, and plot plans approved at the time of building permits may be adjusted or resubmitted during this period without further fees for minor modifications

(iii) If noticed by Owner to City for a Project, all development impact fees and other fees and contributions identified in the EFIP, or agreed upon by the City and Owner in other finance plans such as the City Master Plans, or any other Fee Programs, or other impact fee, agreed to by the City and Owner and attributable to a structure shall be due and payable through close of escrow for a home builder to a home buyer for a residential structure, and upon a final inspection approval for a commercial structure for the noticed Project. The process for such payment is attached hereto and incorporated herein by this reference as Exhibit C. However, if a type of fee to be collected is immediately necessary to fund infrastructure construction that is directly needed by the building being constructed by the building permit for a commercial building then a fee for that relevant category shall be collected at the time the building permit is issued by the City, if prior to issuing the building permit City sends Owner a written justification for accelerating

collection of the fee based upon the reason stated in this sentence and second meets and confers with Owner in good faith at the earliest possible time before accelerating collection of the specific category of fee for the specific building permit. However, if a type of fee to be collected is immediately necessary to fund infrastructure construction that is directly needed by the building being constructed for a residential building then the fee for that related category shall be collected at the time the building permit is issued by the City, if the determination for the need to accelerate payment is made prior to approving the final map that including the relevant building lot(s). City shall send Owner a written detailed and comprehensive justification for accelerating collection of the fee based upon the reason stated in this sentence and shall meet and confer with Owner in good faith at the earliest possible time before accelerating collection of the specific category of fee for the specific final map buildings. In no event shall the time to pay the applicable fees exceed twenty four (24) months from approval of the final inspection for a residential lot.

However, if during the twenty-four months City determines that some or all of the deferred fees are immediately needed to fund infrastructure construction that is directly needed for the future occupants of the residential unit then the City has the right to deliver written notice to the real property owner demanding payment of the applicable fee and the real property owner shall pay the demand within thirty (30) days of receipt of City's written notice.

(iv) The Ellis Specific Plan Finance and Implementation Plan ("EFIP") shall be the finance plan for ESP Property, and the amount of fees as documented is a vested element, and no other fees shall be charged without the mutually written consent of the parties. Owner may request that the ESP or a portion of the ESP join another finance district and upon approval by Owner and City the ESP or a portion of the ESP may be included in a different finance district, including updating the EFIP as needed.

(v) For any finance district, district fee, or community facility districts to be effective Owner's prior written consent, which may be withheld for any reason, is required for any property subject to this development agreement and, the Ellis Community Facilities District (ECFD) has been approved by Owner and is in effect. The obligation to make ECFD payments to City for maintaining the Swim Center shall be considered a community wide benefit and shall take the place of, be the equivalent of participating in and shall constitute full satisfaction for any future community wide facilities district or fees, including any facility district or other funding mechanism to fund public services, public landscape, park maintenance, basin maintenance, project-specific maintenance, police, fire and/or public works. Owner agrees to include Property into the ECFD and therefore, City shall not delay, deny, or condition any application filed, or processing for any Property because any or all of the Property is not joined into a CFD, Mello Roos District, or other Financing District.

(h) Subject to Section 1.02, Owner shall have the right but not the obligation to file a request with the City to approve and if approved thereafter have recorded this development agreement against DA Property subject to the following conditions being satisfied:

(i) The DA Property has been annexed to the City of Tracy;

(ii) The Owner owns or has an enforceable right, within the meaning of "legal and equitable interest in real property" as used in current Government Code Section 65865(a) and (b), to purchase DA Property;

(iii) The Owner agrees to annex the DA Property into the Ellis Property Owners Association, the ECFD or equivalent community finance district, the Ellis Finance Plan, or other requisite finance districts; and,

(iv) The development agreement, either in the form of this Development Agreement or as may be modified by the parties, proposed for DA Property contains an amended property description that includes a property description of the DA Property.

(v) The City Council adopts a finding that amending the property description into this Development Agreement is not inconsistent with the GMO in its form as of the Effective Date of this Agreement.

For purposes of this subsection 1.07(h) the parties acknowledge and agree the term “annexed to the City of Tracy” as used in subsection 1.07(h)(i) means the City of Tracy has complied with the California Environmental Quality Act for purposes of adopting a general plan designation, a zoning or pre-zoning classification, an application to the San Joaquin Local Agency Formation Commission (LAFCo) and, at Owner’s option, a specific plan and one or more tentative parcel or subdivision maps, and LAFCo has approved the City’s annexation request and, if required a sphere of influence amendment for real property not currently subject to the Development Agreement

(i) Notwithstanding any other provision of this Agreement or any other City ordinance, rule, regulation or custom: (1) except for a tentative map receiving DA RGAs in a calendar year, the Property shall not be subject to any limitation or condition concerning the total number of RGAs or building permits from all potential sources in any year or during any RGA and/or building permit cycle; and, (2) approved plot plans and building permits shall have a term of at least two (2) years and shall be eligible for extensions as provided by the City ordinance, rules and regulations or other applicable laws.

5. Section 1.15(c) is added as follows.

(c) The concept plan for neighborhood parks shall be first presented to the City Parks Commission, the concept plan shall then be updated in coordination with City staff, and if City Council approves the neighborhood parks as part of the Specific Plan or relevant planning and approval documents (Project Plan) then the neighborhood park concept and design shall be in accordance with the then existing Project Plan and may including approximate size, name, location site plans, structures, equipment, uses, plants, trees, signage, color palette and features. Neighborhood parks may be one acre or more, and parks of two acres or more are allowed to have adjacent mail boxes with a roof structure, lighting and other features for mail service to the neighborhood residents, adjacent mail boxes with a roof structure shall not be a credit towards neighborhood park acreage, and maintenance for such neighborhood parks shall be funded by the Ellis community facility district or similar district. The neighborhood parks shall be bonded through a park improvement agreement or other acceptable agreement, at a bonding amount determined by the applicable finance plan or Project Plan, the developer shall be responsible for building the parks and there shall be no impact fee or other fees collected for neighborhood parks. The Project Plan shall provide developed neighborhood park land of three (3) acres per thousand residents. The Project Plan shall provide regulations on the character and amenities for each park. As the park system is implemented detailed designs will be developed for the construction of each park and the final location of parks shall be identified by Owner on tentative maps(s). Modifications and refinements of individual park designs including park location will be considered a minor variation as per the approved Project Plans. The elimination of a major amenity, or comprehensive change of a major amenity to another use shall be considered a major variation and require review by the City parks commission.

6. Section 1.15 Ellis Specific Plan Parks (b) is deleted and replaced with the following:

(b) The timing of constructing Property neighborhood park improvements shall be according to the applicable Project Plan.

7. Section 1.15(d) is added as follows.

(d) Except for neighborhood park land which shall be maintained by City with funding from the ECFD, all landscape improvements shall be maintained by the Ellis Property Owners Association (EPOA), with funding from the ECFD. The City and EPOA have or shall enter into a maintenance agreement to set forth and facilitate among other things the required maintenance obligations, standards for maintenance, and other associated obligations(s) as well as compliance with the Ellis operations and maintenance manual, to ensure the long-term maintenance of all public park and landscape areas, and other public improvements within the ECFD boundaries. The City and EPOA may amend and make changes agreed upon to the maintenance agreement and Ellis operations and maintenances manual upon mutual consent. The maintenance manual will be updated by Owner periodically to include improvements which have been installed in public parks, landscape areas, and other public improvements within the ECFD boundaries, and updated versions shall be provided to the City and EPOA. The City and EPOA may then amend and make changes to existing improvement standards or guidelines which are part of the manual upon mutual agreement.

8. A new section 1.16(e) is added as follows:

e. On August 16, 2016 the parties agreed to defer the performance of certain acts. As consideration for this deference Owner agreed to:

(i) design and construct the Swim Center monument sign at the corner of Summit Drive and Corral Hollow Road at Owner's sole expense in an amount not to exceed One Hundred and Fifty Thousand Dollars (\$150,000); and,

(ii) expand and improve the Summit Drive paved travel section to the northeast along the frontage of the Swim Center to a five-foot wider section to accommodate potential future Swim Center turn lanes; and,

(iii) construct the frontage improvements for the Swim Center on Summit Drive; and,

(iv) construct the stubbed utilities to the Swim Center site from Summit Drive; and,

(v) fund up to One Hundred Thousand Dollars (\$100,000) for the resources of Surland planners and architects to work with the City to complete a design for the Swim Center.

9. A new section 1.17 is added as follows:

Section 1.17 **Community Facilities District.**

The City and Owner shall cooperate to annex property into the ECFD and the ECFD shall authorize bond indebtedness, and authorize the special taxes, and bond proceeds from the ECFD. Property identified as a Future Annexation Area may annex into a then existing improvement area, or a new improvement area using the unanimous approval process.

Any fees paid from Property or Owner which are determined to be subject to reimbursement with ECFD proceeds or other proceeds shall be deemed "deposits" which may be

returned to Owner upon payment of an equivalent amount to the City from ECFD proceeds. City and Owner shall agree on all Property which shall be subject to any other community facility district.

10. A new section 1.18 is added as follows:

Section 1.18 **Program/Public Improvements/Infrastructure**

A. Except for the process to fund, design, and/or construct the Aquatic Center which is described at section 1.01(j) of this Second Amendment, Owner or Owner's designee may fund, design, and/or construct any program/public infrastructure upon the execution of the requisite improvement agreement, as approved by the City which approval shall not be unreasonably withheld. Owner shall notify the City in writing of the intent to design and/or construct improvements, and at the time of such notice there shall not be a construction or improvement contract in effect that provides for the construction of the specific improvement. Owner shall insure that improvement agreements have been executed and security is posted for the work of the improvement. Owner shall be eligible for credits and/or reimbursements for the work in amounts equal to the full amount of the capital improvement program plan identified in the applicable fee program, or other public improvements, in such instances City shall not charge cost recovery for the related component of the plans and improvements, plans check fees shall be fully reimbursable. For site improvements which Owner or Owner's designee will fund, design, and/or construct public infrastructure, and a plan check fee is collected by City, Owner shall be eligible to receive reimbursements of plan check fees paid, after acceptance of the improvement by the City, the City shall then reconcile actual costs against the plan check fee paid and shall only charge based on the actual costs, for any project work over five million dollars which is allowed by City code. City

shall keep all EFIP funds in discrete accounts, including program management, and provide Owner with an annual accounting of all accounts.

B. After the parties execute a written agreement to fund, design, and/or construct program infrastructure improvements all credits and reimbursements available to Owner, including without limitation credits and reimbursements available as a result of Owner's election,, shall apply to any program expenditure. Owner shall be eligible for both a credit against fees paid, and/or against future fees to be paid, and reimbursement. Owner and City shall enter into a master reimbursement agreement to identify credits and reimbursements, which shall become part of the reimbursement agreement prior to, concurrent with, or subsequent to the improvement(s).

C. Reimbursement Agreement credits and reimbursements, approved by the City through a Reimbursement Agreement shall be allocated in such a manner determined, and in the sole discretion of Owner as Owner deems appropriate, with credits being allocated to "like-kind" fees, like-kind fees shall be fees which are in the same fund type of infrastructure, such as water, wastewater, storm, transportation/roads, public facilities, parks, etc. Owner may have balances of credits before impact fee payments are due, in such event Owner may allocate such credits to specific lots by written direction to the City indicating available credits being applied to specific lots.

D. All program infrastructure/public improvement capacity funded or constructed by Owner shall be available to accommodate the fair share capacity for Owner's Property as approved by City in the relevant agreement (for purposes of this subsection D and section 1.18. F) The City has discretion on the use of the capacity prior to when Owner needs occur, so long as the capacity is available without delay or restriction to Owner or any partial use of this capacity is required or needed. Owner may construct on-site and off-site infrastructure necessary to provide recycled

water service. Recycled Water Fees will be paid in an amount equal to the requisite finance plan, and in accordance Project Plans but no other current or future fee. All recycled water infrastructure improvements within entry, collector and community streets, and other public streets as approved by the City, and as defined by the requisite Project Plan will be recommended by staff to be program costs as part of the water master plan update. Once adopted these costs will be subject to credit and reimbursement according to the reimbursement agreement designee. Concurrent with approval of a final map for any part of Property subject to the Agreement City shall review, and if capacity not currently being used exists, shall reserve wastewater services capacity for treatment and conveyance for residential and commercial wastewater uses included in the approved final map. Through this Agreement City shall allocate and vest in favor of Owner and City shall supply Owner water supply for 2,250 residential units, including all commercial areas and uses (Including Ellis Village Center and Limited Use Area) in the Ellis Specific Plan, including the Swim Center in accordance with the Ellis FIP. Owner shall have the right to use all fair share infrastructure capacity described in the Ellis FIP, including but not limited to storm, water, wastewater, transportation (traffic), community park and public buildings. The applicable Project Plan shall identify the financial plan(s) such as the Ellis FIP, the City Master Plans, or any other Fee Programs, or other impact fee, development impact fees and other fees and contributions identified and agreed upon by the City and Owner and attributable to a structure.

E. The Reimbursement Agreement shall be approved prior to the City Council second reading of with this Agreement, and within thirty (30) days after approval of the Reimbursement Agreement for the funding and/or constructing infrastructure, the City shall immediately establish separate Reimbursement accounts for the work identified in the Reimbursement Agreement, and the work identified in future additional work to the Reimbursement Agreement for depositing

reimbursements funds due per the Reimbursement Agreement. City shall provide Owner with a written accounting of funds available for reimbursement to the party identified in the Reimbursement Agreement for the Work within sixty (60) days after executing the Reimbursement Agreement or additional work to the Reimbursement Agreement, City shall transfer to the appropriate reimbursement account all available funding necessary to reimburse Developer for any of the Work Components identified in the Reimbursement Agreement which are subject to an executed Improvement Agreement, Off-Site Improvement Agreement, or other agreement to construct the Work Components. In accordance with the Reimbursement Agreement Fee Credits, as this term is defined in the Reimbursement Agreement, credits may be applied toward impact fees due or paid, on any property with like kind infrastructure fees, by notice to the City from Reimbursement Agreement identified party, after the City Council accepts the Work component identified in the Reimbursement Agreement. The City and Owner shall cooperate to amend the Reimbursement Agreement to add additional Work components as necessary. Reimbursements and credits will be based on infrastructure category funds such as water, wastewater, roadways, parks, and storm, etc.

Sources for the Reimbursements may include monies from the South ISP, Plan C, RSP, Infill, I-205, Ellis FIP, Master Plans, benefitting properties, and/or other City Impact Fee Funds, Finance Plans, or other funding sources, as identified by the City. Credits shall apply against Impact Fees, which otherwise would be payable by properties to City, and applied as directed in writing to the City by the party identified in the Reimbursement Agreement. Payment of reimbursements by City shall be by check or by wire and payable as per the Reimbursement Agreement. City shall provide Owner a quarterly report indicating the balance of said reimbursement accounts. Administrative costs may apply for enhanced reporting and accounting.

All reimbursements shall be made in full in accordance with the Reimbursement Agreement from funds available at least as often as each City fiscal quarter the City shall release and immediately disburse all funds in any accounts in accordance with the Reimbursement Agreement. The reimbursement agreement will not substantially impair existing reimbursement agreements, or written commitments in effect, as of the date of this amendment. The City represents, warrants and covenants that the funds deposited in infrastructure fund account(s) available for reimbursement shall not be used for any intra-fund transfer without the prior written consent in accordance with the Reimbursement Agreement. Funds in the account shall be deposited in an interest-bearing account and all interest shall be paid in accordance with the Reimbursement Agreement as additional consideration for entering into this Agreement. City shall make all reasonable efforts to provide the "Total Credit and Reimbursement" as of approval of an agreement for the improvement(s) or work, or as soon thereafter as possible. The right to Reimbursement for the improvement(s) or work shall have priority over other improvement projects, or reimbursements. The reimbursement agreement will not substantially impair existing reimbursement agreements, or written commitments in effect as of the date of this amendment.

F. Wastewater treatment capacity needed by Owner which have not yet been provided shall be made available from existing available capacity of the Tracy Waste Water Treatment Plant by determining the capacity requirements of a final map for use of available capacity during the processing of the final map. Owner may participate in additional expansions above for Owner needs by request to the City. The Ellis Initial Capacity shall be applied to the Property according to written directions from Owner to City. In addition to the Ellis Initial Capacity, all property depicted on final maps which are approved by the City shall be served by the existing wastewater treatment capacity. The Ellis Initial Capacity credits shall be applied to the Property according to

written directions from Owner to City. Owner wastewater conveyance needs which have not been met shall be included in the Corral Hollow Conveyance Expansion, or other requisite conveyance system(s) as approved by City, which approval shall not be unreasonably withheld. City shall make available a minimum capacity from the Corral Hollow Conveyance Capacity Phase 1 Expansion (referred to as a choke point at times) for five hundred and fifty (550) residential units whenever needed by Owner for project improvements and/or development until the ultimate Corral Hollow Conveyance Expansion is complete. Owner may use the Eastside sewer conveyance system via a connection through Peony on an interim basis for the first 550 residential units until the ultimate Corral Hollow Conveyance Expansion upgrades are constructed and operational, including the Corral Hollow conveyance system connection to Ellis Town Drive to serve conveyance required by Owner in the Corral Hollow Conveyance System for property subject to this Agreement.

11. Section 3.01(b).4 is deleted.

12. Section 3.01(b).9 shall be deleted from the Development Agreement and the following inserted in its place.

(9) "**Certificate of Occupancy**" shall mean a certificate issued by the City authorizing occupancy of a residential unit.

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:

By:

Title: Mayor
Date: _____

By: _____
Les Serpa

Title: _____
Date: _____

Attest:

By:
Title: CITY CLERK
Date: _____

EXHIBIT A

When Recorded return to:

For Recorder's Use Only

AQUATIC PARK TERMS

- 1.1. Aquatic Park Annual Pass. Members of the EPOA, as property owners within the boundaries of the ECFD, shall receive a pass (pass for annual all access and use at no charge for utilization of all facilities and amenities located within the Aquatic Park 16-acre site for residents of a household at any time (the "Aquatic Center Pass")) for each member's household to the Aquatic Park at Ellis which is within the boundaries of the ECFD. The Commercial Property Owners Association ("CPOA") shall receive a number of Aquatic Center Passes equal to the number of commercial lots, parcels, and condominium units, within the Ellis Storage/Limited Use and Ellis Village Center area which are within the boundaries of the ECFD. The EPOA and CPOA shall, for the benefit of the City, administer the process of annually providing the Aquatic Center Pass and shall keep accurate records of property ownership, lots/parcels/units, and determine eligibility.

- 1.2. Naming Rights. Serpa Aquatic Park shall be the official and the sole and exclusive name for aquatic park at Ellis. The exclusive imaging elements and permanent signage connected to the aquatic park shall come from the design of the aquatic park which shall have the locations and dimensions generally set forth in the Surland aquatic park design which shall then become Exhibit "A" to this Document shall not change without written agreement of Rights Holder. Permanent signage is defined as any fixed signage that is present for all events, including any digital signage. The cost of the design, installation, implementation and maintenance of such signage shall be paid as a cost of the aquatic park project. Serpa Aquatic Park shall be the exclusive Aquatic Park name for the park, and shall be included in all signage, digital signage, marketing, promotion, websites, apparel, and printed material, and shall have prominence and dominance over any naming or sponsors having a presence inside or outside of the Aquatic Park. Prominence must be present in the embodiment of the park structures and each and every event at the facility. No other signage, or naming shall be placed on any structures, buildings, offsite or onsite signage, or used in digital, or fixed signage without written consent of Rights Holder. The style manual which includes approved artwork for park logos and stylized form of the park name shall be used for all signage, websites, advertising, paper products, tickets, passes, apparel, marketing, print, merchandise inventory, and other items. The Les and Carol Serpa Aquatic Park may also be prominently used throughout the Aquatic Park as generally set forth in Exhibit "A" to this Document and shall not change without written consent of Rights Holder. The Aquatic Park signage locations, size, and style as depicted in Exhibit "A" to this Document shall not change without the consent of Rights Holder. Any signs prepared for gyms, party rooms, event areas, archways and entry gates, or any other signs for the Aquatic Park shall include the official name or logo either in or adjacent to the name of the respective arch or entry. Any apparel, wrist bands, tickets, or other items prepared, given away, used, or sold for the gym, party rooms, events, passes, or any other productions for the Aquatic Park shall include the official name or logo prominently. Aquatic Park official name or logo shall be prominently displayed in and on all design materials, images, illustrations, renderings, site plans, blueprints, animation, video or other depictions that are developed for the Aquatic Park.
- 1.3. Exclusivity. Other than using the official name, unless approved in writing by Rights Holder, the City will not permit any exterior signage, advertising, or promotion on the aquatic park or, on the grounds surrounding the aquatic park (including the entry, gym, parking lots, driveways and roads approaching and surrounding the aquatic park), either temporary or permanent. The City agrees to provide that any party entering into an agreement with the City to use the aquatic park for any event cannot remove, cover or otherwise obscure the view of any signage, or naming without the written consent of Rights Holder.
- 1.4. Advertising, Marketing, Events. All advertising, marketing, website, and any other locational information, including event advertising, and promotion by any party shall use the following for identification and naming purposes of the event "Serpa Aquatic Park at Ellis". The name shall be of the same font size as the largest font size in the print, and shall be a minimum of 10% of the total area, or 10% of the total time as applicable.
- 1.5. Indemnification Against Claims by Third Parties. The City shall defend, indemnify and hold harmless, to the extent permitted by law, Rights Holder from and against any and all claims, damages, causes of action, judgments, liens, losses and costs and liabilities including, without limitation, attorneys, fees and other

litigation expenses arising from the City's acts, omissions or breach of this Document and/or from any litigation, arbitration, hearing, investigation or other proceeding commenced by any third party alleging or arising from claims of wrongful conduct or omission by the City, including, but not limited to, negligence, breach of warranty, and unsafe, hazardous, or defective product or service, except to the extent that such damages, claims, losses and judgments and costs incident thereto are caused by the negligence or intentional misconduct of any party seeking indemnification hereunder. The City shall at all times be insured with liability insurance and such insurance as will provide against claims which may arise from the City's operations of the aquatic park and under this Document.

- 1.6. Copyrights. Trademarks. Service Marks. Logos and Similar Rights of Serpa Aquatic Park. Serpa Aquatic Park Marks. The parties acknowledge that Rights Holder shall own, and have the responsibility to protect, in the United States, and elsewhere in its sole discretion, the trade name "Serpa Aquatic Park", "Serpa Aquatic Park at Ellis", and all associated trademarks, logos, designs, and service marks (the "Aquatic Park Marks"). Rights Holder hereby grants the City a non-exclusive royalty-free, worldwide license to use the Aquatic Park Marks, subject to the terms provided below, for the purpose of promoting the Aquatic Park. Rights Holder further grants the City the right to sublicense the Aquatic Park Marks as approved from time to time by Rights Holder. Further, all such uses of the Aquatic Park Marks shall be subject to the prior written consent of Rights Holder as to form, copy and content. The City agrees that it will include the name of "Serpa Aquatic Park" and any related logo or trademark for all of the following related to the Aquatic Park, on all of its letterhead, envelopes, invoices, brochures, business cards and shall include the name of the Aquatic Park in its address. The City shall use "Serpa Aquatic Park" when making reference to the aquatic park and no other name shall be used without the written consent of Rights Holder. The City in any and all contracts, agreements, arrangements, writings and communications, entered into or amended after the date of this Document, pertaining in any manner to the Aquatic Park (such as contracts with tenants, lessors, operators, and users, suppliers, clubs, media, advertisers and others) shall refer to, and as a term of such contracts, agreements and/or arrangements shall require all other parties to such contracts, agreements and/or arrangements to refer to the Aquatic Park as, and only as, "Serpa Aquatic Park." All printed materials promulgated by the City which would normally refer to the address or site of the Aquatic Park shall refer to the Aquatic Park as "Serpa Aquatic Park at Ellis." The City agrees to use reasonable efforts to ensure that the name "Serpa Aquatic Park" is (i) used in all communications and media concerning the Aquatic Park; and (ii) used by all media and news organizations. With respect to all events that are specifically created for the Aquatic Park by the City or scheduled or hosted in the Aquatic Park by the City or its affiliates, or lessors during the Term, the City agrees that for all such events the City shall use its best efforts to require that (i) all communications and media concerning the Aquatic Park; (ii) all local media and news organizations; and (iii) all tickets issued by users of the Aquatic Park will refer to the Aquatic Park as "Serpa Aquatic Park at Ellis." In addition, the City shall use its reasonable efforts to require that all advertising by users of the Aquatic Park, including teams, leagues, business, or associations refers to the Aquatic Park as "Serpa Aquatic Park at Ellis".
- 1.7. Entire Document; Amendment; Assignment. This Document constitutes the entire agreement and understanding between Rights Holder and the City and supersedes all prior agreements, understandings and representations relating to the subject matter. This Document may only be amended, modified or supplemented by a written agreement between Rights Holder and the City. This Document may not be assigned by either party except with the prior written consent of the other party; provided, however, that

Rights Holder may assign this Document as part of any planning undertaken by Rights Holder for future authorizations related to this Document.

- 1.8. Right of Use. With respect to all events that are specifically created for the aquatic park by the City or its affiliates, scheduled or hosted by the City or its affiliates, the City agrees that to the extent determined or controlled by the City, Rights Holder, shall have the priority access to purchase, from the City or event promoter at the standard ticket price, tickets to all such events. The location of such tickets shall be on a best available basis. Owner or it's assigns (Rights Holders) shall include a location for a cabana during the design process as selected by Rights Holders, and shall fund costs of the cabana structure for that location, which shall be at all times be reserved for Rights Holders use. Cabana may have food and beverage service for users and guests, arranged through and provided by the Aquatic Park food and beverage purveyor's if arranged for by the cabana without any consequence from City.

This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective permitted successors and assigns.

EXHIBIT B

**APPLICATION FOR RESIDENTIAL GROWTH ALLOTMENTS – GMO
Subsection F.3**

Application

Applicant Information

Name: _____ Telephone No.: _____

Company: _____

Mailing Address: _____

City/State/Zip Code: _____

Owner Information

Name: _____ Telephone No.: _____

Company: _____

Mailing Address: _____

City/State/Zip Code: _____

Tentative Map / Map / RGA Information

Tentative Map or other Map: _____

of RGA's requested: _____

Applicant's Signature

I, the undersigned, have complied with the requirements of the Development Agreement relevant to this application:

Applicant's Signature

Date

APPLICATION FOR RESIDENTIAL GROWTH ALLOTMENTS – GMO
Subsection F.4

Application

Applicant Information

Name: _____ Telephone No.: _____

Company: _____

Mailing Address: _____

City/State/Zip Code: _____

Owner Information

Name: _____ Telephone No.: _____

Company: _____

Mailing Address: _____

City/State/Zip Code: _____

Tentative Map / Map / RGA Information

Tentative Map or other Map: _____

of RGA's requested: _____

Applicant's Signature

I, the undersigned, have complied with the requirements of the Development Agreement relevant to this application:

Applicant's Signature

Date

EXHIBIT C

For Recorder's Use Only

AGREEMENT FOR DEFFERRAL OF CERTAIN IMPACT FEES

THIS AGREEMENT is entered into by and between the City of Tracy ("City"), and _____, ("Applicant") on _____ to secure the payment of certain impact fees, which the City has agreed may be deferred until sometime after the filing of the Final Map for this Project and the issuance of building permits.

Recitals

- A. Applicant owns the land included on the final map entitled " _____ " ("Final Map"), which is to record concurrently with this Agreement for Deferral of Certain Impact Fees ("Agreement") for the project known as _____, ("Project"). New homes will be constructed on the lots created by the Final Map.
- B. Applicant has requested a deferral of certain impact fees, which are imposed under Tracy ordinances and resolutions for said Project.
- C. City has agreed to defer the payment of such impact fees ("Deferred Impact Fee") until each new home that is constructed on a lot depicted on the Final Map is sold and conveyed to the original homebuyer as evidenced by a completed close of escrow transaction. The impact fees that shall be paid to the City are itemized on a per lot basis on the Deferred Impact Fee Schedule by Lot No. attached as Exhibit "B" ("Deferred Impact Fee"). The Deferred Impact Fee Schedule may be adjusted by mutual consent of the City and Applicant at any time prior to payment in order to account for fee credits or fee adjustments.
- D. Applicant shall cause an escrow to be opened with an escrow holder ("Escrow Holder") who is processing the escrow closings for the sale of the new homes in the Project. The Deferred Impact Fee shall be paid to City by the Escrow Holder through the escrow upon the close of escrow of each new home sale in the Project to the original homebuyer.
- E. Upon request from Applicant, City shall provide Escrow Holder with a Demand Letter that provides the Deferred Impact Fee for particular lot in the form attached as Exhibit "C" in connection with the sale of a new home to a homebuyer.

- F. Upon receipt of Deferred Impact Fee from Escrow Holder, City shall provide Escrow Holder with a Confirmation and Instruction Letter that confirms the Deferred Impact Fee for a particular lot has been received by City and paid in full, in the form attached as Exhibit "A".

NOW, THEREFORE, the parties hereto agree to the following:

1. This Agreement shall be recorded immediately after the recordation of the Final Map
2. Upon completion of the new home on any lot as shown on the Final Map in the Project, the City shall allow Applicant to obtain utility services, including water, sewer, gas and electricity, to the house; but, shall not allow occupancy until the Escrow has closed and the City has received the Deferred Impact Fee, as set forth below.
3. The Applicant shall instruct the Escrow Holder to deduct sufficient funds to pay the Deferred Impact Fee from the sale escrow of a new home to the original buyer and such Deferred Impact Fee shall be wired by the Escrow Holder to the City as a condition of the closing of such escrow and the conveyance of a lot in the Project to the original homebuyer.
4. Upon receipt of said Deferred Impact Fee by the City from the sale of a new home located on a lot shown on the Final Map that is conveyed to the original homebuyer, this Agreement shall be deemed irrevocably released on said lot in the Project without the necessity of a recorded release signed by the City, and Escrow Holder shall remove any and all exceptions or notices on the title or record related to Deferred Impact Fee for said lot. City agrees to promptly execute and record a release of the Agreement, upon request, if necessary to remove the Agreement from the title to a lot.
5. General Provisions.

- 5.1 Notices. Notices to the parties shall be in writing and delivered in person, or sent by certified mail, postage prepaid, return receipt requested, to the principal offices of the City and Applicant. Notice shall be effective on the date delivered in person or the date when the postal authorities indicate the mailing was delivered to the address of the receiving party indicated below.

To Applicant:

To City:

- 5.2 California Law. This Agreement shall be governed by, and interpreted in accordance with, the laws of the State of California.

5.3 Severability. If any one or more of the provisions of this Agreement is held by a court of competent jurisdiction to be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions of this Agreement shall not be affected or be impaired in any way.

5.4 Attorneys' Fees. If any party files an action or brings any proceeding against the other party arising out of this Agreement or for the declaration of any rights under this Agreement, the prevailing party shall be entitled to recover from the other parties all costs and expenses, including reasonable attorneys' fees, incurred by the prevailing party as determined by the court.

5.5 Modification. This Agreement cannot be modified in any respect except by a writing signed and entered into by the Applicant and the City.

5.6 Captions. The captions of the paragraphs of this Agreement are inserted for convenience of reference only and do not define, describe or limit the scope of the intent of the Agreement.

IN WITNESS WHEREOF, this Agreement is executed by THE CITY OF TRACY and by APPLICANT.

CITY OF TRACY

By: _____

Its: _____

APPLICANT

By: _____

Its: _____

Approved as to form and legality this
_____ day of _____, 20____ .

City Attorney

Exhibit "A"

Confirmation and Instruction Letter

To: _____ (Escrow Holder)
From: The City of Tracy
Re: Payment of Deferred Fee
Final Map _____, Lot # _____
Address _____ of _____ Property: _____
Your Escrow Number if applicable: _____
Date: _____

Regarding the above referenced escrow, Escrow Holder is directed, pursuant to the provisions of the Agreement of Deferral of Certain Impact Fees, recorded on _____, as Document Number _____ in Official Records of the San Joaquin County Recorder's Office, that the following amount has been collected from the above referenced Lot either directly by the City or from Escrow the sum of \$ _____, representing the amount of the Deferred Impact Fee ascribable to the above referenced Lot. Such Deferred Fee has been collected and received by the City of Tracy.

Upon the Escrow Holder receipt of this Confirmation and Instruction Letter, the Agreement of Deferral of Certain Impact Fees shall be deemed irrevocably released on said lot in the Project with this letter considered a release signed and authorized by the City, which may be recorded.

City of Tracy

By: _____

Its: _____

Exhibit “B”

Deferred Fee Schedule

By Lot No.

Exhibit "C"

Demand Letter

To: _____ (Escrow Holder)

From: The City of Tracy

Re: Payment of Deferred Fee

Final Map _____ Lot # _____

Address of Property: _____

Your Escrow Number: _____

Date: _____

Regarding the above referenced escrow, you are directed, pursuant to the provisions of the Agreement of Deferral of Certain Impact Fees, recorded on _____, as Document Number _____ in Official Records of the San Joaquin County Recorder's Office, to collect from the above referenced Escrow the sum of \$_____, representing the amount of the Deferred Impact Fee allocated to the above referenced Lot. Such Deferred Fee shall be collected at the closing the escrow and wired to the City of Tracy as follows:

Wiring Instructions.

Upon the City of Tracy's receipt of such Deferred Impact Fee, the Agreement of Deferral of Certain Impact Fees shall be deemed irrevocably released on said lot in the Project without the necessity of a recorded release signed by the City.

City of Tracy

By: _____

Its: _____

EXHIBIT D

**SWIM CENTER
DESIGN, FUNDING, AND CONSTRUCTION
AGREEMENT**

By and Between the

CITY OF TRACY,
a municipal corporation and

SURLAND COMMUNITIES, LLC

Effective Date: _____, 20__

SWIM CENTER

AGREEMENT

This Swim Center Acquisition Agreement ("Agreement") is made by and between the CITY OF TRACY, a municipal corporation ("City"), and SURLAND COMMUNITIES, LLC ("Owner") (City and Owner are collectively referred to as "Parties") and is effective as of _____, 20____.

RECITALS

A. The Ellis Specific Plan identifies an approximately 1.6 acre (the "Property") within the plan for an Swim Center.

B. On December _____, 20____, the City Council approved and adopted a development agreement amendment which includes the Property (the "DA").

C. The DA obligates Owner to retain and compensate consultants, and contractors for the design and construction of a Swim Center ("Swim Center") on the Property, and requires Owner and the City to execute this Agreement to provide for and memorialize the Parties' obligations with regard to site acquisition, design, and construction of the Swim Center. This Agreement intends to provide the method by which Owner will perform this obligation but does not intend to expand or change the Owner obligation as presented in the amendment to the Development Agreement. The City acknowledges that Owner is not a licensed contractor and therefore in performing the obligations of this Agreement Owner shall retain the services of license contractor as required by law.

AGREEMENT

Based upon the foregoing Recitals, which are incorporated herein as provisions of this Agreement by this reference, and in consideration of the covenants and promises of the City and Owner contained in this Agreement, the Parties agree to perform each of their respective obligations in a timely manner.

SECTION 1 -Definitions

"Affiliate" means (i) an entity that, directly or indirectly, controls, is controlled by, or is under common control with, Owner; or (ii) an entity in which Owner directly or indirectly owns at least a twenty-five percent (25%) interest.

"City" means the City of Tracy, acting through its City Council, officers, employees, and authorized representatives.

"City Engineer" means the City Engineer for the City of Tracy or authorized delegee.

"Construction Contract" means the contract between Owner and Owner's contractor(s) for all of the Work (as defined below) required to construct the Swim Center as designed, including all

services required to be provided by or customarily provided by or under the direction of a licensed general contractor.

"Construction Contract Price" means the total amount of contractors Construction Contract(s).

"Construction Documents" means the design and construction documents, including the Construction Contract and all drawings, specifications, and schematic plans prepared pursuant to the RFP (as defined below), if Owner elects to follow the RFP process, and consistent with all applicable local, state, and federal laws, ordinances, policies, and regulations.

"Development Agreement" or "DA" is defined in Recital B.

"Final Acceptance" means that, following Final Completion, the City has received Owner's irrevocable offer of dedication for the Swim Center Site and all improvements thereon, and the City Council has formally accepted the Work by resolution.

"Final Completion" means that the City Engineer and City Building Official have determined that the Work has been fully completed in accordance with the Construction Documents and this Agreement, including all Punch List items, and title to the Swim Center Site is free and clear of all construction liens and encumbrances, unless otherwise assumed by City.

"Site" is defined as the real property selected by the City Council for this project.

"Swim Center" is defined in Recital C and in the Ellis Specific Plan.

"Swim Center Site" means the Site for the Swim Center that is owned by or under contract to purchase by Owner or Owner's affiliate until City's acquisition at Final Acceptance, and is further described in Section 3.

"Request for Proposal" or "RFP" means Owner's optional "Request for Proposals for Consultant Services" related to design, architectural, and other consultant services, including construction of the Swim Center.

"Total Cost" means all costs, including, but not limited to, costs of design, architectural, consultants, engineering, plan checking, land preparation, utilities installation, project management and overhead, applicable governmental fees, materials, labor, and construction. The Total Cost includes the cost of the land, whether currently owned by Owner or acquired from a third party, at a cost of \$210,000 per acre.

"Work" means all of the design and construction services necessary or incidental to completing the Swim Center in conformance with the requirements of the DA, this Agreement, and the Construction Documents.

SECTION 2 – City Site Selection

Pursuant to the DA and Section 2 of this Agreement, the City has selected the Site for the Swim Center. The Site shall be in the location, and as described in the offer

of dedication. Owner shall own or acquire the Site selected by the City, and the City shall not own the Swim Center Site until Final Acceptance.

SECTION 3 – City Approval of Plans and Construction Documents

Within sixty (60) days after the Development Agreement Amendment is Effective, the Specific Plan is approved and the Owner-Tracy Swim Center construction agreement is executed, then Owner and City representatives shall meet to establish joint timelines and milestones for event 3) and event 4): 1) Owner presenting a final conceptual plan for the Swim Center to the City for City review and approval on or before April 30, 2018; 2) a community groundbreaking ceremony on or before September 30, 2018; 3) After the City has approved all necessary design, plans and construction documents, Owner bid out and enter into a construction contract; and, 4) Owner completing the construction according to the construction documents and this document.

Before Owner starts preparing construction improvement plans the City Council shall approve a final conceptual plan, and a list of design, construction and/or improvements that Owner shall cause to be designed and/or constructed. If, after the City Council approves a final conceptual plan, it decides to modify the plan or add additional features or amenities then all direct and indirect costs of changing the conceptual plan or any design or construction plans relying on the original conceptual plan shall be additive funding provided by the City above the initial Swim Center funding and within the time periods specified herein. To insure the Swim Center is completed with available funds the project may be bid with a base bid, and with bid alternatives, depending on available funds bid alternates may or may not be awarded. City shall promptly approve the Construction Documents, including all design plans, drawings, and specifications. The Construction Documents must include an estimated Construction Contract Price, and must comply with the following:

1. California Building Code; and
2. Applicable Law

SECTION 4 – Schedule

A. General Surety Requirements

Each bond must be issued by a surety admitted in California. If an issuing surety cancels the bond or becomes insolvent, within seven days following written notice from City, Owner must substitute a surety reasonably acceptable to City.

B. Required Bonds

1. Faithful Performance Bond

To secure faithful performance of this Agreement each contractor not covered by a bond for the project shall provide a faithful performance bond in the amount of the work provided, a performance bond shall be provided to the City in the amount of the

Construction Contract Price prior to commencement of construction. The bond must be in the form required by Government Code sections 66499 through 66499.10.

2. Warranty Bond

As a condition precedent to City's Final Acceptance of the Swim Center, a warranty bond must be provided in the amount of 10% of the final Construction Contract Price of the Swim Center, as a full guarantee for one year of Work following Final Acceptance.

Bonds and insurance shall be purchased from the Owner's Contribution funds, funds contributed by the City for the project, or paid for by the contractor.

SECTION 5 – Construction

A. Owner's Obligation to Cause to Construct

Owner shall cause to be constructed the Swim Center in conformance with the Construction Documents to Final Completion.

B. Owner's Swim Center Contribution

Owner's maximum financial obligation regarding the Swim Center is Ten Million Dollars (\$10,000,000.00) ("Owner's Contribution") for the Total Cost. Previously Owner has provided Two Million Dollars of a Ten Million Dollar contribution to the City for the Swim Center. City shall cause the Two Million Dollars initial contribution to be applied to the Owner's design and construction activities in accordance with Exhibit "A", including but not limited to reimbursing Owner for all of Owner's design activity expenses undertaken prior to executing this Agreement, subject to Owner providing City true and correct copies of invoices for the work performed or, at the discretion of Owner, the City shall treat the expense of all of Owner's design activities as credits against development fees. After the Two Million Dollar initial contribution is applied to the Eight Million future contribution then the remaining obligation shall be satisfied in full by Owner facilitating Swim Center design and construction of improvements equal to Ten Million Dollars in costs incurred by Owner. In anticipation of this agreement and at the City's request, the Owner retained consultants prior to approving and executing this agreement or the amendment to the Development Agreement, and funds expended by the Owner prior to this agreement or the amendment to the Development Agreement being executed shall be eligible for reimbursement or credits.

C. City's Obligation for Costs over Owner's Contribution

The City shall provide funding for the Swim Center in an amount equal to Thirty-Five Million Dollars with a supplementary contingency amount of twenty percent of the total estimated costs of Forty-Five Million Dollars (Swim Center Funding). This additional construction of approved plans, which shall take into account the total Swim Center Funding, shall represent Owner's entire obligation to facilitate design and construction improvements for the Swim Center improvements and once the additional agreed upon improvements are constructed the Owner's obligation to facilitate design and construction improvements for the Swim Center under this agreement automatically terminates. Owner shall have no obligation to advance funds above the Owner's Contribution to continue or complete the Swim Center and upon reaching the amount of Owner's Contribution if City fails to fund its share, Owner shall be conclusively deemed to have satisfied its obligation under this agreement and the Development Agreement. City shall pay in full all requested invoiced payments to Owner or Contractor within thirty (30) days of the portion of the Work completion from city Swim Center funding.

D. Change Orders

Change orders which include costs of more than 10% of the construction contingency shall require the City Manager's or his/her designee's approval, which shall not be unreasonably withheld or delayed. Change orders which include costs 10% or less of the construction contingency shall require the Assistant City Manager's or his/her designee's approval, which shall not be unreasonably withheld or delayed.

E. Prevailing Wages

Each worker performing Work under this Agreement that is covered under Labor Code section 1720 or 1720.9, including cleanup of the construction site, must be paid at a rate not less than the prevailing wage as defined in sections 1771 and 1774 of the Labor Code.

F. Payroll Records

At all times during performance of this Agreement, Owner's contractor must comply with the provisions of Labor Code section 1776 and 1812 and all implementing regulations, which are fully incorporated by this reference, including requirements for electronic submission of payroll records.

G. Insurance

Prior to the commencement of construction, the Owner shall furnish or cause to be furnished evidence to the City that all of the following insurance requirements have been satisfied:

1. General Requirements

The Owner shall or shall cause its agents or contractors to maintain insurance to cover Owner, its agents, representatives, contractors, subcontractors, and employees in connection with the performance of services under this Agreement at the minimum levels set forth herein.

2. Policies and Limits

- (a) Commercial General Liability Insurance ("CGL"): A CGL policy (with coverage at least as broad as ISO form CG 00 01 01 96) in an amount not less than \$3,000,000 general aggregate and \$1,000,000 per occurrence for general liability, bodily injury, personal injury, and property damage.
- (b) Automobile Liability Insurance: An automobile policy (with coverage at least as broad as ISO form CA 00 01 07 97, for "any auto") in an amount not less than \$1,000,000 per accident for bodily injury and property damage.
- (c) Workers' Compensation Insurance and Employer's Liability: As required by the State of California.

3. Required Endorsements

The automobile and commercial general liability policies shall contain endorsements with the following provisions:

- (a) The City (including its elected and appointed officials, officers, employees, agents, and volunteers) shall be named as an additional "insured."
- (b) For any claims related to this Agreement, the required coverage shall be primary insurance with respect to the City. Any insurance maintained by the City shall be excess of the Owner's (or contractor or agent, if provided by them) insurance and shall not contribute with it.

4. Notice of Cancellation

All insurance policies required hereby shall contain endorsements 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.

5. Authorized Insurers

All insurance companies providing coverage required by this Agreement 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.

6. Insurance Certificate

Owner (or its agent or contractor) shall provide evidence of compliance with the insurance requirements listed above by providing a certificate of insurance, in a form satisfactory to the City Attorney.

7. Substitution of Certificates

No later than thirty (30) days prior to the policy expiration date of any insurance policy required by this Agreement, Owner (or agent contractor) shall provide a substitute certificate of insurance.

8. Owner's Obligation

Maintenance of insurance by the Owner as specified in this Agreement shall in no way be interpreted as relieving the Owner of any responsibility whatsoever (including indemnity obligations under this Agreement), and the Owner may carry, at its own expense, such additional insurance as it deems necessary.

SECTION 6: Inspection and Final Completion

A. Inspection and Oversight

The City may perform daily field inspections of the construction in progress, during regular business hours, as required to assure that the construction is in accordance with the requirements of this Agreement. All inspections shall be coordinated with Owner's designee with at least 24 hours advance written notice and the City inspection team shall be accompanied by Owner's designee at all times when on Site. In order to permit the City to inspect the Work, the Owner shall, at all times, provide to the City proper and safe access to the site, and all portions of the Work, and to all shops wherein portions of the Work are in preparation. The City shall receive copies of materials quality tests required to assure that the quality meets the construction plans requirements, and may require inspection or any re-testing which may be necessary. The City will perform a final inspection of the Work and prepare an inspection report, setting forth any deficiencies from the Construction Documents that may exist (the "Punch List"). Prior to determining that Owner has achieved Final Completion, as described below, the City may re-inspect any corrective work performed by Owner and the as-built construction plans and records to insure the Punch List has been completed.

B. Final Completion

The City shall certify that Owner has achieved Final Completion when both the City Engineer and City Building Official have determined that the Work is fully completed in accordance with the Construction Documents and this Agreement. Final Completion cannot be achieved until Owner has completed all Punch List items and provided all required submittals, including any contractor warranty, and as-built drawings, to City's satisfaction. After Final Completion has occurred, the City Engineer will recommend Final Acceptance to the City Council. Upon request by Owner City shall provide a Punch List within fifteen days, and once the work from the Punch List provided is complete City shall certify that Owner has achieved Final Completion.

SECTION 7: Dedication and Acceptance

Final Acceptance by the City Council will not be made unless and until a final inspection and determination of Final Completion has been made by the City Engineer and City Building Official in accordance with Section 5.B above, and Owner has submitted to the City an irrevocable offer of dedication for the Swim Center Site with improvements from Owner and evidence that the title to the Swim Center Site is free of all construction liens and encumbrances. Upon recommendation of the City Engineer, the City Council shall formally accept the Work by resolution.

SECTION 8: Warranties and Fee Credits

A. Correction of Defective Work During the Warranty Period

The Contractor(s) shall warrant the quality of the Work, in accordance with the terms of the plans and Construction Documents, for a period of one year after Final Acceptance of the Work by the City Council. In the event that (during the one-year warranty period) any portion of the Work is determined by the City Engineer, or if requested validated by a 3rd party agreed upon by Contractor and City to be defective, the City shall notify Owner of the defect and the Owner shall begin facilitation of the correction of the defect within ten (10) days of receiving notice of the defect from the City. If the defect cannot be corrected within 30 days, Owner shall have such time as is necessary to correct the defect, provided that Owner has timely caused the correction to begin and the contractor is diligently continuing the work necessary to correct the defect. If Owner fails to have the contractor begin the work to correct the defect within 60 days of receiving such notice, or fails to diligently have the contractor continue such work, as reasonably determined by the City, City may take actions as necessary to complete the Work using the Warranty Bond. Pursuant to Section 4.B.3 of this Agreement, Contractor's must provide City with a warranty bond as a condition precedent to Final Acceptance.

SECTION 9: Indemnity

To the fullest extent permitted by law, Owner must indemnify, defend, and hold harmless the City, its agents and consultants (individually, an "Indemnitee," and collectively the "Indemnitees") from and against any and all liability, loss, damage, claims, expenses (including, without limitation, attorney fees, expert witness fees, paralegal fees, and fees and costs of litigation or arbitration) (collectively, "Liability") of every nature arising out of or in connection with acts or omissions of Owner, its employees, subcontractors, representatives, or agents, in bidding or performing the Work or its failure to comply with any of its obligations under the Agreement, except such Liability caused by the active and sole negligence, or willful misconduct, of an Indemnitee. Owner's failure or refusal to timely accept a tender of defense pursuant to this provision will be deemed a material breach of this Agreement. Upon Final Acceptance to the fullest extent permitted by law, City must indemnify, defend, and hold harmless the Owner, its agents and consultants (individually, an "Indemnitee," and collectively the "Indemnitees") from and against any and all liability, loss, damage, claims, expenses (including, without limitation, attorney fees, expert witness fees, paralegal fees, and fees and costs of litigation or arbitration) (collectively, "Liability") of every nature arising out of or in connection with acts or omissions of City, its employees, subcontractors, representatives, or agents, in bidding or performing the Work or its failure to comply with any of its obligations under the Agreement, except such Liability caused by the active and sole negligence, or willful misconduct, of an Indemnitee. Cities failure or refusal to timely accept a tender of defense pursuant to this provision will be deemed a material breach of this Agreement.

SECTION 10: Miscellaneous Provisions

A. Integration; Severability

This Agreement, the DA, and the Construction Documents incorporated herein, including authorized amendments or change orders thereto, constitute the final, complete, and exclusive terms of the agreement between City and Owner. If any provision of this Agreement, or portion of a provision, is determined to be illegal, invalid, or unenforceable, the remaining provisions will remain in full force and effect.

B. Amendment

No amendment or modification of this Agreement will be binding unless it is in a writing duly authorized and signed by the parties to this Agreement, and unless any such amendment conforms to the requirements of the DA, as that document may be amended.

C. Governing Law and Venue

This Agreement will be governed by California law and venue will be in the Superior Court of San Joaquin County, and no other place.

D. Assignment and Successors

Owner may not assign its rights or obligations under this Agreement, in part or in whole, without City's written consent and without simultaneous assignment of its rights and obligations under the DA. Notwithstanding the foregoing, Owner may assign its obligations hereunder to an Affiliate, provided that any such assignment shall not release Owner from responsibility for ensuring that the assigned obligations are satisfied, and Owner shall remain liable to the City for any and all failures by any assignee to fully perform all obligations under this Agreement, such that a failure by an assignee to fully perform an obligation under this Agreement shall constitute a default by Owner.

E. Notice

Any notice given pursuant to this Agreement must be made in writing, and sent to the other party by personal delivery, U.S. Mail, a reliable overnight delivery service, facsimile, or by email. Notice shall be deemed to have been given and received on the first to occur of: (i) actual receipt at the address designated above, or (ii) two working days following the deposit in the United States Mail of registered or certified mail, sent to the address designated below. Notice for each party must be given as follows:

City:

City Manager
City of Tracy
333 Civic Center Plaza
Tracy, CA 95376
Telephone No.: (209) 831-6400

Facsimile
No.: (209)
831-6439

With copy to:

City Attorney
City of Tracy
333 Civic Center Plaza
Tracy, CA 95376
Telephone No.: (209) 831-6130
Facsimile No.: (209) 831-6137

Owner:

Surland Communities
1024 Central Avenue
Tracy, CA 95376
Attention Les Serpa
Telephone No.: (209) 832-7000
Facsimile No.: (209) 833-9700

With copy to:

Herum Crabtree
5757 Pacific Avenue, Suite 222
Stockton, California 95207
Attention: Steve Herum
Telephone: (209) 472-7700
Facsimile: (209) 472-7986

F. Default

1. General

In the event that the Owner is in a material default of this Agreement, as defined in this section, the City Engineer shall provide written notice to the Owner in which the default is described.

2. Default Defined

The Owner shall be in default of this Agreement if the City Engineer determines that any one of the following conditions exist:

- (a) The Owner is insolvent, bankrupt, or makes a general assignment for the benefit of its creditors.

(b) The Owner abandons the Work for a continuous period of thirty (30) days that is not due to weather conditions, labor disputes, acts of God, lack of city funding, or other circumstances beyond the control of Owner,

(c) The Owner fails to perform one or more requirements of this Agreement.

(d) The Owner fails to remedy any loss or damage incurred by the City caused by Owner or its agents, representatives, contractors, subcontractors, or employees in connection with performance of the Work in instance where Owner does not dispute that it is responsible for the loss or damage.

(e) The Owner violates any legal requirement related to the Work.

3. Cure

In the event that the Owner fails to cure the default within thirty (30) days, or provide adequate written assurance to the satisfaction of the City Engineer that the cure will be promptly commenced and diligently prosecuted to its completion, the City may, in the discretion of the City Engineer, take any or all of the following actions:

(a) Cure the default.

(b) Demand the Owner to complete performance of the Work.

G. Independent Contractor Status

The Owner is an independent contractor and is solely responsible for all acts of its employees, agents, or subcontractors, including any negligent acts or omissions. Owner is not City's employee and Owner 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 Owner.

H. Attorneys' 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.

I. Waiver

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.

J. 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 Owner and the City. This Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

[SIGNATURE PAGE FOLLOWS]

"City"

CITY OF TRACY, a municipal corporation

"Owner"

SURLAND COMMUNITIES, LLC, a California limited liability company

By: _____
Title: _____
Date: _____

By: _____
By: _____
Les Serpa
Title: _____
Date: _____

Attest:

By: _____
Title: CITY CLERK
Date: _____