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April 14, 2017

VIA FIRST CLASS AND ELECTRONIC MAIL

Honorable Chair Carolyn Hemming and the
Planning Commission of the City of Pomona
Pomona City Hall
505 S. Garey Ave.
Pomona, California 91766
[sandra_elias@ci.pomona.ca.us]

Re: Grand Central Recycling & Transfer Station, Inc.'s Comments re: Proposed "Code Amendment (CODE 6899-2017) Waste and Recycling Facilities" – April 26, 2017 Planning Commission Meeting

Dear Chair Hemming and the Planning Commission:

This office represents Grand Central Recycling & Transfer Station, Inc. ("Grand Central"), the owner and operator of the Pomona Valley Transfer Station ("Transfer Station"), located at 1371 E. Ninth Street in the City of Pomona ("City").

In advance of the Planning Commission's previous hearing on this matter – held on March 8, 2017 – I submitted Grand Central's written objection to the proposed "Code Amendment (CODE 6899-2017) Waste and Recycling Facilities" ("Code Amendment"), which I have attached hereto as Exhibit "A" for your reference. That letter includes proposed revisions to the Code Amendment to make clear that it would not have any effect on existing uses. If the City accepts the proposed (or similar) revisions, Grand Central would have no objection the proposed Code Amendment. My colleague attended and spoke at the March 8, 2017 hearing, where he explained Grand Central's position that the City should eliminate all ambiguity regarding the Code Amendment's application to existing facilities because, as City staff stated several times, the Code Amendment is not intended to apply to such facilities.

Grand Central sincerely appreciates the Planning Commission's thoughtful consideration of the Code Amendment on March 8, and its decision to continue the matter to April 26, 2017 in order to consider the public comments made at that hearing, as well as allow an opportunity for the public to submit additional materials. Following the meeting, Grand Central submits this letter to briefly emphasize a number of points for the City's consideration when potentially revising the proposed Code Amendment before the Planning Commission's April 26 hearing.

Grand Central firmly believes that because the City does not intend for the Code Amendment to apply to existing facilities, the text of the Code Amendment itself should make that clear, which Grand Central's proposed change set forth on page 3 of Exhibit "A" would

accomplish. At a minimum, the City should at least add the word "new" before the phrase "Waste and Recycling facilities . . ." when describing the now banned uses. Put simply, there is no downside to revising the Code Amendment so that its actual text matches the City's intent.

Additionally, the express "carve out" for the Transfer Station proposed by Grand Central (Ex. "A", p. 3) is very important. As acknowledged by the City Attorney at the March 8, 2017 hearing, the adoption of the Code Amendment as currently written, without the proposed carve out, would result in the Transfer Station becoming a legal nonconforming use, ***which is a significant change from the Transfer Station's current status and has real, significant impacts***. For example, nonconforming status creates problems with obtaining financing, and could result in amortization/abatement of the use in the future. Accordingly, the proposed Code Amendment as currently written would unlawfully violate the vested rights granted to Grand Central, as also set forth in Exhibit "A". In sum, if the City's intent is to truly have no impact on exiting uses, Grand Central's proposed carve out is essential because ***a legal nonconforming use is materially different from a permitted use.***

Finally, it bears repeating that the Transfer Station is Gold LEED certified, is completely enclosed (thereby avoiding the spread of any odors and debris), uses a high-tech odor and ventilation system to further neutralize potential odors, incorporates solar power and translucent panels, and uses Compressed Natural Gas-fueled trucks (instead of diesel vehicles) to transport waste. The Transfer Station looks like, and has an environmental impact more comparable to, an office building than a traditional waste facility. Because it does not have the same type of impacts associated with other waste and recycling facilities, the Transfer Station is not the type of use that the Code Amendment is aimed at impacting. Therefore, Grand Central's proposed revision that specifically carves out the Transfer Station from the Code Amendment is appropriate and consistent with its purpose. (*See,* Ex. "A", p. 3)

Grand Central is thankful for the City's thoughtful consideration of this matter. Please do not hesitate to contact me with any questions.

Sincerely,

RUTAN & TUCKER, LLP

John A. Ramirez

JAR:abf

cc: Arnold M. Alvarez-Glasman, Esq., City Attorney [aglasman@agclawfirm.com]
Brad Johnson, Development Services Manager, City of Pomona [brad_johnson@ci.pomona.ca.us]
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Exhibit A

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March 8, 2017

VIA HAND DELIVERY AND ELECTRONIC MAIL

Honorable Chair Carolyn Hemming and the
Planning Commission of the City of Pomona
Pomona City Hall
505 S. Garey Ave.
Pomona, California 91766
[sandra_elias@ci.pomona.ca.us]

Re: **Grand Central Recycling & Transfer Station, Inc.'s Comments re: Proposed "Code Amendment (CODE 6899-2017) Waste and Recycling Facilities"**

Dear Chair Hemming and the Planning Commission:

This office represents Grand Central Recycling & Transfer Station, Inc. ("Grand Central"), the owner and operator of the Pomona Valley Transfer Station ("Transfer Station"), located at 1371 E. Ninth Street in the City of Pomona ("City"). The purpose of this letter is to provide Grand Central's formal ***objection*** to the proposed "Code Amendment (CODE 6899-2017) Waste and Recycling Facilities" ("Code Amendment") that the Planning Commission will consider at its meeting of March 8, 2017, on the grounds that the Code Amendment, without proper clarification that it does not apply to Grand Central's existing operations, purports to potentially contradict and nullify the vested rights and previous approvals granted to Grand Central by the City for the operation of the Transfer Station.

As you are likely aware, the Transfer Station is a 74,580-square-foot, state-of-the-art solid-waste-transfer station that serves as a point of transfer for waste generated in the City (ultimately to be combined and moved to landfills outside of the City), with a permitted capacity of 1,000 tons of waste per day. Among other environmentally sensitive features, the Transfer Station is Gold LEED certified, is completely enclosed, uses a high-tech odor and ventilation system to neutralize potential odors, incorporates solar power and translucent panels, and uses Compressed Natural Gas-fueled trucks (instead of diesel vehicles) to transport waste.

The City granted approval to Grand Central to construct and operate the Transfer Station under a series of entitlements issued in 2012 and 2014 (the "Project Entitlements"). For instance, on July 16, 2012, the City adopted Resolution No. 2012-124, which approved Conditional Use Permit No. 08-003 (the "CUP"). By its terms, the CUP sets forth 83 separate conditions of approval for Grand Central's construction, operation, and maintenance of the Transfer Station. In addition, on January 27, 2014, the City adopted Ordinance No. 4175, which approved a franchise agreement between the City and Grand Central (the "Franchise

Agreement"), establishing yet more conditions, negotiated by the parties, that would govern the Transfer Station's operations and maintenance.[1]

Based on the explicit rights granted by the Project Entitlements, Grand Central expended substantial sums to construct and maintain the Transfer Station, and has continued to expend substantial sums to operate and maintain the station (in full compliance with the conditions and requirements of the CUP and the Franchise Agreement) for multiple years. As such, Grand Central's rights under the Project Entitlements have fully vested, and those rights represent binding obligations of the City and property and contract rights owned by Grand Central.

Despite these vested entitlements and Grand Central's contractual rights under the Franchise Agreement, the City is now contemplating the adoption of the Code Amendment, the current draft of which would potentially require Grand Central to cease all operations and close the Transfer Station because the Code Amendment would amend the City's M-2 zone (as well as other manufacturing, industrial and commercial zones) to expressly prohibit:

> "Waste and Recycling facilities including hazardous waste facility, automobile dismantling facility, electronic waste facility, food waste facility, green waste facility, recycling facility (excluding convenience recycling facilities), solid waste facility, construction and demolition waste facility, and pallet yards."

Needless to say, Grand Central ***objects*** to the Planning Commission's proposed resolution recommending approval of the Code Amendment because the Code Amendment would unlawfully contradict and interfere with the rights granted to Grand Central by the Project. To avoid this illegality, the Code Amendment must be revised to expressly *exempt* the Transfer Station. While the staff report appears to indicate that the Code Amendment would only apply to future uses, the proposed Code Amendment itself must be clarified to ensure that it cannot be read to apply existing and vested uses like the Transfer Station.

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[1] In addition to the CUP and the Franchise Agreement, the Project Entitlements also included, without limitation, (1) Resolution No. 2012-122, certifying Final Environmental Impact Report State Clearinghouse No. 2009051126 ("EIR"), and (2) Resolution No. 2012-123, approving Tentative Parcel Map 08-007.

To facilitate these revisions, as an example, Grand Central suggests the following revisions (in underline) to the proposed new Section .422(H) of the Pomona Zoning Code (M-2 zones uses expressly prohibited):

> (H) New waste and Recycling facilities including hazardous waste facility, automobile dismantling facility, electronic waste facility, food waste facility, green waste facility, recycling facility (excluding convenience recycling facilities), solid waste facility, construction and demolition waste facility, and pallet yards. This Section shall not apply in any manner to the Pomona Valley Transfer Station, located at 1371 E. Ninth Street in the City of Pomona (the "Pomona Valley Transfer Station"), and/or to any waste-related operations at that facility. On the contrary, notwithstanding any other provision of the City's Code, the operation, maintenance, and construction of the Pomona Valley Transfer Station, and any other rights and duties relating to that facility (including but not limited to the procedures by which those rights and duties may be altered, challenged, or revoked) shall be governed solely by the entitlements and agreements granted by the City in relation to that facility, so long as, and to the extent that, those entitlements and/or agreements remain in effect. As used in the preceding sentence, the term "entitlements and agreements" include, without limitation, (1) Conditional Use Permit No. 08-003, approved by City Resolution No. 2012-124, (2) the franchise agreement between the City and Grand Central Recycling & Transfer Station, Inc., approved and/or amended via Ordinance No. 4175, (3) Resolution No. 2012-122, certifying Final Environmental Impact Report State Clearinghouse No. 2009051126, and (4) Resolution No. 2012-123, approving Tentative Parcel Map 08-007.

Without the foregoing clarification, the proposed Code Amendment is at odds with Grand Central's existing rights under the Project Entitlements, which grant express rights to Grand Central (and place limits on the City's rights). For instance, under the Project Entitlements, the Transfer Station is permitted to handle 1,000 tons of solid waste per day—an amount that is explicitly allowed under both the CUP and the Franchise Agreement. In fact, the Franchise Agreement expressly requires the Transfer Station to receive all of the City's residential waste, up to but not exceeding the 1,000-tons-per-day limit.

Under black-letter law, to the extent the Code Amendment's new regulations impose *any* requirement on the Transfer Station that is more restrictive than the rights granted under the

Project Entitlements, the Code Amendment is illegal, and will be invalidated by the courts. Under California law, a "vested right" is a right that is either already possessed or has been legitimately acquired. (*Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1321.) In the context of conditional use permits, once a landowner makes ***expenditures*** in reliance on such a permit, a vested right is created to use the property ***in accordance with the terms of the conditional use permit, and without additional restrictions or requirements***. (*Malibu Mts. Rec. v. County of Los Angeles* (1998) 67 Cal.App.4th 359, 367, 369-370.) Once secured, a vested right enjoys a heightened level of protection, immune from interference. (*See Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1530-1531.)

Here, after securing the CUP and other Project Entitlements, Grand Central made substantial expenditures for the construction and operation of the Transfer Station. Thus, Grand Central's right to operate the Transfer Station in accordance with the CUP and other Project Entitlements has fully vested and cannot be interfered with. Indeed, Recital L to the Franchise Agreement even states: ***"The Project Approvals are now fully vested."***

In the seminal *Goat Hill Tavern* case, a city's attempt to place additional restrictions on a business via the denial of a request to renew a conditional use permit was found to be an unlawful interference of the business's vested rights. Here, the facts are even more egregious. Unlike in *Goat Hill Tavern*, where the defendant city at least had some right to review the request for a permit renewal, here Grand Central is not even seeking to renew its CUP, or otherwise seeking a new or modified approval from the City. On the contrary, the City is appears to be attempting, unilaterally, and after Grand Central has been peaceably operating pursuant to the Project Entitlements since July of 2015, to ban its continued operation. There is no dispute that the CUP, the Franchise Agreement, and other Project Entitlements are currently valid and in force.

Additionally, the proposed Code Amendment also unlawfully impairs the Franchise Agreement. Article I, section 9, of the California Constitution provides: "A...law impairing the obligation of contracts may not be passed." Additionally, Article I, section 10, clause 1, of the U.S. Constitution provides: "No state shall...pass any law...impairing the obligations of contracts...." The United States Supreme Court has explained that a contract is impaired by a law where (1) a valid contract exists; (2) the law in question impairs an obligation or right under that contract; and (3) the impairment can be characterized as substantial. (*See General Motors Corp. v. Romein* (1992) 503 U.S. 181, 186 [cited in *San Diego Police Officers' Association v. San Diego City Employees' Retirement System* (9th Cir. 2009) 568 F.3d 725].)

Here, the Franchise Agreement is a valid and ongoing contract between the City and Grand Central that, among other things, lays out in great detail the operational requirements of the Transfer Station, the fees required to be paid by Grand Central, and the method for amending the agreement. The Code Amendment, without clarification, results in a fundamental change to the existing contract, which is exactly the type of impairment prohibited by the California and United States Constitutions. (*See, e.g., General Motors Corp., supra,* 503 U.S. 181.)

Finally, over and above the Code Amendment's legal deficiencies, there are also practical reasons to not impose the Code Amendment's ban on the Transfer Station. Based on the City's staff report, the recitals in the proposed Planning Commission resolution, and comments made by both the public and City officials concerning waste-related facilities over the last several years, it appears that the purpose of the Code Amendment is to address environmental concerns relating to waste facilities—such as the proliferation of odors, debris, dust etc.—for the protection of public health in the City. Unlike other waste facilities, however, the Transfer Station does ***not*** give rise to such concerns because of the environmentally-conscious, state-of-the-art manner in which it was constructed. As noted above, the Transfer Station is Gold LEED certified, is completely enclosed (thereby avoiding the spread of any odors and debris), uses a high-tech odor and ventilation system to further neutralize potential odors, incorporates solar power and translucent panels, and uses Compressed Natural Gas-fueled trucks (instead of diesel vehicles) to transport waste. Put simply, the Transfer Station looks like, and has an environmental impact more comparable to, an office building than a traditional waste facility. ***Clearly the Transfer Station is not the type of facility the Code Amendment should be addressing.***[2]

In sum, the proposed Code Amendment fails to take into account the existing rights of the Transfer Station. These rights, as delineated in the CUP, the Franchise Agreement, and the other Project Entitlements, are heavily protected by law, and Grand Central is prepared to take every legal measure available to it to enforce those protections. While the City possesses a police power that allows it to reasonably address general welfare issues, this legislative ability does not grant the City the right to trample on existing vested rights or effectively invalidate existing contracts.

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[2] Ironically, while the Transfer Station was subjected to a multi-year and exhaustive environmental review process pursuant to the California Environmental Quality Act ("CEQA", Pub, Res. Code §§ 21000 *et seq.*), the City has not conducted any adequate CEQA review for the proposed Code Amendment in violation of State law.

To be clear, if the City passes the Code Amendment and attempts to enforce it against Grand Central and the Transfer Station, the Code Amendment will certainly be invalidated by the courts and the City will be held liable for potentially millions of dollars in damages. However, if the City makes Grand Central's straightforward revision proposed herein, which clarifies that the Code Amendment will have no impact on Grand Central and the Transfer Station, the City may lawfully proceed with its Code Amendment and prohibit all new waste and recycling facilities. Accordingly, Grand Central respectfully requests that the Planning Commission revise its currently proposed resolution and recommend that the City Council approve the Code Amendment with Grand Central's suggested additional amendments to Section .422.

Please do not hesitate to contact me with any questions concerning the foregoing analysis.

Sincerely,

RUTAN & TUCKER, LLP

John A. Ramirez

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cc: Arnold M. Alvarez-Glasman, Esq., City Attorney [email only: aglasman@agclawfirm.com]