STATE OF MICHIGAN

COURT OF APPEALS

IONIA COUNTY,

Plaintiff/Counter-Defendant-Appellee,

v

PITSCH RECYCLING & DISPOSAL, INC., and PITSCH SANITARY LANDFILL, INC.,

Defendants/Counter-Plaintiffs-Appellants.

UNPUBLISHED
August 6, 2009

No. 284230
Ionia Circuit Court
LC No. 06-024599-CZ

Before: O'Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendants Pitsch Recycling & Disposal, Inc., and Pitsch Sanitary Landfill, Inc., appeal as of right the trial court's order granting summary disposition and a declaratory judgment in favor of plaintiff Ionia County (the county) on Pitsch's claims that the county violated Part 115 of the Solid Waste Management Act and the Commerce Clause and violated Pitsch's substantive due process rights when it, in effect, imposed an annual cap of 100,000 tons of waste that Pitsch could accept in its landfill located in Ionia County. We vacate the lower court order and remand for further proceedings consistent with this opinion.

Defendants Pitsch Recycling & Disposal, Inc., and Pitsch Sanitary Landfill, Inc.,[1] own and operate the Pitsch Sanitary Landfill (the landfill), the only landfill located in Ionia County that is licensed by the Michigan Department of Environmental Quality (DEQ). Part 115 of Michigan's Natural Resources and Environmental Protection Act (NREPA) authorizes counties to create solid waste management plans governing the recovery, processing, and disposal of nonhazardous solid waste generated in the county. See MCL 324.11533. Ionia County, which has a solid waste management plan (the plan), is required by statute to review and update its plan every five years.[2] See MCL 324.11533(2).

[1] We will collectively refer to defendants as "Pitsch" in this opinion.

[2] At oral arguments, the parties indicated that the 2000 plan, which is at issue in this case, has not
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On May 23, 2000, the Ionia County Board of Commissioners submitted an update to the plan to the DEQ. The revised plan submitted to the DEQ included a provision limiting the total amount of solid waste that could be imported into Ionia County annually for disposal at 100,000 tons. The proposed county plan also included the following note:

> Note: The 100,000 ton per year cap is for the Pitsch Sanitary Landfill. The cap is to ensure the County of Ionia of 20+ years of capacity. This cap is negotiatable [sic] with Ionia County and Pitsch Sanitary Landfill. This cap is in no way to limit the business of Pitsch Sanitary Landfill and any revenue due to the Landfill.

After reviewing the plan, the DEQ informed the county that the county would be required to alter the note before it would approve the plan update. The DEQ explained,

> On page III-2, the Note attached to this page states the cap for Pitsch Sanitary Landfill is negotiable between Ionia County (County) and Pitsch Sanitary Landfill. Annual caps must be established in the Plan and may not be changed except by a Plan amendment. This note should be deleted from the Plan and the annual cap of 100,000 tons per year shall be the only annual cap authorized in the Plan unless amended.

In response, the county board of commissioners made the recommended modifications to the plan update, removing the note and restating that "the annual cap of 100,000 tons per year for Pitsch Sanitary Landfill is the only cap in the Plan unless amended." The DEQ approved the update to the plan with revisions in a letter dated January 19, 2001, stating, in pertinent part,

> The Department of Environmental Quality (DEQ) received the locally approved update to the Ionia County Solid Waste Management Plan (Plan) on May 26, 2000. Except for the items indicated below, the Plan is approvable . . . . [T]he DEQ makes the following modifications to the Plan:
>
> On page III-2, the Note attached to this page states the cap for Pitsch Sanitary Landfill is negotiable between Ionia County (County) and Pitsch Sanitary Landfill. Annual caps must be established in the Plan and may not be changed except by a Plan amendment. This note should be deleted from the Plan and the annual cap of 100,000 tons per year shall be the only annual cap authorized in the Plan unless amended.

For the next few years, the cap went unchallenged. The county initiated this case on different grounds, alleging that Pitsch failed to pay certain surcharge fees required in the county plan. In response, Pitsch filed a counterclaim raising several issues, including breach of contract claims, several constitutional issues, and the issues on appeal in this case. Both Pitsch's and the county's claims were resolved in the county's favor, and many of them are not before this Court. Pitsch only appeals the trial court's orders dismissing its claims that the county violated Part 115 of the NREPA and the United States Commerce Clause and engaged in due process violations.

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been updated and is still in effect.

At its heart, the parties dispute the proper interpretation of certain provisions of the Solid Waste Management Act, Part 115 of the NREPA.

> The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature. To do so, we begin with the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written. In reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory. [*Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001) (citations omitted).]

"Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *In re Smith Estate*, 252 Mich App 120, 124; 651 NW2d 153 (2002).

MCL 324.11533 through MCL 324.11539 describes the process that the county must undertake to implement and renew its solid waste management plan. A county's solid waste management plan must "include an enforceable program and process to assure that the nonhazardous solid waste generated or to be generated in the planning area for a period of 10 years or more is collected and recovered, processed, or disposed of at disposal areas that comply with state law and rules promulgated by the department governing location, design, and operation of the disposal areas." MCL 324.11533(1). After implementation of the initial solid waste management plan, each county must review and update the plan every five years. MCL 324.11533(2). The statute requires, "An updated solid waste management plan and an amendment to a solid waste management plan shall be prepared and approved as provided in this section and sections 11534, 11535, 11536, 11537, and 11537a . . . . The solid waste management plan shall at a minimum comply with the requirements of sections 11537a and 11538." *Id.*

After the county approves a plan, it must submit the plan to the DEQ for approval. MCL 324.11537(1). "An approved plan shall at a minimum meet the requirements set forth in section 11538(1)." *Id.* MCL 324.11538(1) requires that the DEQ "promulgate rules for the development, form, and submission of initial solid waste management plans" that require the following:

> (a) The establishment of goals and objectives for prevention of adverse effects on the public health and on the environment resulting from improper solid waste collection, processing, or disposal including protection of surface and groundwater quality, air quality, and the land.
>
> (b) An evaluation of waste problems by type and volume, including residential and commercial solid waste, hazardous waste, industrial sludges, pretreatment residues, municipal sewage sludge, air pollution control residue, and other wastes from industrial or municipal sources.

(c) An evaluation and selection of technically and economically feasible solid waste management options, which may include sanitary landfill, resource recovery systems, resource conservation, or a combination of options.

(d) An inventory and description of all existing facilities where solid waste is being treated, processed, or disposed of, including a summary of the deficiencies, if any, of the facilities in meeting current solid waste management needs.

(e) The encouragement and documentation as part of the solid waste management plan, of all opportunities for participation and involvement of the public, all affected agencies and parties, and the private sector.

(f) That the solid waste management plan contain enforceable mechanisms for implementing the plan, including identification of the municipalities within the county responsible for the enforcement and may contain a mechanism for the county and those municipalities to assist the department and the state police in implementing and conducting the inspection program established in section 11526(2) and (3). This subdivision does not preclude the private sector's participation in providing solid waste management services consistent with the solid waste management plan for the county.

(g) Current and projected population densities of each county and identification of population centers and centers of solid waste generation, including industrial wastes.

(h) That the solid waste management plan area has, and will have during the plan period, access to a sufficient amount of available and suitable land, accessible to transportation media, to accommodate the development and operation of solid waste disposal areas, or resource recovery facilities provided for in the plan.

(i) That the solid waste disposal areas or resource recovery facilities provided for in the solid waste management plan are capable of being developed and operated in compliance with state law and rules of the department pertaining to protection of the public health and the environment, considering the available land in the plan area, and the technical feasibility of, and economic costs associated with, the facilities.

(j) A timetable or schedule for implementing the solid waste management plan. [MCL 324.11538(1).]

Essentially, in order to properly approve a solid waste management plan, the DEQ must ensure that the plan contains the aforementioned information. MCL 324.11537(2) provides a method for DEQ review of an approved plan to ensure that it is in compliance with the requirements set forth in Part 115 of the NREPA:

> The department shall review an approved plan periodically and determine if revisions or corrections are necessary to bring the plan into compliance with this part. The department, after notice and opportunity for a public hearing held

> pursuant to [MCL 24.201 to MCL 24.328], may withdraw approval of the plan. If the department withdraws approval of a county plan, the department shall establish a timetable or schedule for compliance with this part.

The crux of the county's argument is that because the DEQ approved its solid waste management plan with the fixed 100,000-ton annual cap on solid waste that could be accepted for disposal at the landfill, the DEQ essentially interpreted Part 115 to indicate that such a cap was permitted and, therefore, we should defer to its interpretation of the statute. Initially, we question the county's assertion that the DEQ's approval of its solid waste management plan constitutes an official "interpretation" of Part 115 authorizing the inclusion of an annual cap on the amount of waste that a landfill can admit for disposal in a county solid waste management plan, if for no other reason than the DEQ's communication with the county with regard to the solid waste management plan contains no substantive analysis of the statutory requirements of Part 115. Further, the county fails to cite to any provision of Part 115 or any case law interpreting this part to support its assertion that it can include in its solid waste management plan an annual cap on the amount of solid waste that can be accepted for disposal in the county, especially when Part 115 provides other methods by which the county can ensure that its waste-disposal needs are being met. See MCL 324.11526a, MCL 324.11537a, MCL 324.11538. Simply put, the county provides no reasoning to explain to this Court that the DEQ *did* determine or why the DEQ *might* determine that Part 115 permits the county to include an annual cap in its solid waste management plan.

Instead, the county refers to a table included in a DEQ-issued plan format for preparing a solid waste management plan to support its belief that the DEQ permitted the imposition of an annual cap on the amount of solid waste that could be accepted for disposal in Pitsch landfill. The table in question and associated information, as set forth in the county's plan, states:

> IMPORT AUTHORIZATION
>
> If a Licensed solid waste disposal area is currently operating within the County, disposal of solid waste generated by the EXPORTING COUNTY is authorized by the IMPORTING COUNTY up to the AUTHORIZED QUANTITY according to the CONDITIONS AUTHORIZED in Table 1-A.

Table 1-A

CURRENT IMPORT VOLUME AUTHORIZATION OF SOLID WASTE

IMPORTING COUNTY	EXPORTING COUNTY	FACILITY NAME	AUTHORIZED QUANTITY/ DAILY	AUTHORIZED QUANTITY/ ANNUAL	AUTHORIZED CONDITIONS

The county claims that this table format, which requires it to list an annual authorized quantity of waste that each county can import to the landfill, indicates that the DEQ authorizes counties to place annual caps on the total amount of solid waste that they allow within their borders for

disposal annually.[3] However, defendants claim that the DEQ merely intended for counties to use this table format to list the amount of solid waste that other Michigan counties were authorized to import to Ionia County for disposal.

The problem, however, is that the parties attempt to interpret DEQ memoranda, format guides, and other DEQ-produced information in a manner that suits their arguments without providing any testimony by DEQ officials or other information to support these positions. Further, the lower court file is insufficient to permit us to make these factual determinations, and especially to conclude whether this standard format applies to the regulation of imported and exported solid waste, or if it applies to the total amount of solid waste that can be placed in the landfill. Input from the DEQ is necessary in order to make this determination.

Even more notably, the parties do not dispute that the DEQ has a significant role in the oversight and approval of county waste management plans or that county waste management plans are incorporated into the state waste management plan overseen by the DEQ. Consequently, the DEQ would be affected by any decision in this case regarding the proper interpretation of the county's solid waste management plan and by factual determinations regarding the level of DEQ involvement in the creation and implementation of this plan. Therefore, the DEQ is a necessary party to this case. Remand is necessary in order to include the DEQ in this litigation. After including the DEQ as a party in this case, the trial court can readdress the issues raised by the parties with the benefit of DEQ involvement.

Defendants also argue that Part 115 indicates that annual caps should not be permitted if they hinder private-sector involvement in doing business in solid waste disposal. MCL 324.11548(1) states,

> This part is not intended to prohibit the continuation of the private sector from doing business in solid waste disposal and transportation. This part is intended to encourage the continuation of the private sector in the solid waste disposal and transportation business when in compliance with the minimum requirements of this part. [MCL 324.11548(1).]

We note that placing an annual cap on the amount of waste that a private landfill would be permitted to dispose of could hinder the ability of the company that owns the landfill to engage in the solid waste disposal business—the imposition of an annual cap means that a private waste management company cannot contract to accept more waste for disposal than is permitted by the county's annual cap, even if it has the resources and capacity to accept additional waste for

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[3] When the county compiled its solid waste management plan, it used this table to list a number of counties importing waste into Ionia County and indicated the number of tons that each county could import to Ionia County for disposal daily and annually. The county also included at the bottom of the table, without any additional explanation, "***100,000 tons per year cap." The county did not indicate whether this cap only reflected a limit on the amount of waste that other Michigan counties could import to Ionia County for disposal or if it reflected a cap on the overall amount of solid waste that could be admitted to Pitsch landfill annually.

disposal and still remain in compliance with the minimum requirements of Part 115. Yet again, because this issue would impact whether significant portions of the county waste management plans incorporated into the state waste management plan are binding on private landfills and would affect the implementation of both the county and the state plans, the inclusion of the DEQ as a party in this case is necessary for the trial court to properly address this issue.

We also find as a matter of critical importance to this case whether DEQ approval of a plan necessarily implies DEQ approval of provisions included in the plan that are not authorized by statute. Once a county approves a plan, it must submit the plan to the DEQ for approval. MCL 324.11537(1). At oral arguments, the county indicated to this Court that the DEQ and the counties work together to formulate a solid waste management plan for each county. Defendants asserted that most other counties in the state do not limit the amount of solid waste that can be placed into a private landfill and there exists no DEQ regulation that allows counties to incorporate such a limitation into their plan. Because the DEQ is not a party to this appeal, this panel has no confirmation regarding how the DEQ views its role in assisting in the formulation of a solid waste management plan, and the lower court record is silent on this issue. After the DEQ is added as a party to this case, the trial court should address this issue.

The amicus curiae brief filed by Michigan Waste Industries Association also raises an important question, namely, whether a county can directly regulate the operation of a privately owned solid waste landfill if the Legislature has delegated authority to regulate landfill operations to the DEQ. The lower court record does not provide this Court with any guidance on this issue, and the trial court did not have an opportunity to resolve this issue. However, after factual questions have been addressed regarding the current role of the DEQ in the regulation of solid waste landfills, especially with regard to its use of county waste management plans to regulate these landfills, this will become an important issue for the trial court to consider in order to properly resolve the attendant legal issues in this case.

Because this is an issue of first impression in this state and because we have insufficient information on the record to address these questions ourselves, we vacate the lower court's decision in this matter and remand to the trial court. We instruct the parties to add the DEQ as a necessary party to this case, and we instruct the trial court to conduct an evidentiary hearing to determine the DEQ's involvement in the creation of a county's solid waste management plan and then to redecide the attendant legal issues. Among the issues the trial court is directed to resolve are whether Part 115 permits a county to establish an annual cap on the amount of waste that can be accepted for disposal at landfills within its borders, as well as whether an annual cap on the amount of solid waste that can be accepted for disposal is a "minimum requirement" for inclusion within a county's solid waste management plan.[4] To assist the trial court in this matter, the Michigan Waste Industries Association may file an amicus curiae brief with the trial court.

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[4] If the trial court determines that an annual cap on the amount of waste that can be accepted for disposal is a minimum requirement under Part 115, the trial court shall specify what section of Part 115 or the DEQ regulations requires such a cap.

Vacated and remanded for further proceedings consistent with this opinion. On remand, the parties may address any new issues and all issues previously addressed by the lower court. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio