TO: HONORABLE MAYOR
    AND CITY COUNCIL
FROM: Richard Doyle
        City Attorney
SUBJECT: See below
DATE: June 14, 2017

SUBJECT: RESOLUTION OF LIVING WAGE DISPUTE WITH ALLIED WASTE
SERVICES OF NORTH AMERICA, LLC

RECOMMENDATION

Approve the Cooperative Agreement and Fourth Amendment to the Franchises Agreement with Allied Waste Services of North America, LLC to resolve a dispute about the living wage requirements for sorters and housekeepers at the Newby Island Recyclery in the Commercial Solid Waste and Recyclables Collection Franchises Agreement.

OUTCOME

Settle a dispute regarding the living wage requirements in the Commercial Solid Waste and Recyclables Collection Franchises Agreement for housekeepers and sorters at the Newby Island Recyclery. The settlement will provide both restitution for work performed from July 1, 2012, through June 30, 2017, and an increase in hourly wage rates prospectively.

BACKGROUND

The City and Allied Waste Services of North America, LLC ("Allied") entered into a "Commercial Solid Waste and Recyclables Collection Franchises Agreement" (the "Franchises Agreement") effective as of July 1, 2012. The Franchises Agreement has since been amended three times.

Under the Franchises Agreement, Allied is responsible for the collection of Commercial Solid Waste and Recyclables in both commercial solid waste collection service Districts in the City. Allied takes the Commercial Solid Waste and Recyclables to the Newby Island Recyclery ("Recyclery"), which is owned and operated by Allied's affiliate, Browning-Ferris Industries of California, Inc. ("BFI").

Allied and the City dispute whether Allied was subject to the Living Wage Policy and thus obligated to pay the housekeepers and sorters at the Recyclery the San Jose Living Wage under the Agreement. The City contends that during the procurement of proposals for the commercial collection franchises, the City clearly articulated that
employees engaged in processing San Jose commercial waste and recyclables under the franchises to be awarded, would be paid the San Jose Living Wage. However, Allied disputes this contention and contends that the Recyclery Workers, meaning housekeepers and sorters, were not included in the Franchises Agreement because they work at BFI's Recyclery and not directly for Allied. Allied contends there was no "meeting of the minds" between the parties on whether the housekeepers and sorters would be paid the San Jose Living Wage.

To resolve the dispute, Allied and the City have agreed on a methodology to address the living wage issue, and have therefore agreed to amend the Franchises Agreement to state the parties' respective obligations with respect to the wages to be paid to the housekeepers and sorters who have worked, are currently working, or will work at the Recyclery.

The resolution has five main components: 1) a fund to provide some restitution to housekeepers and sorters that worked at the Recyclery between July 1, 2012, and June 30, 2016; 2) a modified living wage for Recyclery housekeepers and sorters, referred to as the "Recyclery Workers Wage" in the amount of $17.29 per hour that will be paid to the housekeepers and sorters commencing July 1, 2017 and continuing through the remainder of the term of the Franchises Agreement; 3) annual increases in the Recyclery Worker Wage consistent with the Consumer Price Index as defined in the Franchises Agreement as amended; 4) modifications in the Consumer Price Index used in the Franchises Agreement for a period of seven years; and 5) a cost splitting arrangement between the City and Allied to cover the additional costs of paying the Recyclery Workers Wage.

1. Recyclery Worker Restitution Fund

Under the Cooperative Agreement and Fourth Amendment, Allied will deposit $2.75 million into a Recyclery Worker Restitution Fund, which will be administered by a third party administrator. The cost of the third party administrator will be shared equally by the City and Allied. Eligible individuals will be required to submit a claim for restitution with the third party administrator. The administrator will determine eligibility and pay claims within a reasonable period of time. Should any funds remain after all eligible claims are paid, the remaining funds will escheat to the City.

2. Recyclery Worker Wage

The Recyclery Worker Wage was calculated assuming 160 full time sorters and housekeepers work at the Recyclery and that the equivalent of 80 full time sorters and housekeepers work with San Jose solid waste. Since sorters and housekeepers do not work exclusively on one line at all times, it was determined to be too difficult to identify those sorters and housekeepers that work on San
Jose solid waste. Accordingly, Allied and the City agreed to a modified living wage for all sorters and housekeepers at the Recyclery. The Recyclery Worker Wage is an average of the San Jose Living Wage and the San Jose Minimum Wage, which for the 2017-2018 fiscal year is $17.29 per hour.

3. Increases to the Recyclery Worker Wage

Annual increases to the Recyclery Worker Wage will be consistent with the Consumer Price Index in the Franchises Agreement as amended.

4. Modifications to the Consumer Price Index

Allied and the City agreed that Allied's annual rate increase will be calculated according to the existing formula in the Franchises Agreement, but will be increased by the Water and Sewer and Trash Collection Services Index (Series CUUROOOOSEHGE), but not to exceed 3.12% each year during the next seven years. Commencing July 1, 2024, and for the remaining term of the Franchises Agreement, rates will be set using the U.S. Bureau of Labor Statistics Garbage and Trash Collection Index described in the current agreement (Series CUUROOOOSEH02).

5. Cost Splitting to Raise the Housekeepers' and Sorters' Wages

Allied and the City calculated that the annual base cost needed to bring the wage rates for the Recyclery Workers up to the "Recyclery Workers' Wage" will be roughly $3,601,000. Of this amount, Allied will pay $1,454,500 and the remaining $2,146,500 will be eligible to be passed through to Allied's customers as part of the Newby Island Resource Recovery Park processing costs as defined in the Franchises Agreement as amended.

ANALYSIS

The Cooperative Agreement and Fourth Amendment to the Franchises Agreement will allow the City to resolve what would otherwise be very expensive and time-consuming litigation and achieve two goals related to compensating the sorters and housekeepers at the Recyclery. First, the sorters and housekeepers at the Recyclery will receive some restitution in wages sooner rather than later. Long and protracted litigation would have thwarted this goal. Second, the sorters and housekeepers will earn more than the minimum wage in the near term. This goal would likewise have been thwarted by long and expensive litigation.
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PUBLIC OUTREACH/INTEREST

This memorandum and the proposed Cooperative Agreement and Fourth Amendment to the Franchises Agreement have been posted on the City’s website for the June 27, 2017 City Council agenda.

COORDINATION

The City Attorney’s Office has coordinated with the City Manager and the Environmental Services, and Public Works departments on this matter.

COST SUMMARY/IMPLICATIONS

The City agreed to pass through certain costs necessary to bring the sorters and housekeeper wages up to the Recylery Worker Wage rate. These costs will be added to the NIRRP Costs as defined in the Franchises Agreement and passed on to Allied’s customers. The City Council is scheduled to consider a 1.79% rate increase on the June 27, 2017 agenda in order to implement the amendments described above.

CEQA

CEQA: Not a Project; File No. PP10-066h, Settlement Agreements.

Richard Doyle  
City Attorney

cc: Norberto Dueñas, City Manager

For questions please contact RICHARD DOYLE, City Attorney, at (408) 535-1900.