

RESOLUTION NO. 2017-137

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF ROHNERT PARK
APPROVING ASSIGNMENT OF THE THIRD AMENDED AND RESTATED
AGREEMENT BETWEEN THE CITY OF ROHNERT PARK AND ROHNERT PARK
DISPOSAL, INC. FOR REFUSE, RECYCLABLE MATERIALS COMPOSTABLE
MATERIALS, AND STREET SWEEPING SERVICES BETWEEN ROHNERT PARK
DISPOSAL INC. AND RECOLOGY SONOMA MARIN**

WHEREAS, Article XI, § 7 of the California Constitution authorizes cities to protect public health and safety by taking measures in furtherance of their authority over police and sanitary matters;

WHEREAS, the Legislature of the State of California, by enactment of the California Integrated Waste Management Act of 1989 (California Public Resources Code, section 40000 et seq.), has declared that it is in the public interest to authorize and require local agencies to make adequate provisions for refuse handling within their jurisdiction;

WHEREAS, under Section 8.12 of the Rohnert Park Municipal Code, the City has the authority to provide for and otherwise regulate the collection and transportation of refuse, recyclable materials, and compostable materials, including permitting of self-hauling of such materials by its citizens;

WHEREAS, the City has declared its intent to maintain reasonable rates for the collection, transportation and recycling, composting and disposal of refuse;

WHEREAS, Rohnert Park Municipal Code section 8.12.200 requires that waste collection services be provided by contract;

WHEREAS, the City desires to maintain effective solid waste collection and disposal services for City residents; and,

WHEREAS, on November 28, 2017 the approved the Third Amended and Restated Franchise Agreement for Refuse, Recyclable Materials, Compostable Materials and Street Sweeping Services between the City of Rohnert Park and Rohnert Park Disposal, Inc. (the "Franchise Agreement");

WHEREAS, Rohnert Park Disposal, Inc. and the City entered into that certain Multiple Provider Exclusive Temporary Debris and Roll-off Collection Service Agreement, dated as of November 17, 2011 ("Temporary Debris Collection Agreement"), which as subsequently amended has a term through December 31, 2017; and

WHEREAS, the Ratto Group of Companies Inc. and its owners and affiliated entities, including Rohnert Park Disposal, Inc. (collectively, "Ratto"), entered into an Asset Purchase Agreement dated August 11, 2017 which provides for the purchase by Recology Inc. or its designated subsidiaries of substantially all of Ratto's assets;

WHEREAS, Ratto has requested the City's consent to assign the Franchise Agreement to Recology Sonoma Marin, a wholly-owned subsidiary of Recology Inc.;

WHEREAS, pursuant to Section 12.06 of the Franchise Agreement, Rohnert Park Disposal, Inc. must pay for the reasonable expenses for the City to approve of any assignment, must provide satisfactory proof that the proposed assignee has the appropriate waste management experience and sound waste management practices, and any assignment may not result in increased customer rates;

WHEREAS, City staff and the City's consultant, R3 Consulting Group, Inc., have examined the financial data and solid waste industry compliance records of Recology Inc. and its subsidiary, Recology Sonoma Marin; and

WHEREAS, the City's consultant, R3 Consulting Group, Inc., has performed due diligence and determined Recology Sonoma Marin has the resources to be able to effectively carry out the obligations listed in the Collection Services Agreement; and

WHEREAS, the attached Assignment and Assumption Agreement provides that the City will consent to the assignment of the Franchise Agreement on the terms and conditions set forth therein, including payment of all amounts due by Rohnert Park Disposal, Inc. under the Franchise Agreement and Temporary Debris Collection Agreement, and the receipt of certain representations and warranties from Recology Sonoma Marin.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Rohnert Park as follows:

Section 1. Recitals. The above-referenced recitals are true and correct and material to this Resolution.

Section 2. City Consent. The City Council hereby consents to the assignment of the Franchise Agreement to Recology Sonoma Marin on such terms as are set forth in the attached Assignment and Assumption Agreement.

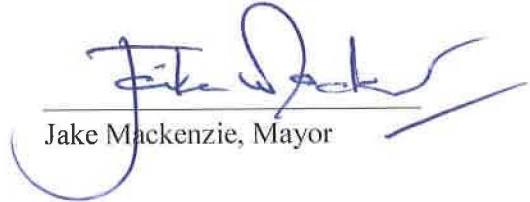
Section 3. Execution. The City Manager is hereby authorized and directed to execute and take all actions necessary to effectuate an assignment in substantially similar form to the Assignment and Assumption Agreement attached hereto as Exhibit A and incorporated by this reference, subject to minor modification by the City Attorney.

Section 4. Environmental Review. The City Council hereby finds that the activity taken by the City Council is exempt from the California Environmental Quality Act (CEQA) under CEQA Guidelines section 15301 (existing facilities), 15308 (actions by regulatory agencies for protection of the environment) and under 15061(b)(3) (the common sense exemption), because it can be seen with certainty that there is no possibility that the adoption of this agreement will have a significant effect on the environment.


Section 5. Severability. If any action, subsection, sentence, clause or phrase of this Resolution shall be held invalid or unconstitutional by a court of competent jurisdiction, such invalidity shall not affect the validity of the remaining portions of this Resolution that can be given effect without the invalid provisions.

DULY AND REGULARLY ADOPTED by the City Council of the City of Rohnert Park
this 28th day of November, 2017.

CITY OF ROHNERT PARK


Jake Mackenzie, Mayor

ATTEST:


Caitlin Saldanha, Deputy City Clerk

Attachments: Exhibit A – Assignment Agreement

AHANOTU: Aye BELFORTE: Aye CALLINAN: Aye STAFFORD: Aye MACKENZIE: Aye
AYES: (5) NOES: (0) ABSENT: (0) ABSTAIN: (0)

ASSIGNMENT AND ASSUMPTION AGREEMENT

This Assignment and Assumption Agreement ("Agreement") is entered into as of November __, 2017 by and among the City of Rohnert Park, a California municipal corporation ("City"), Rohnert Park Disposal, Inc., a California corporation ("RPDI"), and Recology Sonoma Marin, a California corporation ("Recology") (collectively "Parties").

WHEREAS, City and RPDI are parties to a Third Amended and Restated Agreement for Refuse, Recyclable Materials, Compostable Materials and Street Sweeping Services, dated as of November [], 2017 (the "Franchise Agreement");

WHEREAS, The Ratto Group of Companies Inc. and its owners and affiliated entities, including RPDI (collectively, "Ratto"), entered into an Asset Purchase Agreement dated August 11, 2017 (the "APA") which provides for the purchase by Recology Inc. or its designated subsidiaries of substantially all of Ratto's assets;

WHEREAS, in connection with the closing of the transactions contemplated by the APA (the "Closing"), RPDI wishes to assign the Franchise Agreement to Recology, and Recology wishes to accept such assignment;

WHEREAS, the Parties acknowledge that the performance of the Franchise Agreement involves rendering a vital service to City's residents and businesses, and that City previously selected RPDI to perform the services specified therein based on (1) RPDI's experience, skill and reputation for conducting its waste management operations in a safe, effective and responsible fashion, at all times in keeping with applicable waste management laws, regulations and good waste management practices, and (2) RPDI's financial resources to maintain the required equipment and to support its indemnity obligations to City under the Franchise Agreement;

WHEREAS, Section 12.06 of the Franchise Agreement provides that the Franchise Agreement may not be assigned by RPDI without the prior written consent of City;

WHEREAS, Section 12.06 of the Franchise Agreement provides there shall be no increase in costs to the services provided of any kind resulting directly or indirectly from the assignment of RPDI's interest under the Franchise Agreement.

WHEREAS, Section 12.06 of the Franchise Agreement provides that the City is not required to consider consent to assignment until:

- A. RPDI undertakes to pay the City its reasonable expenses for attorneys' fees and investigation costs necessary to investigate any proposed assignee, and to review and finalize any document required for such assignment;
- B. The City is furnished with three years of audited financial statements of the assignee's operations;
- C. The City is furnished with satisfactory proof that the proposed assignee has at least ten (10) years of Refuse management experience on a scale equal to or exceeding the sale of operations conducted by Contractor under this Agreement; that (ii) in the last five (5) years, the proposed assignee has not suffered any citations or other adverse action or decision from any federal, state, or local jurisdiction over its waste

management operations due to any significant failure to comply with federal, state, or local waste management laws and that the assignee has provided the City with a complete list of such citations, actions, and decisions; that (iii) the proposed assignee has at all times conducted its operations in an environmentally safe and conscientious fashion; that (iv) the proposed assignee conducts its operations in accordance with sound waste management practices and in full compliance with all applicable federal, state and local laws regulating the collection and disposal of waste; and (v) of any other information required by City to ensure the proposed assignee can fulfill the terms of this Agreement in a timely, safe and effective manner.

WHEREAS, RPDl and the City entered into that certain Multiple Provider Exclusive Temporary Debris and Roll-off Collection Service Agreement, dated as of November 17, 2011 ("Temporary Debris Collection Agreement"), which as subsequently amended has a term through December 31, 2017; and

WHEREAS, City wishes to ensure that payment obligations by RPDl under the Franchise Agreement and Temporary Debris Collection Agreement will be satisfied notwithstanding the transactions contemplated by the APA.

NOW, THEREFORE, in consideration of the mutual benefits accruing to the Parties and other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. Assignment by RPDl. Subject to and effective as of the Closing, RPDl will assign to Recology all of its right, title and interest in and to the Franchise Agreement.
2. Acceptance by Recology. Subject to and effective as of the Closing, Recology will accept such assignment and will assume all duties and obligations of RPDl under the Franchise Agreement from and after the Closing.
3. Notification to City. Recology shall notify City in writing that the Closing has occurred by the end of the following business day thereafter. Recology shall satisfy the requirements of this section by providing notice via email to Assistant City Manager Don Schwartz at dschwartz@rpcity.org and City Manager Darrin Jenkins at dajenkins@rpcity.org.
4. RPDl Representations and Warranties. RPDl has full power and authority to execute and deliver this Agreement, and the other documents to be executed and delivered pursuant to this Agreement, and to perform and observe the terms and provisions of this Agreement. This Agreement and all other documents or instruments executed and delivered, or to be executed and delivered, pursuant to this Agreement have been executed and delivered by persons who are duly authorized to execute and deliver the same for and on behalf of RPDl and Ratto, and all actions required under the organizational documents and applicable governing law for the authorization, execution, delivery and performance of this Agreement and all other documents or instruments executed and delivered, or to be executed and delivered, pursuant to this Agreement, have been duly taken.
5. Recology Representations and Warranties. As a material inducement to the City's consent to assignment, Recology provides the following representations and warranties to City as of the date Recology executes this Agreement:

- a. Recology is a corporation duly organized, validly existing and in good standing under the laws of the State of California. It is qualified to transact business in the State of California and has the corporate power to own its property and carry on its business as now owned and operated and as may be required by the Franchise Agreement.
- b. Recology has full corporate power and corporate authority to execute and deliver this Agreement, and the other documents to be executed and delivered pursuant to this Agreement, and to perform and observe the terms and provisions of this Agreement and the Franchise Agreement. This Agreement and all other documents or instruments executed and delivered, or to be executed and delivered, pursuant to this Agreement have been or will be executed and delivered by persons who are duly authorized to execute and deliver the same for and on behalf of Recology, and all actions required under Recology's organizational documents and the California Corporations Code for the authorization, execution, delivery and performance of this Agreement and all other documents or instruments executed and delivered, or to be executed and delivered, pursuant to this Agreement, have been or will be duly taken.
- c. To the best of Recology's knowledge, after reasonable investigation, neither the execution or delivery of this Agreement, nor Recology's performance of this Agreement or the Franchise Agreement: (i) conflicts with, violates, or results in a breach of any applicable law; or (ii) conflicts with, violates or results in a breach of any term or condition of any judgment, order or decree of any court, administrative agency or other governmental authority, or any agreement or instrument to which Recology is a party or by which Recology or any of its properties or assets are bound, or constitutes a default thereunder.
- d. To the best of Recology's knowledge, after reasonable investigation, there is no action, suit, proceeding or investigation, at law or in equity, before or by any court or governmental authority, commission, board, agency or instrumentality decided, pending or threatened against Recology wherein an unfavorable decision, ruling or finding, in any single case or in the aggregate, would materially adversely affect the performance by Recology of its obligations under this Agreement or the Franchise Agreement or which, in any way, would adversely affect the validity or enforceability of this Agreement or the Franchise Agreement or which would have a material adverse effect on the financial condition of Recology or any surety guaranteeing Recology's performance under this Agreement and the Franchise Agreement, which has not been waived by the City in writing.
- e. Recology's management has at least ten (10) years of waste management experience on a scale equal to or exceeding the sale of operations conducted by RPDJ under the Franchise Agreement;
- f. In the last five (5) years, Recology has not suffered any citations or other adverse action or decision from any federal, state, or local jurisdiction over its waste management operations due to any significant failure to comply with federal, state, or local waste management laws and that Recology has provided the City with a complete list of any citations, adverse actions, and adverse decisions by any court or governmental authority;

- g. Recology conducts its operations in an environmentally safe and conscientious fashion, in accordance with sound waste management practices, and in full compliance in all material respects with all applicable federal, state, and local laws regulating the collection and disposal of waste;
- h. In accordance with Section 12.06 of the Franchise Agreement, assignment of the Franchise Agreement shall not result in any increase in rates charged for services provided under the Franchise Agreement, except for such adjustments as may be allowed under Section 8.03 and 8.04 or otherwise under the Franchise Agreement.

6. Recology Acknowledgement of Rate Review. Recology acknowledges the detailed rate review recently requested by RDPI and the resulting rate adjustment for the period January 1, 2018-June 30, 2018 and approved by the City concurrently with the Franchise Agreement. The parties acknowledge and agree that the next two (2) refuse rate index (RRI) adjustments under Section 8.03 of the Franchise Agreement shall occur effective July 1, 2018 and July 1, 2019. In accordance with Section 8.04 of the Franchise Agreement, neither Recology nor City may request a detailed rate review under Section 8.04 to adjust rates for any period before July 1, 2020.

7. City Acknowledgement of Recology Fiscal Year. City acknowledges that Recology's fiscal year ends September 30, and that Recology's financial statements will be prepared on that basis. In light of the differing fiscal year, Recology agrees to provide annual reports under Section 6.04.1 and audited financial information under Section 6.05.2 no later than 5:00 p.m. on March 1 after the close of the fiscal year ending September 30.

8. Updated Vehicle Inventory. Recology shall provide a list of vehicles assigned to City's franchise, with vehicles ages and other identifying details as may be requested by the City, within sixty (60) days of the Closing.

9. Insurance. City has reviewed the insurance certificates and endorsements attached hereto as Exhibit L which, subject to and effective as of the Closing, shall become Exhibit L of the Franchise Agreement. Recology warrants to the City that such insurance certificates and endorsements satisfy the requirements of Section 9.04 of the Franchise Agreement, except that Recology's insurers use forms that are different from, but equivalent to, the forms specified in Sections 9.04.1.A, 9.04.1.B and 9.04.7.B(2) of the Franchise Agreement.

10. Notice. In accordance with Section 12.14, notices under the Franchise Agreement shall be provided to Recology at the following address:

Recology Sonoma Marin
c/o Recology Inc.
Attention: Legal Department
50 California Street, 24th Floor
San Francisco, CA 94111

11. Payment by RPD. RPD has deposited with the City a deposit in the amount of \$ _____, representing the City's estimated cost for (1) attorneys' fees and investigation costs necessary to investigate the assignment of the Franchise Agreement to Recology, and to review and finalize documents required for such assignment, and for all other costs of the City in connection with the assignment of the Franchise Agreement, in accordance with Section 12.06,

(2) cost of the detailed rate review, under Section 8.04, (3) an amount reflecting an average of one-month payment anticipated to become due to the City under the terms of the Franchise Agreement, plus contingency and (4) such other amounts otherwise anticipated to become due to the City under the Temporary Debris Collection Agreement, plus contingency. In the event that Closing does not occur by December 15, RPDI shall continue to make franchise payments in accordance with the terms and schedule set forth in the Franchise Agreement, and the making of such payments by RPDI or Recology to the City's reasonable satisfaction, with such satisfaction to be evidenced in writing by the City Manager to the other Parties, shall be a condition precedent to the City's consent under Section 14 of this Agreement. Upon notification to the City of Closing, the deposit shall be applied to satisfy costs associated with the assignment and any amounts due or anticipated to become due under the Franchise Agreement and Temporary Debris Collection Agreement. Within 90 days of the Closing, the City shall complete review of its actual costs incurred and shall refund any balance due to RPDI.

12. Release and Waiver of City by RPDI and Ratto. In exchange for the consideration reflected in this Agreement, including but not limited to release from its obligations under the Franchise Agreement, RPDI and The Ratto Group of Companies Inc. ("TRG"), on their own behalf as well as on behalf of their respective corporations, subsidiaries, predecessors, agents, officers, directors, employees, attorneys, representatives and agents, affiliates, policyholders and dbas and any persons acting on their behalf (collectively, "Releasing Parties"), hereby release and discharge the City, the City Council, and the City's agents, officers, employees, attorneys, and representatives (collectively, "Released Parties") from any and all claims, actions, causes of action, rights or obligations, whether known or unknown, suspected or unsuspected, disclosed or undisclosed, whether contingent or liquidated, of every kind, nature and description that Releasing Parties now have or may have against the Released Parties arising from, related to or having any connection with the Franchise Agreement or the performance of services thereunder (all of the foregoing collectively, "Claims"), except claims to enforce the terms of this Agreement.

In furtherance of this intention, Releasing Parties expressly waive any and all rights that might be claimed by reason of fraudulent inducement and any and all rights under Section 1542 of the California Civil Code with respect to the Released Matters, which provides as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

RPDI acknowledges and agrees that this waiver is an essential and material term of this Agreement and without such waiver the Agreement would not have been entered into by City or Recology.

13. Indemnification by Recology. Subject to and effective as of the Closing, Recology agrees to indemnify, protect, hold harmless and defend (by counsel reasonably satisfactory to the City) the Released Parties, from all Claims made by the Releasing Parties in connection with the Franchise Agreement, except to the extent caused by the City's willful misconduct or gross negligence. The provisions of this section shall survive the expiration or termination of the Franchise Agreement, and shall remain in full force and effect. As a material inducement to the foregoing agreement by Recology, each of City and the Releasing Parties represents and warrants to Recology that, as of the date it executes this Agreement, it is not aware of any Claims.

14. City Consent. City hereby consents to the foregoing assignment and assumption of the Franchise Agreement on the terms and conditions set forth herein.

15. Multiple Originals; Counterparts. This Agreement may be executed in multiple originals, each of which is deemed to be an original, and may be signed in counterparts.

IN WITNESS WHEREOF, this Assignment and Assumption Agreement is entered into as of the date first written above.

City of Rohnert Park

Rohnert Park Disposal, Inc.

By: _____
Name: _____
Title: _____
Date: _____

By: _____
Name: _____
Title: _____
Date: _____

The Ratto Group of Companies Inc.

Recology Sonoma Marin

By: _____
Name: _____
Title: _____
Date: _____

By: _____
Name: _____
Title: _____
Date: _____

Attachments:

Exhibit L – City Insurance Endorsement Forms and Insurance Certificates

Exhibit L-1 – Form of Performance Bond