

CITY COUNCIL REGULAR MEETING AGENDA

REGULAR COUNCIL MEETING
WEDNESDAY
MAY 3, 2023

COUNCIL CHAMBERS
211 WEST ASPEN AVENUE
5:00 P.M.

All City Council Meetings are live streamed on the city's website
(<https://www.flagstaff.az.gov/1461/Streaming-City-Council-Meetings>)

*****PUBLIC COMMENT*****

Verbal public comments may be given through a virtual public comment platform or in-person

If you want to provide a verbal comment during the Council Meeting, use the link below to join the virtual public comment room.

VIRTUAL PUBLIC COMMENT WAITING ROOM

Written comments may be submitted to publiccomment@flagstaffaz.gov. All comments submitted via email will be considered written comments and will be documented into the record as such.

1. CALL TO ORDER

NOTICE OF OPTION TO RECESS INTO EXECUTIVE SESSION

Pursuant to A.R.S. §38-431.02, notice is hereby given to the members of the City Council and to the general public that, at this regular meeting, the City Council may vote to go into executive session, which will not be open to the public, for legal advice and discussion with the City's attorneys for legal advice on any item listed on the following agenda, pursuant to A.R.S. §38-431.03(A)(3).

2. ROLL CALL

NOTE: One or more Councilmembers may be in attendance through other technological means.

MAYOR DAGGETT
VICE MAYOR ASLAN
COUNCILMEMBER HARRIS
COUNCILMEMBER HOUSE

COUNCILMEMBER MATTHEWS
COUNCILMEMBER MCCARTHY
COUNCILMEMBER SWEET

3. PLEDGE OF ALLEGIANCE, MISSION STATEMENT, AND LAND ACKNOWLEDGEMENT

MISSION STATEMENT

The mission of the City of Flagstaff is to protect and enhance the quality of life for all.

LAND ACKNOWLEDGEMENT

The Flagstaff City Council humbly acknowledges the ancestral homelands of this area's Indigenous nations and original stewards. These lands, still inhabited by Native descendants, border mountains sacred to Indigenous peoples. We honor them, their legacies, their traditions, and their continued contributions. We celebrate their past, present, and future generations who will forever know this place as home.

4. **Consideration and Approval:** Termination of Lease, Construction and Service Agreement between City of Flagstaff and Norton Environmental, Inc.

STAFF RECOMMENDED ACTION:

Consideration and approval of the Termination of Lease, Construction and Service Agreement between City of Flagstaff and Norton Environmental, Inc.

5. **ADJOURNMENT**

CERTIFICATE OF POSTING OF NOTICE

The undersigned hereby certifies that a copy of the foregoing notice was duly posted at Flagstaff City Hall on _____, at _____ a.m./p.m. in accordance with the statement filed by the City Council with the City Clerk.

Dated this _____ day of _____, 2023.

Stacy Saltzburg, MMC, City Clerk

CITY OF FLAGSTAFF

STAFF SUMMARY REPORT

To: The Honorable Mayor and Council
From: Scott Overton, Public Works Director
Co-Submitter: Evan Tyrrell
Date: 05/01/2023
Meeting Date: 05/03/2023



TITLE:

Consideration and Approval: Termination of Lease, Construction and Service Agreement between City of Flagstaff and Norton Environmental, Inc.

STAFF RECOMMENDED ACTION:

Consideration and approval of the Termination of Lease, Construction and Service Agreement between City of Flagstaff and Norton Environmental, Inc.

Executive Summary:

Norton and the City entered into a Lease, Construction and Service Agreement dated January 16, 1996, for Norton to design, construct and operate a materials recovery facility on property owned by the City and located at 1800 E. Butler Avenue, Flagstaff, Arizona, in order for the City to divert waste material from its landfill and to provide for the sorting, processing, transportation, and sale of certain recyclable waste. Over the past 25 years, Norton has operated the facility processing collected recyclables for the City of Flagstaff.

On April 25, 2023, Norton closed the facility due to several factors, including staffing issues and a recent fire inside the Facility. As a result, the City has entered into discussions and come to an agreement with Norton to terminate the lease and service agreement effective May 3, 2023.

Financial Impact:

The cost to the city will be \$75,000 to complete the transaction per the agreement. This will be paid from the Solid Waste account numbers 211-06-166-0643-0-4290 and 211-06-166-0646-04290.

Policy Impact:

The materials recovery facility was in transition as the existing agreement was to end September 30, 2023. This action will allow the City to assume the site and operations control resulting in resuming curbside residential service and providing for the transfer of local collected recyclables.

Connection to PBB Priorities/Objectives, Carbon Neutrality Plan & Regional Plan:

This action allows greater control for the City to incorporate improved waste stream goals and objectives moving forward.

Has There Been Previous Council Decision on This:

No

Attachments: Norton Agreement

TERMINATION OF LEASE, CONSTRUCTION, SERVICE AGREEMENT
BY AND BETWEEN
CITY OF FLAGSTAFF
AND
NORTON ENVIRONMENTAL, INC.

This Termination Agreement is made and entered into this 3rd day of May, 2023 (“Effective Date”), by and between the City of Flagstaff (the “City”) with offices at 211 West Aspen Avenue, Flagstaff, Arizona 86001, and Norton Environmental, Inc. (“Norton”) with offices at 6055 Rockside Woods Boulevard, Suite 100, Independence, Ohio 44131. The City and Norton may be referred to collectively as the “Parties” and individually as a “Party.”

RECITALS

WHEREAS, Norton and the City entered into a Lease, Construction and Service Agreement dated January 16, 1996 (the “Original Agreement”), for Norton to design, construct and operate a materials recovery facility (the “Facility”) on property owned by the City and located at 1800 E. Butler Avenue, Flagstaff, Arizona, in order for the City to divert waste material from its landfill and to provide for the sorting, processing, transportation, and sale of certain recyclable waste; and

WHEREAS, Norton and the City entered into that certain First Amendment to Lease, Construction and Service Agreement dated August 28, 2002 (the “First Amendment”); and

WHEREAS, Norton and the City entered into that certain Second Amendment to Lease, Construction and Service Agreement dated December 22, 2009 (the “Second Amendment”) (the Original Agreement together with the First and Second Amendments will be referred to as the “Agreement”); and

WHEREAS, after three extensions, the Agreement is currently set to expire on September 30, 2023; and

WHEREAS, Norton owns the equipment within the Facility and possesses legal title to the Facility for the term of the Agreement, while the City retained legal title to the real property on which the Facility was constructed and located (“Facility Site”); and

WHEREAS, upon termination of the Agreement, title to the Facility reverts to the City and the City is authorized to expel and remove Norton to repossess and enjoy the Facility Site; and

WHEREAS, due to several factors, including staffing issues and a recent fire inside the Facility, Norton has decided to cease operations as of April 25, 2023; and

WHEREAS, the Parties agree that Norton has abandoned its conduct of business at the Facility, which is an Event of Default under the Agreement and grounds for the City to terminate the Agreement for cause; and

WHEREAS, in the event of a termination of the Agreement by the City for cause, the City is entitled to obtain the services to be provided by Norton under the Agreement from another source and recover any and all excess costs of such services over the costs set forth in the Agreement by deduction

from any unpaid balances due to Norton, including any amounts that may be due to Norton under the Annual Minimum Guarantee provision in the Agreement; and

WHEREAS, in order to clarify and reach agreement on an organized and smooth transition of the Facility and Facility Site from Norton to the City, the Parties desire to enter into this Termination Agreement.

NOW THEREFORE, in consideration of the mutual conditions and covenants contained herein, Norton and the City hereby agree to the following.

ARTICLE I TERMINATION OF THE AGREEMENT

- 1.1 As of April 25, 2023, Norton has ceased operations and abandoned its conduct of business at the Facility, thereby resulting in an Event of Default pursuant to section 6.1(b) of the Agreement. Accordingly, the City is entitled to terminate the agreement for cause under section 6.2 of the Agreement.
- 1.2 To avoid a protracted termination process and reach agreement on an orderly and smooth transition of the Facility and Facility Site from Norton's possession to the City, the Parties mutually agree to terminate the Agreement as of the Effective Date. As a result of such termination, the Parties hereby acknowledge and agree that, except as expressly provided for under this Termination Agreement, their respective rights and obligations under the Agreement are hereby terminated as of the Effective Date and that both Parties shall have no further liability to each other under the Agreement or with respect to the Agreement, except as expressly set forth in this Termination Agreement.
- 1.3 Norton represents and warrants that there are no creditors of Norton that are entitled to be appointed as a Representative pursuant to section 6.2(b) of the Agreement.
- 1.4 Norton represents and warrants that there are no parent or subsidiary businesses of Norton that have any rights or involvement in the operations at the Facility.
- 1.5 Upon the termination of the Agreement, all rights and obligations of the Parties under the Agreement shall terminate, except those described in the following Articles and Sections of the Agreement: Sections 8.5, 8.6, and 8.7.

ARTICLE II RECONCILIATION OF FINANCIAL TERMS AND OBLIGATIONS

- 2.1 The Parties desire to reconcile all financial obligations and liabilities between the Parties on the date of termination, and as consideration for termination of the Agreement according to the terms and conditions set forth in this Termination Agreement, the Parties agree to the following:
 - 2.1.1 The City shall pay Norton the total gross sum of seventy-five thousand dollars (\$75,000) ("Termination Payment") in full on or before May 5, 2023, at 5:00 pm. The Parties acknowledge that the Termination Payment is the only payment being made under this Termination Agreement and is in exchange for the

consideration, promises, covenants, and releases provided in this Termination Agreement. Norton agrees that no additional payments are due from the City under the Agreement, including any amounts that may have been due under the Annual Minimum Guarantee or as consideration for any equipment, materials, or supplies related to Facility operations remaining within the Facility or on the Facility site as of the Effective Date, including the Facility scale (collectively referred to as the “Facility Equipment”). Norton hereby expressly waives any claims for additional payments due under the Agreement.

- 2.1.2 The Parties agree that, upon termination of the Agreement and payment of the Termination Payment by the City, any pending or outstanding invoices or expenses between the Parties will be deemed settled and neither Party will be responsible for any additional payments to the other Party.
- 2.2 This Termination Agreement shall not relieve Norton of any liabilities it incurs or has incurred related to its operation of the Facility prior to the Effective Date, including but not limited to the following:
 - 2.2.1 Norton shall remain responsible for payment of all utilities applicable to the Facility and Facility site, including water, wastewater, and stormwater, through the Effective Date.
 - 2.2.2 Norton shall remain responsible for any City, County, or State taxes owed as of the Effective Date.
 - 2.2.3 Norton shall remain responsible for all amounts owed to vendors, contractors, suppliers, employees, and contracted labor related to operations at the Facility as of the Effective Date.
 - 2.2.4 Norton represents and warrants that there are no valid liens or judgments against the Facility or Facility Equipment, and to the extent any do exist, Norton will be responsible for payment of said liens and judgments upon notification by the City.

ARTICLE III TRANSITION OF FACILITY AND FACILITY SITE

- 3.1 Upon the Effective Date and termination of the Agreement, the City’s lease of the Facility Site to Norton shall terminate and title to the Facility and all Facility Equipment shall revert to the City. The City shall be responsible for disposal of any material remaining on the Facility Site as of the Effective Date.
- 3.2 As of the Effective Date and termination of the Agreement, Norton will have no right to access the Facility Site and shall in no way attempt to restrict or interrupt access by the City.
- 3.3 Norton warrants and represents that it has not filed for bankruptcy as of the Effective Date, and that it does not intend to file bankruptcy after termination of the Agreement. If Norton files for bankruptcy at any time after the Effective Date, it acknowledges that

it does not have any interest in the Facility, Facility Site, or Facility Equipment. Norton also agrees that it will be liable to the City for any expenses incurred by the City as a result of Norton filing for bankruptcy or failing to identify a creditor who asserts rights against the Facility or Facility Equipment, including but not limited to all attorney's fees, costs, and expenses incurred by the City responding to a bankruptcy filing by Norton and securing possession, title, and use of the Facility and Facility Equipment.

- 3.4 Prior to the Effective Date, Norton shall provide to the City copies of the insurance policies required under section 4.6 of the Agreement, as well as the applicable certificates of insurance and endorsements naming the City as an additional insured. If the City determines that a claim under any policy is warranted, Norton agrees to make all reasonable efforts to assist the City in making such claim(s). Norton will not be responsible for any expenses arising from insurance claims made by the City under the Norton policies.
- 3.5 Norton has an agreement with Joy Cone Co., located at 2843 W. Shamrell Blvd., Flagstaff, AZ 86005, to provide Joy Cone access to a rail spur located behind the Facility and use of the Facility scale. The City agrees to continue to provide access to Joy Cone under the same terms as previously agreed to by Norton.

ARTICLE IV GENERAL CONDITIONS

- 4.1 Entire Agreement. This Termination Agreement contains the entire understanding and agreement between the parties with respect to the subject matter hereof and supersedes any prior written or oral understandings or agreements between the parties.
- 4.2 Applicable Law. This Termination Agreement shall be construed under and in accordance with the laws of the State of Arizona.
- 4.3 Venue and Attorneys' Fees. Except as otherwise agreed by the parties, any litigation brought by either Party against the other to enforce the provisions of this Termination Agreement must be filed in the Coconino County Superior Court or in the United States District Court for the District of Arizona, if appropriate under 28 U.S.C. § 1331. In the event any action at law or in equity is instituted between the Parties in connection with this Termination Agreement, the prevailing party in the action will be entitled to its costs including reasonable attorneys' fees and court costs from the non-prevailing party, as well as expenses incurred in connection with the prosecution or defense of such action. For purposes of this Termination Agreement, the term "attorneys' fees" or "attorneys' fees and costs" will mean the reasonable fees and expenses of in-house and outside counsel to the parties hereto, which may include reasonable printing, photocopying, duplicating and other expenses, air freight charges, and fees billed for law clerks, paralegals, and other persons performing services under the supervision of an attorney, and the reasonable costs and fees incurred in connection with the enforcement or collection of any judgment obtained in any such proceeding. The provisions of this section will survive the entry of any judgment, and will not merge, or be deemed to have merged, into any judgment.
- 4.4 Authorization. The execution and performance of this Termination Agreement has been

duly authorized by all necessary laws, resolutions, or corporate actions of the respective parties. The Parties to this Termination Agreement represent and warrant that the persons executing this Termination Agreement have full authority to bind the respective Parties.

- 4.5 Cancellation for Conflict of Interest. This Termination Agreement is subject to the cancellation provisions of A.R.S. § 38-511.
- 4.6 Counterparts. This Termination Agreement may be executed in any number of counterparts, each of which will constitute an original, but all of which will constitute one and the same agreement.
- 4.7 Construction of Agreement. This Termination Agreement has been arrived at by negotiation and will not be construed against either Party or against the Party who prepared the last draft.
- 4.8 Severability. If any provision or provisions of this Termination Agreement, or the application thereof to any person or circumstance, is determined to be invalid or unenforceable to any extent, the remainder of this Termination Agreement, or the application of such provision to persons or circumstances other than those as to which it is so determined invalid or unenforceable, will not be affected thereby, and each provision hereof will be valid and will be enforced to the fullest extent permitted by law unless the enforcement of the remaining provisions would defeat the benefit of the bargain for either party in any material respect.
- 4.9 Binding Effect. This Termination Agreement shall inure to the benefit of, and shall be binding upon, the Parties hereto and their respective legal representatives, successors and assigns.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, Norton and the City have caused this Termination Agreement to be executed by their duly authorized officers as of the day and year first written above.

City of Flagstaff

Norton Environmental, Inc.

Becky Daggett, Mayor

Joseph A. Balog, President

Attest:

City Clerk

Approved as to form:

City Attorney