

Introduced by: Mr. Street, Mr. Carter,  
Ms. Durham, Mr. Smiley,  
Mr. Bell, Mr. Cartier,  
Mr. Hollins

Date of Introduction: November 26, 2019

**RESOLUTION NO. 19-223**

**SUPPORTING THE EXECUTION OF A SETTLEMENT AGREEMENT TO RESOLVE  
LITIGATION BETWEEN DELAWARE RECYCLABLE PRODUCTS, INC. AND  
NEW CASTLE, NEW CASTLE COUNTY COUNCIL, *ET AL.***

**WHEREAS**, Ordinance No. 19-046, as amended by Floor Amendment No. 1 (the “Ordinance”), establishing special use standards and a vertical height limitation of 140 feet for solid waste landfills, was adopted by New Castle County Council on August 27, 2019 and approved by the New Castle County Executive on August 28, 2019; and

**WHEREAS**, Delaware Recyclable Products, Inc. (“DRPI”) owns and operates the landfill located on Marsh Lane in New Castle, Delaware (the “Landfill”) under Permit SW-15/02 (the “Permit”), issued by the Delaware Department of Natural Resources and Environmental Control (“DNREC”) on December 30, 2015; and

**WHEREAS**, DRPI alleges that prior to the introduction of the Ordinance, it filed a permit modification application with DNREC to amend the Permit to increase the previously approved final vertical elevation of the Landfill from 130 feet mean sea level (“MSL”) to 190 feet MSL; and

**WHEREAS**, DRPI commenced litigation in the Delaware Court of Chancery against New Castle County, New Castle County Council, the County Executive in his official capacity, and all members of County Council in their official capacity, seeking, in part, an injunction against enforcement of the Ordinance; and

**WHEREAS**, County Council supports resolution of the litigation through a settlement agreement under which: (1) DRPI will limit its request to expand the landfill to a final vertical height limitation of 140 feet MSL; (2) DRPI will dismiss the litigation with prejudice; (3) DRPI will waive any and all claims arising from or related to the adoption of the Ordinance; and (4) the County will acknowledge that DRPI may increase the final elevation of the landfill to a maximum of 140 feet MSL without securing a special use permit.

**NOW, THEREFORE, BE IT RESOLVED** by and for County Council of New Castle County that County Council supports the County Executive’s execution of the settlement agreement, attached hereto as Exhibit A, on behalf of County Council and its members.

Adopted by County Council of  
New Castle County on:

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President of County Council  
of New Castle County

**SYNOPSIS:** By way of this Resolution, New Castle County Council supports the execution of the attached settlement agreement to resolve litigation between Delaware Recyclable Products, Inc. and New Castle, New Castle County Council, the New Castle County Executive, *et al.*

**FISCAL NOTE:** There is no discernible fiscal impact.

## Exhibit A

## SETTLEMENT AGREEMENT

This Settlement Agreement (this "Agreement"), entered into as of the Effective Date (defined below), between Delaware Recyclable Products, Inc. ("DRPI"), a corporation formed under the laws of the State of Delaware, and New Castle County (the "County"), a political subdivision of the State of Delaware.

### RECITALS

WHEREAS, DRPI owns and operates a permitted construction and demolition landfill and recycling center located at 246 Marsh Lane, New Castle, Delaware (the "Landfill"); and

WHEREAS, DRPI currently operates the Landfill under Permit SW-15/02 (the "Permit"), issued by the Delaware Department of Natural Resources and Environmental Control ("DNREC") on December 30, 2015; and

WHEREAS, the Permit currently limits the Landfill to a final vertical elevation of 130 feet mean sea level ("MSL"); and

WHEREAS, in July 2018, DRPI filed with DNREC a permit modification application (the "Application") for vertical expansion of the Landfill up to 190 feet MSL; and

WHEREAS, under 7 *Del. C.* § 6003(c)(1), DNREC cannot approve the Application unless the County "has first approved the activity by zoning procedures provided by law" and under 7 *DEL. ADMIN. CODE* § 1370, subsection 8.1, DNREC cannot approve the Application "until the local governing body having land use planning and zoning authority certifies in writing to the Department that the applicant complies with local land use plans and zoning regulations" (the "County Certification"); and

WHEREAS, on August 27, 2019, New Castle County Council ("County Council") voted to adopt Ordinance 19-046, as amended by Floor Amendment No. 1, entitled *To Amend New Castle County Code Chapter 40 ("Unified Development Code"), Article 3 ("Use Regulations") and Article 33 ("Definitions") Regarding Landfills* (the "Ordinance") and the Ordinance was signed the next day, August 28, 2019, by New Castle County Executive Matthew S. Meyer ("County Executive"); and

WHEREAS, the Ordinance establishes, among other things, that solid waste landfills located within the County cannot exceed 140 feet MSL in height and further provides that requests to increase the landfill height up to and including this maximum height conform to certain use standards (the "Use Standards") and are contingent upon the landfill owner securing a special use permit from the County Board of Adjustment (the "BOA"); and

WHEREAS, as of the Effective Date, the Application has not been granted by DNREC; and

WHEREAS, on October 30, 2019, DRPI commenced litigation captioned *Delaware Recyclable Products, Inc. v. New Castle County, et al.*, C.A. No. 2019-0868-JTL (the "Litigation") before the Delaware Chancery Court (the "Court") by filing a complaint (the "Complaint") against the County, County Council, the County Executive (in his official capacity) and individual members of County Council (in their official capacities) (together with the County, County Council and the County Executive, the "Defendants") asserting, among other things, that the Ordinance: (1) is arbitrary and capricious; (2) is inconsistent with the County's Comprehensive Development Plan ("CDP"); and (3) deprived DRPI of a vested right to increase the height of the Landfill to 190 feet MSL because the Application was submitted to DNREC prior to introduction of the Ordinance; and

WHEREAS, the Defendants dispute the claims asserted by DRPI in the Litigation, and assert that the Ordinance: (1) represents the proper exercise of the County's police powers; (2) is consistent with numerous provisions of the CDP; and (3) did not deprive DRPI of any vested right to increase the height of the landfill because no such vested right exists; and

WHEREAS, DRPI and the Defendants wish to resolve the Litigation by agreeing that, in exchange for dismissing the Complaint, DRPI has the right to increase final elevation of the Landfill to 140 feet MSL without DRPI: (1) demonstrating compliance with the Use Standards set forth in the Ordinance; or, (2) securing a special use permit from the BOA.

#### AGREEMENT

Now, therefore, in consideration of the mutual promises set forth herein, the adequacy and sufficiency of which the parties acknowledge, DRPI and the County agree as follows:

1. Effective Date. This Agreement shall become effective (the "Effective Date") upon full execution by an authorized representative of DRPI and the County.

2. Application for Zoning Verification. DRPI shall submit an application for a zoning verification ("Zoning Verification Application") to the New Castle County Department of Land Use (the "Department") describing its intent to seek a permit modification of the Permit (the "Permit Modification") with DNREC to increase the height of the Landfill to a maximum final elevation of 140 feet MSL and seeking confirmation that the proposed Permit Modification complies with New Castle County zoning provisions.

3. Zoning Verification and DNREC Certification. Within five (5) business days following receipt of DRPI's Zoning Verification Application, the Department will provide a zoning verification ("Zoning Verification") that contains a certification ("Certification") intended to satisfy the requirements of 7 *Del. C.* § 6003(c)(1) and 7 DEL. ADMIN. CODE § 1370, subsection 8.1. The form of the Zoning Verification shall be materially consistent with Exhibit A and is hereby incorporated by reference. The parties acknowledge that the County engaged DNREC regarding the adequacy of the Certification language prior to the Effective Date and that DNREC confirmation may already have been obtained prior to submission of the Zoning Verification Application by DRPI. If for any reason, DNREC finds that the Certification provided on the Zoning Verification does not meet the requirements of applicable law, the

Department will engage in good faith negotiations with DNREC to provide Certification language that satisfies the requirements of 7 Del. C. § 6003(c)(1) and 7 DEL. ADMIN. CODE § 1370, subsection 8.1. The Department's obligation to engage in good faith negotiations with DNREC to provide the foregoing Certification will survive dismissal of the Litigation.

4. Dismissal of Litigation. Within five (5) business days following the Department's issuance of the Zoning Verification to DRPI, DRPI shall file a stipulation dismissing the Litigation with prejudice and with the parties bearing their own costs (the "Stipulation of Dismissal") in substantially the form attached hereto as Exhibit B.

5. No Admission of Liability or Illegality. This Agreement constitutes the compromise and settlement of disputed claims. Nothing contained herein, nor any actions taken by DRPI or the Defendants, shall constitute, be construed as, or be deemed to be, and admission of fault, liability or wrongdoing of any kind on the part of either DRPI or the Defendants, nor shall anything herein be construed as an acknowledgement of the merit or lack of merit of any claim or defense asserted or that could have been asserted in the Litigation. For the avoidance of doubt, Defendants deny any allegation or claim that the Ordinance was not properly or legally adopted or does not reflect the proper exercise of the Defendants' police powers. For the avoidance of doubt, DRPI asserts that all of its claims asserted in the Complaint are meritorious.

6. Releases.

a. Upon entry of the Stipulation of Dismissal, DRPI, on behalf of itself and its predecessors, parents, partners, principals, shareholders, representatives, attorneys, participants, members, subsidiaries, officers, directors, managers, executives, owners, employees, agents, purchasers, successors and assigns (the "DRPI Releasing Parties") shall be deemed to have released the Defendants, and all of the County's departments and agencies, and all of its and their respective past, present or future general managers, employees, consultants, attorneys, representatives, and agents from all claims, causes of action and defenses arising from or related to the adoption of the Ordinance, including all claims asserted in the Litigation, or that could have been asserted by any DRPI Releasing Party based on the facts alleged in the Complaint. For the avoidance of doubt, upon entry of the Stipulation of Dismissal, the DRPI Releasing Parties will be deemed to have released any claim against the Defendants that DRPI has a vested right under any statute, ordinance, regulation, plan or agreement to increase the final elevation of the Landfill above 140 feet MSL.

b. Upon entry of the Stipulation of Dismissal, County Council and the individual Defendants (in their official capacities only), shall be deemed to have released DRPI and its predecessors, parents, partners, principals, shareholders, representatives, attorneys, participants, members, subsidiaries, officers, directors, managers, executives, owners, employees, agents, purchasers, successors and assigns from any claim, cause of action or defense that increasing the final elevation of the Landfill to 140 feet MSL without obtaining a special use permit or demonstrating compliance with the Use Standards does not comply with any applicable County land use plan or zoning regulation.

7. Authority and Representations.

a. DRPI represents and warrants that: (i) the individual executing this Agreement on behalf of DRPI has actual authority to execute this Agreement on behalf of DRPI; (ii) DRPI is a corporation in good standing under the laws of the State of Delaware; (iii) entering into this Agreement does not violate any term in DRPI's certificate of incorporation, bylaws or any other governing document of DRPI; and (iv) no additional act is necessary to bind DRPI to this Agreement.

b. The County represents and warrants that the individual executing this Agreement on behalf of the County has the authority to bind the County to this Agreement and that entering into this Agreement does not violate any statute or ordinance governing the County.

c. The intent of this Agreement is to allow DRPI to proceed with its Permit Modification to secure DNREC approval to increase final elevation of the Landfill up to 140 feet MSL without obtaining a special use permit or demonstrating compliance with the Use Standards. The County agrees that any official act on the part of the County that has the effect of frustrating or interfering with the intent of this Agreement shall constitute a material breach of this Agreement, *provided, however*, that: (i) the enforcement of the *New Castle County Code* as to any future conditions at the Landfill, excluding the provisions of the Ordinance addressed herein, and (ii) the amendment or replacement of the Ordinance in a manner not inconsistent with, and that does not frustrate, the intent and terms of this Agreement, shall not constitute a breach of this Agreement.

8. Notice. Any notice provided under this Agreement shall be provided to the following:

a. To the County:

Wilson B. Davis  
County Attorney  
87 Reads Way  
New Castle, DE 19720  
Email: Wilson.Davis@newcastlede.gov

b. To DRPI:

Wendie C. Stabler  
Saul Ewing Arnstein & Lehr LLP  
1201 N. Market St., Ste 2300  
Wilmington, DE 19801  
Email: Wendie.Stabler@saul.com

Sharon Morgan  
Fox Rothschild LLP  
Citizens Bank Center  
919 N. Market St., Ste 300  
Wilmington, DE 19899-2323  
Email: SMorgan@foxrothschild.com

Waste Management  
Attn: Chris Farley  
107 Silvia St.  
Ewing, NJ 08628  
Email: cfarley@wm.com

9. Drafting, Reliance and Entire Agreement. This Agreement was mutually prepared by the parties hereto and shall not be interpreted or construed in any manner prejudicial to either party based upon its authorship. The parties hereto have been represented by counsel of their choosing and have relied upon the advice of their respective counsel in entering into this Agreement. In executing this Agreement, neither DRPI nor the County are relying upon any representation not set forth herein. This Agreement and the exhibits hereto reflect the entire agreement of DRPI and the County with respect to the subject matter of this Agreement and supersede all prior agreements and understandings, oral or written, with respect to such matters, which the parties acknowledge have been merged into this Agreement and its exhibits.

10. Modification. Any modification of this Agreement must be made in a writing executed by representatives having authority to bind DRPI and the County.

11. Governing Law. This Agreement shall be governed by the laws of the State of Delaware. The parties consent to the jurisdiction of the courts of the State of Delaware to resolve any dispute arising under this Agreement.

12. Execution. This Agreement may be executed in counterparts with the same effect as if the signatures were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument, effective as of the Effective Date. Copies and facsimiles signatures shall be deemed to be the valid and binding signature of any party. The signatures of the parties need not be notarized to be effective.

13. Survival. This Agreement shall be binding on all purchasers, successors and assigns of DRPI and all successors and assigns of the County. Additionally, this Agreement shall survive denial of the Permit Modification by DNREC on any basis or for any reason that does not arise from a breach of this Agreement.

14. Termination. Either party may terminate this Agreement prior to DRPI's submission of a Zoning Verification Application to the Department by providing written notice to the non-terminating party. Termination of this Agreement shall return the parties to their











recording of this plan indicates the plan's compliance with the subdivision and zoning code in effect at that time.

- A Record Minor Land Development Plan for Petrillo Industrial Park, Lot 1 and Lot 2 (microfilm 13285) to subdivide the Property was recorded in the Office of the Recorder of Deeds for New Castle County on August 22, 1997. The approval and recording of this plan indicates the plan's compliance with the subdivision and zoning code in effect at that time.
- A Record Minor Land Development Plan for Maintenance Building (Instrument No. 200108140066051) to establish 2,600± square feet for a maintenance building was recorded in the Office of the Recorder of Deeds for New Castle County on August 14, 2001. The approval and recording of this plan indicates the plan's compliance with the subdivision and zoning code in effect at that time.
- A Utility Plan to relocate an easement. (Application No. 20030417).

### Prior Zoning Verifications

In addition to the approval of the above land development plans, the Department has issued two zoning verifications, both following the transfer of ownership of the Property to the current owners.

- On July 31, 2006, regarding "tax parcel numbers 10-015.40-366, which is located at 198 Marsh Road", the Department provided "A review of the Official Zoning Map of New Castle County indicates that the subject parcels are zoned **HI (Heavy Industrial)**, which **permits heavy industrial uses and other major utilities (including the landfilling and disposal of construction and demolition debris pursuant to a recorded plan)**, pursuant to UDC section 40.33.270D. & F." (Emphasis in original). It is unclear if the tax parcel or address noted on the zoning verification is associated with the Landfill. However, the zoning verification includes a history of the above referenced plans and associated tax parcel numbers.
- On September 15, 2010, regarding tax parcel no. 10.004.00-002, the Department provided "A review of the Official Zoning Map of New Castle County indicates that the subject parcel is zoned HI (Heavy Industry), which permits *recycling or storage* uses (**including tire recycling**) as a limited use pursuant to Table 40.03.110 of the New Castle County Unified Development Code (UDC). **Please be advised that expansion of paving or structures at the subject property will result in the need to submit a new land development plan to the Department for review.**" (Emphasis in original).

### Board of Adjustment Decisions

- No relevant variance decisions were found for the Property in a search of the County tax parcel information system.



### **Property Maintenance Code Compliance**

- There are currently no open property maintenance code violations.

### **Litigation**

Ordinance 19-046, as amended by Floor Amendment No. 1, effective August 28, 2019 (“Ord. No. 19-046”) classified solid waste landfills as heavy industrial uses, established a vertical height limit of 140 feet, and provided that any increase of a current height must meet certain use standards as determined by the Board of Adjustment (“BOA”) through a special use review.

DRPI contends that the terms of Ord. 19-046 do not apply to the Permit Modification Application and has filed litigation (the “Litigation”) to enjoin its application and enforcement. Pursuant to the terms of a settlement agreement between DRPI and the County intended to resolve the Litigation, the use standards and the BOA’s special use review as delineated in Ord. No. 19-046 shall not apply to the Permit Modification Application if DRPI’s permit limits the Landfill’s final elevation to 140 feet MSL.

The terms of this zoning verification are conditioned and dependent upon the dismissal of the Litigation captioned *Delaware Recyclable Products, Inc. v. New Castle County, et al.*, C.A. No. 2019-0868-JTL filed in the Delaware Court of Chancery and compliance with the terms of Settlement Agreement between DRPI and New Castle County in furtherance thereof. If for any reason, the terms of the Settlement Agreement are terminated or held invalid, DRPI fails to dismiss the Litigation as contemplated by the Settlement Agreement, the Permit Modification Application requests an increase in the final elevation above 140 feet MSL or includes terms not herein contemplated, or the Settlement Agreement is otherwise breached by DRPI or its predecessors, parents, partners, principals, shareholders, representatives, attorneys, participants, members, subsidiaries, officers, directors, managers, executives, owners, employees, agents, purchasers, successors or assigns, this zoning verification shall have no force or effect and shall be considered void *ab initio*.

### **Other Conditions and Requirements**

Please be advised that this letter only verifies whether the type of use that exists or is proposed on the Property – to the extent described in your zoning verification application – is permitted, not permitted, or permitted under limited circumstances in the zoning district.

The use as proposed in the zoning verification application does not require Department permits, certificates and/or plans. However, any future expansion of the existing use, a change of use, alterations to the building or site, demolition, or new construction, not described in the zoning verification application or shown on an approved plan or permit, may require Department permits, certificates, and/or plans.

General questions regarding the plan review process; building, demolition, and sign permits; and Certificates of Use/Occupancy, can be answered by the Department at 395-5400. Copies of documents such as certificates of occupancy or code violations may be obtained, where

applicable and available, by submitting an Information Request Form (FOIA). The form is available online at [www.nccde.org](http://www.nccde.org). Thank you for your attention to this matter.

Sincerely,

Richard Hall,  
General Manager, Department of Land Use

**Exhibit B**

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

DELAWARE RECYCLABLE PRODUCTS, INC., )  
)  
Plaintiff, )  
)  
v. ) C.A. No. 2018-0868-JTL  
)  
NEW CASTLE COUNTY, DELAWARE, )  
NEW CASTLE COUNTY COUNCIL, )  
)  
and )  
)  
COUNTY EXECUTIVE MATTHEW S. MEYER, )  
COUNCIL PRESIDENT KAREN HARTLEY-NAGLE, )  
COUNCILMAN KENNETH R. WOODS, )  
COUNCILWOMAN DEE G. DURHAM, )  
COUNCILWOMAN JANET T. KILPATRICK, )  
COUNCILMAN PENROSE HOLLINS, )  
COUNCILWOMAN ELISA C. DILLER, )  
COUNCILMAN DAVID B. CARTER, )  
COUNCILMAN GEORGE SMILEY, )  
COUNCILMAN JOHN J. CARTIER, )  
COUNCILMAN TIMOTHY P. SHELDON, )  
COUNCILMAN JEA P. STREET, )  
COUNCILMAN DAVID L. TACKETT, and )  
COUNCILMAN JAMES W. BELL, )  
in their official capacities, )  
)  
Defendants. )

**STIPULATION OF DISMISSAL**

Pursuant to Delaware Chancery Court Rule 41(a)(1)(ii), Plaintiff Delaware Recyclable Products, Inc., and Defendants New Castle County, Delaware, New Castle County Council, County Executive Matthew S. Meyer, Council President



Karen Hartley-Nagle, Councilman Kenneth R. Woods, Councilwoman Dee G. Durham, Councilwoman Janet T. Kilpatrick, Councilman Penrose Hollins, Councilwoman Elisa C. Diller, Councilman David B. Carter, Councilman George Smiley, Councilman John J. Cartier, Councilman Timothy P. Sheldon, Councilman Jea P. Street, Councilman David L. Tackett, and Councilman James W. Bell, each named in their official capacities, through their undersigned counsel, hereby stipulate and agree to the dismissal of the above-captioned matter with prejudice, the parties to bear their own fees and costs.

Dated: \_\_\_\_\_, 2019

**FOX ROTHSCHILD LLP**

*/s/ DRAFT*

Sharon Oras Morgan (No. 4287)  
Sidney S. Liebesman (No. 3702)  
Courtney A. Emerson (No. 6229)  
919 North Market Street, Suite 300  
Wilmington, DE 19899-2323  
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**NEW CASTLE COUNTY  
OFFICE OF LAW**

*/s/ DRAFT*

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