

**SMART STATION MERCHANT USER AGREEMENT
FOR RECYCLING AND SOLID WASTE PROCESSING AND TRANSFER SERVICES
BETWEEN THE CITY OF CUPERTINO
AND
THE CITY OF SUNNYVALE**

This SMaRT Station Merchant User Agreement (“Agreement”) is entered into and effective as of _____, 2025, by and between the City of Sunnyvale, a chartered municipal corporation (“Sunnyvale”), and City of Cupertino, a general law municipal corporation (“Merchant User” or “Cupertino”). Sunnyvale and Merchant User are collectively referred to as “the parties” and individually as a “party”.

RECITALS

A. The City of Sunnyvale (“Sunnyvale”) is the owner of the Sunnyvale Materials Recovery and Transfer Station, also known as the SMaRT Station® (“the Facility”). The Facility is currently operated by Bay Counties Waste Services, Inc., a California corporation dba Bay Counties SMaRT (“the Operator”), pursuant to a Contract for the Operation of the Sunnyvale Materials Recovery and Transfer Station between the City of Sunnyvale and Bay Counties Waste Services, Inc., dated January 1, 2022 (“the SMaRT Station Operating Agreement”).

B. Sunnyvale’s operation of the Facility is also subject to an agreement between Sunnyvale and the City of Mountain View entitled the New Memorandum of Understanding Among the Cities of Mountain View and Sunnyvale Relating to the Operation of a Materials Recovery and Transfer Station, entered into on December 22, 2021 (“the Partner Agencies’ MOU” or “the MOU”).

C. Pursuant to Section 9.2 of the MOU, Sunnyvale as Managing Partner, with the mutual consent of the other Partners which may not be unreasonably withheld, may enter into agreements with third-party merchant users, who may be a solid waste hauler or a public agency, to utilize excess capacity at the Facility for any waste stream so long as such sale would have no adverse operational or financial impact on the Partners or affect the capacities provided to any Partner under the MOU. Such offers for sale are subject to the mutual agreement of the Partners, which may not be unreasonably withheld.

D. Merchant User, a public agency, desires to utilize excess capacity at the Facility for certain waste streams as identified in this Agreement.

E. Cupertino has awarded a franchise to a hauler (“the Hauler”) for collection of waste and materials in its jurisdiction (“the Franchise Agreement”) and wishes to use the Facility to provide post-collection processing and transfer services for Municipal Solid Waste (“the Services”).

F. Waste Management of California, Inc., a California corporation (“Waste Management”) provides refuse disposal services to Sunnyvale at the Kirby Canyon Landfill (“Landfill”) pursuant to an Agreement Between the City of Sunnyvale and Waste Management of California, Inc. for Long Term Disposal of Solid Waste, dated September 10, 1991, as amended on August 31, 1993 (“the First Amendment”), and on December 16, 2013 (Second Amendment), collectively referred to as “the SMaRT Station Kirby Canyon Disposal Agreement”. The SMaRT Station Kirby Canyon Disposal Agreement requires that all unrecycled solid waste leaving the Facility be delivered to the Landfill for disposal.

G. Waste Management of California, Inc., a California corporation (“Waste Management”) provides refuse disposal services to Sunnyvale at the Kirby Canyon Landfill (“Landfill”) pursuant to an Agreement Between the City of Sunnyvale and Waste Management of California, Inc. for Long Term Disposal of Solid Waste, dated September 10, 1991, as amended on August 31, 1993 (“the First Amendment”), and on December 16, 2013 (Second Amendment), collectively referred to as “the SMaRT

Station Kirby Canyon Disposal Agreement". The SMaRT Station Kirby Canyon Disposal Agreement requires that all unrecycled solid waste leaving the Facility be delivered to the Landfill for disposal.

H. This Agreement sets forth the general terms and conditions under which: (1) Sunnyvale will direct the Operator of the Facility to provide the Services to Merchant User and (2) Merchant User will direct Hauler to deliver all of Merchant User's Municipal Solid Waste to the Facility.

NOW, THEREFORE, Sunnyvale and Merchant User agree as follows:

1. Recitals. The above recitals are true and correct and are incorporated by reference into this Agreement.

2. Term of Agreement. The term of this Agreement shall commence upon full execution of the Agreement by the parties. This Agreement shall terminate twenty years after execution, unless earlier terminated pursuant to Section 13 of this Agreement. Delivery of Merchant User's Municipal Solid Waste and payment of per ton rates will begin upon achievement of the Full Start-Up Date following completion of the Planned Capital Improvements as set forth in the MOU (Section 4 and Exhibit D).

3. Materials to be Delivered; Services to be Provided. Merchant User will require Hauler to deliver to the Facility all of the materials set forth on Exhibit "A" attached hereto and incorporated herein by this reference, collected by Hauler under the Franchise Agreement (the "Municipal Solid Waste"). The Facility will accept all materials received from Hauler as set forth on Exhibit "A", process such materials to remove items that can be recycled and recycle them (or have a facility named below do such processing), and dispose of the residue at the Landfill. "Recycle" refers to processes by which materials that would otherwise become solid waste are sorted, packaged and marketed as raw materials to end users that will return them to the economic mainstream in the form of new, reused or reconstituted products. Other facilities may be used from time to time to provide specialized services or to accommodate processing during maintenance, repair or replacement of portions of the Facility. The Operator will not be required to segregate the Merchant User materials from materials received from the cities of Sunnyvale and Mountain View, other partners or merchant users, but will keep accurate records of the tonnages of each type of material received from Merchant User.

4. Mechanics of Delivery. The Facility will be open for the delivery of materials between the hours of 5:00 a.m. and 5:00 p.m. Monday through Friday and Saturday 8 a.m. and 3 p.m. For weeks containing a holiday that falls on a weekday, the Facility will be open for the delivery of materials on the following Saturday between the hours of 5:00 a.m. and 5:00 p.m. Holidays as of the date of this Agreement are January 1, the fourth Thursday in November, and December 25. The anticipated maximum turnaround time for delivering vehicles carrying one type of material is 15 minutes and for split-vehicles carrying two types of material is 30 minutes. The Operator will inspect loads, weigh loads and reject or dispose of unacceptable waste at Merchant User's expense, in accordance with the Facility's operating procedures. Any changes to the operational information in this Section will be communicated to the Merchant User at least thirty (30) days in advance.

5. Operating Procedures. Merchant User and Hauler shall comply with the Facility's operating procedures.

6. Capacity; Diversion. Sunnyvale will provide capacity at the Facility for materials delivered from Merchant User up to the following maximum amounts: solid waste – 75 tons per day. Sunnyvale will require the Operator to process materials delivered from Merchant User in the same manner as similar materials received from Partner Agencies and use best efforts to achieve the maximum amount of diversion. Merchant User acknowledges that the ability of the Operator to achieve the maximum diversion will be materially influenced by the composition and quality of the materials delivered from Merchant User.

7. Fees; Billing; Payment. Merchant User shall pay the fees for providing the Services as set forth on Exhibit "A". The fees are subject to annual CPI adjustment by Sunnyvale on or about July 1 of each year. Base Rate, as adjusted hereunder, shall be automatically seasonally adjusted by a percentage equal to the annual percent change in the average Consumer Price Index for All Urban Consumers (CPI-U) U.S. City Average for Water and sewer and trash collection services ("CPI"), as published by the Bureau of Labor Statistics, for the 12-month period ending the previous June (compared to the average CPI for the next previous 12-month period ending April), and adjustment per Section 8 below. Fees will be invoiced monthly by Sunnyvale and payment from Merchant User will be due within thirty (30) calendar days of the date of invoice. Any invoice balance not paid within thirty (30) days of the date of invoice is subject to a late charge, and any check returned for insufficient funds is subject to a non-sufficient funds fee, both to the maximum extent allowed by applicable law. The Operator and/or Sunnyvale will be responsible for transmitting payment of all fees due to the facilities named in Section 3 above.

8. Cost of Service Review. Sunnyvale may intermittently, approximately every three years, perform a cost of service review, which, if performed, shall become the basis for a revision in the costs and fees moving forward. The cost of service review is designed to ensure a 100% cost recovery for the City of Sunnyvale during the term of the Agreement and to cover changes in the costs, especially from significant events such as regulatory changes or the addition or loss of a MOU Partner. During the term of this Agreement, the first cost of service review will be conducted no sooner than the first one-year anniversary of the commencement of the Services. Notwithstanding the provisions of Section 7, if based on the cost of service review, Sunnyvale determines that costs exceed the CPI adjustment in Section 7, the applicable fees under this Agreement will be adjusted and will apply to this Agreement with at least ninety (90) days' written notice to Merchant User.

9. Modifications During Facility Closure. From time to time, the Facility may be inoperable for processing. When the Facility is inoperable, including during unplanned shutdowns, waste delivered to the Facility by Hauler will not be processed for recycling or diversion and will instead be directly transported to Landfill for disposal (if feasible), and the applicable fees in Section 7 and, if applicable, Section 8 shall be adjusted to remove processing costs.

10. Indemnification. To the furthest extent allowed by law, Merchant User shall indemnify, protect, defend at its own expense and hold harmless Sunnyvale and Sunnyvale's officials, officers, employees, representatives, contractors and agents (collectively, the "Indemnified Parties") from and against any and all losses, liabilities, damages, claims or costs (including attorneys' fees and litigation expenses) arising from the negligent acts, errors, omissions or willful misconduct of Merchant User, its officers, employees, representatives, contractors and agents, excluding any such losses arising from the sole negligence or willful misconduct of the Indemnified Parties. The defense and indemnification obligations contained in this Agreement are undertaken in addition to, and shall not in any way be limited by, the insurance obligations contained in this Agreement. The obligations set forth in this paragraph shall survive the termination, expiration and/or completion of this Agreement.

Merchant User shall ensure its agreement with its Hauler for delivery of materials to the Facility includes a requirement for the Hauler to: (a) indemnify, protect, defend and hold harmless Sunnyvale and Sunnyvale's officials, officers, employees, representatives, contractors and agents from any and all losses, liabilities, damages, claims or costs (including attorneys' fees and litigation expenses) arising from the negligent acts, errors, or omissions and willful misconduct with respect to the obligations of the Hauler, its officers, employees, representatives, contractors and agents arising from the Hauler's collection and delivery of waste and materials under the Franchise Agreement and the Services. The indemnification obligations shall survive the termination and expiration of the Franchise Agreement and this Agreement; and (b) at the Hauler's sole cost and expense maintain insurance coverage during the term of this Agreement against claims for injuries to persons or damages to property which may arise from, or in connection with, Hauler's performance of services under the Franchise Agreement and this Agreement. The types of insurance and amounts of coverage shall be satisfactory to Sunnyvale and Sunnyvale shall be named an

additional insured under said policies.

11. Insurance. Sunnyvale requires Merchant User to maintain insurance requirements on the City of Sunnyvale's electronic insurance verification system. Merchant User shall procure and maintain, at its own expense during the life of this Agreement, policies of insurance as specified in Exhibit "B" attached and incorporated herein by reference and shall provide all certificates and endorsements as specified in Exhibit "B" electronically for approval by the City Risk Manager prior to Merchant User (or subcontractor) commencing any use of or deliveries to the Facility under this Agreement. Notwithstanding the foregoing, the requirements set forth in Exhibit B may be satisfied through evidences of self-insurance.

12. Force Majeure. If Sunnyvale or Operator is prevented, in whole or in part, from carrying out this Agreement due to a Force Majeure, then Sunnyvale and Operator may reduce or cease performance of the Agreement to respond to such event of Force Majeure. Sunnyvale shall promptly provide written notice to Merchant User of a declaration of Force Majeure, and as soon as practicable, within thirty (30) days, the parties shall meet and confer to determine the impact and duration of the event and any reasonable steps that can be taken by the parties to mitigate or reduce the impact of the Force Majeure. "Force Majeure" means the failure of Sunnyvale to meet its obligations under this Agreement by reason of acts of God, earthquakes, droughts, floods, storms, explosion, fires, third party strikes, work stoppage or labor unrest, insurrection, riots, pandemics, epidemics, acts of the public enemy, or federal, state, or local law, order, rule, or regulation, excepting any imposed by Sunnyvale in its sole discretion.

13. Termination. Either party may terminate this Agreement for any reason with ninety (90) days written notice to the other party. Either party may suspend or terminate this Agreement upon thirty (30) days written notice for a material breach of the Agreement, except that such notice shall be effective immediately if the breach endangers the health, welfare or safety of the public.

14. No Third Party Beneficiaries. This Agreement does not and is not intended to confer any rights or remedies upon any person or entity other than the parties.

15. Integration Clause. This Agreement, including all Exhibits, contains the entire agreement between the parties and supersedes whatever oral or written understanding they may have had prior to the execution of this Agreement. This Agreement shall not be amended or modified except by a written agreement executed by each of the parties hereto.

16. Severability Clause. Should any provision of this Agreement ever be deemed to be legally void or unenforceable, all remaining provisions shall survive and be enforceable.

17. Waiver. Waiver by either party of any default, breach or condition precedent shall not be construed as a waiver of any other default, breach or condition precedent or any other right hereunder.

18. Ambiguity. The parties acknowledge that this is a negotiated agreement, that they have had the opportunity to have this Agreement reviewed by their respective legal counsel, and that the terms and conditions of this Agreement are not to be construed against any party on the basis of such party's draftsmanship thereof.

19. Notices. All notices or instruments required to be given or delivered by law or this MOU shall be in writing and shall be effective upon receipt thereof and shall be by personal service or delivered by depositing the same in any United States Post Office, registered or certified mail, postage prepaid, addressed to:

If to Sunnyvale:

Ramana Chinnakotla
Director

City of Sunnyvale
Environmental Services Department
PO Box 3707
Sunnyvale CA 94088-3707

If to Merchant User:

Chad Mosley
Director of Public Works
City of Cupertino
10300 Torre Ave
Cupertino, CA 95014

Any party may change its address for receiving notices by giving written notice of such change to the other party in accordance with this section.

20. Counterparts. The parties may execute this Agreement in one or more counterparts, each of which shall be deemed an original, but all of which together shall be deemed one and the same instrument.

21. Facsimile Signature; Electronic Signature. This Agreement shall be binding upon the receipt of facsimile signatures or e-mailed by PDF or otherwise. Any person transmitting his or her signature by facsimile or electronically shall promptly send an original signature to the other party pursuant to the notice provision of this Agreement. The failure to send an original shall not affect the binding nature of this Agreement.

22. Authority. The persons executing this Agreement warrant that they are duly authorized to execute this Agreement on behalf of and bind the respective party that each purports to represent.

Executed as of the date of the last party to sign this Agreement as set forth below.

CITY OF SUNNYVALE,
a municipal corporation

Tim Kirby
City Manager

Date: _____

Approved as to Form:

Rebecca Moon
City Attorney

CITY OF CUPERTINO
a general law municipal corporation

Name: _____

Title:

Date: _____

Approved as to Form:

City Attorney

EXHIBIT "A"

<u>Materials Delivered to Facility</u>	<u>Base Rate Per Ton Delivered</u>
Residential, Commercial, and Industrial Municipal Solid Waste	\$197.13

Municipal Solid Waste ("MSW"), commonly called "garbage," "trash" or "rubbish," means all solid waste as defined in California Public Resources Code, Division 30, Part 1, Chapter 2, Section 40191, as amended, and regulations promulgated thereunder, which is generated in the city of Cupertino. Excluded from the definition of MSW are Excluded Waste, Source Separated Recyclable Materials, Source Separated Organic Materials, construction and demolition debris, and radioactive waste. MSW may include de minimis volumes or concentrations of waste of a type and amount normally found in residential solid waste after implementation of programs for the safe collection, recycling, treatment, and disposal of household hazardous waste in compliance with Sections 41500 and 41802 of the California Public Resources Code, as amended.

"Excluded Waste" means hazardous substance, hazardous waste, infectious waste, designated waste, volatile, corrosive, medical waste, regulated radioactive waste, and toxic substances or material that facility operator(s), which receive materials from the city and its generators, reasonably believe(s) would, as a result of or upon acceptance, transfer, processing, or disposal, be a violation of local, state, or federal law, regulation, or ordinance, including: land use restrictions or conditions, waste that cannot be disposed of in Class III landfills or accepted at the facility by permit conditions, waste that in the city, or its designee's reasonable opinion would present a significant risk to human health or the environment, cause a nuisance or otherwise create or expose the city, or its designee, to potential liability; but not including de minimis volumes or concentrations of waste of a type and amount normally found in residential solid waste after implementation of programs for the safe collection, processing, recycling, treatment, and disposal of batteries and paint in compliance with Sections 41500 and 41802 of the California Public Resources Code. Excluded Waste does not include used cooking oil, motor oil and filters, household batteries, and/or universal wastes when such materials are defined as allowable materials for collection through the city's collection programs and the generator or customer has properly placed the materials for collection pursuant to instructions provided by city or its designee for collection services.

"Organic Materials" means yard trimmings, food scraps, and food-soiled papers that are set aside, handled, packaged, or offered for collection in a manner different from solid waste for the purpose of processing.

"Recyclable Materials" means materials, byproducts, or components of such materials set aside, handled, packaged, or offered for collection in a manner different from solid waste for the purpose of recycling.

"Recycle" or "Recycling" means the process of sorting, cleansing, treating, and reconstituting at a recyclable materials processing facility, materials that would otherwise be disposed of at a landfill for the purpose of returning such materials to the economy in the form of raw materials for new, reused, or reconstituted products.

"Source Separated" or "Source-Separated (materials)" means materials, including commingled recyclable materials and organic materials, that have been separated or kept separate from the mixed waste stream, at

the point of generation, for the purpose of additional sorting or processing those materials for recycling or reuse in order to return them to the economic mainstream in the form of raw material for new, reused, or reconstituted products, which meet the quality standards necessary to be used in the marketplace, or as otherwise defined in 14 CCR Section 17402.5(b)(4). Source separated shall include separation of materials by the generator, responsible party, or responsible party's employee, into specified approved collection containers for the purpose of collection such that source-separated materials are separated from mixed waste for the purposes of collection and processing.

EXHIBIT "B"

INSURANCE REQUIREMENTS

Contractor shall procure and maintain for the duration of the contract insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work by the Contractor, their agents, representatives, or employees.

Minimum Scope and Limits of Insurance. Contractor shall maintain limits not less than:

1. **Commercial General Liability:** coverage written on an occurrence basis with limits not less than \$1,000,000 per occurrence and \$2,000,000 aggregate for bodily injury, personal injury and property damage. ISO Occurrence Form shall be at least as broad as CG 0001.

Deductibles, Self-Insured Retentions and Other Coverages:

Any deductibles or self-insured retentions must be declared and reviewed by the City of Sunnyvale, Risk Manager. The Contractor shall guarantee payment of any losses and related investigations, claim administration and defense expenses within the deductible or self-insured retention. Policies containing any self-insured retention provision shall provide, or be endorsed to provide, that the SIR may be satisfied by either the Named Insured or the City.

The aforementioned insurance requirements can be met through any combination of selfinsured, primary and excess/umbrella policies that fulfill the stipulated coverage as cited above.

Other Insurance Provisions:

1. During the term of the contract, the City of Sunnyvale, its officers, officials, employees, agents, and volunteers are to be covered as an additional insured in the Contractor's commercial general liability policy with respect to liability arising out of activities performed by or on behalf of the Contractor; products and completed operations of the Contractor; premises owned, occupied or used by the Contractor. The coverage shall contain no special limitations on the scope of protection afforded to the City of Sunnyvale, its officers, officials, employees, agents, or volunteers.

Additional Insured Endorsement for ongoing operations at least as broad as ISO CG 20 10 Scheduled, or automatic CG 20 38 and completed operations shall be at least as broad as ISO CG 20 37 scheduled or automatic ISO CG 20 40.

2. For any claims related to this project, the Contractor's insurance shall be primary. Any insurance or self-insurance maintained by the City of Sunnyvale, its officers, officials, employees, agents and volunteers shall be excess of the Contractor's insurance and shall not contribute with it and shall be at least as broad as ISO CG 20 01 04 13.

3. Any failure to comply with reporting or other provisions of the policies including breaches of warranties shall not affect coverage provided to the City of Sunnyvale, its officers, officials, employees, agents or volunteers.

4. The Contractor's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

5. Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, cancelled by either party, reduced in coverage or in limits except after thirty (30) days' prior written notice by email to riskmanagement@sunnyvale.ca.gov, has been given to the City.

6. Any umbrella or excess Insurance Liability policies shall be true "following form" of the underlying policy coverage, terms, conditions, and provisions and shall meet all of the insurance requirements stated in this document, including the additional insured, SIR, and primary and non-contributory insurance requirements for the benefit of City (if agreed to in a written contract or agreement) until all coverage carried by or available to the Contractor's primary and excess liability policies are exhausted and before the City's own Insurance or self-insurance shall be called upon to contribute to a loss.

7. The policy limits of coverage shall be made available to the full limits of the policy. The minimum limits stated above shall not serve to reduce the Contractor's policy limits of coverage. Therefore, the requirements for coverage and limits shall be (1) the minimum coverage and limits specified in this agreement, or (2) the broader coverage and maximum limits of coverage of any insurance policy or proceeds available to the named insured and also available to the Additional Insured, whichever is greater.

Acceptability of Insurers:

Insurance is to be placed with insurers with a current A.M. Best's rating of no less than Superior or Excellent, and who are admitted and authorized to do business and in good standing in California unless otherwise acceptable to the City of Sunnyvale's Risk Manager.

Verification of Coverage:

City utilizes an electronic insurance verification system to track and verify all insurance related documents. City is no longer accepting insurance documents by mail and will only accept electronic insurance documents. City will email the Contractor requesting proof of insurance for this Agreement through an electronic insurance verification system, which includes instructions on how to upload insurance documents electronically. Contractor shall furnish the City with an electronic Certificate of Insurance effecting the coverage required. The certificates are to be signed by a person authorized by that insurer to bind coverage on its behalf and name City of Sunnyvale, Attn: Risk Management, 456 W. Olive Ave, Sunnyvale, CA 94088 as the certificate holder. All certificates are to be received and approved by the City, Risk Manager prior to commencement of work.

The Contractor shall provide certificate(s) evidencing renewals of all insurance required herein prior to the expiration date of any such insurance. Contractor shall submit insurance certificates, reflecting the policy renewals through the City's electronic insurance verification system. City reserves the right to require complete, certified copies of all required insurance policies, at any time.

Subcontractors:

Contractor shall require and verify that all subcontractors or other parties hired for this Work, purchase and maintain coverage for indemnity and insurance requirements as least as broad as specified in Subcontractors Minimum scope, Limits and Provisions of Insurance herein, to the extent they apply to the scope of the subcontractor's work with the same Certificate of Insurance requirements and naming as additional insureds all parties to this Contract. Failure of Contractor to verify existence of subcontractor's insurance shall not relieve Contractor from any claim

arising from subcontractors work on behalf of Contractor.

Contractor shall include the following language in their agreement with Subcontractors: "Subcontractors hired by Contractor agree to be bound to Contractor and City in the same manner and to the same extent as Contractor is bound to City under the Agreement Documents and provide a valid certificate of insurance and the required endorsements included in the Agreement as proof of compliance prior to commencement of any work and to include this same requirement for any subcontractors they hire for this work. A copy of the Insurance provisions will be furnished to the Subcontractor upon request." Contractor shall provide proof of such Compliance and verification to the City upon request.

Subcontractors Minimum Scope, Limits and Provisions of Insurance.

The minimum insurance coverage limits and endorsements required herein, do not preclude the Contractor from requiring higher limits or additional insurance coverage as it deems necessary.

1. Commercial General Liability: coverage written on an occurrence basis with limits not less than \$3,000,000 per occurrence and \$6,000,000 aggregate for bodily injury, personal injury and property damage. ISO Occurrence Form shall be at least as broad as CG 0001.

2. Automobile Liability: coverage with a combined single limit of not less than \$2,000,000 per occurrence applying to all owned, non-owned, or hired vehicles used in conjunction with this Agreement for bodily injury and property damage. ISO Form shall be at least as broad as CA 0001.

3. Workers' Compensation: Statutory Limits and Employer's Liability: \$1,000,000 per accident and per employee for bodily injury or disease.

4. Pollution Liability coverage with limits not less than \$2,000,000 per occurrence for bodily injury, property damage, and environmental damage resulting from pollution and related cleanup costs incurred or arising out of any Work to be performed under the Agreement, including liability for and defense of lawsuits and regulatory actions.