

ORDINANCE No. 185830

Grant residential solid waste, recycling and composting collection franchises in the City (Ordinance)

The City of Portland ordains:

Section 1. The Council finds:

NATURE OF GRANT

1.1 The City of Portland (City), does hereby grant a residential Solid Waste, Recycling and Composting collection franchise to each of the separately named Grantees, individually listed as follows:

Allied Waste Services of Lake Oswego	Portland Disposal & Recycling, Inc.
J M Boitano Sanitary Service, Inc. dba City Sanitary Service	S&C Licensing LLC
Cloudburst Recycling, Inc.	Wacker Sanitary Service
Mel Deines Sanitary Service	Walker Garbage & Recycling, Inc.
DeYoung Sanitary Service	Waste Connections of Oregon, Inc. dba American Sanitary Service
Elmer's Sanitary Service LL	Waste Connections of Oregon, Inc. dba Arrow Sanitary Service
Gruetter Sanitary Service, Inc.	Waste Management of Oregon, Inc.
Heiberg Garbage & Recycling LLC	Weisenfluh Sanitary Service LLC
Hoodview Disposal & Recycling, Inc.	Weitzel's Garbage & Recycling, Inc.
Lehl Garbage, Inc. dba Lehl Disposal	

Each of these Grantees is individually qualified to do business in Oregon. A franchise to collect residential Solid Waste, Recyclable Materials and Compostables is granted to each Grantee separately, and to its successors and assigns as approved by the City under Section 14 of this franchise. Grantee's franchise area within the city is shown on the map attached hereto and incorporated by reference as Exhibit A. In consideration for the grant of this franchise, Grantee agrees to collect residential Solid Waste, Recyclable Materials and Compostables, set out for collection, as required under this franchise.

1.2 All Grantees may directly provide Recyclable Material collection services for their Residential Customers, provided that Grantee has received approval from the City for a residential recycling plan as established in the Administrative Rules. Grantees who have not received such City approval shall provide for the collection of Recyclable Materials by arrangement with a Grantee who has been approved by the City.

Section 2. TERM OF FRANCHISE

2.1 Duration. The term of this franchise, and all rights and obligations pertaining thereto, shall be ten (10) years from the effective date of the franchise unless forfeited or revoked sooner as provided herein.

2.2 Effective Date. The effective date of this franchise shall be sixty (60) days after passage of the franchise by the City Council, unless Grantee fails to file an unconditional written acceptance of this franchise in accordance with Section 24 herein, in which event this franchise shall be null and void. The passage date of this franchise is set forth on the last page of the original hereof, as stamped by the Council Clerk.

Section 3. DEFINITIONS

3.1 For the purposes of this franchise, the following terms, phrases and their derivations shall have the meanings given below unless the context indicates otherwise. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural include the singular and words in the singular include the plural. The word "shall" is always mandatory and not merely directory.

3.2 "Administrative Rules" shall refer to the standards and requirements for Residential Solid Waste, Recyclables and Compostables collection developed by the Bureau of Planning and Sustainability, under the authority granted by the City Council.

3.3 "Allowable Expenses" shall include all reasonable costs incurred by Grantee associated with the provision of residential Solid Waste, Recycling and Composting collection services required herein and the cost of complying with all applicable laws, regulations or orders as now or hereafter amended. Allowable Expenses as defined above shall be presumed to be reasonable if, in the context of overall cost for the Grantee, such expenses are comparable with: (A) the expenses incurred by a preponderance of similarly situated residential Solid Waste, and Recycling and Composting collection companies franchised by the City; or, (B) other such companies similarly situated in urban areas located on the West Coast of the United States, after adjustment for cost of living, if necessary. Allowable Expenses shall include, but not be limited to, the following costs associated with residential Solid Waste, Recycling and Composting collection services provided by Grantee under this franchise:

(A) Disposal tipping fees and related charges established by Metro. The amount recognized as an allowable expense shall be the disposal tipping fee, solid waste transaction fee and other solid waste disposal charges as actually set from time to time by Metro;

(B) Labor costs, including supervisory labor, directly associated with residential Solid Waste, Recycling and Composting collection services, including worker's compensation and benefits;

(C) Equipment costs including depreciation, vehicle registration fees, motor fuel, oil, tires, repairs and maintenance and sustainable fleet requirements;

(D) Container, cart and bin costs including depreciation, repairs, maintenance and

replacement;

- (E) Insurance in the amounts and coverages required by the City;
- (F) Administrative costs including, but not limited to, officer salaries, administrative staff, data processing, billing and supplies;
- (G) Utilities;
- (H) Training and worker safety;
- (I) Marketing and public education costs approved by the City;
- (J) Interest costs such as interest charges on the purchase of equipment or facilities, or on loans for working capital but not interest costs which are otherwise an Unallowed Expense under Section 3.18;
- (K) Equipment or facility rental or lease costs;
- (L) Professional fees and costs for financial reporting, accounting and regulatory processes associated with or required by this franchise;
- (M) Any expense incurred in the collection, processing, marketing, sale or disposition of Recyclable or Compostable Materials;
- (N) Costs associated with implementing environmental management plans; and
- (O) Costs associated with responding to force majeure.

3.4 "Calendar Quarter" shall be the segment of a calendar year from January 1 through March 31, from April 1 through June 30, from July 1 through September 30, or from October 1 through December 31.

3.5 "Collect" and "Collection" shall include accept, accumulate, store, process, transport, market and dispose of as required by City regulations, Metro, state and federal law.

3.6 "Compostables/Composting" shall mean Yard Debris, Food Scraps, Food Soiled Paper and Approved Compostable Bags when source separated for composting.

3.7 "Food Scraps" means all food, including meat, poultry, seafood, dairy, bread, fruits and vegetables, cheese, eggshells, rice, beans, pasta, coffee grounds and filters, tea bags, bones and other plate scrapings. Food Scraps does not include liquids or large amounts of grease or oil.

3.8 "Food Soiled Paper" means paper products that cannot now be recycled or that have been in contact with organic materials to the degree that they would not be able to be recycled. Food Soiled Paper includes, but is not limited to, used paper table covers, used napkins, and waxy corrugated cardboard. Food Soiled Paper includes recyclable paper that has been in contact with food to the degree that it is not recyclable, but does not include unsoiled cardboard boxes,

newspaper or office paper. Food Soiled Paper does not include any plastic coated paper products or other paper unfit for controlled biological composting.

3.9 "Franchise Area" shall mean the geographic area(s) described in Exhibit A attached hereto and incorporated herein for each individual Grantee.

3.10 "Gross Residential Revenue" shall mean all gross receipts associated with residential Solid Waste, Recyclable Materials and Compostables collection services performed within the Franchise Area. Gross Residential Revenue does not include revenues from the marketing and sale of Recyclable Materials or the provision of additional services such as commercial drop boxes or medical waste collection.

3.11 "Metro" shall mean the Metropolitan Service District encompassing Multnomah, Washington and Clackamas counties, as provided for under ORS Chapter 268 (2007).

3.12 "Operating Margin" shall be Gross Residential Revenues plus any additional revenues from sales of Recyclable Materials, less the sum of Allowable Expenses and Pass-Through Expenses. For the purpose of any rate reviews under this Franchise, the Operating Margin percentage shall be calculated using a weighted average of the representative sample of Grantees' Operating Margins. The weighting factor for Grantees shall be calculated on the basis of the-Grantees' Gross Residential Revenue plus Recyclable Materials revenue, less Pass-Through Expenses. Expressed as a percentage, the Operating Margin shall be nine and one-half percent (9.5%) of these revenues net of Pass-Through Expenses.

3.13 "Pass-Through Expenses" shall include: (A) the franchise fee required under this franchise; and (B) surcharges or taxes levied by state or local governments upon the collection of Solid Waste; and (C) Business License fees paid to the City. The calculation of the Operating Margin shall not include any Pass-Through Expenses.

3.14 "Recyclable Material/ Recyclables/Recycling" shall include, but not be limited to, newspaper, ferrous scrap metal, non-ferrous scrap metal, used motor oil, corrugated cardboard and kraft paper, container glass, aluminum, tin cans, plastic milk jugs, plastic tubs, plastic buckets, plastic plant pots, magazines, scrap paper and junk mail, steel aerosol cans, milk cartons and drink boxes, plastic bottles and phone books. Recyclable Materials may be added or deleted as designated by the City through its Administrative Rules adoption process.

3.15 "Residential Customer" shall be a.) any individual who subscribes for the collection of Solid Waste, Recyclable Materials or Compostables from either a single family dwelling or multiple family dwelling with up to and including four dwelling units or b.) any non-Residential Customer who qualifies for collection services as provided in Subsection 4(B).

3.16 "Service Level" shall be any type of regulated service provided to Residential Customers as reflected in the rate schedule.

3.17 "Solid Waste" shall have the meaning given in ORS 459.005(24) (2005), including but not limited to garbage, rubbish, refuse, ashes, discarded home appliances, manure, vegetable or animal solid and semisolid wastes and other waste, generated by Residential Customers; but the term shall not include:

- (A) Sewage sludge, septic tank and cesspool pumping or other sludge;
- (B) Commercial and industrial wastes;
- (C) Discarded or abandoned vehicles;
- (D) Recyclable or Compostable Material which is source separated and set out for recycling or composting purposes; or,
- (E) Waste that is designated by the Oregon State Department of Environmental Quality (DEQ) or Metro as requiring special handling, treatment, storage or disposal to avoid potential damage to the environment or to public health.

3.18 "Unallowed Expenses" shall include the following:

- (A) Contributions;
- (B) Fines and penalties;
- (C) Affiliated party transaction costs to the extent they exceed the fair market rate for such goods or services;
- (D) Accruals for future unknown regulatory changes;
- (E) Costs associated with purchase of other companies including, but not limited to, Employee Stock Ownership Plan payments, goodwill, amortization of goodwill and premiums on key-person life insurance policies;
- (F) Principal or interest payments on the acquisition of residential Solid Waste, Recycling and Compostables collection routes; the purchase of equipment and facilities at a price that would be construed to include goodwill or a premium in excess of fair market value at the time of acquisition; and
- (G) State, federal and local income taxes, other than City business license fees.

3.19 "Yard Debris" shall mean organic materials, including grass clippings, leaves, prunings of no greater than four (4) inches in diameter and thirty-six (36) inches in length and other plant materials. However, "Yard Debris" shall not include dirt, sod, rocks and stumps.

Section 4. SCOPE OF SERVICES.

(A) Grantee shall provide collection service for Solid Waste, Recyclable Material and Compostables in the Franchise Area in accordance with such standards and specifications as set forth in the Administrative Rules promulgated by the Bureau of Planning and Sustainability under the authority granted by the City Council. Grantee shall furnish all necessary skill, labor, equipment, materials, billing facilities, transportation facilities and related services required therefor.

(B) Upon request from a non-Residential Customer within Grantee's Franchise Area for Grantee to provide collection service of Solid Waste, Recyclable Material and Compostables at a Service Level equivalent to a single Solid Waste and Recycling can or cart as established in the rate schedule approved by the City Council, Grantee shall provide collection service to the non-Residential Customer at the established residential rates. The Bureau of Planning and Sustainability shall develop Administrative Rules regarding the standards and specifications for provision of such services to non-Residential Customers by Grantees. These Administrative Rules shall address aspects such as weight, hours of collection pick-up, and set-out collection standards, as incorporated in the rate schedule for Residential Customers.

Section 5. FRANCHISE FEES AND AUDITING

5.1 Franchise Fees

(A) Grantee shall pay as compensation to the City, for the rights and benefits granted under this franchise, a fee of up to eight percent (8%) of Gross Residential Revenue during the term of the franchise. The City Council shall specify the amount of the franchise fee by ordinance. Franchise fee revenues in excess of any percentage more than five percent (5%) of Gross Residential Revenue shall be dedicated for rate stabilization purposes for Residential Customers. Any adjustment of franchise fee revenues in excess of five percent (5%) shall only occur during a rate review proceeding, as set forth in Section 8.1.

(B) The City shall issue an invoice for franchise fees after each Calendar Quarter. Grantee's compensation payments shall be made within thirty (30) days of the date of invoice. Interest shall be charged on invoices not paid within thirty (30) days of the date of invoice. Interest shall accrue at one and one-half (1-1/2 %) per month on unpaid balances thirty (30) days after the date of invoice, compounded daily from the due date.

5.2 Auditing

(A) An acceptance of any payment shall not be construed as an accord that the amount paid is, in fact, the correct amount, nor shall an acceptance of payment be construed as a release of any claim the City may have for further or additional sums payable.

(B) All amounts paid shall be subject to confirmation and recomputation by the City. Grantee agrees to reimburse the City for:

(1) The reasonable costs for such confirmation if the City's recomputation discloses that the Grantee has paid less than ninety-five (95%) of the franchise fee owing for the period at issue; or

(2) One-half of the reasonable costs of such confirmation if the City's recomputation discloses that the Grantee had paid ninety-five (95%), but less than ninety-eight (98%) of the franchise fee owing for the period at issue;

(3) There shall be no cost to the Grantee if the City's recomputation discloses that the Grantee has paid ninety-eight (98%) or greater; and

(4) The City shall reimburse the Grantee for any overpayment if the City's recomputation discloses that the Grantee has paid more than 100%.

5.3 Grantee shall pay the cost of publication of the proposed franchise ordinance and any amendments thereto, together with the cost of publishing notice of City Council consideration of the proposed franchise, as such publications are required by City Charter.

5.4 Payment of this franchise fee shall not exempt Grantee from the payment of any other license fee, tax or charge on the business, occupation, property or income of the Grantee that may be imposed by the City, except as otherwise may be provided in the ordinance or ordinances imposing such other license fee, tax or charge.

Section 6. REGULATION

6.1 This franchise is hereby made subject to the Charter of the City of Portland and general ordinance provisions passed pursuant thereto, now in effect or hereby made effective, and particularly to the applicable provisions presently contained in Sections 10-101 through 10-218 inclusive, of said Charter (1942 compilation and revised in part by subsequent amendments), as the same now exist or hereafter are amended by the people of the City of Portland, which are hereby expressly made a part of this franchise.

6.2 The power and right to reasonably regulate the exercise of the privileges permitted by this franchise in the public interest shall at all times be vested in the City. The City reserves the right to establish rules, regulations or standards regarding the collection of residential Solid Waste, Recycling and Composting through ordinances or Administrative Rules promulgated thereunder. Consideration shall also be given to safety factors when reviewing the performance and costs of existing Solid Waste, Recycling and Composting collection programs, considering modifications to existing programs or in developing new programs.

6.3 This franchise is made subject to, and Grantee shall abide by, all present and future laws, regulations, orders of regulatory bodies, City Code provisions and Administrative Rules applicable to the performance of the collection services hereunder and shall obtain all licenses and permits required by federal, state, Metro and local governments.

6.4 Grantee shall provide all Residential Customers with the "opportunity to recycle" in accordance with all relevant requirements of the Oregon Revised Statutes and of the Oregon Administrative Rules as now or subsequently promulgated. Grantee shall, pursuant to a recyclable material collection strategy established by the City, implement the necessary collection services to comply with such strategy, including but not limited to, any waste reduction/diversion requirements or goals that may be specified by the State, Metro or the City.

6.5 Grantee shall not be relieved of its obligation to promptly comply with any provision of this franchise by any failure of the City to enforce compliance with this franchise.

6.6 The City will establish, through Administrative Rules, reporting standards for environmental management practices. As used in this section, environmental management practices may include recycling of office paper and other materials; purchase of recycled content

and environmentally preferable products; waste reduction, energy and water conservation; and the use of reduced emission vehicle fuels. The City will provide technical advice and assistance to the Grantee to develop a plan for implementing environmental management practices in its business operations. Grantee shall submit a brief annual report regarding environmental management practices within its business operations.

6.7 Open Books and Records. Upon at least 24 hours notice, the City shall have the right to inspect at any time, during normal business hours at an office of the Grantee located in the local metropolitan area, all books, records, maps, plans, income tax returns, financial statements and other like materials of the Grantee which are directly related to the operation of the franchise.

6.8 Reports. All reports required in this Section and in Section 8 are limited to information directly attributable to the residential Solid Waste, Recycling and Composting collection services provided under this franchise. Grantee shall submit an Annual Financial Report, quarterly reports and other financial reports as specified by the City in the Administrative Rules.

(A) After the end of each calendar quarter, the due dates of which are specified by the Administrative Rules, the Grantee shall submit written reports to the City's Bureau of Planning and Sustainability, verified by an officer or manager of the Grantee. The report shall contain:

- (1) An accurate statement of gross receipts from collection rates and miscellaneous customer charges;
- (2) The number of accounts by service level;
- (3) The quantities of Recyclables and Compostables collected;
- (4) The number of setouts and extras collected each month in Recycling and Composting programs;
- (5) Labor hours for each type of collection service: Solid Waste, Recyclable Materials, and Compostables; and
- (6) A report detailing the number of multifamily accounts sharing each service level.

(B) Annual Reports. Grantee shall submit an accrual-based annual detailed cost report in accordance with administrative rules, verified by an officer or manager of the Grantee. The report shall contain:

- (1) A summary statement of Portland residential franchise revenues, Recyclable Material sales, miscellaneous fees charged to customers and costs itemized on the Detail Cost Report as specified in the Administrative Rules;
- (2) A detailed analysis of certain "other" and "miscellaneous" Portland residential franchise cost line items and cost allocation methods as specified in the Administrative Rules; and

(3) Names and addresses of owners of the company and percentage of ownership.

(C) General Reports. Grantee shall prepare and submit to the City such other non-financial reports regarding its Residential Solid Waste, Recycling and Composting collection services provided under this franchise as the City may deem reasonably necessary or appropriate. In addition, the Grantee shall submit to the City any information for reporting purposes which shall be required by the Department of Environmental Quality or Metro.

(D) Format of Submissions. The City, after consultation with the Grantee, may specify the form and details of all reports provided under this Section.

6.9 Public Records

(A) Grantee and the City acknowledge that documents and records submitted by the Grantee to the City may be subject to public inspection under the Oregon Public Records Law, ORS 192.410 through 192.505 (2005). Grantee acknowledges its responsibility for becoming familiar with the provisions of the Oregon Public Records Law.

(B) Confidentiality. Grantee may identify information submitted to the City as confidential. Prior to submitting such information to the City, Grantee shall prominently mark any such information with the word "Confidential" in letters at least one-half (1/2) inch in height. The City shall treat any information so marked as confidential and not subject to public disclosure, until the City receives any public records request for disclosure of such information. Within five (5) working days of receiving any such request, the City shall provide the Grantee with written notice of the request, including a copy of the request. Grantee shall have five (5) working days within which to provide a written response to the City, before the City may release any of the requested confidential information. Whether the Grantee submits any written response to the City, the City shall retain final discretion to determine whether to release the requested confidential information, provided that the City shall give the Grantee at least five (5) working days written notice after receipt of any response from Grantee prior to releasing such information.

(C) (1) Some information submitted by the Grantee to the City may be relevant to the Grantee's obligation to pay franchise fees. Requiring such information to be submitted to the City in order to determine fees payable or paid to the City may qualify such information as being exempt from public disclosure under ORS 192.501 (5) (2005) of the Oregon Public Records Law.

(2) Some information submitted by the Grantee to the City may otherwise be used to conduct its business and known to certain individuals within the organization, with actual or potential commercial value, and giving Grantee a business advantage over its competitors. Such information may constitute trade secrets and be exempt from public disclosure under ORS 192.501(2) (2005) of the Oregon Public Records Law.

(3) Identification of these exemptions under the Oregon Public Records Law, which may apply to information submitted by the Grantee to the City, is not intended as an exhaustive list of the statutory exemptions possibly applicable to information submitted by the

Grantee to the City.

Section 7. **RATE CRITERIA.** The City shall establish a rate schedule for all Service Levels for the residential Solid Waste, Recycling and Compostables collection services to be provided by Grantee under this franchise. All rate schedules shall be subject to approval and adoption by the City Council by ordinance. The City shall set rates sufficient for Grantees in aggregate to recover Grantees' projected Allowable Expenses, Operating Margin and Pass-Through Expenses as defined in this franchise. The rate schedules established by the City shall reasonably reflect the distribution of customer Service Levels of residential Solid Waste, Recycling and Compostables collection service provided by the franchisees in the City. The rate schedule may also include incentives to Residential Customers to reduce their Solid Waste and to reuse and recycle. In accordance with administrative rules, recycling revenues will be offset for the benefit of customers through a weighted average of revenues.

Section 8. **RATE ADJUSTMENT.** The City Council shall periodically adjust the rate schedules established under the franchise, as set forth below:

8.1 **Rate Review.** In order to insure that the rate schedule in effect at any time under this Agreement ("Current Rate Schedule") conforms with the rate setting criteria established in Section 7 ("Rate Criteria"), the rates shall be subject to review as provided in this Section (hereinafter "rate review"). If as a result of the rate review the City determines that the Current Rate Schedule does not conform to the Rate Criteria, the City Council shall adjust the rate schedule to conform with the Rate Criteria.

(A) The City shall conduct an annual rate review in accordance with the process set forth in this agreement.

(B) **Extraordinary Rate Review:**

(1) The City may initiate extraordinary rate review, at any time, if it has reasonable cause to believe that the Current Rate Schedule results in an Operating Margin that is either less than eight and one-half (8.5%) or greater than ten and one-half (10.5%);

(2) Grantee may initiate extraordinary rate review at any time upon request of franchise haulers representing at least thirty percent (30%) of the City's residential collection service customers. The City shall initiate extraordinary rate review within thirty (30) days of such request;

(3) The burden of proof in any extraordinary rate review shall be on the party initiating rate review; and

(4) The City shall complete extraordinary rate review and adopt a modified rate schedule, if any, within 180 days of such a request.

8.2 During the annual rate review or within thirty (30) days following the initiation of an extraordinary rate review, the City shall select a representative number of franchisees as described below, for the purpose of determining the reasonableness of the Allowable Expenses in the preceding rate period, and the projected Allowable Expenses, Operating Margin and Pass-Through Expenses for the next succeeding rate period;

(A) The representative franchisees shall be selected by the City based upon a weighted random sampling technique. This technique assigns each Grantee a probability of selection proportional to the Grantee's share of solid waste customers served. The number of Grantees selected and the details of the selection process shall be as specified in the Administrative Rules.

(B) To assist in determining the reasonableness of the current and proposed rate schedules, the City may at its discretion, have Grantees' detailed cost reports reviewed by an independent Certified Public Accountant. The accountant used in this process shall be selected and paid by the City. Any adjustments to the detailed cost reports recommended by the accountant described above may be taken into consideration in the rate review process.

(1) In addition to the review by the accountant selected by the City, the City may also consider information submitted by Grantee or others relevant to the establishment of the rate schedules. Such information may include expense information available, adjusted for cost of living, if necessary, relating to other similarly situated residential collection companies located in other urban areas on the West Coast of the United States. The City shall incorporate all such information into the ratemaking record.

(2) Based on its determination of the projected Allowable Expenses, Operating Margin and projected Pass-Through Expenses, the City shall establish a rate schedule for all Service Levels applicable to all residential Solid Waste, Recycling and Composting collection franchises in the City of Portland. The overall rate schedule shall be sufficient to allow Grantees in aggregate to recover Grantees' projected Allowable Expenses, Pass-Through Expenses and Operating Margin as set forth in Section 7.

8.3 Change in Law or Material Change in Cost

(A) For the purposes of this Section 8.3, the term "Change in Law" means any new or revised law, statute, rule, regulation, ordinance, order or requirement of any federal, state, regional or local government effective after the effective date of this franchise. The term "Material Change" means any material change in the Grantees' Allowable Expenses to perform its obligations under this franchise, and which is beyond Grantee's control, including change in location of disposal site, change in method of collection, any amendment to the list of Recyclable Materials, and any change in the City's Solid Waste, Recycling or Composting collection program requirements.

(B) If a Change in Law or Material Change significantly increases Grantees' projected Allowable Expenses to perform its obligations under this franchise, the City shall adjust the rate schedule either prior to the effective date of the Change in Law or the Material Change, or as soon thereafter as practicable. For all other Changes in Law or Material Changes that increase Grantees' projected Allowable Expense to perform its obligations under this franchise, the City shall adjust the rate schedule at a date specified during the annual rate review. If the parties are unable to agree either that a Change in Law or Material Change has occurred, or on the effect on the Grantees' projected cost in performance of this franchise, the provisions of Section 8.1(B)(2) or any other remedy available to Grantee may be invoked.

8.4 (A) Rate Adjustment Dispute Resolution. If the Grantee is dissatisfied with a rate

adjustment approved by the City, then Grantee may seek review of the rate adjustment by any proceedings available including a claim for breach of contract.

(B) The Parties agree that writ of review shall not be the exclusive means of resolving disputes under this franchise and the City agrees not to raise as a bar to any breach of contract proceeding brought by Grantee that writ of review is the exclusive remedy.

Section 9. COVENANT TO INDEMNIFY AND HOLD THE CITY HARMLESS

9.1 Grantee agrees and covenants to indemnify, defend and hold the City, its officers, agents and employees harmless from any claim for injury, damage, loss, liability, cost or expense, including court and appeal costs and attorney fees or expenses, arising from any casualty or accident to person or property by reason of any act done under this franchise, by or for Grantee, its officers, agents or employees, or by reason of any neglect or omission of Grantee to keep its equipment or operating system in safe condition. Grantee shall consult and cooperate with the City while conducting its defense of the City.

9.2 Grantee also hereby agrees to indemnify the City for any damages, claims, additional costs or expenses assessed against or payable by the City arising out of or resulting, directly or indirectly, from Grantee's failure to conduct its business operations in accordance with federal, state or local laws governing such operation, unless Grantee's failure arises directly from the City's negligence or willful misconduct.

Section 10. LIABILITY INSURANCE

10.1 Liability Insurance Requirements

(A) The Grantee shall maintain public liability and property damage insurance that protects the Grantee and the City, as well as the City's officers, agents, and employees from the claims referred to in Section 5. The insurance shall provide coverage at all times of not less than \$1,000,000 combined single limit for bodily injury liability and property damage liability per occurrence with an annual aggregate limit of not less than \$3,000,000. The limits of the insurance shall be subject to any changes as to maximum statutory limits of liability imposed on municipalities of the State of Oregon during the term of the Franchise.

(B) The insurance shall be without prejudice to coverage otherwise existing and shall name as additional insureds the City and its officers, agents and employees. Notwithstanding the naming of the additional insureds, the insurance shall protect each insured in the same manner as though a separate policy had been issued to each, but nothing herein shall operate to increase the insurer's liability as set forth elsewhere in the policy beyond the amount or amounts for which the insurer would have been liable if only one person or interest had been named as insured. The coverage must apply as to claims between insureds on the policy.

(C) The insurance shall provide that the insurance shall not be canceled or materially altered without thirty (30) days prior written notice first being given to the City Auditor. If the insurance is canceled or materially altered within the term of this Franchise, Grantee shall provide a replacement policy with the same terms. Grantee agrees to maintain continuous uninterrupted coverage, in the terms and amounts required, for the duration of the Franchise.

(D) Grantee shall maintain on file with the City Auditor a certificate of insurance certifying the insurance coverage required above. The adequacy of the insurance shall be subject to the approval of the City Attorney. Failure to maintain liability insurance shall be cause for conditional forfeiture of this franchise by the City.

10.2 In the alternative to providing a certificate of insurance to the City, certifying liability insurance coverage as required above, Grantee may provide the City with a statement certifying its self-insurance. Grantee's self-insurance shall provide the same amount and scope of protection for the Grantee and the City, its officers, agents and employees, as otherwise provided under Section 10.1. The adequacy of self-insurance under the terms of this Section shall be subject to the City Attorney's review and approval. Failure to maintain adequate self-insurance under this paragraph shall be cause for conditional forfeiture of this franchise by the City.

Section 11. WORKER'S COMPENSATION INSURANCE

11.1 Grantee shall obtain worker's compensation insurance coverage for all of its workers, employees and subcontractors as provided by Chapter 656 of the Oregon Revised Statutes (the Oregon Worker's Compensation Law). Grantee shall maintain continuous uninterrupted worker's compensation coverage, in the amounts required by law, for the term of this franchise.

11.2 In the event the Grantee's worker's compensation insurance coverage expires or is revoked during the term of this franchise, Grantee shall timely renew such insurance before its expiration, or otherwise arrange for its timely replacement, as required by the Oregon Worker's Compensation Law. Grantee shall provide the City with further certificates of worker's compensation insurance as such renewals occur.

11.3 Grantee shall maintain on file with the City Auditor a certificate of worker's compensation insurance certifying the coverage required above. The adequacy of the insurance shall be subject to the approval of the City Attorney. Failure to maintain worker's compensation insurance coverage shall be cause for conditional forfeiture of this franchise by the City.

Section 12. NONDISCRIMINATION. In performing the collection services hereunder, Grantee shall not discriminate against any person on the grounds of race, sex, sexual orientation, age, creed, color, religion national origin, marital or economic status, or physical or mental disability.

Section 13. FRANCHISE NOT EXCLUSIVE

13.1 This franchise is not exclusive. The City expressly reserves the right to grant rights or franchises to other persons or corporations as well as the right in its own name to use its streets for purposes similar to or different from those allowed to Grantee hereunder.

13.2 The City may grant additional franchises for Solid Waste, Recyclable Material and Compostables collection in Grantee's existing Franchise Area if it is determined that a need exists for the additional service. The determination of need is the responsibility of the City Council which shall consider the following criteria:

(A) The effect that multiple franchises in a Franchise Area would have on the efficient delivery of service, including but not limited to, the unnecessary deterioration of city streets or inefficient fuel consumption;

(B) The effect that multiple franchises in a Franchise Area would have on the opportunity for the existing Grantee to make a reasonable Operating Margin on allowed operating expenses;

(C) The effect that multiple franchises in a Franchise Area would have on the Grantee's ability to generate the revenues needed to invest in efficient, modern equipment;

(D) The effect that multiple franchises in a Franchise Area would have on Grantee's ability to provide the best service, in the determination of the City Council, in a manner consistent with the public interest; and

(E) Any other factors determined by the City Council to be relevant.

13.3 The City shall not grant any additional franchises for Solid Waste, Recyclable Material and Compostables collection in Grantee's existing Franchise Area, without a prior public hearing at which time Grantee shall have the opportunity to be heard.

Section 14. CITY'S WRITTEN CONSENT REQUIRED FOR ASSIGNMENT, TRANSFER, MERGER, LEASE OR MORTGAGE

14.1 (A) This franchise shall not be sold, leased, mortgaged, assigned, merged or otherwise transferred without the prior written consent of the City as expressed by ordinance, except to entities that control, are controlled by, or are under common control with the Grantee. Grantee shall notify the City of any such sales, leases, mortgages, assignments, mergers or other transfers to such entities within ten (10) days of such transfers. The City's granting of consent in one instance shall not render unnecessary any subsequent consent in any other instance. Nothing contained in this Section 14 shall be deemed to prohibit the mortgage, pledge, or assignment of Grantee's tangible assets for the purpose of financing the acquisition of equipment for the operation of the Grantee's franchise without the City's consent, but any such mortgage, pledge or assignment shall be subject to the City's other rights contained in this Franchise.

(B) In determining whether the City will consent to any sale, lease, mortgage, assignment, transfer or merger, the City may inquire into the technical, legal and financial qualifications of the prospective party. Grantee shall assist the City in any such inquiry. The City shall not unreasonably delay or withhold its consent to any such sale, lease, mortgage, assignment, transfer or merger. The City may condition any sale, lease, mortgage, assignment transfer or merger upon such conditions as it deems appropriate, related to the technical, legal, and financial qualification of the prospective party to perform according to the terms of this franchise.

(C) No sale, lease, mortgage, assignment, transfer or merger for which the City's consent by ordinance is required may occur until successor, assignee or lessee has complied with the requirements of Section 10, including, but not limited to, providing certificates of insurance, unless the City Council waives such compliance by ordinance. Within ten (10) days after

execution and delivery of any instrument so consented to by the City, Grantee shall file with the Auditor an executed counterpart or certified copy thereof.

14.2 Grantee shall not subcontract its work under this franchise, in whole or in part, without the prior written approval of the City. Grantee shall require any approved subcontractor to agree, as to the portion subcontracted, to fulfill all of Grantee's obligations as set forth in this franchise. Notwithstanding the City's approval of a subcontractor, Grantee shall remain obligated for full performance under this franchise, and the City shall incur no obligation other than its obligations to the Grantee hereunder. Grantee agrees that if subcontractors are employed in the performance of this franchise, Grantee and its subcontractors are subject to the requirements and sanctions of the Oregon Worker's Compensation Law.

14.3 No sale, lease, mortgage, assignment, transfer or merger of this franchise shall be valid and binding that endeavors to relieve the Grantee of any obligations to make payments under this franchise, including but not limited to franchise fees under this franchise, or civil penalties assessed by the City under this franchise or the Administrative Rules that accrued prior to the date of the sale, lease, mortgage, assignment, transfer or merger, unless the successor has affirmatively agreed, in writing, to assume all such obligations.

Section 15. FORFEITURE AND OTHER REMEDIES

15.1 Immediate Forfeiture

(A) In addition to any rights set out elsewhere in this franchise, the City Council reserves the right to declare an immediate forfeiture of the franchise, and all of Grantee's rights arising thereunder, in the event that:

(1) Grantee accrues assessments in excess of the allowable limit for failure to comply with the Solid Waste, Recyclable Material and Compostables collection standards, within a 365 day period, as established in the Administrative Rules; or

(2) Grantee is found by a court of competent jurisdiction to have practiced any fraud or deceit upon the City.

15.2 Conditional Forfeiture

(A) In addition to any rights set out elsewhere in this franchise, the City Council reserves the right to declare a conditional forfeiture of the franchise, and all of Grantee's rights thereunder, in the event that:

(1) Grantee fails to comply with any provision of the franchise;

(2) Grantee fails to obtain and maintain any permit required by the City or any federal, state or other regulatory body;

(3) Grantee's noncompliance with the Solid Waste, Recyclable Materials or Compostables collection standards creates a hazard to public health or safety;

(4) Grantee fails to maintain liability insurance as required by Section 10 herein;

(5) Grantee fails to maintain Worker's Compensation Insurance as required by Section 11 herein; or

(6) Other cause exists for the forfeiture of this franchise.

(B) In the event of a conditional forfeiture, the City shall give Grantee thirty (30) days prior written notice of its intent to exercise its rights under this Section, stating the reasons for such action. If Grantee cures the stated reason within the thirty (30) day period, or if Grantee initiates efforts satisfactory to the City to remedy the stated reason and the efforts continue in good faith, the City shall not exercise its rights under this Section. If Grantee fails to cure the stated reason within the thirty (30) day notice period, or if Grantee does not undertake efforts satisfactory to the City to remedy the stated reason, then the City may exercise all its authority as set forth in this Section.

15.3 Civil Penalties. In addition to any rights set out elsewhere in this franchise, as well as its rights under the City Code, the City reserves the right to impose scheduled civil penalties for failure to comply with the Solid Waste, Recyclable Material and Compostables collection standards set forth in the Administrative Rules.

15.4 Suspension

(A) Upon written notification to Grantee of the immediate forfeiture of the franchise, all of Grantee's franchise rights shall be immediately suspended.

(B) Upon written notification to Grantee of the conditional forfeiture of the franchise, all of Grantee's franchise rights may be suspended, with reinstatement of the franchise rights conditioned upon Grantee's curing the stated reason for the conditional forfeiture within the time specified by the City.

Section 16. PREVENTING INTERRUPTION OF SERVICE

16.1 If, at any time during the term of this franchise, either: (A) Grantee's rights are suspended; or (B) for a period of three (3) consecutive working days or more, Grantee fails for any reason to collect and remove Solid Waste, Recyclable Materials or Compostables as required in this franchise, except as provided in Section 17 herein, the City may immediately, upon written notice to the Grantee, cause such Solid Waste, Recyclable Material or Compostables to be collected and removed by whatever means are available to the City. In this event, Grantee shall, upon demand, immediately provide the City with driver route listings and any other necessary operational records.

16.2 Grantee agrees that it shall be responsible for reimbursing the City for any and all incurred costs in providing the collection service identified in Section 16.1, including but not limited to, (A) all fees paid to Grantee for provision of services otherwise provided by the City under Section 16.1; and (B) any costs incurred by the City in excess of the fees that would have been paid to Grantee if Grantee had performed the services performed by the City under Section

16.1.

Section 17. FORCE MAJEURE

17.1 For purposes of this Section 17 "force majeure" shall mean acts of God, landslides, lightning, forest fires, floods, volcanic eruptions, earthquakes, civil disturbances, acts of terrorism or of the public enemy, wars, blockades, public riots, explosions, shortage of materials and other events which are not reasonably within the control of the City or Grantee.

17.2 If, as a result of force majeure, either Grantee or the City is wholly or partially unable to meet its obligations under this franchise, then that party shall give the other party prompt notice of such force majeure, describing the same in reasonable detail.

17.3 In the event of force majeure, the Grantee's primary responsibility shall be to reestablish regular routes and schedules for collection of Solid Waste, Recyclable Materials, and Compostables as soon after the event as possible. After the event of a force majeure, Grantee shall make the reestablishment of routine collection and disposal of Solid Waste the highest priority over the reestablishment collection Recyclables and Compostables.

17.4 As soon as practicable after force majeure, Grantee shall advise the City when it is anticipated that normal routes and schedules can be resumed. The City may allow Grantee a variation from regular routes and schedules for the duration of the force majeure. The City shall make an effort through the local news media to inform the public when regular services may be resumed. Some events of force majeure may require that Grantee hire additional equipment, employ additional personnel, or work existing personnel on overtime hours to reestablish collection.

17.5 Within 270 days of the renewal of the franchise, Grantees with more than 7,000 Portland residential customers shall submit to the City a written preparedness plan on a form provided by the City demonstrating Grantees' arrangements to provide vehicles and personnel and to maintain uninterrupted service in case of force majeure.

Section 18. RENEWAL OF FRANCHISE

18.1 (A)

(1) During the six (6) month period beginning with the forty-eighth (48) month from the effective date of this franchise, the City Council may, at its discretion, initiate a process to review the operation of the franchise, based upon both system wide review and the performance of individual Grantees. During this same six (6) month period, Grantee may initiate franchise review upon request of franchised haulers representing at least thirty percent (30%) of the City's Residential Customers.

(2) The City Council has publicly indicated that the City will begin evaluating the system for collection of commercial solid waste, recycling and compostables. The City Council has further indicated that the current commercial collection system may be significantly overhauled. The current commercial hauling system at the time of this franchise renewal is for the issuance of one-year permits, with fees based on tonnage. If the City Council adopts a resolution directing the Bureau of Planning and Sustainability to undertake development and

negotiation of a franchise for commercial solid waste, recycling and compostables collection, the Bureau of Planning and Sustainability shall provide written notice to each of the residential franchisees. After such notice is provided to the franchisees, the City Council may, at its discretion, initiate franchise review regarding the residential franchise collection system for Solid Waste, Recycling and Composting, based upon a determination by the Council that such review is necessary to address coordination, consistency, and territorial values in franchising collection of commercial solid waste, recycling and composting.

(B) If initiated by the City, the franchise review process shall be triggered by the adoption of a resolution by the City Council outlining the scope of the review. If initiated by a written notice from the franchised haulers, the City Council shall adopt a resolution outlining the scope of review within thirty (30) days of the written notice of the request. After the City Council's adoption of the resolution, the Bureau of Planning and Sustainability shall undertake a review of the franchise, and report back to the City Council within 180 days of the date upon which the City Council adopts the resolution.

18.2 The franchise review process may consider the following factors, among others identified by the City Council in its resolution.

(A) System Review:

(1) Performance of the franchise system for the collection of Solid Waste, Recycling and Composting;

(2) System performance indicators, including quantities of Solid Waste disposal and Recyclables and Compostables collected, and overall rates of participation in recycling and composting;

(3) Measurements of customer satisfaction, including but not limited to customer concerns, results of public surveys, and system compliance issues;

(4) Comparative analysis of programs for Solid Waste, Recycling and Composting collection used in other cities, including but not limited to system features, program costs, funding mechanisms and overall rates of waste diversion and participation in recycling and composting; and,

(5) Whether renewal of the franchise system is in the overall public interest.

(B) Performance of Grantee:

(1) Grantee's performance of its obligations and responsibilities under this franchise, including Grantee's technical and financial abilities to perform;

(2) Grantee's responsiveness to customer communications to the City;

(3) Grantee's ability to provide evidence of insurability; and,

(4) Whether renewal of Grantee's franchise is in the public interest.

18.3 (A) Upon submission of the review by the Bureau of Planning and Sustainability and acceptance of the review by the Council, the City Council may decide whether or not to renew the franchise, upon such terms and conditions as it deems appropriate.

(B) If the City Council decides to proceed with franchise system renewal, the Council shall direct that the Bureau of Planning and Sustainability send out franchise renewal application to Grantee by certified mail. The City shall issue a franchise renewal application to Grantee unless the City Council has determined the Grantee has not met the performance as set forth in 18.2 (B). If issued to the Grantee, the completed application shall be returned within thirty (30) days after issuance. Any failure by Grantee to return the completed application within thirty (30) days shall be deemed a rejection of Grantee's franchise renewal. Upon application by Grantee for renewal of its franchise, Grantee shall have the first and preferential right to take and receive such authority upon the terms and conditions approved by the City. Upon receipt of the completed application, the City Council may direct the Bureau of Planning and Sustainability by resolution, to prepare a renewal franchise, upon such terms and conditions as the Council deems appropriate. The renewal franchise shall be prepared by the Bureau of Planning and Sustainability and submitted to the City Council within 180 days of the approval of the resolution. The renewal franchise shall be for a term of ten (10) years.

Section 19. SEVERABILITY. If any provision of this franchise, or its application to any person or circumstance, is declared invalid or unenforceable, the remainder of this franchise shall not be affected thereby.

Section 20. DISPUTE RESOLUTION

20.1 Choice of Forum. Any litigation between the City and the Grantee arising under or regarding this franchise shall occur, if in the state courts, in the Multnomah County Court having jurisdiction thereof, and if in the federal courts, in the United States District Court for the District of Oregon, Portland Division.

20.2 Mediation. By the effective date of this franchise, the City shall develop, and have in effect, Administrative Rules regarding the non-binding mediation of disputes between the parties under this franchise, including any disputes regarding the Administrative Rules.

20.3 Choice of Law. This franchise shall be governed by and construed in accordance with the laws of the State of Oregon, even if Oregon's choice of law rules would otherwise require application of the law of a different state.

Section 21. NOTICE

21.1 Except as specifically provided elsewhere in this franchise, any notice provided for under this franchise shall be sufficient if in writing and (1) delivered to the following addressee by depositing said notice in United States first class mail, postage prepaid, (2) sent by overnight or commercial air courier, or (3) sent by facsimile transmission, addressed as follows, or to such other address as the receiving party hereafter shall specify in writing:

(A) If to the City:

Bureau of Planning and Sustainability
 Solid Waste & Recycling Program
 1900 SW 4th Avenue
 Portland OR 97201
 FAX: (503) 823-4562

(B) If to Grantee:

(C) If required by Oregon law to maintain a registered agent in the state, notice to the Grantee shall also be sufficient by delivery to the Grantee's registered agent by any of the means identified in Section 21.1.

21.2 Any such notice, communication or delivery shall be presumed to have been effective and delivered upon the earliest to occur of: (A) actual delivery; (B) three (3) business days after depositing in the United States mail as aforesaid; (C) one (1) business day after shipment by commercial air courier as aforesaid; or (D) the same day as facsimile transmission (or the first business day thereafter if faxed on a Saturday, Sunday or legal holiday).

Section 22. ENTIRE AGREEMENT; AMENDMENT. This renewal franchise constitutes the entire agreement between the parties concerning the subject matter hereof and supersedes any and all other communications, representations, proposals, understandings or agreements, either written or oral, previously entered into by Grantee and the City. The terms of this franchise may not be amended in whole or in part, except by a writing signed by both parties hereto.

Section 23. OTHER AUTHORITY SUPERSEDED. Upon effectiveness of this renewal franchise, any and all authority to operate previously granted to Grantee by the City of Portland including the previous residential Solid Waste, Recycling and Composting collection franchise embodied in Ordinance No. 181666, is superseded by this franchise.

Section 24. **WRITTEN ACCEPTANCE.** Within thirty (30) days after the ordinance granting this franchise becomes effective, Grantee shall file in the Office of the Auditor of the City of Portland a written acceptance, executed by the Grantee, of this franchise on the form attached to the franchise as Exhibit B, approved by the City Attorney. A failure on the part of the Grantee to file such written acceptance within such time shall be deemed an abandonment and rejection of the rights and privileges conferred hereby and the ordinance granting this franchise shall thereupon be null and void. Such acceptance shall be unqualified and shall be construed to be an acceptance of all the terms, conditions and restrictions contained in this franchise.

Passed by the Council:

DEC 19 2012

Commissioner Mayor Sam Adams

Prepared by: Megan Ponder

Date Prepared: October 31, 2012

LaVonne Griffin-Valade

Auditor of the City of Portland

By

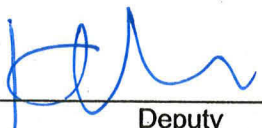
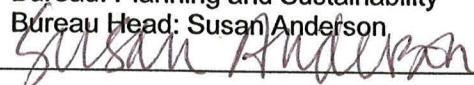



Deputy

088281

Agenda No. **185830**
ORDINANCE NO.
Title

Grant residential solid waste, recycling and composting collection franchises in the city (Ordinance)

INTRODUCED BY Commissioner/Auditor: Mayor Sam Adams	CLERK USE: DATE FILED <u>NOV 08 2012</u>
COMMISSIONER APPROVAL Mayor—Finance and Administration - Adams Position 1/Utilities - Fritz Position 2/Works - Fish Position 3/Affairs - Saltzman Position 4/Safety - Leonard	LaVonne Griffin-Valade Auditor of the City of Portland By:  Deputy
BUREAU APPROVAL Bureau: Planning and Sustainability Bureau Head: Susan Anderson  Prepared by: Megan Ponder Date Prepared: October 31, 2012	ACTION TAKEN: NOV 14 2012 PASSED TO SECOND READING DEC 19 2012 9:30 A.M.
Financial Impact & Public Involvement Statement Completed <input checked="" type="checkbox"/> Amends Budget <input type="checkbox"/>	
Portland Policy Document If "Yes" requires City Policy paragraph stated in document. Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	
Council Meeting Date November 14, 2012	
City Attorney Approval: required for contract, code, easement, franchise, comp plan, charter 	

AGENDA
TIME CERTAIN <input checked="" type="checkbox"/> Start time: 2:30 pm
Total amount of time needed: 60 min (for presentation, testimony and discussion)
CONSENT <input type="checkbox"/>
REGULAR <input type="checkbox"/> Total amount of time needed: _____ (for presentation, testimony and discussion)

FOUR-FIFTHS AGENDA	COMMISSIONERS VOTED AS FOLLOWS:		
		YEAS	NAYS
1. Fritz	1. Fritz	✓	
2. Fish	2. Fish	✓	
3. Saltzman	3. Saltzman	✓	
4. Leonard	4. Leonard	✓	
Adams	Adams	✓	