



# Memorandum

**TO:** CITY COUNCIL

**FROM:** Ron Gonzales, Mayor  
Del Borgsdorf, City Manager  
Richard Doyle, City Attorney

**SUBJECT:** Response To Grand Jury  
Report on Norcal  
Agreement

**DATE:** September 1, 2005

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## **RECOMMENDATION**

1. It is recommended that the City Council review and transmit the following response prepared by the Mayor, City Manager, and City Attorney to the 2004-2005 Santa Clara County Civil Grand Jury Report released on June 13, 2005, regarding the December 2004 amendment to the Norcal *Recycle Plus!* contract.

The response incorporates both this memorandum and the attached comprehensive chronology and related documents of the City's actions related to the *Recycle Plus!* Program and its contracts (EXHIBIT A). In addition, staff has compiled an audio and video record of Council Meetings regarding the *Recycle Plus!* Program and its contracts for review (EXHIBIT B). Copies of files (i.e., email, correspondence, etc.) are also available for further review from the City Attorney's Office, and a document inventory is summarized in EXHIBIT C (available September 6, 2005).

2. Because the City's independent investigation of the issues raised by the Grand Jury has not started, it is also recommended that the City Council expressly include a statement that once the investigation is completed and the results considered by the Council, the City will forward the investigation report to the Grand Jury and submit a supplemental response if the results of the independent investigation warrant.

## **BACKGROUND**

### **Procedural Information**

The purpose of this memorandum is to provide the City Council with a recommended response to the Grand Jury's Report and to comply with the legal requirements for responding to Civil Grand Jury reports. State law requires the governing body to respond within 90 days of the issuance of the Report and, to a large extent, dictates the format of the response. The response is due by September 14, 2005.

The suggested response has been coordinated among the Mayor's Office, City Manager's Office, and City Attorney's Office. While co-authorship of Council memoranda with the Mayor's Office is unusual, in this case many of the Grand Jury's findings and recommendations deal specifically with the actions of the Mayor and the Mayor's Budget and Policy Director, thus requiring this coordinated response.

The response notes that on June 28, 2005, the City Council approved the Mayor's recommendation to retain an independent investigator to review the matter of the Norcal Agreement and the Grand Jury's allegations. The Mayor and Council directed the City Auditor to administer the selection of an independent panel to select the investigator. The status of the selection process is discussed in a separate memorandum by the City Auditor. The investigation has yet to begin and likely will not be completed until later this fall, well after the legally required schedule for the City's official response to the Grand Jury. Therefore, the suggested response is an interim response, and is based on the information currently available and is without the benefit of any additional information that might be developed by the independent investigation. If revisions to the response are determined to be necessary after the conclusion of the investigation, such revisions will be brought to the Council for consideration and transmittal to the Grand Jury as part of the City's complete response.

### **Chronology of Events**

Given the extent of the record, a brief summary of actions leading to the December 2004 amendment to the Norcal contract is discussed below.

- On November 25, 1997, the City Council adopted a policy setting fees and establishing that the residential and commercial solid waste fund would be at full cost recovery by July 2002. Proposition 218 noticing was initiated for a July 1, 1998, rate increase for the *Recycle Plus!* Program. (*Councilmembers present: Dando, Diaz, Diquisto, Fernandes, Fiscalini, Johnson, Pandori, Powers, Shirakawa, Jr., Hammer. Excused: Woody.*)
- On May 5, 1998, the City Council adopted revised Integrated Waste Management (IWM) policies incorporating the City's commitment to competition, diversion goals, and cost recovery. The revised policies established the starting point to prepare for modifications and improvements to the IWM Program, including preparation for a Request for Proposals (RFP) for residential service. (*Councilmembers present: Dando, Diaz, Diquisto, Fernandes, Fiscalini, Johnson, Pandori, Powers, Shirakawa, Jr., Woody, Hammer.*)
- On December 7, 1999, the City Council directed the Administration to continue development of the RFP for the 2002 *Recycle Plus!* Program and requested additional information on specific program improvements and contractor

requirements related to labor issues and local preference. Specifically, the City Council requested information on the application of the City's local preference for contractors and living wage policy to *Recycle Plus!* contracts, large-item collection, and neighborhood clean-up days. (Councilmembers present: Chavez, Dando, Diquisto, Fiscalini, LeZotte, Matthews, Powers, Shirakawa, Jr., Woody, Gonzales. Diaz excused.)

- On January 25, 2000, the City Council approved policy direction related to the RFP for the *Recycle Plus!* Program. The policy direction included commitment to worker retention, prevailing wage, and labor peace. (Councilmembers present: Chavez, Dando, Diaz, Diquisto, Fiscalini, LeZotte, Powers, Shirakawa, Jr., Woody, Gonzales. District 4 vacant.)

As part of the RFP process, the City Council required that proposers had to provide information to demonstrate that it would meet labor peace requirements. "Labor peace" generally refers to commitments by employers and unions providing services under government contracts to minimize the probability of labor disruptions during the lifetime of the agreement. Those requirements also included retention of workers that would be displaced as the result of the selection of a new vendor.

Norcal submitted a proposal that included subcontracting the recycling processing services to California Waste Solutions (CWS), an Oakland-based operator that did not have a recycling facility in San Jose at that time. The Norcal/CWS proposal included documentation of an agreement with the Longshoremen's Union (ILWU, Local 6) as the bargaining representative for workers at the future San Jose CWS facility. CWS had an existing agreement with the ILWU, which represented the workers at the CWS Oakland Facility.

- On June 27, 2000, the City Council approved the criteria and guidelines for evaluating the proposals responding to the RFP.
- July 14, 2000, was the deadline for companies to submit their proposals to the City.
- The City's *Recycle Plus!* contracts in 2000 were with GreenTeam and Waste Management of San Jose, Inc. (WMI). Workers at the GreenTeam recycling facility were represented by the Carpenters' Union. Workers at the WMI recycling facility were represented by the Teamsters, Local 350. Upon learning of the proposal from Norcal/CWS that the ILWU would represent the displaced recycling facility workers, the Teamsters raised objections to the Mayor and members of the City Council.

Prior to the October 10, 2000, Council Meeting to consider the *Recycle Plus!* contractors, the Teamsters questioned the legal ability of CWS to recognize only the ILWU as the bargaining agent for its future workers in correspondence to the Mayor's Office on October 3. Given the City's worker retention requirements, the

existing Teamster workers would be given offers of employment by CWS. Teamster officials argued that only the workers could select the union as their bargaining agent, not the employer. The Teamsters filed an unfair labor practice charge against CWS with the National Labor Relations Board on October 5, 2000.

- On October 9, 2000, CWS and Norcal amended their subcontract that committed Norcal to pay CWS for any additional labor costs CWS might incur. The City Council first learned of this in August 2003 in correspondence from CWS, and the City received a copy in September 2004.
- On October 10, 2000, the City Council directed the Administration to: 1) process the *Recycle Plus!* contracts with Norcal Waste Systems, and to negotiate final agreements within 60 days; 2) report on the economic feasibility of achieving rate reductions or improved service; 3) submit quarterly status reports on customer outreach and costs of monitoring marketing and providing community outreach for the transition period; 4) evaluate maximum feasible performance bond to be provided by each hauler; 5) clarify the City's prevailing wage, employee retention and labor peace policies and ensure inclusion in the negotiated contract; and 6) direct the City Auditor to perform a review audit of recommended haulers. *(Councilmembers present: Chavez, Dando, Diaz, Diquisto, Fiscalini, LeZotte, Powers, Shirakawa, Jr., Woody Gonzales.)*

The dispute between the Teamsters and CWS also was discussed at the City Council Meeting on October 10, 2000. At that meeting, concerns were raised by some Councilmembers who wanted to know what the labor peace requirements of the RFP meant and whether the City could require a neutrality agreement with respect to the recycling facility workers. A neutrality agreement is generally recognized as an agreement between a union and the employer that the employer will not campaign or argue against unionization of its employees or for or against a particular union. Bob Morales of the Teamsters also informed the Council at this meeting that there were economic issues revolving around the dispute with CWS and Norcal.

- The City Council was advised by the City Attorney on October 27, 2000, that the City could not require a neutrality agreement because it could be deemed interference by the City with the collective bargaining process, an area that is regulated by federal law, and it was not a requirement of the RFP.
- On December 12, 2000, the City Council selected Norcal and GreenTeam to be the City's *Recycle Plus!* haulers beginning July 1, 2002, and directed staff to proceed with final contract negotiations. Council directed staff to report to Council on a quarterly basis regarding transition activities involving the *Recycle Plus!* Program. *(Councilmembers present: Chavez, Dando, Diquisto, Fiscalini, LeZotte, Powers, Reed, Shirakawa Jr., Woody Gonzales.)*

- Prior to the December 12, 2000 Council Meeting, CWS voluntarily entered into a neutrality agreement with the Teamsters that provided assurance to all parties that labor peace could be accomplished. While it was not certain who the bargaining representative would be, the agreement made it clear that CWS would not designate which union would be the bargaining agent for its workers at the materials recovery facility.
- On March 27, 2001, the new *Recycle Plus!* contracts were approved by Council, and staff provided its first quarterly report on the transition activities involving the *Recycle Plus!* Program. Two areas of the Norcal contract are important to note:
  1. Sections 17.023 and 24.11 required Norcal to be responsible for all labor costs; and
  2. Section 24.24, which is a standard integration clause, in which each party acknowledged that the entire agreement was set forth in the approved written contract, and no other prior agreements (oral or written) would have any effect.

Following a discussion on the transition activities at the March 27 meeting, Council directed staff to work with the contractors to provide prevailing wage for MRF workers and report back to Council on any impacts resulting from the change. Councilmember Chavez made a motion stating that, "I think we made an error and left out the MRF sorters and workers. If we have such a policy it makes sense to include these workers as well, and I'd like to engage staff in discussion with haulers regarding prevailing wage to these employees."

- At a City Council study session on September 20, 2001, the Office of Equality Assurance presented the results of the study on prevailing wage for MRF workers in response to Council's request in March. Staff reported that work performed at material recovery facilities is not on public property, and according to City policy, prevailing wage requirements would therefore not apply. Council was informed, however, that if Council extended its prevailing wage policy to include MRF workers, the preliminary estimate of the cost was \$1.4 to \$1.6 million per year and would require an amendment to the City's contracts. (*Councilmembers present at the study session: Campos, Chavez, Cortese, Dando, Diquisto, LeZotte, Reed, Shirakawa, Jr., Williams, Yeager, Gonzales.*)
- The study session was continued to September 25, 2001. During the discussion regarding prevailing wage and MRF workers, Councilmember Chavez commented, "The chart [on prevailing wage] also includes the impact on [garbage fund] expenditures, should prevailing wage be required for MRF worker classification ... and then staff will continue to monitor the fund and report back to Council as part of the Annual Budget process."

Staff explained, "...If the prevailing wage or the wage paid to those workers at the recycling facility was as presented in the report ... there would be an additional cost of \$1.4 to \$1.6 million. We calculated the incremental differences in what we are aware is being paid to those workers here today...The prevailing wage for these MRF workers is not a part of the contract that the Council has approved or in force today. So any change to the prevailing wage would affect the cost to us and the contract."

After this comment was made, Councilmember Chavez asked, "Is this something that could be considered during the budget process as we're looking at what the real cost of this is going to be?" Staff responded, "...If the Council chose to change the prevailing wage in this area, this is an item we could amend the contract and work the details out with the contractors...it is not just the monetary decision related to it but the policy decision..."

Councilmember Reed followed with, "... if you pay prevailing wage, the deficit is \$34 million, and if you don't, the deficit is \$26 million and change. Is that the entire amount due to the change in prevailing wage?" Staff responded, "That's right."

Councilmember Williams asked, "If the decision was made to infuse some money into that fund... if we wanted to take care of prevailing wage.... we could increase the service fees. I mean, there's a way to take care of it if we decide to do it?"

- At the Council meeting on May 28, 2002, Councilmembers expressed their concerns about the difficulties in the negotiations between CWS and Teamsters. Councilmember Reed said, "I do want to encourage California Waste Systems to spend a lot of time with the Teamsters. This is practically June 1<sup>st</sup>, and there's not a lot of time, and so they need to spend how many hours it takes to get the issue resolved." This was followed by Councilmember Chavez who said, "I wanted to just follow up on that and make a request if I could, and that's for both Norcal and California Waste Solutions. I think it would be helpful to the Council to be apprised of their meetings and the outcomes of how they're doing, because my concern is the issue we raised around labor peace, but quite frankly, the service. Getting this close to the edge makes very nervous."
- After a 15-month period to prepare for the transition to new services, Norcal and GreenTeam began providing garbage and recycling services to San Jose residents under the new contracts with the City in July 2002. CWS started processing material at its San Jose MRF on Timothy Drive in August 2002. Prior to that, CWS processed recyclable materials at its MRF in Oakland.
- On September 13, 2002, an information memo was sent to the City Council regarding the notices being sent to customers recommending a 3% *Recycle Plus!*

service rate increase for single-family dwellings (SFD) and 4% for multiple-family dwelling (MFD) properties effective January 1, 2003. The public notice also covered proposed *Recycle Plus!* rate increases for additional amounts of up to 5% per year for SFD services and 6% per year for MFD services beginning July 1, 2003 and for each year thereafter through FY 2006-07. The notice provided to customers explained that proposed rate increases were needed to cover cost-of-living increases, ensure the residential garbage program was self-supporting, and provide a fund balance sufficient to cover any emergencies or contingencies.

- On October 11, 2002, through an information memo, staff informed the City Council that it had received new information regarding potential increases in fuel and labor costs to the *Recycle Plus!* contracts and thus would have to modify the proposed rate increases.
- In December 2002, CWS and the Teamsters reached an agreement for the MRF sorters that included an increase in wages retroactive to July 2002. Because of a contract dispute between CWS and Norcal regarding payment for additional labor costs, this labor agreement was not executed until July 2003.
- On November 20, 2002, CWS customer service representatives walked off the job for one day because they wanted to be represented by the Teamsters. Norcal drivers were called in off their routes by the Teamsters. The Mayor indicated that he called the Teamsters to urge them to return to work and to work with CWS and Norcal to resolve the matter without delay. At this time the Teamsters then asked the Mayor if he could facilitate discussions between the union and Norcal/CWS over the unresolved contract for MRF workers. The Mayor agreed to help, contingent on the consent of the contractors, which was given later.
- On February 19, 2003, the Teamsters sanctioned a one-day strike by CWS sorters who had been working without a signed contract and had not yet been paid full wages under the agreement between the Teamsters and CWS that had not yet been executed. A collective bargaining agreement was eventually signed by CWS and the Teamsters in July 2003, committing CWS to pay wages to sorters retroactive to July 2002.
- On May 27, 2003, Council approved a 9% garbage rate increase as part of a multi-year funding strategy to strengthen the Integrated Waste Management Fund. The purpose for the increase was to cover the costs of system needs, installing a new data management system, making garbage operations self-sufficient by shifting appropriate costs from the General Fund to the Integrated Waste Management fund, potential labor cost increases, and contractually required cost of living adjustments for Norcal and GreenTeam. (*Councilmembers present: Campos, Chavez, Chirco, Cortese, Dando, Gregory, LeZotte, Reed, Williams, Yeager, Gonzales.*)

Council transcripts show that staff informed the City Council that this increase included several factors, including "increased program operating costs."

- In August 2003, David Duong, President of CWS, sent a letter to the Mayor and Council regarding its contract disputes with Norcal and the problem of garbage commingling with recyclable materials. In the letter he mentions the amendment to the CWS/Norcal recycling subcontract that committed Norcal to pay the increased labor costs, citing that CWS was owed "hundreds of thousands of dollars" by Norcal.
- The City filed an enforcement action against CWS in August 6, 2003 requiring CWS to take necessary and appropriate steps to improve its operations and comply with land use permits and other Municipal Code requirements. This contributed to Norcal's delay in seeking a contract amendment since CWS and Norcal needed to correct operational deficiencies first. That matter was not settled until February 2004.
- On June 16, 2004, Norcal submitted a letter to the Director of Environmental Services requesting a contract amendment to cover the additional labor costs arising from the CWS labor agreement with the Teamsters. The request was renewed in a July 22, 2004 letter to the City Manager.
- In September 2004, the City Manager forwarded to the City Council Norcal's contract amendment request and options for the Council to consider. The Mayor recommended that the City Manager and City Attorney negotiate the terms of an amendment providing for the City to cover the additional labor costs incurred by CWS and ultimately Norcal because of the CWS collective bargaining agreement with Teamsters.

At the September 21, 2004, City Council Meeting, the City Council was advised by the City Attorney that they were under no legal obligation to approve the amendment to the contract. The Mayor recommended approval to achieve the Council's long-standing goal for providing for labor peace and worker retention, noting that the amendment would still maintain the City Council's primary goals for lower customer costs and improved service.

During September 21 meeting, Councilmember Chavez noted, "the outcome is still worthy of the support of all of us in terms of making sure that we maintain customers, high customer service, that we're not doing anything disruptive as it relates to any sort of transition, that we treated people fairly and quite frankly that we had warnings that this could be a possibility, the whole Council did who was here at that time." Councilmember LeZotte noted, "we're paying for this out of the rates that we increased, it's coming out of that fund. So to delude ourselves into thinking that the ratepayers aren't paying this -- they are, because it's coming out of that fund."

The Council, by a 7-3 vote, authorized the City Manager and City Attorney to negotiate an amendment with Norcal to cover the additional labor costs.  
(*Councilmembers present: Campos, Chavez, Chirco, Cortese, Dando, Gregory, LeZotte, Reed, Williams, Yeager, Gonzales. Gregory absent.*)

- On December 14, 2004, the Norcal contract amendment was approved by the Council by a 7-3 vote. (*Councilmembers present: Campos, Chavez, Chirco, Cortese, Dando, LeZotte, Reed, Williams, Yeager, Gonzales. Gregory absent.*)
- The Civil Grand Jury chose to conduct its review of the Norcal contract and amendment in early 2005, following coverage of the issue in the news media in fall 2004. The Grand Jury issued its report to the public on June 13, 2005, after conducting interviews, reviewing the some of the documents set forth in Exhibit D.

## **ANALYSIS**

The following is the response recommended by the authors of this memorandum with respect to each Finding and Recommendation contained in the Grand Jury Report. This format of this response is dictated by state law regarding Grand Juries. As noted at the beginning of this memorandum, the suggested response has been coordinated among the Mayor's Office, City Manager's Office, and City Attorney's Office, and it will meet the 90-day time requirement for responding to the Grand Jury Report.

Because the City's independent investigation of the issues raised by the Grand Jury has not started, we recommend that the City Council transmit this response to the Court as an interim report based on information currently available and notify the Grand Jury that the Council may submit a supplemental response once the independent investigation is completed and the results have been considered by the Council.

The City Attorney has contacted the Presiding Judge of Santa Clara County Superior Court and informed him of the intended action to transmit the response at this time to meet the legal requirements, with the caveat that upon completion of the independent investigation, any necessary supplemental or corrected response would be provided to the Court. The Presiding Judge expressed his understanding of the need to respond in this manner and made no objections to this approach.

### **Finding 1A**

Prior to the Council's first vote on Norcal in October 2000, the Mayor, his Policy and Budget Director, and Norcal knew that CWS would have to pay Teamsters wages instead of Longshoremen wages, and that this would cost CWS an extra \$2 million or more a year. Thus, the Mayor, Norcal, and CWS anticipated the extra labor costs

incurred by CWS. The Mayor and his Policy and Budget Director should have advised the Council of this information, but they did not do so, in apparent violation of the City Charter.

## **Response**

The City Council agrees in part and respectfully disagrees in part with the finding.

The City agrees that prior to the Council's first vote on the Norcal contract in October 2000, the entire City Council and Norcal knew of a potential jurisdictional union dispute between the ILWU and the Teamsters. This information was raised at the Council Meeting of October 10, 2000. Bob Morales of the Teamsters informed the entire City Council that there were economic issues related to the dispute with CWS. However, the City disagrees with the finding that there may have been a Charter violation.

The Mayor and his Budget and Policy Director have said they learned during the week before the October 10, 2000, Council Meeting that there was a potential dispute between the Longshoremens and the Teamsters about who would represent CWS recycling sorters. Correspondence from both Norcal and the Teamsters received in the Mayor's Office during the week before the Council Meeting referred to potential jurisdiction issues. Norcal and CWS also sent letters to the Mayor's Office on October 9, 2000, stating that they were both committed to paying wages and benefits to CWS sorters and Norcal drivers at least equivalent to those paid to workers in those positions under agreements in effect for contractors providing services in San Jose at that time.

Because CWS had not even secured a site in San Jose for its recycling facility, and union jurisdictional issues were not resolved prior to the Council's first vote on Norcal on October 10, 2000, there was no way of knowing specifically what the potential extra labor costs that might be incurred by CWS.

The record of the October 10, 2000, meeting shows that the City Council was made aware of issues regarding labor union jurisdiction, labor peace, and worker retention, which were discussed by City staff, representatives of the contractors and unions, and Councilmembers prior to the Council vote. At this meeting, The Teamster's representative said there were "economic issues" regarding wages still to be resolved. Norcal's representative also stated that he had met with every Councilmember to discuss the company's proposal prior to the Council Meeting. The Mayor also indicated at this meeting that he was "well aware of" the issues of worker retention and prevailing wages.

The Grand Jury asserts that the Mayor and the Mayor's Budget and Policy Director's actions were "in apparent violation of the City Charter" because they did not disclose to the City Council information regarding additional labor costs to be incurred by CWS. The Grand Jury does not indicate what section or provision of the City Charter it

believes may have been violated. The City Charter does not contain any specific obligation for the Mayor, any Councilmember, or the Mayor's Budget and Policy Director to inform the City Council of discussions with prospective contractors of the City. The City Charter at section 204 provides that:

"The citizens of San Jose expect and must receive the highest standard of ethics from all those in public service. City officers and employees must be independent, impartial and responsible in the performance of their duties and accountable to the members of the public."

While the Grand Jury makes reference to language found in Charter Section 204, it is unclear as to whether this is the section that the Grand Jury feels has been violated. It is equally unclear why the Grand Jury believes that the so-called failure to inform the Council of discussions with potential City contractors is a violation of this section.

Separately, Charter Section 501 is a general statement designating the Mayor as the "political leader within the community by providing guidance and leadership to the Council, by expressing and explaining to the community the City's policies and programs, and by assisting the Council in the informed, vigorous and effective exercise of its powers." While the Grand Jury Report makes no mention of this section, it could be interpreted by the Grand Jury that the Mayor must provide all material information to the Council so as to assist the Council in making its decision. However, there is no specific requirement in the City Charter mandating that the Mayor, or any Councilmember for that matter, advise the Council on all known matters.

The Mayor and every Councilmember have the responsibility to make their own determinations regarding public policy decisions. Each member is independent, and seeks information and advice from a variety of sources, including City staff, the community, news media, their own research, a range of stakeholders, as well as applicants, contractors and developers.

It should be noted that the Council is expected to begin discussion of the issue of whether and when the Mayor and Councilmembers should be obligated to reveal all material facts each might have to the full Council on items being considered by the Council. This discussion is expected to occur this fall as part of the Council's review of possible amendments to the Council's Ethics Policy.

**Finding 1B**

When initially interviewed by the Grand Jury in March 2005, the Mayor and his Policy and Budget Director insisted that the Mayor never met with the representatives of Norcal or CWS. At that time, the Mayor contended that, in order to avoid the appearance of impropriety, he did not meet face to face with Norcal or CWS because he did not want to be criticized about "backroom discussions." In the second interview with

the Mayor and in the third interview with his Policy and Budget Director, they admitted that indeed such a meeting had occurred on October 6, 2000, in the Mayor's conference room, four days prior Council's vote on October 10, 2000 to approve Norcal as a vendor. The Grand Jury finds that the Mayor indeed met with the Norcal and CWS representatives on October 6, 2000. Either the Mayor and his Policy and Budget Director had a memory lapse or they did not tell the truth initially. In any event, the Mayor took part in "backroom discussions," and this conduct was improper and appears to be in violation of the City's Independent Judgment Policy and/or City Charter.

## **Response**

The City Council agrees in part and respectfully disagrees in part with the finding.

The Mayor has explained that when the Grand Jury conducted its initial interviews in March 2005; it was unclear whether the Grand Jury was asking the Mayor whether he had participated in "contract negotiations" or merely had "discussions" with representatives of Norcal. The Mayor did meet with Norcal representatives on October 6, 2000. However, there are no City Charter provisions or Council policies that would prohibit such a meeting with the Mayor or any Councilmember.

The Mayor and his Budget and Policy Director deny that they concealed the October 6, 2000, meeting from the Grand Jury. They say they were responsive to the Grand Jury's specific question about whether the Mayor had participated in contract negotiations, which he had not. The Mayor indicates that the Grand Jury did not ask if the Mayor had had any kind of meeting with Norcal, and it was neither "a memory lapse" nor deception because of the incomplete or ambiguous nature of the Grand Jury's question.

The Mayor's Office voluntarily provided the Grand Jury with the Mayor's calendar that indicated that Norcal did have a 30-minute meeting with the Mayor on October 6. At the October 10 Council Meeting, Norcal also indicated that its representatives had met with every Councilmember as well as with the Mayor prior to this Council Meeting. The Mayor's Office does not have a record of CWS being present at the October 6 meeting, and neither the Mayor nor his Budget and Policy Director remembers representatives of CWS being there.

The Grand Jury's finding characterizes this meeting as a "backroom discussion," which clearly leaves the impression that something wrong or unethical happened during such discussions with the Mayor. The Grand Jury implies that all such meetings outside a public meeting as "backroom discussions"; this broad-brush definition casts an unwarranted and inaccurate stigma on any person or organization that meets privately with any Councilmember on an issue. City Councilmembers routinely meet with residents, community organizations, potential contractors, and developers to discuss important citywide and district-specific issues. Those discussions routinely lead to recommendations from individual Councilmembers for the City Council's consideration.

These are proper legislative activities of Councilmembers, and should not be considered "backroom discussions."

The Mayor indicates that when he met with Norcal representatives on October 6, he told them that he wanted the company to provide excellent service to the people of San Jose and to work hard to ensure labor peace. The union jurisdictional issue was discussed in the context of the Council's goal of achieving labor peace and avoiding potential disruptions of service. There was no discussion of the potential wage differential between Longshoremen and Teamsters workers.

The Grand Jury asserts that the Mayor and the Budget and Policy Director's meetings with representatives from Norcal appear to be in violation of the City's Independent Judgment Policy and/or the City Charter. As with Finding 1A, the Grand Jury does not specify which section of the Charter has been allegedly violated, but there is no Charter provision that prohibits the Mayor or members of the Council from having discussions with potential contractors.

As to the Independent Judgment Policy, in the body of its report the Grand Jury notes two sections of the Independent Judgment Policy as being pertinent.

"3. No individual member of the City Council shall present his or her views as being the view of the City or the City Council unless that view reflects an official City position or the member has been officially authorized by the City Council to speak on behalf of the City."

Section 3 provides that no member of the Council (including the Mayor) shall present his or her views as being that of the entire City Council without authorization. The policy does not prohibit the Mayor or any Councilmember or the Mayor's staff from meeting with a potential City contractor. Nowhere does the Grand Jury allege that the Mayor or the Mayor's Budget and Policy Director represented their individual views as the view of the City Council. In fact, on several occasions, the Mayor's office told Norcal that any amendment to their contract would have to be approved by the City Council.

"7. No member of the City Council shall negotiate with any property owner or developer for the grant, loan, payment or forgiveness of any sum of money by the City unless either officially authorized by the City Council to do so or done as part of a coordinated negotiating effort in conjunction with City staff and when an express disclaimer that any proposal is subject to approval by the Council as a whole."

Section 7 of the Independent Judgment Policy specifically applies to land use decisions and relates to negotiations with property owners and developers. The discussions with Norcal were in regard to the City's *Recycle Plus!* agreement, not land use. The Grand Jury's Report contains no allegations of negotiations with a property owner or developer in connection with the development process as contemplated by the policy.

**Finding 1C**

At this October 6, 2000, meeting, the Mayor asked Norcal and CWS what the extra labor costs would be, and the President of CWS estimated the first year cost would be approximately \$2 million, with additional increases each succeeding year. The Mayor assured Norcal and CWS that he would take the steps necessary to see that San Jose paid the increased costs.

**Response**

The City Council respectfully disagrees with the finding.

The Mayor has indicated that at the October 6, 2000, meeting he told Norcal that he wanted the company to provide excellent service to the people of San Jose and to work hard to ensure labor peace, and that there was no discussion at this meeting of the potential cost impact of the wage differential between Longshoremen and Teamsters workers. In fact, at that point, no labor negotiations between CWS and any union had yet begun. A neutrality agreement between CWS and the Teamsters was not reached until December 2000, and there was no estimate of what cost differential there might be, if any. The Mayor has indicated that he did not make any commitments to Norcal about paying increased costs at that meeting.

It should be noted that the proposed contract with Norcal included Section 24.24, which is a standard integration clause in which each party acknowledged that the entire agreement was set forth in the written contract that was approved, and no other prior agreements (oral or written) would have any effect. The integration clause was in the agreement ultimately signed by Norcal and approved by the Council on March 27, 2001. This clearly underscores that Norcal knew that there could be no separate agreement regarding its contract. The Mayor does not have any authority under the City Charter to commit the City or Council to an agreement. There is no documentation that Norcal ever raised any concerns with the integration clause related to any alleged or perceived "deal" with the Mayor.

The Mayor's Office does not have a record of CWS being present at the October 6 meeting, and neither the Mayor nor his Budget and Policy Director remembers representatives of CWS being there.

**Finding 1D**

For a period of almost four years, between October 2000 and early September 2004, the Mayor and his Policy and Budget Director concealed from the Council: (a) the occurrence of the October 6, 2000 "backroom discussion" the Mayor had with Norcal and CWS; (b) the Mayor's October 6, 2000 assurance to Norcal and CWS that the Mayor would take the steps necessary to have San Jose pay the increased costs; (c) the increased costs were known and anticipated prior to the Council's October 10, 2000 vote; (d) that Norcal was willing to take less than the \$11.25 million it requested; (e) that the primary purpose of the proposed nine percent garbage rate increase in FY 2003-2004 was to cover the increased costs to Norcal; and (f) that the threatened strike by the Teamsters in February 2003 was primarily caused by the Mayor's delay in asking the Council to pay Norcal the \$11.25 million.

**Response**

The City Council agrees in part and respectfully disagrees in part with the finding.

The City agrees that between October 2000 and early September 2004, the Mayor did not inform the Council of his meeting with Norcal on October 6, 2000. It should be noted that City Councilmembers also did not disclose their prior meetings with Norcal to the full Council. Apparently the Grand Jury has unfairly held the Mayor to a different standard than other Councilmembers, even though he is only one voting member of the full City Council

The City disagrees with the remainder of the finding for the following reasons.

The Mayor and his Budget and Policy Director have denied that they concealed from the City Council any of these matters listed in the Grand Jury's finding and further assert the following:

- a. The Mayor met with Norcal representatives on October 6, 2000, though not with CWS representatives. The Grand Jury categorizes this as a "backroom discussion" between the Mayor and Norcal/CWS. However, a Norcal representative indicated in a public meeting that Norcal had met with every other Councilmember prior to the October 10, 2000 Council meeting.

When addressing the City Council Norcal representative Bill Jones stated, "There is one issue I'd like really to address right here. I've met with everybody (referring to the City Council) and we've talked about our proposals, and I appreciate all the time you have given us the last couple of weeks. I know you've all been very busy. We understand that there are some remaining issues with respect to labor peace." Additionally Councilmembers Dando and LeZotte made reference to their discussions with Norcal representatives held prior to the Council meeting.

- b. Neither the Mayor nor his Budget and Policy Director made assurances to Norcal/CWS at the October 6 meeting that “the Mayor would take the steps necessary to have San Jose pay the increased costs.” The costs were neither known nor discussed, and under the City Charter, the Mayor does not have authority to commit the City or the City Council to a policy or a contract.
- c. Prior to the Council's October 10, 2000 vote, no one knew what the potential increased costs might be, including the Mayor, City Councilmembers, City staff, Norcal, and CWS, or labor representatives. Over the next 18 months as Norcal and CWS moved forward with implementation of services, and as CWS took steps to resolve its labor issues, these costs began to be better defined.

The entire City Council was informed that there were economic issues related to the dispute between the Teamsters and CWS by Bob Morales of the Teamsters at the October 10, 2000 meeting. The Mayor's Office became aware of the potential for increased labor costs in the weeks following the October 10 Council meeting. Although there are no records of when it learned about this, recollections by the Mayor's Office are it was in the period between October and December that the Mayor's staff had preliminary discussions with Norcal about potential cost increases.

Councilmembers were aware that labor peace and worker retention ultimately would be a factor in the cost of service. In March 2001, Council directed staff to engage in “discussion with haulers regarding prevailing wage to these employees and ask staff to return to us with a full report on any impacts that may result from this change.” In September 2001, City staff followed up with its analysis of the potential cost impacts of paying “prevailing wages” to materials recovery facility workers in response to Council's questions. Staff calculated that there could be an additional labor cost up to \$1.6 million. Lengthy Council discussion at a study session on the matter on September 25, 2001, also confirmed that Councilmembers understood that requiring prevailing wage be paid to MRF workers would require the City Council to amend the contract.

Actual costs of increased wages for the CWS sorters were not determined until after CWS and the Teamsters concluded their contract negotiations in July 2003, and were not verified by City staff until fall 2004.

- d. The Grand Jury Report cites no direct evidence, either through testimony or documents, stating that Norcal would accept less than the amount in the amendment. There was no statement by Norcal at any time that the \$11.25 million figure was negotiable. The only document cited by the Grand Jury is an indirect inference contained in a letter from CWS to Norcal, in January 2003, emphasizing that if Norcal did not receive full reimbursement from the City, then Norcal, not CWS, would be responsible for the difference.

When the Council considered the proposed contract amendment in September 2004, it directed the City Manager and City Attorney to negotiate an amendment to cover the full amount of the increased labor cost for the CWS workers. Labor cost figures audited by staff validated \$11.9 million in additional labor costs incurred by Norcal and CWS. Staff deemed Norcal's request of \$11.25 million as an appropriate and less expensive settlement that reduced the added costs by nearly \$650,000.

- e. The service rate increase for FY 2003-04 was necessary for several operating and financial purposes, including strengthening the Integrated Waste Management Fund Reserve for system needs, installing a new data management system, making garbage services self-supporting, potential Norcal/CWS labor cost increases, and covering contractually required cost of living adjustments for Norcal and GreenTeam.

The 2003 proposed rate increases was adopted by Council as part of a multi-year rate increase strategy to strengthen the Fund. On September 13, 2002, staff provided an information memorandum to Council that it was notifying customers regarding the City's consideration of a potential 3% rate increase effective January 2003, and a potential 5% rate increase effective July 2003. Furthermore, in order to achieve Council's budget-balancing goal of reducing the General Fund subsidy of garbage costs and making garbage services self-sufficient, the Administration identified an additional 5% rate increase that could be needed in 2003.

The City agrees that information about potential labor cost increases specifically associated with Norcal and CWS were not provided to Council at this time, and it would have been better if the City Council was informed that these anticipated costs were included in the rate increase. The Council also should have been reminded of their previously stated goals of labor peace and worker retention as well as their prior discussions about the potential costs of labor peace and paying prevailing wage for the MRF workers that had occurred in September 2001. It is important to keep in mind; however, there was still no formal contract amendment request from Norcal, no signed agreement between CWS and the Teamsters, and no staff analysis to verify any additional costs. At the time the rate increase was presented to the City Council, City staff had separately identified needs that would require a 9% rate increase in 2003-04, and another 9% in 2004-05. Furthermore, absent a Council approved contract amendment these funds could not have been used for increased labor costs associated with MRF workers but could have been used for other already identified operational system needs.

- f. The Mayor and the Administration took the possibility of a strike by the Teamsters seriously in early 2003. It should be noted that there was a one-day Teamsters-sanctioned strike on February 19, 2003, by CWS sorters who were protesting that they were working without a signed union contract, even though CWS and the Teamsters had reached an agreement. There also was a one-day work stoppage in

November 2002 by CWS customer service representatives that prevented Norcal's Teamster drivers from crossing picket lines.

The Mayor did not "delay" asking the City Council for a contract amendment. The delay was caused by difficulties between Norcal and its subcontractor CWS. In early 2003, Norcal and CWS were contentiously negotiating a variety of contract issues. Until those issues were resolved, it was not appropriate for the City Council to consider any action to amend its contract with Norcal. Furthermore, Mayor indicated he would not support the amendment until City staff had completed its due diligence to verify that any increase in payments to Norcal for higher pay to CWS sorters would be passed through to the workers and were in fact the actual amount of the increased costs.

Separately, the City filed an enforcement action against CWS in August 2003 requiring CWS to take necessary and appropriate steps to improve its operations and comply with land use permits and other Municipal Code requirements. This contributed to Norcal's delay in seeking a contract amendment since CWS and Norcal needed to correct operational deficiencies first. That matter was not settled until February 2004.

**Finding 1E**

The Mayor and his Policy and Budget Director made several misrepresentations to the City Council and the public, including: (a) that the increased costs were unanticipated prior to the October 10, 2000 vote, when in fact they were anticipated; (b) that the Mayor found out about the increased costs after the October 10, 2000 vote to approve Norcal as a vendor, when in fact he knew beforehand; (c) that the proposed nine percent garbage rate increase in FY 2003-2004 was needed for reasons other than to reimburse Norcal; and (d) that the Mayor stated that there would be no garbage rate increases as a result of the Council's decision to pay Norcal the \$11.25 million, when other City representatives have admitted that further increases would be required to fund the \$11.25 million payment to Norcal.

**Response**

The City Council agrees in part and respectfully disagrees in part with the finding.

The Mayor and his Budget and Policy Director deny that they misrepresented these matters to the City Council. Specifically, the Mayor and his Budget and Policy Director assert:

- a. The entire City Council was aware of the jurisdictional dispute between the ILWU and the Teamsters at the October 10, 2000 meeting, and City Council also was informed that there were economic issues related to the dispute between the

Teamsters and CWS by Bob Morales of the Teamsters. The Mayor's Office became aware of the potential for increased labor costs in the weeks following the October 10 Council Meeting. Although there are no records of when it learned about this, our recollections are it was in the period between October and December that the Mayor's staff had preliminary discussions with Norcal about potential cost increases.

As noted above, the City Council was advised of the potential cost impact of worker retention following the Administration's presentation of estimated \$1.4 to \$1.6 million costs of paying prevailing wage for MRF workers in September 2001. Actual costs of increased wages for CWS sorters were not determined until after CWS and the Teamsters concluded their contract negotiations in early 2003, and were not verified by City staff until December 2004.

- b. The Mayor and his Budget and Policy Director learned the week before the Council approved the City staff's recommended vendors on October 10, 2000, that there was a potential dispute between the Longshoremen and the Teamsters about who would represent the recycling sorters. There could be no determination at that time as to what increased costs might be because the potential dispute between the Teamsters and the Longshoremen had not been resolved and subsequent labor negotiations between CWS and the Teamsters had not yet begun.
- c. The service rate increase for FY 2003-04 was necessary for several operating and financial purposes, as discussed in the response to Finding 1D.
- d. The Mayor's comments in December 2004 reflect the fact that no additional rate increase was necessary in December 2004 to pay for the higher labor costs already incurred and approved by the City Council in the contract amendment. Prior rate increases and the strengthened Integrated Waste Management Fund Reserve were sufficient to cover the increased costs at that time. If the Council determines that the *Recycle Plus!* Program should continue to be fully self-sufficient without any General Fund subsidy; there will be increased service rates in the future. A policy for General Fund subsidies of garbage costs in the future could have an impact on the level of resources available to provide other essential City services such as police, fire, libraries, and parks.

**Finding 1F**

The Grand Jury agrees with the two Councilmembers' September 20, 2004 memorandum opposing payment of \$11.25 million, including the assertions that: (a) The payment of \$11.25 million appears to be a gift of public funds. The only way San Jose would have been justified in paying Norcal \$11.25 million was if Norcal had provided consideration of \$11.25 million in additional services; instead Norcal was offering at most \$150,000 in additional services; (b) The October 2000 promise or representation by the Mayor to Norcal was not disclosed to the Council when the Council voted to approve Norcal as the preferred vendor in October 2000; (c) The Mayor's assurance to Norcal to pay Norcal the extra labor costs, without Council approval, appears to be a violation of the City Charter and void under California law; (d) Allowing a side deal to alter the terms of the contract was not fair to the other vendors who participated in the Request For Proposal process but were not made aware of this arrangement; and (e) The additional labor costs amount to \$11.25 million and will have to come from reserves and additional rate increases.

**Response**

The City Council agrees with subsection (e) but respectfully disagrees with the assertions in subsections (a) through (d) of the finding.

- a. The City disagrees with the Grand Jury's assertion that the Norcal contract amendment "appears to be a gift of public funds." At the Council Meeting of September 9, 2004, the City Attorney advised the Council that the City would receive several valid public benefits as a result of the amendment, including labor peace and averting a possible strike by workers at the CWS facility, and therefore the additional payment would not be a gift of public funds. The City also received additional services from Norcal as set forth in the amendment. The City Council approved the amendment and its purposes in December 2004 with full knowledge of the costs and benefits. A secondary benefit of the amendment is that it prevented a possible claim by Norcal that the company relied to its detriment on representations from the Mayor's Office that the City would cover its additional labor costs. Norcal had asserted this, although the City Attorney noted that this potential claim had little legal merit in his opinion.
- b. The Mayor has indicated that he made no assurance or representation to Norcal at the October 6, 2000, meeting that he would take steps necessary to have San Jose pay the increased costs.
- c. The Mayor has indicated that he made no such assurance to Norcal. Under the City Charter he does not have the authority to bind the City or the City Council. The Council approved the contract amendment with Norcal in December 2004 in full compliance with its obligations under the law, with full knowledge that it had no

obligation to approve the amendment, and with full knowledge of the increased costs.

The Grand Jury makes unspecified allegations that a Charter violation may have occurred. However, as noted previously in the response to Finding 1B, the City disagrees with the Grand Jury's finding that there would have been a violation of the Charter, even if such an assurance had been made at that time.

- d. The Mayor has denied that there was a "side deal" between the City or the Mayor and Norcal/CWS. Under the City Charter he does not have the authority to bind the City or the City Council; only the City Council can do that. The agreement signed by Norcal and approved by Council March 27, 2001, contained an integration clause that expressly stated that there were no other agreements, oral or written. The Council amended the Norcal contract in December 2004, four years after its original approval. The cost of garbage services was still approximately \$40 million lower than under previous contractors, and still substantially lower than what was proposed by other bidders in 2000.
- e. The City agrees with this subsection of the finding. The costs of providing garbage and recycling services by Norcal and CWS under the contract and the amendment ultimately are paid by the ratepayers.

#### **Finding 1G**

There were many discrepancies or versions of the facts related by the 18 people who were interviewed in this investigation by the Grand Jury. It appears that some of these individuals were not telling the truth, but at times it was difficult for the Grand Jury to determine, with reasonable certainty, fact from fiction. By the nature of this inquiry, these individuals were not under oath and their statements were not recorded. The Grand Jury finds that the only way to ascertain all of the facts, and the ultimate truth, is to have everyone testify under oath and under penalty of perjury.

#### **Response**

The City Council agrees in part and respectfully disagrees in part with this finding.

The Council is not in a position to verify the Grand Jury's statement that the Grand Jury could not reconcile different versions of the facts. However, it appears that the Grand Jury members did not consult videotapes or transcripts of the Council Meetings in question where the contract issues were discussed at length. This would have helped the Grand Jury develop more accurate findings and ascertain the relative credibility of its sources of information.

On June 28, 2005, the City Council approved the Mayor's recommendation to retain an independent investigator to review the matter of the amendment to the Norcal *Recycle Plus!* agreement and the Grand Jury's allegations. The independent investigator will be able to conduct the investigation as he or she sees fit, including the possibility of using subpoenas or open hearings if that is determined appropriate or effective to obtain factual testimony.

The City Council disagrees with the Grand Jury finding that "the only way to ascertain the facts, and the ultimate truth, is to have everyone testify under oath and under penalty of perjury." While the independent investigator may determine that it is appropriate to obtain testimony under oath, the City Council directed that that decision should be left to the professional investigator discretion. It should be noted that the Grand Jury had both the ability and the authority to obtain testimony under oath but chose not to do so in this matter. If the Grand Jury believed that some individuals were untruthful, it could have exercised its legal power to take testimony under oath.

**Recommendation 1**

The San Jose City Council should retain the services of a special investigator to: (a) Determine if the Mayor and/or the Mayor's Policy and Budget Director or other independent key City employees violated San Jose's Charter, Municipal Code, Independent Judgment Policy, ordinance, or any state code; (b) Determine if the Council's vote to pay Norcal \$11.25 million constituted a gift of public funds; (c) Determine if a reprimand, censure, or other sanction should be recommended against the Mayor, his Policy and Budget Director, or other key employees of the City of San Jose, if any are found to have acted inappropriately; and fix; (d) Conduct an open hearing wherein the Mayor, his Policy and Budget Director, the City Attorney, the City Manager, the Director of Environmental Services, the members of the Council, and other key employees of the City of San Jose will be asked questions under oath by the special investigator to ascertain what they knew, when they knew it, and what actions they took. If such conduct is inappropriate, the special investigator should recommend what reprimand, censure, or other sanctions to impose.

**Response**

Sections (a) through (c) of the recommendation will be implemented. Section (d) may be implemented if the independent investigator determines that it would be appropriate and effective to conduct a hearing.

Although the Grand Jury's findings leading up to its first recommendation are disputed, the City Council has already concurred that a professional, objective, and unbiased investigation will be valuable to address the Grand Jury's allegations and the questions they raised for the public. On June 28, 2005, the City Council approved the Mayor's recommendation to retain an independent investigator to review the matter of the Norcal contract amendment and the Grand Jury's allegations. The independent investigator

will conduct the investigation as he or she sees fit, including the possibility of using subpoenas or open hearings if that is judged appropriate or effective.

**Finding 2**

At the October 6, 2000 meeting, the President of Norcal advised the Mayor that, if the City of San Jose agreed to pay for the increased costs, Norcal would pass San Jose's payment on to CWS. After this meeting, outside the presence of the other parties, Norcal and CWS then signed an addendum to their contract that was kept secret from the City of San Jose. This addendum, dated October 9, 2000, expressly stated that Norcal would pay CWS for the increased costs CWS would incur as a result of CWS having to use Teamsters. This addendum was not contingent upon the City of San Jose reimbursing Norcal. The terms of this addendum were not divulged to anyone at the City of San Jose for a period of four years, until October 7, 2004, when Norcal's attorney provided it to the City Attorney. By that time the City Council had already voted on September 21, 2004 to authorize the City Manager to negotiate the terms of the increased payment to Norcal. The Grand Jury finds that Norcal, not the City of San Jose, owed CWS the \$11.25 million, and that Norcal appears to have defrauded the City of San Jose by not disclosing the secret contract addendum.

**Response**

The City Council agrees in part and respectfully disagrees in part with the finding.

The City Council approved the Norcal contract amendment in December 2004 based on full information about the contract and its impacts, including the 2000 addendum between Norcal and CWS. In 2004, the City received a copy of the addendum referred to by the Grand Jury, although it was referenced in CWS correspondence to the Mayor and Council in August 2003. The Mayor has indicated that he made no commitment to Norcal/CWS at the meeting on October 6, 2000, regarding potential labor costs or that he would take the steps necessary to have San Jose pay the increased costs.

Because the City Council had full information when it did approve the amendment and was clearly aware that it had no obligation to do so, there appears to be no basis for the assertion that Norcal "defrauded" the City. The Grand Jury does not reveal any facts upon which it bases its conclusion that the addendum was "secret" or that Norcal had a duty to inform the City of its amendment to the subcontract with CWS. The results of the independent investigation will be helpful to determine if there is any further information to support the Grand Jury's allegation that "Norcal appears to have defrauded the City of San Jose by not disclosing the secret contract addendum."

As noted above in the responses to Findings 1D and 1E, the City Council was advised of the potential additional labor costs related to achieving worker retention and labor peace in September 2001. City staff gave Council an estimate at that time that the potential cost impact of paying prevailing wages to all MRF sorters could be in the range

of \$1.4 to \$1.6 million annually. Actual costs of increased wages for CWS sorters were not determined until after CWS and the Teamsters concluded their contract negotiations in early 2003, and were not verified by City staff until summer 2004.

**Recommendation 2**

The City Attorney or special investigator (see Recommendation 1) retained by the San Jose City Council should take the legal steps necessary to rescind the amended contract with Norcal. The rescission would be based on the fact that Norcal did not disclose to the Council the secret contract addendum between Norcal and CWS, and that Norcal thereby defrauded the City of San Jose. A rescission would result in the return of the millions of dollars San Jose has already paid to Norcal and CWS, and preclude any further payments to Norcal and CWS related to the amended contract. The return of the money would be subject to a reduction of the so-called extra "consideration" given by Norcal, which the Grand Jury believes has a value of approximately \$150,000.

**Response**

Based on existing information, this Grand Jury recommendation should not be implemented because it is unwarranted.

Based on currently available information, documentation, and analysis, there would be no basis for the City Council to rescind the contract amendment.

The City Council approved the contract amendment in December 2004 based on full information about the contract and its cost impacts. Because the City Council had full information when it approved the amendment and was clearly aware that it had no obligation to do so, there appears to be no basis for rescission of the amendment. If the independent investigator provides further findings and information that would alter this conclusion, the City Council could consider new facts and make a determination, if appropriate, at that time.

**Finding 3**

No one on the Council, including the Mayor, could recall another time when the Council voted to amend a contract to pay a vendor additional funds, when the vendor knew, in advance of signing a contract with the City of San Jose, that the vendor would incur additional labor costs. The reason for this is fundamental: once a contract is signed, the parties are required to adhere to the terms of the contract. The Grand Jury has difficulty understanding how the Council could be duped into paying Norcal an extra \$11.25 million when San Jose had no contractual obligation to do so.

## **Response**

The City Council respectfully disagrees with the finding.

The City disagrees with the Grand Jury's characterization that the City Council was "duped." The September 21, 2004, staff report clearly states, "Although the Council is under no obligation to amend the contract with Norcal, staff believes that there are three primary alternatives for the City Council to consider with respect to the Norcal request: amend the contract as requested; provide Norcal with a counter proposal; and, decline to amend the contract." The City Council was informed of its options and of the absence of an obligation to proceed with the contract amendment.

As noted in the response to Finding 1F, the Council identified several valid public benefits at the Council Meeting of September 21, 2004, as a result of the contract amendment, including labor peace, long-term stability and improvement of services, and long-term cost savings that were outlined in the goals of the original RFP. The City Council then approved the contract amendment in December 2004 based on full information about the contract and its impacts.

### **Recommendation 3**

San Jose should place in its Charter a provision that henceforth it shall never consider amending an existing contract with any vendor, wherein the vendor is aware of actual anticipated additional costs prior to being approved as the vendor.

## **Response**

The Grand Jury's recommendation will not be implemented because it is unwarranted.

The San Jose City Charter [Section 800 (b)] provides appropriate provisions regarding the limitations, powers, and duties for contracts made by the City. Although the Council has authority to adopt an ordinance, policy, or procedure to implement this recommendation, a permanent Charter restriction to enforce and limit the Council's ability to respond to changed circumstances in the future would be both impractical and imprudent.

**Finding 4**

The Mayor and his Policy and Budget Director knew that Norcal was willing to take less than \$11.25 million, but the Mayor chose not to negotiate, and the Mayor did not advise the Council that Norcal would take less than the \$11.25 million. Further the City Manager and Director of Environmental Services were authorized to negotiate with Norcal, but they made no effort to negotiate a lower settlement before the Council voted to approve the \$11.25 million reimbursement. The Grand Jury observed that the Mayor and Councilmembers received contributions from Norcal and CWS, but could not determine what might have motivated the City's actions.

**Response**

The City Council respectfully disagrees with the finding.

The Mayor and his Budget and Policy Director have stated that there was no indication by Norcal to the Mayor or his Budget and Policy Director at any time that Norcal would accept less than the \$11.25 million or that the figure was negotiable.

On September 21, 2004, the City Council approved the staff report and the memorandum from Mayor Gonzales, Vice Mayor Dando, and Councilmember Chavez, dated September 16, 2004, and directed the City Manager and City Attorney (not the City Manager and Director of Environmental Services) to negotiate an amendment to the Norcal agreement and return to the Council for approval of the final amendment. The record of the meeting show that Council's action did not include direction to negotiate for a lesser amount.

The action approved by the Council at this meeting included the following direction: "Adoption of a resolution, authorizing the City Manager and City Attorney to negotiate and execute an amendment to the agreement between the City and Norcal Waste Systems of San Jose, Inc., for *Recycle Plus!* Integrated Waste Management Services. Amendment to include payment for additional labor costs, contribution to a recycling characterization study, an e-scrap collection and processing program, and bins for 10 additional annual neighborhood cleanups." The direction was clear to negotiate an amendment that would specifically reimburse Norcal for the additional labor costs for the recycling sorters.

The Grand Jury's "observation" in this finding regarding campaign contributions and Council motivation is gratuitous and misleading. The Grand Jury apparently did not ask Councilmembers the reasons for their public policy positions, but the statement implies that their motivations are not based on serving the public interest. As noted in the response to Finding 1F and Finding 3, the Council identified several valid public benefits the City would receive as a result of the contract amendment, including achieving long-held Council goals of labor peace, long-term stability and improvement of services, and long-term cost savings that were outlined in the original RFP in 2000.

**Recommendation 4**

In addition to the steps detailed under Recommendation 1, the special investigator should determine why the City Council chose to pay the entire \$11.25 million payment to Norcal rather than, at a minimum, trying to settle for a lesser amount. The special investigator should: (a) Determine if some influence, such as political contributions from Norcal, CWS, their employees, and the Teamsters, played a role in the conduct of the Mayor or the Councilmembers who voted in favor of the \$11.25 million payment; and (b) Determine if a reprimand, censure, or other sanction should be recommended against the Mayor, his Policy and Budget Director, other key employees, or the members of the Council who voted in favor of paying Norcal should any be found to have acted inappropriately.

**Response**

The recommendation will be implemented in part, as noted in the response to Recommendation 1.

The City Council will consider further findings and information provided by the independent investigator and determine whether any additional actions are appropriate at that time.

The Grand Jury's recommendation with respect to negotiating for a lesser amount is discussed in the Response to Finding 4. The Grand Jury's recommendation with respect to political contributions is discussed in the Response to Finding 8 and Recommendation 8.

**Finding 5**

The October 6, 2000, meeting was initiated and chaired by the Mayor and it was held at the Mayor's conference room at City Hall. The Mayor made it clear to the Norcal and CWS representatives that he wanted labor peace and he wanted the Teamsters to represent the CWS workers. It appears that the Mayor's intervention on behalf of the Teamsters may have been a violation of federal and/or state labor law.

**Response**

The City Council agrees in part and respectfully disagrees in part with the finding.

The Mayor has indicated he did convey the City Council's priority goals that included labor peace to Norcal at this meeting.

The Mayor recalls that the meeting was held at the request of Norcal, which was also

having similar meetings with other Councilmembers during this period, as noted in the response to Finding 1B. The Mayor's calendar records do not indicate that CWS was present at the meeting of October 6, 2000, and he does not recall that any CWS representatives were there.

The Mayor indicates that at this session he told Norcal that he wanted the company to provide excellent service to the people of San Jose and to work hard to ensure labor peace. The Mayor has stated that he did not express a preference for the Teamsters Union and he did not "intervene on behalf of the Teamsters." Selection of union representation can only be done by the workers themselves, not by the employer.

The Grand Jury again alleges possible violations of law but does not specify what federal or state labor law or laws it believes to have been violated, making it difficult to address this finding. Even if the alleged actions had occurred, they do not appear to have been a violation of federal labor law. If the Mayor had participated in the resolution of a labor dispute there would not have been a violation of federal and/or state labor law unless the participation was the result of some formal action by the City Council to interfere in the dispute. The Mayor's discussion at the October 6, 2000, meeting was not the result of an attempt by the Council to interfere in a labor dispute.

**Recommendation 5**

The special investigator (see Recommendation 1) should determine if the Mayor violated federal and/or state labor laws and, if so, report the result to the appropriate authorities.

**Response**

The recommendation will be implemented as noted in the Response to Recommendations 1 and 4.

**Finding 6**

The current Councilmembers who were part of the Council in September 2000, and who were interviewed by the Grand Jury, acknowledged that they never read the documents pertaining to Norcal's history and Norcal's reply to the Request for Proposal, and, as a result, were unaware of Norcal's problematic history in San Bernardino County.

**Response**

The City Council is not in a position to agree or disagree with the finding regarding individual Councilmember recollections of staff reports.

City staff provided extensive background information regarding Norcal's history to the

City Council in fall 2000 in response to Council questions. At the October 10, 2000, Council meeting, Councilmembers discussed general concerns about the capabilities of proposers and problems in other communities. As a result, the Mayor and staff have indicated the Mayor's Office was aware of Norcal's history.

The various requests for information by Councilmembers and the presentation of staff reports regarding Norcal demonstrate a certain level of knowledge of this subject. A broad-brushed generalization that the entire Council did not read related materials or was unaware of Norcal's history is not substantiated by review of the meeting transcripts, requests made by Councilmembers, and the volume of reports provided to Council. In fact the transcripts indicate that at the October 10, 2000 Council Meeting, Councilmember LeZotte said, "We [should] look at both haulers related to any litigation, exposure... Have they recently lost a contract? Is there any liability exposure that will come due during term of contract..."

During the period in question the following documents and reports were provided regarding Norcal's history in San Bernardino County:

- a. **September 22, 2000 (Council Report).** The Proposal Summary of the staff report outlines in detail information from each proposer, including "Risk and Contractual Obligations/Litigation History." Staff specifically mentioned the difficulties in San Bernardino County and stated that contracting with Norcal would present "some risk to the City."
- b. **October 2, 2000 (Information Memo).** Staff forwarded an Information Memo to the City Council regarding a news media history of stories on proposers, with 37 out of 49 news stories related to Norcal. This memo provided additional background on the companies that submitted proposals to the *Recycle Plus!* RFP and the media coverage over the previous five years.
- c. **October 6, 2000 (Information Memo).** Staff forwarded an Information Memo to the City Council that included a section on Norcal's history in San Bernardino County and correspondence from Norcal recapping events in San Bernardino and the actions taken by Norcal to address the situation.
- d. **October 10, 2005 (Mayor, et al., Council Memo).** Council directed the City Auditor to conduct a review of all recommended haulers to determine the operational adequacy of their proposals and their financial capability to perform. Councilmember LeZotte added that the audit should include "any recent loss of business by the two recommended companies that could impact their financial assessments, any pending litigation or liability exposure that could impact their ability to perform during the contract period...."
- e. **December 12, 2000 (Auditor's Report).** Auditor's report issued based on the

October 10, 2000, direction states that all three proposers were financially fit, qualified and capable of performing the services proposed in their respective response. The Auditor also noted, "In addition, Norcal's recent loss of its contract with San Bernardino County will not, in our opinion, create a significant negative impact on Norcal's financial assessment."

**Recommendation 6**

Councilmembers should be required to review staff reports pertaining to long-term contracts involving millions of dollars of public funds. Each Councilmember should sign a check-off sheet to verify that: (a) they received the staff report; and (b) they reviewed and considered it prior to voting.

**Response**

The recommendation will not be implemented because it is unwarranted and impractical.

The proposed recommendation would result in an additional administrative procedure that would not necessarily achieve the desired results. The City Council depends on multiple sources and methods for forming public policy, including: community input; business and/or master plans; Administrative and Council staff analysis and recommendations; testimony and information from key stakeholders; lobbyists; Councilmember research and expertise, research and reports from other agencies, and news media information. Council's discussion and action, along with individual recorded votes by Councilmembers, on each agenda item constitutes their sign-off, review, and consideration.

**Finding 7**

The current Councilmembers who were not part of the Council in September 2000, and who were interviewed by the Grand Jury, acknowledged that they never read the documents pertaining to Norcal's history and Norcal's reply to the RFP, and as a result, were unaware of Norcal's problematic history in San Bernardino County.

**Response**

The City is not in a position to agree or disagree with the finding regarding individual Councilmember recollections.

However, historical information on previous Council actions is a matter of public record and, typically is summarized in staff reports at key milestones in the course of a project, especially when the Council is dealing with complex and major issues that develop over a period of many years and over many transitions on the City Council. Given the

thorough documentation provided to Councilmembers on this topic, the City believes that the historical information was available and well documented for current Councilmembers.

**Recommendation 7**

When a new Councilmember is elected, and thereafter a vote is to be taken on a contract in excess of one million dollars that has been previously been discussed and voted on, the new Councilmember should be required to review the prior staff reports and the prior minutes, and file a statement with the City Clerk that the prior staff reports and minutes have been reviewed.

**Response**

The Grand Jury's recommendation will not be implemented because it is unwarranted and impractical.

The proposed recommendation would result in an additional administrative procedure that would not necessarily achieve the desired results for the same reasons as noted in the responses to Recommendation 6 and Finding 7.

The City agrees that the Administration does have an ongoing responsibility to provide Councilmembers with adequate background and historical information, especially for complex issues that stretch over many years and many transitions on the City Council.

**Finding 8**

Between January 2000 and December 31, 2004, every Councilmember received political contributions, including from Norcal.

**Response**

The City Council agrees with the finding.

Political contributions and local campaign finance are regulated by the San Jose Municipal Code and state law and contributions are fully disclosed under existing law.

**Recommendation 8**

Prior to any vote on a contract in excess of one million dollars involving any party or entity that has contributed to one or more of the members of the City Council, the City Clerk's office should prepare a staff report that identifies the names and affiliations of the contributors, the names of the recipients, and the dates and amounts of the contributions. This staff report should be available prior to any discussion or consideration of such proposed contract.

**Response**

The Grand Jury's recommendation will not be implemented because it is unwarranted and impractical.

Information about candidate campaign and/or officeholder account activities, including the names, addresses, and occupations of contributors, as well as the dollar amount of contributions is already available to anyone, anytime in the Office of the City Clerk. Candidates and officeholders are required by state and City law to report and disclose this information routinely, and the information is a matter of public record. Beginning in 2006, candidates and officeholders will be able to file on-line activity statements, and the City of San Jose will have this information with search capability, available to the public on its website.

A mandate for the Clerk to prepare a separate report for each agenda item relating to a contract in excess of one million dollars would create an additional workload for the Office of the City Clerk and would provide no value added, given that the information is already available.

**Finding 9**

The Mayor and/or his Policy and Budget Director received several relevant communications from Norcal, CWS and Teamsters. The Mayor and his Policy and Budget Director had a duty to disclose and provide those documents to the Council, but failed to do so.

**Response**

The City Council agrees in part and respectfully disagrees in part with the finding.

The offices of the Mayor, Councilmembers, and the Administration routinely receive information, communications and documents that are relevant to the consideration of matters coming before the Council. The offices of the Mayor and every Councilmember receive hundreds of letters, emails, and other materials every week regarding many

issues, both related to items coming before the Council for consideration and other matters.

Over the five-year period covered by the Grand Jury, the Mayor's Office and City Councilmembers received communications from Norcal, CWS, and Teamsters. During this same period, however, the entire City Council also received numerous staff reports and presentations about the RFP process and contracts, implementation of the new services, and answers to Council questions regarding the proposers and their ability to achieve the Council's goals. As a result, when the Council approved the Norcal contract amendment in December 2004, Councilmembers had sufficient knowledge about the matter. Councilmembers knew they had no obligation to approve the amendment, were aware of the financial consequences of the amendment before they voted, and knew the public benefits that would be achieved by the amendment.

While it can be argued that the Mayor and Councilmembers should share material information with each other, There is no clear legal or ethical "duty" for the Mayor and individual Councilmembers to share all known information, communications, and documents with the full Council. This will be a topic for future Council discussion, as noted in the response to Recommendations 9 and 10.

**Recommendation 9**

When the Mayor's office or any Councilmember receives written communications from a vendor, a lobbyist or union representative involving a planned contract or existing contract in excess of one million dollars, the Mayor or Councilmember should assure that copies of all such communications are provided in a timely fashion to the City Clerk, who will have the responsibility to provide copies to every member of the Council.

**Response**

The Grand Jury's recommendation will not be implemented.

It is not reasonable or practical for all communications that an individual Councilmember's office or the Mayor receives to be forwarded to every other member of the Council. As part of its upcoming discussion on its ethics policy, however, the City Council will be discussing later this year what obligation each has to the full Council to disclose material information.

**Finding 10**

The Mayor's Policy and Budget Director authored several communications to Norcal and CWS. Copies of those communications apparently were not provided to the Council prior to the Council's vote.

## Response

The City Council agrees in part and respectfully disagrees in part with the finding.

While it is true that not all communications authored by the Mayor's Budget and Policy Director to Norcal and CWS were provided to the Council, the essential information related to the matter of the Norcal contract amendment was provided to the City Council prior to its vote to approve the contract amendment in September and December 2004. See the response to Finding 9 for further discussion.

### **Recommendation 10**

When the Mayor's Office authors written communications to a vendor, a lobbyist or union representative involving a planned contract or existing contract in excess of one million dollars, the Mayor's office shall ensure that copies of all such communications, and any responses thereto, are provided in a timely fashion to the City Clerk, who will have the responsibility to provide copies to every member of the Council.

## Response

The Grand Jury's recommendation will not be implemented.

Although the recommendation specifically refers only to the Mayor's Office, it is not reasonable or practical for all communications, whether from the Mayor's Office or from Councilmembers in general, to be forwarded to every other member of the Council. As part of its upcoming discussion on its ethics policy, however, the City Council will be discussing what obligation each has to the full Council to disclose material information.

### **Finding 11**

The three Councilmembers from Districts 1, 4 and 8 are commended for their efforts in opposing the increased payments to Norcal. These three Councilmembers demonstrated exceptional integrity and courage in voicing their concerns, in criticizing the Mayor's conduct, and in attempting to save the City \$11.25 million.

## Response

The City Council is not in a position to agree or disagree with the finding regarding the commendation of individual Councilmembers.

This finding appears to be more a statement of opinion by the Grand Jury than a finding of fact. Individual Councilmembers don't necessarily agree on all matters of policy coming before the City Council. It is the City Council's position that all Councilmembers should be commended for their public service. Unanimity on the Council is not a requirement for setting policy, and disagreement on issues is not necessarily an

indicator of integrity or its lack.

<b>Recommendation 11</b>
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None.
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**Response**

None.

**CONCLUSION**

The Grand Jury raised serious issues about the Norcal Amendment and, on a larger scale about the policy making process of the San Jose City Council, the role of the Mayor, Councilmembers, and staff, and public accountability. This response to the Grand Jury's findings and recommendations is based on the extensive documentation and public records currently available. The Council agrees these are matters that must be fully addressed, which is why it approved the Mayor's recommendation to conduct an independent investigation that is professional, thorough, and objective. Once the independent investigation of the issues raised by the Grand Jury is completed and the results considered by the Council, the City Council should forward the investigation report to the Grand Jury and submit a supplemental response if the results of the independent investigation warrant.

**PUBLIC OUTREACH**

Not applicable.

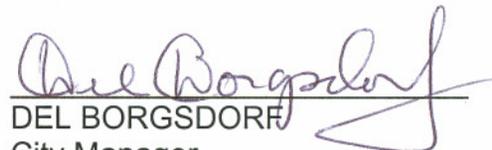
**COORDINATION**

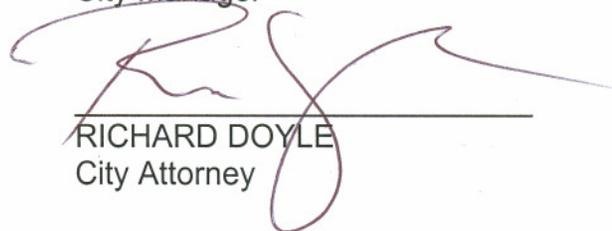
This response has been coordinated with the Office of the Mayor, City Manager's Office and City Attorney's Office.

**CEQA**

Not applicable.

  
\_\_\_\_\_  
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Mayor

  
\_\_\_\_\_  
DEL BORGSDORF  
City Manager

  
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