



THE CITY OF SAN DIEGO

REPORT TO THE CITY COUNCIL

DATE ISSUED: September 30, 2009 REPORT NO. 09-137

ATTENTION: Natural Resources and Culture Committee

SUBJECT: Consent to Transfer of Franchises in connection with Merger of Allied Waste Industries, Inc. with Republic Services, Inc.

REFERENCE:

REQUESTED ACTION:

1. Authorize introduction and adoption of an ordinance approving the transfer of the Non-Exclusive Franchise for Solid Waste Management Services to Allied Waste Systems, Inc., dba Allied Waste Services of San Diego (formerly known as Pacific Waste Services) and execution of the Consent to Assignment of the Franchise Agreement.
2. Authorize introduction and adoption of an ordinance approving the transfer of the Facility Franchise and Agreement for the Sycamore Canyon Landfill to San Diego Landfill Systems, LLC and execution of the Consent to Assignment of the Franchise Agreement.

STAFF RECOMMENDATION:

Approve the requested action.

SUMMARY:

Allied Waste Industries Inc. [Allied], the former ultimate parent company of the City's franchisees, San Diego Landfill Systems, Inc., [SDLS] and Pacific Waste Services [Pacific Waste], merged with Republic Services, Inc. [Republic] effective December 5, 2008. This action requests the City's consent to transfer the existing Sycamore Canyon Landfill Facility Franchise and the Solid Waste Collection Franchise to the new entities.

BACKGROUND:

At the time the City granted the Franchises and up until the merger, SDLS and Pacific Waste were wholly-owned subsidiaries of Allied. Throughout that time, Allied was an independent, publicly-owned and traded company. It had no parent company. As a result of the merger, Allied has become a wholly-owned, direct subsidiary of Republic, which is now the ultimate parent company of Allied and its subsidiaries. The City has carefully analyzed the various merger documents which alternatively describe the transaction as a merger, stock swap, purchase, and

reorganization. Based on the City's analysis, the City has determined that the transaction constitutes a change in the legal structure of the City's franchisees, which has altered both the ownership and the control of those franchisees. Thus, in the City's view, the merger constitutes a transfer of the franchises under City Charter section 103, which requires the approval of the City Council. Republic and Allied have requested the City's approval of the transfer and have executed proposed Consents to Assignment of the franchise agreements.

DISCUSSION:

City of San Diego Charter Article VII, Section 103 (Franchises) states in relevant part: "... No franchises shall be transferable except with the approval of the Council expressed by ordinance. . . .

A Council approved

transfer shall be required when there is any change in the legal structure of the entity which holds the franchise, and which change alters the ownership or control of the entity. Such changes include, but are not necessarily limited to, sale, lease, assignment, corporate merger, stock swap, leveraged buy-out reorganization, or any other method heretofore or hereafter devised which results in a change of ownership or control of the

entity. Absent Council approval, the franchise shall not be deemed to have been transferred to the new entity. . . ." (See also San Diego Municipal Code section 66.0120)

In support of its requests for transfer of the franchises, Allied and Republic have submitted documentation regarding the legal structure, control, and ownership of the combined company; the financial wherewithal of the combined company; key personnel, staffing, and records retention matters; an updated collection franchise application; and security for performance of the franchise obligations. The City requested and received financial assurance, in the form of a new guarantee of performance from Republic for the Facility Franchise, certificates of insurance providing current proof of all insurance required under both Franchise Agreements, and new performance and payment bonds as per both Franchise Agreements. Based on its evaluation of the material submitted and the terms and conditions of the Consents to Assignment, Staff recommends approval of the requests to transfer the franchises and assign the agreements to the new entities.

FISCAL CONSIDERATIONS:

There are no anticipated expenses or significant revenue impacts related to this action. This action will authorize the transfer of franchises resulting from a merger between Allied and Republic. Allied and Republic have agreed to pay the City's costs and expenses in reviewing, examining, analyzing, and processing the request to transfer the franchises and assign the franchise agreements.

PREVIOUS COUNCIL AND/OR COMMITTEE ACTION:


None

COMMUNITY PARTICIPATION AND PUBLIC OUTREACH EFFORTS:

This action is a transfer of existing franchises and will not result in a decrease or increase of hauling or disposal services available to the businesses or residents of the City of San Diego.

KEY STAKEHOLDERS AND PROJECTED IMPACTS:

Republic Services, Inc.
San Diego Landfill Systems, LLC
Allied Waste Industries, Inc.
City of San Diego



Chris Gonaver
Environmental Services Director



David Jarrell
Deputy Chief of Public Works

GONAVER/SM

Exhibits:

- A. Consent to Assignment of Facility Franchise Agreement for Sycamore Canyon Landfill
- B. Consent to Assignment of Class II Non-Exclusive Solid Waste Management Franchise

CONSENT TO ASSIGNMENT OF CLASS II
NON-EXCLUSIVE FRANCHISE AGREEMENT
FOR SOLID WASTE MANAGEMENT SERVICES

This consent to the assignment of the *Class II Non-Exclusive Franchise Agreement between the City of San Diego and Pacific Waste Services (aka Allied Waste Systems, Inc., dba Allied Waste Services of San Diego) for Solid Waste Management Services* [Consent to Assignment] is entered into between the City of San Diego [City], Republic Services, Inc. [Republic], Allied Waste Industries, Inc. [Allied], and Allied Waste Systems, Inc., dba Allied Waste Services of San Diego.

RECITALS

WHEREAS, by Ordinance No. O-19180, adopted on May 20, 2003, the City Council granted a non-exclusive franchise to Pacific Waste Services to provide solid waste management services within the City [Franchise]; and

WHEREAS, effective July 1, 2003, the City and Pacific Waste Services entered into the *Class II Non-Exclusive Franchise Agreement between the City of San Diego and Pacific Waste Services for Solid Waste Management Services* [Agreement], which is on file in the Office of the City Clerk as Document No. OO-19180-2; and

WHEREAS, Pacific Waste Services later changed its name to Allied Waste Systems, Inc., dba Allied Waste Services of San Diego [Allied San Diego]; and

WHEREAS, on July 8, 2009, the City and Allied San Diego entered into the First Amendment to the Agreement, which is on file in the Office of the City Clerk as Document No. OO-19854-2; and

WHEREAS, Allied, the former ultimate parent company of Allied San Diego has merged with Republic, effective December 5, 2008, as a result of which Allied has become a fully-owned subsidiary of Republic, which also is now the ultimate parent company of Allied San Diego; and

WHEREAS, San Diego City Charter Section 103 requires the City's consent to the transfer of a franchise in the event of any change in the legal structure of the entity which holds the franchise, which change alters the ownership or control of the entity; and

WHEREAS, the City maintains that the merger between Allied and Republic constitutes a transfer of the Franchise and assignment of the Agreement under San Diego City Charter Section 103, San Diego Municipal Code section 66.0120, and the Agreement, which requires the approval of the City Council, without which the Franchise and Agreement will not be deemed to have been transferred; and

WHEREAS, Allied and Republic maintain that the merger of Allied and Republic does not constitute a transfer or assignment which requires the consent of the City Council; and

WHEREAS, without waiving their rights under the Agreement, Allied and Republic have requested the City's consent to a transfer of the Franchise and assignment of the Agreement, as amended, to Allied San Diego as it is legally structured, owned, and controlled following the merger of Allied and Republic [Allied San Diego as it is legally structured, owned, and controlled following the merger of Allied and Republic will hereinafter be referred to as "Allied San Diego-Republic"] [Republic, Allied, and Allied San Diego-Republic collectively will be referred to hereinafter as the "Republic Parties"]; and

WHEREAS, the City has evaluated the requested transfer of the Franchise and assignment of the Agreement, as amended, and has determined to consent thereto upon the terms and conditions contained herein;

NOW THEREFORE, the City and the Republic Parties, for and in consideration of the mutual covenants and agreements hereinafter stated and the performance thereof, and for other valuable and adequate consideration, do promise and agree for and on behalf of themselves and their successors in interest as follows:

TRANSFER

1. Consent to Transfer. The City hereby consents to the transfer of the Franchise and assignment of the Agreement, as amended, to Allied San Diego-Republic. All references in the Agreement, as amended, to Franchisee shall mean Allied San Diego-Republic.
2. Assignment of Rights and Delegation of Duties. All rights, title, and interest in the Franchise and the Agreement, as amended, are hereby assigned to Allied San Diego-Republic. All responsibilities, duties, and obligations under the Franchise and the Agreement, as amended, are hereby delegated to Allied San Diego-Republic.
3. Acceptance of Rights and Duties. Allied San Diego-Republic hereby accepts the transfer of the Franchise and assignment of the Agreement, as amended, and all rights, title, and interest therein. Allied San Diego-Republic accepts, assumes and agrees to fully, faithfully, and timely perform all the terms, covenants, conditions, stipulations, responsibilities, obligations, and duties under the Franchise and the Agreement, as amended.
4. Franchise Application. Prior to or concurrently with the execution by the Republic Parties of this Consent to Assignment, the Republic Parties shall submit to the City a franchise application in accordance with San Diego Municipal Code section 66.0112 for Allied San Diego-Republic.
5. Insurance. Pursuant to section 8.2 of the Agreement, the Republic Parties shall deliver to the City a new certificate of insurance showing proof of all insurance required under the Agreement, as amended. Such certificate of insurance and the endorsements required by City shall be delivered to the City prior to or concurrently with the execution by the Republic Parties of this Consent to Assignment.
6. Bonds. Pursuant to section 8.3 of the Agreement, as amended, the Republic Parties shall deliver to the City a new Faithful Performance Bond meeting all the requirements of the

Agreement, as amended. Such bond shall be delivered to the City prior to or concurrently with the execution by the Republic Parties of this Consent to Assignment.

7. City Costs. The Republic Parties agree to reimburse the City for all reasonable costs and related expenses incurred by the City in reviewing, examining, analyzing, and processing the request for transfer of the Franchise and assignment of the Agreement. The Republic Parties agree to pay such costs within thirty (30) days after receiving an invoice from the City, after which time the amount owing and unpaid will accrue interest in accordance with San Diego Municipal Code section 22.1707(c).

8. Controlling Law. This Consent to Assignment will be governed by the laws of the State of California, and venue for all legal actions and proceedings related to this Consent to Assignment shall be in the County of San Diego, State of California.

9. No Waiver. All parties hereto agree and acknowledge that the City's consent to transfer of the Franchise and assignment of the Agreement, as amended, is not intended and shall not be construed as a waiver of any rights nor as a release of any party hereto or their respective officers, directors, employees, or agents from any claims, demands, damages, debts, costs, losses, obligations, causes of action, or liabilities of any nature whatsoever, whether known or unknown.

10. Execution in Counterparts. This Consent to Assignment may be executed in multiple counterparts, each of which shall be deemed an original and all such counterparts together shall constitute one in the same instrument.

10. Effective Date. This Consent to Assignment shall become effective on the date executed by the last party to sign it.

IN WITNESS WHEREOF, this Consent to Assignment is executed by the City of San Diego, acting by and through the Mayor or his designee, pursuant to Ordinance No. O- _____ authorizing such execution, and by the Republic Parties through their duly authorized officers, pursuant to duly approved resolutions of their respective Boards of Directors.

ALLIED WASTE INDUSTRIES, INC.

By: [Signature]

Name: Tim M. Benter

Title: Vice President + Asst. Secy.

Date: 9/9/09

REPUBLIC SERVICES, INC.

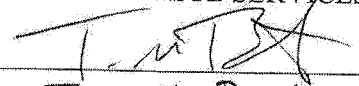
By: [Signature]

Name: Tim M. Benter

Title: Vice President + Asst. Secy.

Date: 9/9/09

ALLIED WASTE SYSTEMS, INC.,
DBA ALLIED WASTE SERVICES OF SAN DIEGO

By: 

Name: Tim M. Benter

Title: Vice President + Asst. Secy.

Date: 9/9/09

LAW OFFICES OF THOMAS M. BRUEN

By: 

Thomas M. Bruen,
Attorney for the Republic Parties

Date: _____

CITY OF SAN DIEGO

By: _____

Name: _____

Title: _____

Date: _____

I HEREBY APPROVE the form and legality of the foregoing Consent to Assignment this _____
day of _____, 2009.

JAN I. GOLDSMITH, City Attorney

By _____

Grace C. Lowenberg
Deputy City Attorney

CONSENT TO ASSIGNMENT OF
FACILITY FRANCHISE AGREEMENT
BETWEEN THE CITY OF SAN DIEGO
AND SAN DIEGO LANDFILL SYSTEMS, INC.
FOR THE SYCAMORE CANYON LANDFILL
TO SAN DIEGO LANDFILL SYSTEMS, LLC

This consent to the assignment of the *Facility Franchise Agreement Between the City of San Diego and San Diego Landfill Systems, Inc.* [Consent to Assignment] is entered into between the City of San Diego [City], Republic Services, Inc. [Republic], Allied Waste Industries, Inc. [Allied], San Diego Landfill Systems, Inc., and San Diego Landfill Systems, LLC [SDLS].

RECITALS

WHEREAS, by Ordinance No. O-18668, adopted on August 2, 1999, the City Council granted a non-exclusive solid waste facility franchise [Franchise] to San Diego Landfill Systems, Inc., identified as a subsidiary of Allied, for the Sycamore Canyon Landfill; and

WHEREAS, on August 11, 1999, the City and San Diego Landfill Systems, Inc., entered into the *Facility Franchise Agreement Between the City of San Diego and San Diego Landfill Systems, Inc.* [Agreement], which is on file in the Office of the City Clerk as Document No. OO-18668; and

WHEREAS, on March 8, 2005, the City and San Diego Landfill Systems, Inc., entered into the First Amendment to the Agreement, which is on file in the Office of the City Clerk as Document No. OO-19355; and

WHEREAS, in 2005, Allied established a fully-owned subsidiary known as San Diego Landfill Systems, LLC [SDLS], a California limited liability company, to own Sycamore Landfill, Inc., which in turn owns the Sycamore Canyon Landfill; and

WHEREAS, Allied, the former ultimate parent company of San Diego Landfill Systems, Inc. and SDLS, has merged with Republic, effective December 5, 2008, as a result of which Allied has become a fully-owned subsidiary of Republic, which also is now the ultimate parent company of SDLS and all other Allied subsidiaries [Republic, Allied, SDLS, and San Diego Landfill Systems, Inc., collectively will be referred to herein as the "Republic Parties"]; and

WHEREAS, San Diego City Charter Section 103 requires the City's consent to the transfer of a franchise in the event of any change in the legal structure of the entity which holds the franchise, which change alters the ownership or control of the entity; and

WHEREAS, the City maintains that the merger between Allied and Republic, as well as the substitution of SDLS for the original franchisee, each independently constitute a transfer of the

Franchise and assignment of the Agreement under San Diego City Charter Section 103 and the Agreement, which requires the approval of the City Council, without which the Franchise and Agreement will not be deemed to have been transferred; and

WHEREAS, the Republic Parties maintain that the merger of Allied and Republic does not constitute a sale or assignment of the landfill or the Agreement, and that consent of the City is not required for the merger, because the resulting company has a net worth greater than the pre-merger net worth of Allied; and

WHEREAS, without waiving their rights under the Agreement, the Republic Parties have requested the City's consent to a transfer of the Franchise and assignment of the Agreement, as amended, to SDLS; and the City has evaluated the transfer of the Franchise and assignment of the Agreement, as amended, and has determined to consent thereto upon the terms and conditions contained herein;

NOW THEREFORE, the City and the Republic Parties, for and in consideration of the mutual covenants and agreements hereinafter stated and the performance thereof, and for other valuable and adequate consideration, do promise and agree for and on behalf of themselves and their successors in interest as follows:

TRANSFER

1. Consent to Transfer. The City hereby consents to the transfer of the Franchise and assignment of the Agreement, as amended, to SDLS. All references in the Agreement, as amended, to the "Company" shall mean SDLS.
2. Assignment of Rights and Delegation of Duties. All rights, title, and interest in the Franchise and the Agreement, as amended, are hereby assigned to SDLS. All responsibilities, duties, and obligations under the Franchise and the Agreement, as amended, are hereby delegated to SDLS.
3. Acceptance of Rights and Duties. SDLS hereby accepts the transfer of the Franchise and assignment of the Agreement, as amended, and all rights, title, and interest therein. SDLS accepts, assumes and agrees to fully, faithfully, and timely perform all the terms, covenants, conditions, stipulations, responsibilities, obligations, and duties under the Franchise and the Agreement, as amended.
4. Financial Assurances. Pursuant to section 9.2 of the Agreement, the Republic Parties shall deliver to the City a new irrevocable and unconditional Guarantee of the performance of the Agreement, as amended, executed by Republic, substantially in the form set forth in Exhibit E of the Agreement, replacing references to "San Diego Landfill Systems, Inc." with "San Diego Landfill Systems, LLC." The Guarantee shall be delivered to the City prior to or concurrently with the execution by the Republic Parties of this Consent to Assignment.
5. Insurance. Pursuant to section 9.3 of the Agreement, the Republic Parties shall deliver to the City new certificates of insurance showing proof of all insurance required under the Agreement, as amended, as specified in Appendix C and section 9.3(B) thereof. Such certificates of

insurance and the endorsements required by City shall be delivered to the City prior to or concurrently with the execution by the Republic Parties of this Consent to Assignment.

6. Bonds. Pursuant to section 1.22 of Appendix F of the Agreement, as amended, the Republic Parties shall deliver to the City new Performance and Payment Bonds meeting all the requirements of the Agreement, as amended. Such bonds shall be delivered to the City prior to or concurrently with the execution by the Republic Parties of this Consent to Assignment.

7. City Costs. In accordance with section 9.10 of the Agreement, the Republic Parties agree to reimburse the City for all costs and expenses incurred by the City in reviewing, examining, analyzing, and processing the request for transfer of the Franchise and assignment of the Agreement, up to the maximum reimbursable amount set forth in section 9.10 of the Agreement. The Republic Parties agree to pay such costs within thirty (30) days after receiving invoices from the City, after which time the amounts owing and unpaid will accrue interest as specified in section 9.10.

8. Controlling Law. This Consent to Assignment will be governed by the laws of the State of California, and venue for all legal actions and proceedings related to this Consent to Assignment shall be in the County of San Diego, State of California.


9. No Waiver. All parties hereto agree and acknowledge that the City's consent to transfer of the Franchise and assignment of the Agreement, as amended, is not intended and shall not be construed as a waiver of any rights nor as a release of any party hereto or their respective officers, directors, employees, or agents from any claims, demands, damages, debts, costs, losses, obligations, causes of action, or liabilities of any nature whatsoever, whether known or unknown.

10. Execution in Counterparts. This Consent to Assignment may be executed in multiple counterparts, each of which shall be deemed an original and all such counterparts together shall constitute one in the same instrument.

11. Effective Date. This Consent to Assignment shall become effective on the date executed by the last party to sign it.

IN WITNESS WHEREOF, this Consent to Assignment is executed by the City of San Diego, acting by and through the Mayor or his designee, pursuant to Ordinance No. O- _____ authorizing such execution, and by the Republic Parties through their duly authorized officers, pursuant to duly approved resolutions of their respective Boards of Directors.

SAN DIEGO LANDFILL SYSTEMS, LLC

By: 

Name: Tim M. Benter

Title: Vice President + Asst. Secy.

Date: 9/9/09

SAN DIEGO LANDFILL SYSTEMS, INC.
dba for Allied Waste Industries, Inc.

By: 

Name: Tim M. Benter

Title: Vice President + Asst. Secy.

Date: 9/9/09

ALLIED WASTE INDUSTRIES, INC.

By: [Signature]

Name: Tim M. Benter

Title: Vice President + Asst. Secy.

Date: 9/9/09

REPUBLIC SERVICES, INC.

By: [Signature]

Name: Tim M. Benter

Title: Vice President + Asst. Secy.

Date: 9/9/09

LAW OFFICES OF THOMAS M. BRUEN

By: [Signature]

Thomas M. Bruen,
Attorney for the Republic Parties

CITY OF SAN DIEGO

By: _____

Name: _____

Title: _____

Date: _____

I HEREBY APPROVE the form and legality of the foregoing Consent to Assignment this _____ day of _____, 2009.

JAN I. GOLDSMITH, City Attorney

By: _____

Grace C. Lowenberg
Deputy City Attorney