

## NOTICE OF SPECIAL MEETING

Pursuant to Section 54956 of the Government Code of the State of California, a Special Joint Meeting of the **Tracy City Council** and the **Tracy Unified School District Board (TUSD)** is hereby called for:

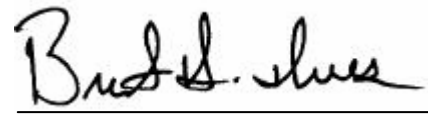
**Date/Time:** **Tuesday, February 6, 2007, at 6:30 p.m.**  
(or as soon thereafter as possible)

**Location:** **Community Center**  
**950 East Street (formerly 300 East Tenth Street)**

Government Code Section 54954.3 states that every public meeting shall provide an opportunity for the public to address the Council on any item, before or during consideration of the item, however, no action shall be taken on any item not on the agenda.

1. **CALL TO ORDER**
  - i) Mayor Ives calls City Council to Order
  - ii) President Crandall calls TUSD Board to Order
2. **ROLL CALL**
  - i) City Clerk calls roll for City Council
  - ii) President Crandall calls roll for TUSD Board
3. **ITEMS FROM THE AUDIENCE** – In accordance with Council Policy D-4, Brown Act Open Meeting Requirements and Public Access, any item not on the agenda brought up by the public at a meeting, shall be automatically referred to staff. If staff is not able to resolve the matter satisfactorily, the item shall be placed on an agenda within 30 days.
4. **RATIFY AGREEMENT TO TERMINATE THE CONTRACT DATED AUGUST 23, 2006, BETWEEN STEVE ABERCROMBIE AND THE TRACY UNIFIED SCHOOL DISTRICT, EFFECTIVE JANUARY 23, 2007**
  - i) Dr. Franco, Superintendent of TUSD, presents staff report
  - ii) Public Comment
  - iii) TUSD Discussion
  - iv) TUSD Action – Ratify Agreement to Terminate Contract  
(Voice Vote)
5. **REVIEW AND APPROVE THE MEMORANDUM OF UNDERSTANDING (MOU) BETWEEN THE CITY OF TRACY AND THE TRACY UNIFIED SCHOOL DISTRICT (TUSD) FOR THE DEVELOPMENT AND OPERATION OF A SWIMMING POOL AT WEST HIGH SCHOOL**
  - i) Maria Hurtado, Acting Assistant City Manager, and Denise Wakefield, Director of Facilities Planning, TUSD, present staff report
  - ii) Joint City Council and TUSD Board questions
  - iii) Public Comment
  - iv) Joint City Council and TUSD discussion
  - v) TUSD Action – Authorize TUSD Board to Execute Agreement  
(Voice Vote)
  - vi) City Council Action – Resolution Authorizing Mayor to Execute Agreement  
(Voice Vote)

6. Adjournment

A handwritten signature in black ink, appearing to read "Bud D. Shue", is written above a solid horizontal line.

Mayor

**February 1, 2007**

The City of Tracy is in compliance with the Americans with Disabilities Act and will make all reasonable accommodations for the disabled to participate in employment, programs and facilities. Persons requiring assistance or auxiliary aids in order to participate should contact the City Manager's Office at (209) 831-4100 at least 24 hours prior to the meeting."

February 6, 2007

TRACY UNIFIED SCHOOL DISTRICT  
AGENDA ITEM 4

REQUEST

RATIFY AGREEMENT TO TERMINATE THE CONTRACT DATED AUGUST 23, 2006, BETWEEN STEVE ABERCROMBIE AND THE TRACY UNIFIED SCHOOL DISTRICT, EFFECTIVE JANUARY 23, 2007

BACKGROUND

On August 23, 2006, the Tracy Unified School District approved a contract with Steve Abercrombie to provide DARE instruction for 5<sup>th</sup> grade classes. On January 23, 2007, Steve Abercrombie and the Tracy Unified School District signed an agreement to terminate the special contract for services.

DISCUSSION

At the Tracy City Council meeting on January 16, 2007, a concern was raised that the City may be prohibited from entering into a contract with the Tracy Unified School District ("District") because, at that time, Council Member Abercrombie had a contract with the District to teach Drug Abuse Resistance Education ("D.A.R.E.") classes. The concern raised at the meeting on January 16th related to the prohibitions on conflicts of interest in contracts contained in Government Code section 1090. On January 23, 2007, Mr. Abercrombie and the District terminated their contract (see attached letter executed by Assistant Superintendent Casey Goodall and Mr. Abercrombie). If the District and Council Member Abercrombie terminate their contract, this no longer remains a concern as the prohibitions against entering into a contract under section 1090 are not triggered. Therefore, the City would not be precluded from entering into the Memorandum of Understanding ("MOU") with the District for the development and operation of a swimming pool at West High School.

RECOMMENDATION

The Tracy Unified School District ratify the agreement to terminate the contract dated August 23, 2006, between Steve Abercrombie and the Tracy Unified School District, effective January 23, 2007.

ATTACHMENT

Agreement to Terminate Contract





**TRACY**  
UNIFIED SCHOOL DISTRICT

January 23, 2007

*"The future belongs  
to the educated"*

Dr. James C. Franco  
*Superintendent*  
(209) 830-3201  
(209) 830-3204 Fax

James Mousalimas  
*Assistant Superintendent  
of Human Resources*  
(209) 830-3260  
(209) 830-3264 Fax

Dr. Sheila Harrison  
*Assistant Superintendent  
of Educational Services*  
(209) 830-3202  
(209) 830-3209 Fax

Dr. Casey Goodall  
*Associate Superintendent  
of Business Services*  
(209) 830-3230  
(209) 830-3234 Fax

The Tracy Unified School District, hereinafter referred to as "District," and Steve Abercrombie hereinafter referred to as "Contractor," entered into an Addendum to Agreement for Special Contract Services on August 23, 2006. This agreement may be terminated by either party upon 30 days' written notice. Both the District and Contractor hereby agree to terminate this agreement as of the date below and hereby waive the 30 day notice.

This agreement is effective on the 23 day of January, 2007.

District: Tracy Unified School District

By: Casey Goodall  
Dr. Casey Goodall

Contractor:

Steve Abercrombie  
Steve Abercrombie

AGENDA ITEM 5

REQUEST

**REVIEW AND APPROVE THE MEMORANDUM OF UNDERSTANDING (MOU) BETWEEN THE CITY OF TRACY AND THE TRACY UNIFIED SCHOOL DISTRICT (TUSD) FOR THE DEVELOPMENT AND OPERATION OF A SWIMMING POOL AT WEST HIGH SCHOOL**

BACKGROUND

On November 21, 2006, Council discussed a proposed partnership between the City of Tracy and the Tracy Unified School District (TUSD) for the construction and operation of a 50-meter competition pool at West High School. After Council's review of the preliminary cost estimates and proposed operational options, Council provided the following direction to staff:

- That staff should pursue discussions to reach agreement with TUSD as to Memorandum of Understanding (MOU) terms that clearly demonstrate the operation of the pool and scheduling as well as a method to permit modifications to the schedule;
- That staff should pursue discussions to reach agreement with TUSD as to MOU language reflecting a "lifetime shared ownership;"
- That staff should pursue discussions to reach agreement with TUSD for a cost formula to be included in the MOU for operation and repair costs.

DISCUSSION

In response to Council's direction, staff conducted several meetings with TUSD representatives to refine cost estimates for construction and ongoing operational shared expenses, determine a shared use schedule, and delineate other terms to be included memorandum of understanding between the City and TUSD.

The Memorandum of Understanding (MOU) between the City and the TUSD is attached (Exhibit "A"). Below are key terms of agreement to be included in the MOU for Council's consideration.

**TERM:** The MOU shall be in effect for a period of thirty (30) years. The term will automatically extend for two additional ten-year terms, unless the City, at its sole discretion upon 180 days written notice to District prior to the then current expiration date of the MOU, chooses not to allow the MOU to automatically extend (Section 3: Term, page 5 of the attached Memorandum of Understanding).

A thirty-year term with two-ten year automatic renewal options should exceed the expected life cycle of the pool and responds to the City's interest to include language that reflects "lifetime shared ownership" of the pool. Thirty-year terms with ten-year renewal options are typical for similar joint ventures between school districts and municipalities.

**ONE-TIME CAPITAL PROJECT COST:** The Tracy Unified School District will build a 53-meter competition swimming pool that contains a hydraulic lift for wheel chair accessibility with a graduated access at the stair well entrance to the pool to ensure compliance with American with Disabilities Act (ADA).

The MOU term related to the project cost stipulates that the City will contribute 25% of the design and construction costs directly related to the construction of the pool and all costs of the construction contract directly related to construction of the Community Building. The Community building encompasses an approximately 960 square foot restroom building facility and a 960 square foot office/storage building facility to be used exclusively by the City. The TUSD will contribute 75% of the design and construction costs that directly relate to the construction of the 53-meter competition pool (Section 5: Project Costs, page 7 of the attached Memorandum of Understanding).

Based on the most recent construction estimates, the total cost for design and construction of the pool is approximately \$5,580,964 including all soft costs. The District's 75% contribution is approximately \$3,791,952. The City's 25% contribution is approximately \$1,263,984. In addition, the City will pay for all costs related to the community buildings, which total \$525,028. The total one-time capital contribution by the City is approximately \$1,789,012. Although these cost estimates are accurate, the final cost will be determined once the actual bids for construction are received in the spring, 2007.

**ONGOING OPERATION AND MAINTENANCE COSTS:** The MOU would include a provision that the City pay 25% of the operation and maintenance costs and that TUSD pay 75% of the operation and maintenance costs.

The total estimated operation and maintenance costs are \$250,000 per year. The estimate for TUSD's 75% share is \$187,500 and the estimate for the City's 25% share is \$62,500 annually.

**CAPITAL MAINTENANCE:** The MOU would include a requirement that both TUSD and the City contribute to a repair and replacement fund to complete any future capital maintenance necessary for the pool and community building. Amounts would be deposited by both parties into a separately established fund. No expenditures would be made from such fund unless approved by both TUSD's Superintendent, or his or her designee, and the City Manager, and his or her designee.

A total of \$179,578 would be deposited into the repair and replacement fund annually for a period of thirty (30) years. The TUSD's contribution would be approximately \$134,683 per year and the City's contribution would be approximately \$44,895 per year (Section 6: Operation, Maintenance and Clean Up, page 8-9 of attached Memorandum of Understanding).

The annual contribution by both the TUSD and the City is based on funds needed to re-plaster the pool after fifteen (15) years of use, and replacement of the entire pool after thirty (30) years).

**SHARED-USE SCHEDULE:** If the City Council chooses to enter into this partnership with the school district, the school district and the City will explore a pilot joint reservation system between the two entities that allows for seamless pool reservations by both the City and TUSD, minimizing potential conflicts on usage.

The MOU would include a stipulation that the City shall have priority use of the pool during the summer weekends from the Memorial Day weekend through the Labor Day weekend, and on weekdays from the final regular school day of the school year, through

the first return day of the new school year. The MOU also contains a provision that permits the City and TUSD to make adjustments to this "set" schedule as necessary.

The priority use provision would provide the City with the ability to provide food and beverage service and use of ample District parking facilities for City program participants, which parking facilities shall be maintained by the TUSD at its sole cost. Additionally, the City would have exclusive year-round access to the Community Buildings to allow for secured storage and retention of equipment and materials necessary for City's programming of its activities at the pool. Adjustments to the schedule may take place during the year with prior written approval by both the TUSD and the City (Section 8: Use of Pool and Community Building, page 10 of the attached Memorandum of Understanding).

The TUSD would have priority use of the pool during the school year. Priority use would include use for their student educational and recreational purposes during school hours and for TUSD-sponsored extra curricular athletic activities during non-school hours.

The City would be able to use the pool during evenings throughout the school year and on weekends during non-TUSD use and would coordinate scheduled use with the TUSD.

At their January 23, 2007, school board meeting, the Tracy Unified School District Board reviewed and unanimously approved the Memorandum of Understanding between the City of Tracy and the Tracy Unified School District for the Development and Operation of a swimming pool at West High School.

The Parks and Community Services Commission reviewed the key terms outlined in this staff report at their January 4, 2007 Commission meeting and voted 4-1 in support of the terms, with one Commissioner abstaining.

#### FISCAL IMPACT

The three-million dollars currently budgeted in the Capital Improvement Project (CIP) 7854 for an aquatics park is not available to fund this project due to restrictions in Mitigation Fee Act (AB 1600), which limits use of the fees for fixed capital projects to City-owned property.

The estimated \$1,789,012 one-time cost for this project could be taken from the General Projects Fund due to higher than anticipated General Fund balance as of 6/30/06 and confirmed by the Annual Audit. This expenditure will exhaust all available current funding in the General Projects Fund.

#### RECOMMENDATION

That the City of Tracy, by resolution, and the Tracy Unified School District approve the Memorandum of Understanding (MOU) for the development and operation of a swimming pool at West High School and authorize the execution of the MOU.

#### ATTACHMENTS

Exhibit "1": Memorandum of Understanding (MOU) Between the City of Tracy and the Tracy Unified School District (TUSD) for the Development and Operation of a swimming pool at West High School.

Exhibit "2": Resolution

Prepared by: Floyd Lewis, Recreation Supervisor  
Reviewed by: Chris Daste, Interim Director of Parks and Community Services  
Maria A. Hurtado, Acting Assistant City Manager  
Approved by: Dan Hobbs, City Manager



**MEMORANDUM OF UNDERSTANDING  
BETWEEN THE CITY OF TRACY AND  
THE TRACY UNIFIED SCHOOL DISTRICT FOR  
THE DEVELOPMENT AND OPERATION OF A  
SWIMMING POOL AT WEST HIGH SCHOOL**

THIS MEMORANDUM OF UNDERSTANDING ("MOU"), made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2007, by and between the CITY OF TRACY, a municipal corporation of the State of California, ("City") and the TRACY UNIFIED SCHOOL DISTRICT, a political subdivision of the State of California, ("District").

**RECITALS**

A. Section 10900 *et seq.* of the Education Code authorizes cities and school districts to organize, promote and conduct programs of community recreation; to establish systems of playgrounds and recreation; and to acquire, construct, improve, maintain and operate recreation centers, including facilities such as swimming pools.

B. Section 10910 of the Education Code provides that the governing body of any school district may use or grant the use of any of the buildings or grounds of the school district to any other public authority for the purpose of organizing, promoting and conducting of community recreation whenever such use will not interfere with the use of such facilities for any other purpose of the public school system.

C. District intends on constructing a swimming pool facility at its West High School site using funds from a voter-approved bond measure (Measure E).

D. The proposed swimming pool facility consists of a 53-meter by 25-yard competition pool ("Pool");

E. The proposed swimming pool facility also includes a 960 square foot restroom building facility and a 960 square foot office/storage/changing room area building facility ("Community Buildings");

F. City is in need of additional aquatics facilities to meet the needs of its residents.

G. District has offered City use of Pool and Community Buildings during specified times, in exchange for contributions towards project and maintenance costs as specified in this MOU.

H. This MOU sets forth the understandings of the parties as it relates to funding, maintenance and use of Pool and Community Buildings.

**NOW THEREFORE**, the parties agree as follows:

**SECTION 1.**

**DEFINITIONS.**

For the purposes of this MOU, the following terms, phrases and words shall have the meanings and be interpreted as set forth in this Section:

A. "Capital Maintenance" shall mean the renovation, repair or replacement of Pool and Community Buildings or any mechanical or operating system contained within Pool and Community Buildings, including, but not limited to: heating, ventilation and cooling systems; plumbing systems; electrical systems; pool heating and filtration systems; building and pool mechanical and lighting systems; seating; walls, including painting and wall covering; floors, including floor covering; and pool deck. "Capital Maintenance" costs do not include Routine Operation, Maintenance and Repair costs or any costs resulting from any of the following:

1. District's failure to perform its obligations related to Routine Operation, Maintenance and Repairs under Section 6.A of this MOU;
2. The negligent or wrongful acts or omissions of District, its agents, employees or subcontractors and/or the negligent or wrongful acts or omissions of City, its agents, employees or subcontractors;
3. An insured casualty or natural disaster to the extent realized by real property insurance coverage; or
4. Any work that is covered by a contractor's warranty or defective workmanship bond.

B. "Community Buildings" shall mean the 960 square foot restroom building facility and the 960 square foot office/storage building facility.

C. "Design and Construction Management Related Services" shall mean the following services, costs and fees related to the construction of Pool and Community Buildings: preparation of working drawings and plans and specifications, including architectural and engineering costs; construction management costs; permit fees; and testing and inspection fees.

D. "Joint Use Agreement" shall mean the Joint Use Collaborative Agreement for Use of Facilities and Active Use Areas, entered into between the City and District on August 25, 2006.

E. "Pool" shall mean the 53-meter by 25-yard competition swimming pool.

F. "Project Costs" shall mean costs for the design and construction of Pool as set forth in Section 4 of this MOU.

G. "Routine Cleanup" shall mean:

1. Removal of all trash, litter and/or garbage from entire Pool area, and deposit of such material in a proper receptacle provided by District;

2. Spray/wash-down of the restroom floors and Pool deck area; and
3. Covering and uncovering Pool (tarps).

H. "Routine Operation, Maintenance and Repairs" shall mean the work necessary to keep Pool and Community Buildings in a neat, clean and working condition, including, but not limited to: graffiti removal; providing custodial services; maintaining the desired water temperature of Pool; and maintaining the proper chemical balance of Pool. "Routine Maintenance and Repairs" shall also include the cost of chemicals and the cost to provide electricity, gas, water, sewer and refuse service necessary to operate Pool and Community Buildings (to the extent as necessary and practicable, additional utility metering facilities shall be installed at the site for the Pool and Community Buildings). Further, unless otherwise agreed to by staff of City and District, the temperature of Pool shall be maintained between 78 and 82 degrees during the time City has priority use of Pool, as set forth in Section 8. If at any point, the District has knowledge that the temperature of the Pool is below 78 degrees, the District shall immediately take reasonable measures to cure and conform to the provisions of this section.

## **SECTION 2. GENERAL PROVISIONS.**

This MOU constitutes the entire agreement between the parties respecting the Pool and City's use of Community Buildings. However, the Joint Use Agreement shall apply to District's use of Community Buildings at any time and City's use of Pool during District's priority use times specified in Section 8.A. of this MOU.

**SECTION 3.**        **TERM.**

Subject to provisions set forth elsewhere in this MOU regarding termination, the term of this MOU shall commence as of the date this MOU is signed by both parties, and shall remain in effect for a period of 30 years. The term will automatically extend for two additional 10-year terms, unless the City, in its sole discretion and upon at least 180 days written notice to District prior to the then current expiration date of the MOU, chooses not to allow the MOU to automatically extend.

**SECTION 4.**        **DESIGN AND CONSTRUCTION OF POOL AND  
COMMUNITY BUILDINGS.**

A. District shall be responsible for the design and construction of Pool and Community Buildings. This includes, but is not limited to, the following (which collectively are referred to as "Project Costs"):

1. Design and Construction Management Related Services;
2. Compliance with all legal requirements, including, but not limited to, the Americans with Disability Act, the California Environmental Quality Act, legal advertisements to the public and to qualified bidders;
3. Conducting and administering the bidding process for construction;
4. Awarding the construction contract;
5. Administration of construction;
6. Payment of amounts due to the architect, the contractor and other persons providing services; and
7. Administration and resolution of any claims of, or disputes with, the contractor or any provider of Design and Construction Management Related Services.

B. District shall prepare working drawings and plans and specifications for Pool and Community Buildings (collectively referred to as "Plans and

Specifications"). City shall have a reasonable opportunity to inspect the Plans and Specifications, District's estimated cost of construction and the construction contingency budget. District shall consult with City as to the Plans and Specifications. If City and District cannot agree to the Plans and Specifications after working in good faith for a reasonable time period, the City or District may terminate this MOU by providing written notice to the other party. However, any party providing notice of termination must first attempt to meet with the other party in good faith to attempt to resolve any disputed issues.

C. If the bid from the lowest responsible bidder exceeds District's estimated cost of construction, District shall consult with the project architect and City as to whether and/or how the Plans and Specifications should be modified. If City and District cannot agree as to whether and/or how the Plans and Specifications should be modified after working together in good faith, the City or District may terminate this MOU by providing written notice to the other party. However, any party providing notice of termination must first attempt to meet with the other party in good faith to attempt to resolve any disputed issues.

1. If both parties agree to terminate this MOU pursuant to this Subsection C, the parties shall agree as to a reasonable allocation of Design Related Services costs.

2. If District chooses to terminate this MOU pursuant to this Subsection C, it shall be responsible for all Design Related Services costs and Project Costs.

3. If City chooses to terminate this MOU pursuant to this Subsection C, it shall pay District for Design Related Services costs reasonably necessary to remove Community Buildings and recreation swim area of Pool from the Plans and Specifications.

D. District anticipates that construction of Pool and Community Buildings will be completed approximately twelve (12) months following the opening of bids for construction of the Pool and Community Buildings. District shall exercise its best

efforts to cause the Pool and Community Buildings to be completed no later than eighteen (18) months following opening of bids for construction of Pool.

E. Ownership of Pool and Community Buildings shall vest in District.

F. Pool shall be named by District.

## **SECTION 5. PROJECT COSTS.**

A. The Project Costs shall be funded by contributions from City and District. City's contributions for Project Costs shall be limited to the following:

1. All costs of the construction contract directly related to construction of Community Buildings;
2. Twenty-five percent of the construction contract directly related to construction of Pool; and
3. Twenty-five percent of Design and Construction Management Related Services.

B. Notwithstanding Subsection A, above, if District chooses to bid construction of Pool and/or Community Buildings with other District projects:

1. District shall prepare the bidding documents in such a manner so that the fixed price per unit for each item of work directly associated with the construction of Pool and/or Community Buildings is separately identified; and
2. City's contributions for Project Costs shall be limited to the following:
  - a. All costs directly related to construction of Community Buildings, as identified in the lowest bid for such work, regardless of whom the overall lowest bidder for the project or projects is;

b. Twenty-five percent of costs directly related to construction of Pool, as identified in the lowest bid for such work, regardless of whom the overall lowest bidder for the project or projects is; and

c. Twenty-five percent of Design and Construction Management Related Services.

B. City shall make three (3) separate deposits of its contributions to the Project Costs as follows:

1. Within 60 days of District's issuance of the Notice to Proceed to the construction contractor, City shall deposit with District the amount equal to 50% of the total costs identified in Subsections A or B, above.

2. Within thirty (30) days of the date the architect certifies substantial completion of project construction, City shall deposit with District the amount of equal to 25% of the total costs identified in Subsections A or B, above.

3. Within thirty (3) days following completion of all punch list items to City's reasonable satisfaction, City shall deposit with District the amount equal to 25% of the total costs identified in Subsections A or B, above.

## **SECTION 6. OPERATION, MAINTENANCE AND CLEANUP.**

A. District shall be responsible for all Routine Operation, Maintenance and Repairs and Capital Maintenance of Pool and Community Buildings, except as set forth in this MOU.

B. Within thirty (30) days following the end of each fiscal year, District shall exercise its best efforts to provide City with a detailed summary of actual Routine Operation, Maintenance and Repair costs for the previous year. City shall pay district 25% of such costs within thirty (30) days of receipt of the summary of costs.



C. District shall pay \$134,683 annually, for a period of 30 years, for Capital Maintenance. City shall pay \$44,895 annually, for a period of 30 years, for Capital Maintenance. These amounts reflect the actual costs anticipated for Capital Maintenance and Repair for operation of the Pool and Community Buildings over a 30 year period. These amounts shall be deposited by both parties into a separately established facilities fund to be used solely as a repair and replacement fund for long-term improvements on the Pool and Community Buildings. No expenditures shall be made from such fund unless approved by both the District's Superintendent, or his or her designee, and City's Manager, and his or her designee.

D. City shall be responsible for Routine Cleanup during the hours of use of Pool and Community Buildings by City. District shall be responsible for Routine Cleanup during all other times.

#### **SECTION 7. STAFFING OF POOL.**

A. City shall be responsible for staffing, supervision and control of Pool during the time City uses Pool, including:

1. Providing qualified swimming instructors, lifeguards, attendants and/or other necessary personnel who are Water Safety Instructors, Lifeguard Trained or appropriately certified by the American Red Cross or another comparable association;
2. Following all local and State health and safety laws, statutes and ordinances for operations and personnel certifications;
3. Paying the salaries and other expenses of necessary personnel; and
4. Supplying any special equipment necessary for teaching and other uses of Pool by City.

B. District shall be responsible for staffing, supervision and control of Pool during all other times when City does not have priority use or is not using Pool.

**SECTION 8.**            **USE OF POOL AND COMMUNITY BUILDINGS.**

A. District shall have priority use of Pool during school year for:

1. Student educational and recreational purposes during school hours; and
2. District-sponsored extra curricular athletic activities during non-school hours.

B. City shall have priority use of Pool on weekends from the Memorial Day weekend through the Labor Day weekend, and weekdays from the final regular school day of the school year, through the first return day of the new school year. City's use of Pool and Community Buildings shall include:

1. The ability to provide food and beverage services at City's sole cost and liability;
2. The use of ample District parking facilities for City program participants, which shall be maintained by District but that City shall be responsible for routine clean-up of garbage during its use; and
3. Exclusive year-round access to the Community Buildings to permit secured storage and retention of equipment and materials necessary for City's programming.

C. District and City shall coordinate a schedule for their respective uses of Pool, annually by the end of April of each year prior to the start of the academic year in August, with final schedule completed and agreed upon by August 15 of each year, during the term of this MOU. Adjustments to the coordinated schedule may take place during the year with approval by both District and City. Both parties agree to work in good faith to accommodate reasonable change requests. Should an activity need to be relocated, assistance will be provided by

either party to secure and publicize an alternate location for the activity, whether it is an appropriate District or City facility.

D. District may use Community Buildings in accordance with the Joint Use Agreement.

## **SECTION 9. INDEMNIFICATION.**

A. City shall indemnify, defend and hold harmless District, its officers, employees, elected officials, and agents, from and against any and all claims, losses, damages, expenses or liabilities arising as a result of the negligence or willful misconduct of City, its officers, employees, elected officials, agents, contractors, invitees, or fee-paying patrons in performing under the terms and conditions of this MOU, including compliance with all applicable local, state, and federal regulations and laws. This Section shall not release District from the statutory obligation to comply with the applicable Tort Claims statutes in the event of a claim against the City.

B. District shall indemnify, defend and hold harmless City, its officers, employees, elected officials, and agents, from and against any and all claims, losses, damages, expenses or liabilities arising as a result of the negligence or willful misconduct of District, its officers, employees, elected officials, agents or contractors, invitees, or fee-paying patrons in performing under the terms and conditions of this MOU, including compliance with all applicable local, state, and federal regulations and laws. This Section shall not release City from the statutory obligation to comply with the applicable Tort Claims statutes in the event of a claim against the District.

## **SECTION 10.**

## **INSURANCE.**

A. City and District shall each maintain insurance in connection with this MOU at the following minimum levels:

1. General liability as provided by: City through membership and affiliation with the San Joaquin Valley Risk Management Authority, a retention group; and District through membership and affiliation with NorCalRelief, a retention group.
2. Coverage shall be maintained in an amount not less than \$2,000,000 Aggregate and \$1,000,000 per occurrence for general liability, bodily injury and property damage.
3. Retention (SIR) as agreed upon by City and District.

B. City and District shall maintain worker's compensation coverage as required by the State of California.

C. City shall obtain endorsements to its automobile and commercial general liability coverage naming District (including its elected officials, officers, employees, agents, and volunteers) as an "additional insured"; and District shall obtain endorsements to its automobile and commercial general liability coverage naming City (including its elected officials, officers, employees, agents, and volunteers) as an "additional insured."

D. District shall either carry insurance on the Pool adequate to cover the full replacement value of the Pool to extent available, or provide City with evidence showing that District is adequately self-insured.

## **SECTION 11.**

## **DAMAGE AND DESTRUCTION.**

A. If Pool and/or Community Buildings are substantially damaged through no fault of City so as to render them unusable for City's purposes, City shall have

the option to terminate this MOU upon providing District thirty (30) days written notice. After receipt by the District of City's intention to terminate the MOU, District may elect to undertake repairs within that thirty (30) day period so as to render the Pool and/or Community Buildings usable for City's purposes. If the facilities are reasonably restored or repaired to such extent as to make the Pool and/or Community Buildings usable by City within the thirty (30) day time period, City shall act in good faith as to whether it decides to terminate this MOU. If City chooses to terminate the MOU, City's Contribution shall be refunded according to the schedule set forth in the attached Exhibit A to the extent of insurance coverage paid to District for the loss, less costs to secure the site and render it safe (which costs shall be shared equally). In the alternative, City and District may agree upon rebuilding Pool and/or Community Buildings upon terms that may be negotiated.

## **SECTION 12.**

## **DEFAULT.**

A. Except for the notice and cure provisions contained in this Section, failure or delay by either party to perform any term or provision of this MOU constitutes a breach under this MOU. The party who commits a breach shall promptly commence to cure, correct or remedy such failure or delay and shall complete such cure, correction or remedy with reasonable diligence, and during any period of curing shall not be in default of this MOU.

B. In the event of a breach by either party, the injured party shall give written notice of breach to the party in breach, specifying the breach complained of by the injured party.

C. If a breach, however, is not cured or commenced to be cured within 30 days after receipt of the notice of breach, then the party not so curing or commencing to cure shall be in default under this MOU, and the nondefaulting

party shall have the right to exercise any and all remedies available to it at law or in equity.

**SECTION 13.**

**ELECTIVE TERMINATION.**

A. Only upon completion of Pool and City use of Pool for a period of five (5) years, District may terminate this MOU, without cause, upon one hundred eighty (180) days written notice to City. If District chooses to terminate this MOU pursuant to this Section, City's contributions to all of the Project Costs described in Section 5.A., shall be refunded according to the method set forth in the attached Exhibit A, and any unused amounts paid by City and District for Capital Maintenance shall be refunded with interest to each party.

B. At any time, City may terminate this MOU, without cause, upon one hundred eighty (180) days written notice to District. If City chooses to terminate this MOU pursuant to this Section, City's contributions to the Project Costs described in Section 5.A.2. (costs of construction contract directly related to construction of Pool), shall be refunded according to the method set forth in the attached Exhibit B, and any unused amounts paid by City and District for Capital Maintenance shall be refunded with interest to each party.

C. If District does not have sufficient funds to refund Project Costs to City pursuant to this Section, District may request that the City agree to a reasonable repayment plan.

D. The provisions of this Section are in addition to, and not a limitation of, any other rights or remedies available to the parties.

**SECTION 14.**

**ASSIGNMENT AND SUBLETTING.**

A. Neither City nor District shall assign its interest in this MOU without the prior written consent of the other.

B. Notwithstanding Subsection A, above, City may allow groups and individuals to reserve Pool and Community Buildings pursuant to the City's policies and procedures, during the time City has priority use of Pool.

C. All covenants, promises, conditions, representations, and agreements expressed in this MOU shall be binding on the party who makes them and on that party's representatives, successors, and permitted assigns.

**SECTION 15.**

**WAIVER.**

In no event shall any payment by City or any acceptance of payment by District hereunder constitute or be construed to be a waiver by City or District of any breach of covenants or conditions of this MOU or any default which may then exist on the part of City or District, and the making of any such payment or the acceptance of any such payment while any such breach or default exists, shall in no way impair or prejudice any right or remedy available to City or District with respect to such breach or default. The waiver by one party of any breach by the other party of any of the provisions of this MOU shall not constitute a continuing waiver or a waiver of any subsequent breach either of the same or of another provision of this MOU.

**SECTION 16.**

**INDEPENDENT CONTRACTOR.**

Under no circumstances shall this MOU be construed as one of agency, partnership, joint venture or employment between District and City. Each party acknowledges and agrees that it neither has, nor will give the appearance or

impression of having, any legal authority to bind or commit the other party in any way. The City and District agree that each party shall be responsible for the payment of wages and benefits of each of their respective employees and agents.

**SECTION 17.**

**AMENDMENTS.**

Amendments to the terms and conditions of this MOU shall be requested in writing by the party desiring such revision, and any such adjustment to this MOU shall be determined and effective only upon the mutual agreement in writing of the parties.

**SECTION 18.**

**NOTICES.**

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

City:                      City of Tracy  
                                Maria Hurtado  
                                Director of Parks and Community Services  
                                400 East 10<sup>th</sup> Street  
                                Tracy, California 95376

District:                Tracy Unified School District  
                                Casey Goodall  
                                Assistant Superintendent of Business Services  
                                1875 West Lowell Avenue  
                                Tracy, California 95376



**SECTION 19.****FORCE MAJEURE.**

If either party shall be delayed or prevented from the performance of any act required by this MOU by reason of acts of God, strikes, lockouts, labor troubles, inability to procure materials, hazardous materials testing or remediation ordered by any governmental entity with authority therefore or other cause, without fault and beyond the reasonable control of the party obligated (financial inability excepted), performance of such act shall be excused for the period of the delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay.

**SECTION 20.****ENTIRE AGREEMENT.**

This MOU, including the attached exhibits, constitutes the entire agreement between the parties respecting the Pool and Community Buildings, and correctly sets forth the obligations of City and District to each other as of the Effective Date. Any agreements or representations not expressly set forth in this Agreement shall be null and void.

**SECTION 21.****PARTIAL INVALIDITY.**

If any provision of this MOU is held by a court of competent jurisdiction to be either invalid, void or unenforceable, the remaining provisions of this MOU shall remain in full force and effect and unimpaired by the holding. All laws, rules, requirements, and regulations of the State of California, applicable to school districts and the functioning, powers, and administration of school districts and school facilities, are deemed included in this MOU as if fully set forth to the extent they apply to the design, construction, administration, and operation of the Pool, and shall be complied with in the performance of this MOU. Upon request by City, District shall use reasonable efforts to provide to City copies of such

requested laws, rules, and regulations applicable to school districts and shall use reasonable efforts to inform City of any changes to foregoing.

**SECTION 22.**

**GOVERNING LAW.**

This MOU shall be governed by and in accordance with the laws of the State of California.

**SECTION 23.**

**NONDISCRIMINATION.**

Neither City nor District shall discriminate, in any way, against any person on the basis of race, sex, color, age, religion, sexual orientation, disability, ethnicity, or national origin, in connection with or related to the performance of this MOU.

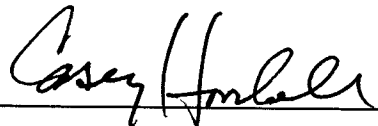
**SECTION 24.**

**COUNTERPARTS.**

This MOU may be signed in counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same MOU.

District

City



\_\_\_\_\_

Associate Superintendent,  
Business Services

Mayor

Dated: 1/24/07

Dated: \_\_\_\_\_

Approved as to Form:

Approved as to Form:

\_\_\_\_\_

\_\_\_\_\_

## Exhibit A

Under this method, the total actual project costs as defined in Section 5 are divided by 30 years. This is the average annual straight line depreciation. In years one through nine, 50% of the annual straight line depreciation will be deducted for each year that has passed since completion of the pool until termination by the District of the agreement. This amount will be deducted from the total actual project costs and the balance remaining will be due by the District to the City. In years ten through nineteen, 100% of the annual straight line depreciation will be used as a deduction. In years twenty through twenty nine, 150% of the annual straight line depreciation will be used as a deduction. The following table shows this method being applied to the estimated project costs. However, the refund will be based on actual project costs.

### CITY'S SHARE OF PROJECT COST \$1,789,012

IF DISTRICT CANCELS AFTER YEAR	DISTRICT REFUNDS
5	\$1,639,012
6	\$1,609,012
7	\$1,579,012
8	\$1,549,012
9	\$1,519,012
10	\$1,459,012
11	\$1,399,012
12	\$1,339,012
13	\$1,279,012
14	\$1,219,012
15	\$1,159,012
16	\$1,099,012
17	\$1,039,012
18	\$979,012
19	\$919,012
20	\$829,012
21	\$739,012
22	\$649,012
23	\$559,012
24	\$469,012
25	\$379,012
26	\$289,012
27	\$199,012
28	\$109,012
29	\$19,012
30	\$0

## Exhibit B

Under this method, 25% of the actual total hard construction costs of the pool are divided by 30 years. This is the average annual straight line depreciation. This amount will be deducted for each year that has passed since completion of the pool until termination by the City of the agreement. This amount will be deducted from the total actual hard construction costs and the balance remaining will be due by the District to the City. The following table shows this method being applied to the estimated project costs. However, the refund will be based on actual project costs.

### 25% OF POOL

\$818,537

### IF CITY CANCELS AFTER YEAR

### DISTRICT REFUNDS

1	\$788,537
2	\$758,537
3	\$728,537
4	\$698,537
5	\$668,537
6	\$638,537
7	\$608,537
8	\$578,537
9	\$548,537
10	\$518,537
11	\$488,537
12	\$458,537
13	\$428,537
14	\$398,537
15	\$368,537
16	\$338,537
17	\$308,537
18	\$278,537
19	\$248,537
20	\$218,537
21	\$188,537
22	\$158,537
23	\$128,537
24	\$98,537
25	\$68,537
26	\$38,537
27	\$8,537
28	\$0
29	\$0
30	\$0

RESOLUTION \_\_\_\_\_

APPROVE THE MEMORANDUM OF UNDERSTANDING (MOU) BETWEEN THE CITY OF TRACY AND THE TRACY UNIFIED SCHOOL DISTRICT (TUSD) FOR THE DEVELOPMENT AND OPERATION OF A SWIMMING POOL AT WEST HIGH SCHOOL AND AUTHORIZE THE MAYOR TO EXECUTE THE MOU

WHEREAS, On November 21, 2006, Council discussed a proposed partnership between the City of Tracy and the Tracy Unified School District (TUSD) pertaining to the construction and operation of a 50-meter competition pool at West High School; and

WHEREAS, The City has conducted several meetings and negotiations with TUSD to refine cost estimates for construction and determine operational shared expenses, shared use schedule, and other terms to be included in a Memorandum of Understanding (MOU) between the City and TUSD;

NOW, THEREFORE, BE IT RESOLVED, That City Council approve the Memorandum of Understanding (MOU) between the City of Tracy and the Tracy Unified School District (TUSD) for the development and operation of a swimming pool at West High School.

\* \* \* \* \*

The foregoing Resolution \_\_\_\_\_ was adopted by the Tracy City Council on the 6<sup>th</sup> day of February, 2007, by the following vote:

AYES: COUNCIL MEMBERS:

NOES: COUNCIL MEMBERS:

ABSENT: COUNCIL MEMBERS:

ABSTAIN: COUNCIL MEMBERS:

\_\_\_\_\_  
Mayor

ATTEST:

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