MEMORANDUM

TO: Mayor and Members of the City Council

FROM: Eddie M. Buffaloe, Acting City Manager

Dwan Bell, Public Utilities Director

DATE: October 8, 2021

REF: Consideration - GFL Environmental Franchise Fee Contract Renewal

BACKGROUND:

GFL Environmental has submitted a *Franchise Agreement* renewal, which grants the right to use right-of-ways to collect, haul, or transport solid, or industrial waste from commercial properties in the city to the landfill. This evergreen contract since 2006 cites Chapter 11 of the Elizabeth City Code of 1953, entitled "Sanitation" for the orderly solid waste collection service of industrial bulk containers; and it appears to the City to be the most effective means to effect these ends, and to promote the general welfare of the citizens of Elizabeth City.

ANALYSIS:

As empowered by NCGS 160A-319 to grant this franchise fee and in accordance with NCGS 160-A-76, this agreement is most satisfactory and economical for the pick-up service of commercial and industrial bulk containers by allowing GFL Environmental to continue to haul, empty and dispose commercial waste contents at a rate of 5% per year of the Company's annual Gross Revenues less bad debt.

STAFF RECOMMENDATION:

By motion, authorize the renewal of the existing franchise fee contract with GFL for another (5) consecutive years.

§ 160A-319. Utility franchises. (a) A city shall have authority to grant upon reasonable terms franchises for a telephone system and any of the enterprises listed in G.S. 160A-311, except a cable television system. A franchise granted by a city authorizes the operation of the franchised activity within the city. No franchise shall be granted for a period of more than 60 years. A franchise granted for a sanitary landfill shall be subject to all requirements pertaining thereto under G.S. 130A-294. A franchise for solid waste collection or disposal systems and facilities, other than sanitary landfills, shall not be granted for a period of more than 30 years. Except as otherwise provided by law, when a city operates an enterprise, or upon granting a franchise, a city may by ordinance make it unlawful to operate an enterprise without a franchise. (b) For the purposes of this section, "cable television system" means any system or facility that, by means of a master antenna and wires or cables, or by wires or cables alone, receives, amplifies, modifies, transmits, or distributes any television, radio, or electronic signal, audio or video or both, to subscribing members of the public for compensation. "Cable television system" does not include providing master antenna services only to property owned or leased by the same person, firm, or corporation, nor communication services rendered to a cable television system by a public utility that is regulated by the North Carolina Utilities Commission or the Federal Communications Commission in providing those services. (Code, ss. 704, 3117; 1901, c. 283; 1905, c. 526; Rev., s. 2916; 1907, c. 978; P.L. 1917, c. 223; C. S., s. 2623; Ex. Sess. 1921, c. 58; 1927, c. 14; 1933, c. 69; 1949, c. 938; 1955, c. 77; 1959, c. 391; 1961, c. 308; 1967, c. 100, s. 2; c. 1122, s. 1; 1969, c. 944; 1971, c. 698, s. 1; 1975, c. 664, s. 11; 1991 (Reg. Sess., 1992), c. 1013, s. 2; 2006-151, s. 15; 2017-10, s. 3.2(c); 2018-114, s. 21(b).)

§ 160A-76. Franchises; technical ordinances.

(a) No ordinance making a grant, renewal, extension, or amendment of any franchise shall be finally adopted until it has been passed at two regular meetings of the council, and no such grant, renewal, extension, or amendment shall be made otherwise than by ordinance. (b) Any published technical code or any standards or regulations promulgated by any public agency may be adopted in an ordinance by reference subject to G.S. 143-138(e). A technical code or set of standards or regulations adopted by reference in a city ordinance shall have the force of law within the city. Official copies of all technical codes, standards, and regulations adopted by reference shall be maintained for public inspection in the office of the city clerk. (1917, c. 136, subch. 13; C.S., s. 2823; 1963, c. 790; 1971, c. 698, s. 1; 1973, c. 426, s. 17.)

P.O. Box 1142 | Elizabeth City, NC 27906 | 252-264-2996

10/01/2021

City of Elizabeth City

P.O. Box 347

Elizabeth City, NC 27907-0347

Attn: Eddie Buffaloe, Acting City Manager

Mr. Buffaloe,

Please accept this letter that GFL Environmental dba Waste Industries would like to extend the Franchise Agreeement for an additional 5yrs.

Thank you

Tim Black

"EXHIBIT B"

NON-EXCLUSIVE FRANCHISE AGREEMENT

NORTH CAROLINA
PASQUOTANK COUNTY

NON-EXCLUSIVE FRANCHISE AGREEMENT

THIS AGREEMENT, made and entered into this the 1st day of October, 2021 by and between the City of Elizabeth City, a municipal corporation organized under the laws of the State of North Carolina, ***hereinafter*** referred to as the City; and Waste Industries, LLC hereinafter referred to as the Company;

WITNESSETH:

WHEREAS, the City of Elizabeth City is a municipal corporation in the State of North Carolina having powers conferred upon it by the laws of the State of North Carolina;

WHEREAS, the City desires, within the City and upon City owned property, to improve its system of collection of garbage and refuse, as defined in Chapter 11 of the Elizabeth City Code of 1953, entitled "Sanitation", and in order to implement this ordinance will require the orderly solid waste collection service for collection and industrial bulk containers; and it appearing to the City that the most satisfactory means to effect these ends, and to promote the general welfare of the citizens of Elizabeth City and the sanitation of the City in the most economical fashion, is to grant a nonexclusive franchise for the pick-up service of commercial and industrial bulk containers by emptying said containers and hauling the contents to disposal facilities for dumping;

WHEREAS, North Carolina General Statues 160A-319 empowers the City to grant this franchise; and

WHEREAS, in accordance with North Carolina General ***Statutes*** 160-A-76, the City Council of the City of Elizabeth City has by Ordinance, duly adopted at two regular meetings of the City Council after a duly advertised public hearing, authorized the granting of this franchise.

NOW, THEREFORE, in consideration of the mutual covenants of the parties, the City does hereby grant to the Company a nonexclusive franchise for the solid waste collection services for commercial and industrial bulk containers within the City and upon City owned property, subject to the following terms and conditions:

1. For the purpose of this Agreement, the following words and phrases shall have the following ***meanings***:

BULK CONTAINERS – A metal container of not less than two (2) cubic yards or more than eight (8) cubic yards, to be watertight, of all steel construction. Bulk

containers do not include those that are to be serviced by the use of roll-offs or compactors.

GARBAGE – Organic waste matter both animal and vegetable, from houses, kitchens, restaurants, hotels, hospitals, etc., comprised chiefly of waste food.

REFUSE – Ashes, tin cans, dirty rags, trash, house sweepings, waste paper, shavings, bottles, and other rubbish.

DISPOSAL FACILITY – A place on land where solid waste is disposed of in a sanitary manner without creating nuisances or hazards to public health or safety by utilizing legally approved means to landfill the material or incinerate the material at an approved incineration facility.

SOLID WASTE – Garbage and refuse and solid industrial waste.

SOLID WASTE COLLECTOR – Any person who collects or transports solid waste.

2. The territory covered by this Agreement shall be the territory in which is presently, or by annexation will be, within the corporate limits of the City of Elizabeth City, together with any municipality owned or occupied property outside the corporate limits of the City of Elizabeth City.

3. This franchise shall continue for a period of five (5) years, commencing on the 1st of October, 2021 and ending on the 30th of September, 2026, and may be renewed with the consent of both parties for three (3) additional five (5) year terms, provided that there shall be no changes in the terms and conditions hereof (except as otherwise provided herein) unless a duly advertised public hearing is first held.

4. The Company shall provide solid waste collection services for all commercial and industrial bulk containers within the territory covered by this Agreement, said services to include the furnishing of all necessary labor, vehicles and equipment in order to collect all solid waste as the sites of the bulk containers and removal of said solid waste to an approved disposal facility in accordance with the terms of this Agreement.

5. The Company shall indemnify and save the City free and harmless from any and all liability, loss, cost, damage, or other expense from accident or damage, either to itself or to the persons or property of others, which may occur by reason of the exercise of rights and privileges granted. During the period of this franchise, the Company will carry motor vehicle and general liability insurance with minimum limits of one million dollars ($1,000,000.00) for bodily injury or death to any one person, one million dollars ($1,000,000.00) aggregate bodily injuries or deaths in any one accident and one million dollars ($1,000,000.00) for property damage as the same is commonly

understood in the insurance trade. The company will furnish to the City proof that such insurance has been obtained annually and the Company shall by the 11th day of January each year beginning with January, 2022 file a certificate with the City Manager for his approval. After the approval of the City Manager of said certificate shall remain on file in the Office of the ***Risk Manager*** of the City of Elizabeth City.

6. The commercial and industrial establishments required to have bulk containers for solid waste collection by Chapter 11 of the Elizabeth City Code shall be required to obtain their solid waste collection services from the Company or any other person, firm or corporation granted in a similar franchise by the City.

7. The Company shall, during the periods of this franchise, provide a local telephone number or otherwise toll-free number to the nearest office from which service is provided for a minimum of forty (40) hours per week during regular business hours to answer questions and receive complaints; and the Company will handle all complaints within twenty-four (24) hours from the time of notification; the Company will further provide the City with a telephone number whereby the Company can be reached at all times.

8. The City ***may***, at its option, require the Company to maintain in full force and at its expense and to furnish to the City a performance bond executed by one or more surety companies legally authorized to do business in the State of North Carolina, in a manner and form approved by the City Manager, in the amount of one hundred thousand dollars ($100,000.00). Upon finding that the Company's performance is satisfactory, by mutual consent by both the City and the Company, the City may agree to waive the performance bond requirements. The Company may at its option provide the City an irrevocable letter of credit from an institution acceptable to the City in lieu of any performance bond requirement.

9. The City agrees that insofar as the fulfillment of this agreement is concerned, Company shall have all of the rights, and privileges and access to property and garbage storage areas as the City has under the General Statute of North Carolina and the City Code of the City of Elizabeth City, whether said storage areas are on public or private premises, and the City hereby assigns Company said non-exclusive rights and privileges during the term of this Agreement (and any removal thereof).

10. The Company shall further continue the City's practice of reasonably greater frequency of service for those establishments which occasionally request additional service. Billing for this service shall be done separately by the Company directly to the customer.

11. All solid waste collected by the Company shall be collected and hauled in enclosed, tight, non-leakable packer trucks equipped with operable two-way radio communication; the trucks shall be assigned so that refuse is exposed only for the time needed to dump the bulk containers into the truck and to unload the truck at the disposal facility. Any leakage or spillage of solid waste from the trucks onto streets or

alleys or private property shall be removed immediately by the company. The Company shall maintain with the City a current list showing the size, age, make, serial number and identification number of all vehicles which will be or are being used to perform Company's services under this Agreement, and to make those vehicles available for inspection upon request of the city.

12. The Company shall promptly settle any and all disputes between the Company and its customers or the furnisher of the bulk containers, if different from the Company. In the event of an irreconcilable dispute, the Company shall submit the dispute to the City Manager of the City of Elizabeth City for determination of the dispute. His determination shall be binding on the Company unless either party appeals his decision to the City Council. Written notice of an appeal must be submitted to the City Clerk within three (3) days after the parties are notified of the City Manager's decision. In the event of an appeal to the City Council, the City Council's decision shall be binding on the Company.

13. It is understood and agreed that the nature of the performance under this Agreement is such that time is of the essence. Events of default and/or major breach of this Agreement by the Company in performance constitute ***grounds*** for termination by the City; these include (but are not limited to):

(a) Substantial failure to perform any term or provision of this Agreement by Company for a period of one week, except when the failure to perform is caused by an act beyond the control of Company, such as acts of God, war, public enemy, civic commotion, riot, insurrection or any similar act beyond the control of the Company which renders impossible the performance under this Agreement.

(b) The filing by the Company of a voluntary petition in bankruptcy or the failure of the Company to lift or suspend ***an*** execution, garnishment or attachment of such consequence as will impair the ability of the Company to perform under the Agreement, or the commission by the Company of any act of bankruptcy or the adjudication of the Company to be bankrupt, or the assignment by the Company for the benefit of its creditors under the provisions of the Federal Bankruptcy Act, as amended or under any similar act which may be hereinafter enacted.

In the event of any breach of this Agreement or unsatisfactory performance on the part of the Company, written notice of the nature of the breach or unsatisfactory performance and demand ***for*** its correction, and if the Company does not within twenty (20) days of receipt of such notice, correct the condition causing the breach, the City may terminate this contract on the last day of any month by giving written notice to the Company on or prior to the 15th day of said month after the City Council has approved its termination.

In the event of termination of this Agreement under any of the above two (2) specifically mentioned causes or procedures and in the further event all other

companies which may have been granted a similar solid waste collection franchise by the City also have had their agreements terminated, the performance bond or deposit of the Company (if required) shall be retained by the City as liquidated damages and not as a penalty. It now being agreed that the face amount thereof is a reasonable and fair estimate of the amount of damages that the City shall sustain due to the Company's failure to perform and breach of default hereunder as the sole solid waste collection franchise.

In the event of termination of this Agreement under any of the above two (2) specifically mentioned causes or procedures without all other companies who may have been granted a similar franchise by the City also having their Agreement terminated, the city shall be entitled to so much of the bond or deposit which represents actual damages caused by the Company's termination.

14. The Company shall conduct operations in compliance with all applicable Federal and State laws, together will all applicable ordinances of the City of Elizabeth City. Company shall dispose of all solid waste collected in a manner and at a site approved by the State of North Carolina or the Commonwealth of Virginia.

15. The City reserves the right to request the Company to provide a certified public accounting firm's audited profit and loss statement. The Company's audited annual and quarterly reports will be sufficient to satisfy this requirement.

16. The Company shall not, in the performance of this Agreement discriminate against any employee or applicant for employment because of race, color, creed, national origin or ancestry.

17. The Company shall indemnify and save the City (and its officials, employees and agents) harmless from any and all claims, suits, and actions of every kind ***made*** upon or brought against the City (or its officials, employees or agents) on account of any damages or injuries sustained by any person, firm, or corporation and arising in any way out of the performance or nonperformance of this Agreement by Company or any of its officials, agents or employees (said indemnification to include ***attorney's*** fees and all other expenses incurred by or for the City in investigating or defending the same); provided, however, that the Company will not be liable for any suits, actions, legal proceedings, claims, demands, damages, costs, expenses and attorneys' fees arising out of the award of this contract for a willful and negligent act or omission of the City, its officers, agents, servants and employees.

18. Should any court of competent jurisdiction hold any provision in this Agreement invalid, such invalidity shall not affect any other provision hereof. Any questions concerning the interpretation or validity of this Agreement shall be decided by a lawsuit instituted in the Superior Court of Pasquotank County, North Carolina.

19. Other than by operation of law, no assignment of this Agreement or any right accruing under the Agreement will be made in the whole or in part by the Company

without express written consent of the City, which consent will not be reasonably withheld. In the event of an assignment, the assignee will assume the liability and all responsibilities of the Company under this Agreement.

20. The rights of the Company for the period of this franchise shall not be exclusive and during such period the City may grant a similar franchise. This franchise is adopted by the parties in good faith and in the event it should be determined by any court of competent jurisdiction that this franchise is an ultra vires act by the City or that it is in violation of any anti-trust law, the Company agrees that no action shall be taken against the City for damages.

21. It is agreed and understood by both parties that the Company may utilize any legally permitted disposal facility and pay all applicable fees and charges for disposal. The City will not furnish a landfill site.

22. The Company shall not be required to collect solid waste unless it is in bulk containers reasonably adapted to Company's trucks. The Company agrees to make said bulk containers readily available at reasonable prices to all customers utilizing bulk container for solid waste within the City limits (as changed from time to time by annexation) and further to reasonably assist said customers in disposing of any existing non-compatible containers.

23. The Company agrees to have said bulk containers available for all potential customers and commences providing full services to all such customers within ten (10) days following the formal award of the franchise to the Company by the City.

24. During the term of each franchise, the Company shall pay to the City an amount equal to FIVE percent (5.0%) per year of the Company's annual Gross Revenues, less bad debt. Said fee shall begin November 1, 2006. Gross Revenues shall mean all cash, credits, property of any kind or nature or other consideration derived directly or indirectly by the Company, its affiliates, subsidiaries, parents, and any other person or entity in which the Company has a financial interest or which has a financial interest in a Company, derived from the service of solid waste collection of bulk containers pursuant to this agreement arising from or attributable to the sale or exchange of services within the City.

(a) Said fees shall be paid quarterly, not later than July 30, October 30, January 30, and April 30 for the preceding three-month period ending, respectively, on June 30, September 30, December 31, and March 31. Not later than the date of each payment, each Grantee shall file with the City a written statement signed and sworn to by local management of the Company, certified by a representative in the corporate headquarters of the Company, which identifies in detail the sources and amounts of Gross Revenues, less bad debt, received by the Company during the quarter for which payment is made.

(b) No acceptance of any payment shall be construed as an accord that the amount paid is, in fact, the correct amount, and such acceptance of payment

shall not be construed as a release of any claim which the City may have for further or additional sums payable under the provisions of this section.

(c) Any Franchise Fees which remain unpaid after the dates specified above shall be delinquent and shall thereafter accrue interest at the maximum legal rate until paid.

(d) Not less than annually, the Company shall provide the City with an unqualified certification of the Company's Officer certifying the accuracy of the quarterly Franchise Fee payments paid within the preceding twelve (12) months. Said certification shall be prepared in accordance with Generally Accepted Accounting Principles. The City may in its discretion require such certification be prepared by an independent certified public accountant, but such request may not be made more frequently than biannually.

(e) During the term of the franchise, the City may, not more frequently than once each year, conduct an audit of the books, records and accounts of the Company for the purpose of determining whether the Company has paid franchise fees in the amount prescribed by this Ordinance. The audit may be conducted by the Auditor of the City or by an independent certified public accounting firm retained by the City, and shall be conducted at the sole expense of the City. The party conducting the audit shall prepare a written report containing its findings, and the report shall be filed with the City, and mailed to the City and Company.

(f) Each Company shall make available for inspection by authorized representatives of the City, its books, accounts, and all other financial records at reasonable times and on reasonable advance notice for the purpose of permitting exercise of the authorities conferred by this section.

[Signatures on following page]

IN WITNESS WHEREOF, ***said*** parties have set their hands and seals the day and year first above written, in duplicate originals.

CITY OF ELIZABETH CITY

_____

Bettie J. Parker
MAYOR

Attest:

_____

April Onley, NCCMC
CITY CLERK

WASTE INDUSTRIES, LLC

_____

Printed Name: _____

Title: _____

Attest:

_____

(Assistant) Secretary