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August 25, 2023

BY HAND DELIVERY

Mr. Michael Volino
Town Supervisor
Town of Thurston
7578 County Route 333
Campbell, New York 14821
Thurston.supervisor@gmail.com

Re: Town of Thurston Proposed Local Law #3 of 2023

Dear Supervisor Volino:

On behalf of our client, Casella Recycling, LLC ("Casella"), we write regarding Proposed Local Law #3, including its impact on the continued operation of Casella's Bonny Hill Organics Facility (the "Facility"). As you are aware, the Facility is located in the Town of Thurston, Steuben County, New York and, for many decades, has been permitted for land application of biosolids (including sewage sludge) on a number of farms in agricultural districts in the Town of Thurston and surrounding towns. Proposed Local Law #3, if enacted, will result in shutting down the Facility and, concomitantly, (1) negatively impact longstanding farm operations (which operations are statutorily protected), and (2) create other environmental concerns (e.g., increased burden on landfilling due to increased disposal of organics, adverse impacts resulting from the use of chemical fertilizer in lieu of organic fertilizer). A history of the Facility and its operation, as well as the impact of Local Law #3, are detailed below.

Also detailed below are the many infirmities that plague proposed Local Law #3. These include, among other issues: (1) defects under the New York State Environmental Quality Review Act ("SEQRA"); (2) inconsistency with State law, policy and practice, including but not limited to 6 NYCRR Part 361-2 and the Right to Farm Law; (3) reliance on analytical testing non-compliant with State requirements; (4) facial invalidity of certain provisions (e.g., unilateral attorney's fees clause); and (5) impairment of Casella's vested rights. Each of these issues is discussed, in turn, below.

Background History of the Facility and Impact of Local Law #3

On July 21, 2022, Casella purchased Dickson's Environmental Services, Inc. Facility located in the Town of Thurston. This acquisition included the assets of the land application operation that Leo Dickson & Sons and Dickson Environmental Services operated since the late 60's. The acquisition included 150 acres on which the Facility is located, as well as the transfer of the land application permit. Casella leases the remaining 2700 acres for land application, all of which are in the Town of Thurston, Town of Cameron, and Town of Bath. The Part 360 Land Application permit transfer application is in the final stage of review with New York State Department of Environmental Conservation ("DEC") Region 8. The Facility and all the land application sites are located in Agricultural District 1 and/or Agricultural District 2 in Steuben

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County, New York. Importantly, permitted farms have long relied on the application of organics for successful farming operations.

A specific example of reliance on land application of biosolids is Leo Dickson & Sons, Inc. ("LDS") which is a third-generation farm. In October of 2021, LDS sold all livestock and now operates as a crop farming operation growing corn, soybeans, and alfalfa. LDS had operated a dairy farm since the late 1960s, obtaining a Part 360 land application permit after promulgation of Part 360 sometime in the 1980s. LDS has been dependent on biosolids for soil amendment since the late 1960s. Since the sale of the livestock, there is no longer manure available for land application, and, therefore, the biosolids are an essential source of nutrients to grow the crops. Land application of Class B Biosolids is an approved practice in NYS and supports the NYS Solid Waste Management Plan's efforts to recycle organics that can be used for beneficial use, as opposed to disposing of those organics in landfills or using chemical fertilizers. Moreover, land application of biosolids (in lieu of chemical fertilizer) has proven to be very beneficial for LDS's farming operation (and for the continued operation of other area farms). The ban of this practice – on which these farms have relied since the 1960s – would be devastating, both financially and agronomically, due to the rising cost of commercial fertilizer and the environmental benefits of organic fertilizer versus commercial fertilizer.

In February 2023, Town of Thurston Local Law #1 was passed. This moratorium as written did not have an impact on Casella's land application operations because the moratorium only applied to expansions or new Part 360 permitted facilities. The neighboring Towns of Cameron and Bath followed with the same moratorium.

On Monday, August 14th, the Town of Thurston proposed Local Law No. 3 of 2023, A Local Law Regulating the Disposal of Sewage Sludge effectively banning the land application of biosolids in the Town of Thurston. The Town categorized this action as Type I under SEQRA and named only the County as an involved agency. There are serious infirmities in both content of and the process relative to Local Law #3.

SEQRA Defects

First, there are a number of glaring defects in the Town's SEQRA process. While the Town properly classified this action as Type I (*see* 6 NYCRR 617.4[b][2]), the Town's supporting SEQRA documentation is fatally defective.

At the outset, the Town failed to identify involved and/or interested State agencies – namely, the New York State Department of Environmental Conservation ("DEC") (i.e., whose State-issued Part 360 permit for the Facility will be invalidated by the Local Law) and the New York State Department of Agriculture & Markets ("Ag & Markets") (i.e., pursuant to which the Commissioner, on his own initiative or upon request by anyone in the agricultural district, may bring an action or issue a determination under Ag & Markets Law 305-a as to whether local regulation is unreasonably restrictive on farming operations in agricultural districts). *See* 6 NYCRR 617.2(t), (u); *see generally*, 6 NYCRR 360-2; Ag & Markets Law 305-a & 36(1).

Because Type I actions require coordinated review, failure to identify and notify these agencies is a fatal defect. See 6 NYCRR 617.6(a)(1)(iii), (a)(2), (b)(2), (b)(3); 6 NYCRR 617.3(d).

Additionally, beyond that the Environmental Assessment Form ("EAF") is bereft of any response to most of the questions therein, the EAF fails to identify any potential negative environmental impacts (including agricultural impacts) from the proposed Local Law. See, e.g., Environmental Assessment Form, Part 2, #8 (marking "no" to the question asking whether the Local Law would impact agricultural resources, including as to whether the action would result, directly or indirectly, in increased pressure on farmland or potentially result in converting agricultural land to non-agricultural land). Despite the Local Law's pronouncement that it is not intended to be violative of the State Right to Farm Law (see Local Law, Section X.C), indisputably, the prohibition on land application of sewage sludge will directly adversely impact longstanding farm operations that have relied on organics since the 1960s, threaten farms' continued operating ability, increase farm operational costs, increase the burden on landfills, and result in the need for chemical fertilizer (i.e., all of which has its own associated adverse impacts). These are significant almost-certain impacts – indeed, unreasonable burdens – flowing directly from the Local Law's prohibitions.

**Inconsistency with State Statute and Policies;
Failure to Support Local Law with NY Certified Testing**

These omissions in the SEQRA documentation are particularly glaring in light of both State policy and statutory requirements. As a matter of public policy, the NYS DEC has long supported the beneficial use of organics, as opposed to chemical fertilizer or disposal in landfills. See, e.g., NYS DEC, *Biosolids Management*, <https://www.dec.ny.gov/chemical/97463.html#:~:text=Ways%20to%20beneficially%20reuse%20biosolids&text=Heat%20drying%20or%20pelletization%20%2D%20A,or%20blended%20with%20another%20material>. Among other reasons, beneficial use through land application decreases reliance on chemical fertilizers, which have their own significant negative environmental impacts. See, e.g., NYS DEC, *Land Application*, <https://www.dec.ny.gov/chemical/8797.html>. Beneficial use of organics is also consistent with State solid waste management policy – i.e., to recycle materials for reuse and to dispose by land burial only as a last resort. ECL 27-0106. Furthermore, the regulatory regime governing land application of biosolids is exceedingly comprehensive in every respect. See generally, 6 NYCRR 361-2.4, 2.5, 2.6, 2.7.

Additionally, the prohibition on land application in Local Law #3 is starkly inconsistent with the State Right to Farm Law (Ag and Markets Law 305-a). That statute protects farming operations in agricultural districts from unreasonably restrictive local laws, directing: "Local governments, when exercising their powers to enact and administer comprehensive plans and local laws ... shall exercise these powers in such manner as may realize the policy and goals set forth in this article, and shall not unreasonably restrict or regulate farm operations within agricultural districts in contravention of the purposes of this article unless it can be shown that the public health or safety is threatened." Ag & Markets Law 305-a(1)(a); see also Ag & Markets Law 301(11) (defining farm operation). Notably, the Commissioner of Ag & Markets has invalidated similar town prohibitions on the land application of sewer sludge as being unreasonably restrictive of farm

operations. See, e.g., *Town of Bennington*, Determination and Order (Commissioner Richard Ball, June 9, 2016). In *Town of Bennington*, the Commissioner looked to the DEC's standards and requirements to make the determination of whether the subject local laws were unduly restrictive of farm operations. Ultimately, the Commissioner found that the Town failed to demonstrate that the DEC's standards and permitting requirements were inadequate to protect the environment and the public health and safety. The same is true here.

Although the Town maintains that land application of sewage sludge results in harm to the public health, its proffered support for that position is wanting at best. For example, the Town's supporting references for Local Law #3 rely, in part, on water testing results for PFAS using in-home kits (e.g., Cyclopure, Inc.), and not testing by laboratories certified by the New York State Department of Health (as required by NYS DEC regulations). See e.g., 6 NYCRR 361-2.46(1)(ii)(f). Beyond that, while the Town cites articles regarding general concerns about PFAS, it provides no bona fide evidence that land application of biosolids in Steuben County (i.e., due to specific circumstances in Steuben County at the land application sites) has created any impairment of public health and safety (including as to PFAS). Thus, there has been no showing that the DEC's comprehensive regulations are inadequate to protect the public health, and this renders the prohibitions in the Local Law unreasonably restrictive and invalid. See NYS Ag & Markets, *Guidelines for Review of Local Laws Affecting Nutrient Management Practices (i.e. Land Application of Animal Waste, Recognizable and Non-Recognizable Food Waste, Sewage Sludge and Septage; Animal Waste Storage/Management)* (4/2/15) ("The Department [of Ag & Markets] considers the standards and permitting requirements under the DEC's regulations in evaluating whether restrictions of agricultural land use and nutrient management practices are unreasonably restrictive in violation of [Ag & Market Law] 305-a. In many instances, the Department has found local laws that exceed State standards unreasonably restrictive. ... If a local government believes that local conditions warrant standards that differ from the DEC's, the Department considers those conditions in evaluating whether the standards are unreasonably restrictive").

In this regard, it bears reiterating that DEC regulations are incredibly detailed and comprehensive as to all aspects of land application of biosolids (land application criteria, testing requirements, application restrictions, monitoring, record keeping and reporting) and the storage of such materials. See 6 NYCRR 361-2.4, 2.5, 2.6, 2.7. Further, the DEC is in the process of promulgating new standards to further ensure protection of public health and safety (including as to PFAS). See generally, New York State DEC, *DMM – Draft 7/Biosolids Recycling in New York State – Interim Strategy for the Control of PFAS Compounds*. And, as noted above, the NYS Department of Ag & Markets has found that DEC's comprehensive regulatory regime minimizes adverse impacts to the public and the general environment. Thus, absent specific circumstances unique to Steuben County that would show DEC's regulations to be inadequately protective, the Local Law violates Ag & Markets Law 305-a and cannot stand. See *Town of Bennington, supra*; cf. *Town of Butternuts v. Davidson*, 259 A.D.2d 886 (3d Dep't 1999).

Moreover, this conclusion stands, notwithstanding ECL 27-0711. This general provision does not override or render void the specific language in Ag & Markets Law 305-a(1) relative to the protection of farm operations in agricultural districts. See, e.g., *Town of Bennington, supra* (invalidating local laws restricting application of sewage sludge). Further, while ECL 27-0711

may preclude a field preemption argument, we respectfully maintain that Local Law #3 is conflict preempted under DEC's comprehensive, detailed regulatory scheme governing biosolid reuse and the directive in Ag & Markets Law 305-a(a) that localities may not unduly restrict/regulate farm operations absent a demonstrated public health concern.

Further, to the extent the Town points to land application bans in the State of Maine, it cannot escape notice that those bans are state-imposed, and not imposed on a patchwork basis by individual localities. Where, as here, land application of biosolids (including sewer sludge) is an accepted, promoted practice under State policy and strictly controlled under a comprehensive regulatory regime, the local prohibition must fail, either as being preempted under State law or being an unreasonable restriction on farm operations under Ag & Markets 305-a.

In short, given that the Town's Local Law (1) ignores and is inconsistent with the comprehensive State regulatory scheme and underlying State policies governing beneficial use of organics; (2) unreasonably restricts and impairs farm operations in agricultural districts; and (3) fails to provide any showing of any legitimate public health threat to Steuben County, the Local Law is invalid as proposed.

Miscellaneous: Invalidity of Attorney's Fees Provision

Beyond fatal SEQRA defects and inconsistency with State law and policy, other individual provisions of the Local Law are of dubious validity. For example, the unilateral attorney's fees provision – i.e., granting attorney's fees to the Town or any Town resident seeking to enforce the Local Law – appears to be invalid on its face. *See* Local Law #3, Section IX.B & C. Generally (and with certain caveats), attorney fee shifting, typically written in terms of the prevailing party, is valid only if authorized by statute (State or Federal), contract or Court Order. *See Sage Systems, Inc. v. Liss*, 39 N.Y.3d 27 (2022). The Town has not identified any statutory authority for the provision; there is no contract; and there is no Court Order.

It would be interesting, indeed, were the Commissioner of Ag & Markets to enjoin enforcement of/invalidate application of the Local Law in agricultural districts under Ag & Markets Law 305-a. Under the Local Law as written, the Town (or any private person) could claim entitlement to attorney's fees in any litigation against the Commissioner. Notably as well, if such broad-based, unilateral fee-shifting provisions were valid as a general matter, they would provide an avenue for every locality to insulate its enactments from challenge or at the very least provide an extreme disincentive for challenge. The invalidity of such a provision, thus, is apparent on its face.

Vested Rights; Inverse Condemnation

Finally, the proposed Local Law unreasonably impairs Casella's vested rights. Casella has vested rights to operate the Facility, given the Facility's longstanding permitted status and Casella's substantial investment/purchase of the Facility (including the valid Part 360 permit). If the proposed Local Law is enacted and upheld, at the very least, Casella would have a claim for inverse condemnation against the Town of Thurston (and any other town that follows suit with a

Mr. Michael Volino, Town Supervisor
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similar prohibition) both for the investment in the Facility/permits and for lost profits, totaling millions of dollars.

We appreciate the opportunity to comment on Proposed Local Law #3 and thank the Town Board for its consideration of our concerns as expressed herein. If the Town's consideration of Local Law #3, as written, progresses further, Casella reserves all rights to present additional detail on the issues presented above and to raise additional issues.

Please feel free to reach out to me with any questions or concerns.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Thomas A. West', is written over the typed name.

cc: Richard A. Ball, NYS Department of Agriculture and Markets
Basil Seggos, NYS Department of Environmental Conservation
David Vitale, NYS Department of Environmental Conservation