

**MEMORANDUM OF UNDERSTANDING
FOR RECYCLING AND SOLID WASTE PROCESSING AND TRANSFER SERVICES
BETWEEN THE CITY OF MILPITAS
AND
THE CITY OF SUNNYVALE**

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 June 30, 2014 (“the SMaRT Station Operating Agreement”).

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

C. Waste Management currently has an agreement to provide refuse disposal services to Milpitas at the Guadalupe Landfill (the “Guadalupe Disposal Agreement”). This agreement contemplates delivery of Milpitas solid waste to the Guadalupe Landfill for disposal, at prices and on terms that differ from the Kirby Canyon Disposal Agreement.

D. Sunnyvale’s operation of the Facility is also subject to an agreement among Sunnyvale, Palo Alto and Mountain View entitled the Second Memorandum of Understanding Among the Cities of Mountain View, Palo Alto and Sunnyvale Relating to the Construction and Operation of a Materials Recovery and Transfer Station and the Long Term Disposal of Municipal Solid Waste at Kirby Canyon, dated June 9, 1992 (“the Participating Agencies’ Agreement”).

E. The City of Milpitas (“Milpitas”) has awarded a franchise to a hauler (“the Hauler”) for collection of waste and materials that include solid waste, recyclable materials and yard trimmings in Milpitas (“the Franchise Agreement”) and wishes to use the Facility to provide post-collection processing and transfer services for such waste and materials (“the Services”).

F. This Memorandum of Understanding for Recycling and Solid Waste Processing and Transfer Services (the “MOU”) sets forth the general terms and conditions under which: (1) Sunnyvale will direct the Operator of the Facility to provide the Services to Milpitas and (2) Milpitas will direct Hauler to deliver all such solid waste, recyclable materials and yard trimmings to the Facility.

G. The parties to this MOU intend to engage in further negotiations to develop a binding written agreement (the “Post-Collection Agreement”) for the provision of the Services contemplated by this MOU. City of Sunnyvale City Council approval of the Post-Collection Agreement is contingent on the conditions set forth below and some of such conditions may be satisfied only upon the satisfaction of other such conditions.

(1) Milpitas’s award of a Franchise Agreement to Hauler that contemplates use of the Services at the Facility.

(2) Agreement between Sunnyvale and the Operator of the Facility on the methods for adjusting relevant costs and revenues to enable calculation of the ongoing amount(s) of the equitable adjustment authorized by Section 10.20 of the SMaRT Station Operating Agreement for the change in scope directed by Sunnyvale.

(3) Approval of the proposal by either Mountain View or Palo Alto, preferably both cities, as required by the Participating Agencies' Agreement.

(4) Agreement among Waste Management, Milpitas and Sunnyvale that the Operator will deliver the unrecycled portion of Milpitas solid waste delivered to the Facility to Kirby Canyon Landfill for the same price and terms as provided in the Guadalupe Disposal Agreement.

(5) Completion of appropriate environmental review under the California Environmental Quality Act (CEQA). Sunnyvale anticipates that approval of the plan to receive waste and materials from Milpitas will require an addendum to the 1990 EIR for the SMaRT Station. The parties acknowledge that this MOU is merely a preliminary step in reaching an agreement to deliver Milpitas solid waste, recyclable materials and yard trimmings to the SMaRT Station. This MOU does not commit the parties to any definite course of action and each party retains discretion to disapprove the project and to decline to enter a Post-Collection Agreement.

(6) Conformance of the definitions and other terms in the Franchise Agreement and the SMaRT Station Operating Agreement.

NOW, THEREFORE, Sunnyvale and Milpitas agree as follows:

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

2. Term of MOU. This MOU shall commence upon its execution by the parties and shall terminate upon execution of the Post-Collection Agreement. In addition, Sunnyvale and Milpitas may terminate this MOU with thirty (30) days written notice upon (1) breach of this MOU by the other party, (2) the failure of the parties to meet any of the conditions specified in Recital G or other pre-conditions to the execution of the Post-Collection Agreement as set forth in this MOU, and (3) the failure of the parties to agree on the terms and conditions of the Post-Collection Agreement despite good faith negotiations to do so consistent with the terms of this MOU.

3. Post-Collection Agreement Negotiation. The parties to this MOU will negotiate in good faith to draft, execute and deliver the Post-Collection Agreement for approval to their respective City Councils 90 days after approval of this MOU. The Post-Collection Agreement will be substantially on the terms set forth below and such additional provisions as are customary for an agreement of such nature. Sunnyvale shall be the Lead Agency for any applicable environmental review under the California Environmental Quality Act ("CEQA") necessary for the parties' city council to approve the Post-Collection Agreement. Milpitas will act as a Responsible Agency under CEQA.

4. Materials to be Delivered; Post-Collection Services to be Provided. Milpitas 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. 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 Kirby Canyon 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. Source-separated recyclable materials, construction and demolition debris ("C&D"), and bulky items will be processed at the Facility. Yard trimmings will be transferred from the Facility to be composted at Z-Best Composting Facility or other appropriate compost facility. 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 Milpitas materials from materials received from the cities of Sunnyvale, Mountain View and Palo Alto, but will keep accurate records of the tonnages of each type of material received from each city.

5. Term. The term of the Post-Collection Agreement will be concurrent with the term of the Franchise Agreement, estimated to commence on September 6, 2017 and expiring on December 31, 2032

(the "Term").

6. 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 MOU 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 20 minutes and for split-vehicles carrying two types of material is 40 minutes. The Operator will inspect loads, weigh loads and reject or dispose of unacceptable waste at Milpitas's expense, in accordance with the Facility's operating procedures.

7. Capacity; Diversion. Sunnyvale will guaranty capacity at the Facility for materials delivered from Milpitas up to the following maximum amounts: (a) solid waste – 250 tons per day; (b) source-separated recyclable materials - 100 tons per day; (c) yard trimmings - 70 tons per day; (d) C&D (Construction and Demolition waste) - 60 tons per day; and (e) Bulky Items - 30 tons per day. Sunnyvale will require the Operator to process materials delivered from Milpitas in the same manner as similar materials received from Participating Agencies and use best efforts to achieve the maximum amount of diversion. Milpitas will acknowledge 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 Milpitas.

8. Fees for Post-Collection Services; Billing; Payment. The estimated initial fees for providing the Services are as set forth on Exhibit A. The initial fees may be further negotiated as part of the Post-Collection Agreement and such fees will be subject to adjustment on an annual basis. Fees for disposal of solid waste at Kirby Canyon Landfill will be charged in accordance with the Landfill agreement and adjusted to reflect changes in governmental fees and taxes assessed on materials disposed at the Landfill. Fees will be invoiced monthly by Sunnyvale and payment from Milpitas will be due within 15 calendar days of the date of invoice. Penalties and interest will be charged on late payments. Sunnyvale will rebate to Milpitas an amount equal to 25% of the net revenue (after transportation costs) generated by the sale of recyclables attributable to Milpitas source separated recyclable materials to offset the costs for the service. The Operator and/or Sunnyvale will be responsible for payment of all fees due to the facilities named in paragraph 4 above. The cost structure shall be designed to ensure a 100% cost recovery for the City of Sunnyvale during the term of the agreement.

9. Cost of Service Review. The Post-Collection Agreement shall include a provision allowing either party to request a cost of service review each year of the contract which, if performed, shall become the basis for a revision in the costs moving forward. The cost of service review is designed to cover changes in the costs especially from significant events such as regulatory changes or the addition or loss of a SMaRT Station partner.

10. Indemnification. To the furthest extent allowed by law, Milpitas shall indemnify, protect, defend and hold harmless Sunnyvale, and its officials, officers, employees, representatives, members, and agents from and against any and all challenges to this Agreement, including but not limited to any action taken pursuant to the California Environmental Quality Act, and 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 Milpitas, its officers, employees, representatives, member and agents, excluding any such losses arising from the active negligence or willful misconduct of Sunnyvale and its officials, officers, employees, representatives, members, and agents. The obligations set forth in this paragraph will survive termination and expiration of this MOU.

Sunnyvale and Milpitas will negotiate in good faith an indemnification clause in the Post Collection Agreement that will require Milpitas to have the Hauler: 1) indemnify, protect, defend and hold harmless Sunnyvale, and its officials, officers, employees, representatives, members, 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, member and agents arising from the Hauler's collection of waste and materials under the Franchise Agreement and the Services. The indemnification obligations shall survive the termination and expiration of the Post Collection Agreement; and 2) at the Hauler's sole cost and expense maintain insurance coverage during the term of the Post Collection 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 the Post Collection 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. No Third Party Beneficiaries. This MOU does not and is not intended to confer any rights or remedies upon any person or entity other than the parties.

12. Integration Clause. This MOU, 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 MOU shall not be amended or modified except by a written agreement executed by each of the parties hereto.

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

14. 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.

15. 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.

16. 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:

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

If to Milpitas:

[insert name]
[insert title]
City of Milpitas]
[insert Department name, if applicable]
[insert street name and suite #, if any]
[insert city, state and zip code]

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.

17. Counterparts. The parties may execute this MOU 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.

18. Facsimile Signature; Electronic Signature. This MOU 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 MOU. The failure to send an original shall not affect the binding nature of this Agreement.

19. Authority. The persons executing this MOU warrant that they are duly authorized to execute this MOU 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 MOU as set forth below

CITY OF SUNNYVALE,
a municipal corporation

Deanna J. Santana
City Manager

Approved as to Form:

John A. Nagel
City Attorney

CITY OF MILPITAS,
a municipal corporation

By: _____
Title: _____

EXHIBIT A

<u>Materials Delivered to SMaRT Station</u>	<u>Rate Per Ton Delivered</u>
Residential, Commercial, and Industrial Municipal Solid Waste (includes all roll off boxes, compactors, and bulky item collections)	\$78.39
Source Separated Recyclables Processing (includes Residential Dual Stream, and Commercial Single Stream	\$63.64
25% of Net Revenues Generated from the Sale of Milpitas Source Separated Recyclables	TBD
Source separated Yard Trimmings	\$49.74