IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Tri-County Landfill, Inc., Appellant	:	
v.	:	No. 175 C.D. 2013
	:	Argued: November 14, 2013
Liberty Township Board of Supervisors	:	
v.	:	
Dr. Ray Yourd, Diana Hardisky, Eric & Polly Lindh, Bill & Lisa Pritchard, Anne & Dave Dayton, Doug Bashline & The Grove City Factory Shops Limited Partnership	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: January 9, 2014**

In this case, one of two related, complex land use appeals, Tri-County Landfill, Inc. (Tri-County) asks whether the Court of Common Pleas of Mercer County (trial court) erred in denying its appeal from the decision of the Liberty Township Board of Supervisors (Supervisors) that granted its request for a conditional use for its proposed landfill, but ultimately deadlocked on the issue of whether the proposed landfill was a "structure" as defined by the Liberty Township Zoning Ordinance (zoning ordinance), thereby subjecting it to a 40-foot height restriction set forth in the zoning ordinance.

On Tri-County's appeal, the trial court determined the proposed landfill was a "structure," under the zoning ordinance and, therefore, subject to the zoning ordinance 40-foot height restriction. Further, the trial court remanded to the Liberty Township Zoning Hearing Board (ZHB) to consider whether Tri-County was entitled to a variance from the 40-foot height restriction, and, if not, to determine whether the zoning ordinance effectively excluded landfills from the Township.

Before this Court, Tri-County primarily argues that, because doubt exists as to whether or not the zoning ordinance's definition of "structure" can be read to encompass "landfills," the trial court erred in failing to acknowledge that inherent ambiguity and in failing to interpret the ordinance in favor of the landowner as the Pennsylvania Municipalities Planning Code[1] (MPC) requires. Tri-County further contends that, because an ordinance must be given a constitutional interpretation where possible, the trial court erred in failing to consider the unconstitutional and exclusionary effect of a 40-foot height limitation. Tri-County also maintains the trial court erred in remanding this matter to the ZHB.

Upon review, we agree with the trial court that Tri-County's proposed, modern landfill falls within the zoning ordinance's broad, unambiguous definition of the term "structure," rendering it subject to the zoning ordinance 40-foot height limitation. However, we conclude the trial court erred in remanding this matter to the ZHB; thus, we vacate that portion of the trial court's order.

[1] Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §§10101-11202.

I. Factual and Procedural Background

In October 2010, Tri-County filed an application for conditional use approval to operate a sanitary landfill in the Township's IS Industrial Special zoning district, which permits sanitary landfills by conditional use, subject to a 40-foot height limitation. The proposed landfill site is located in Mercer County in Liberty and Pine Townships, on approximately 99.27 acres, about half of which is located in Liberty Township. Tri-County owns the landfill site, which was previously permitted and used as a landfill. In 1990, Tri-County ceased accepting waste at the site after failing to obtain a permit from the Department of Environmental Resources (now the Department of Environmental Protection (DEP)). Several hearings on Tri-County's conditional use request ensued before the Supervisors.

During the course of the hearings, the Supervisors heard evidence and testimony from Tri-County and several Objectors, including Pine Township, Grove City Factory Shops Limited Partnership, and several individual landowners.[2]

Ultimately, the three-member Supervisors[3] unanimously granted Tri-County's request for conditional use approval. Specifically, the Supervisors determined that Tri-County satisfied its burden of proving compliance with the zoning ordinance's conditional use criteria. Further, the Supervisors determined

[2] Individual Objectors are Dr. Ray Yourd, Diana Hardisky, Eric and Polly Lindh, Bill and Lisa Pritchard, Anne and Dave Dayton, and Doug Bashline.

[3] The members of the Board of Supervisors (Supervisors) were Ronald Faull, Charles N. Larish and Robert Pebbles.

Objectors did not meet their burden of proving to a high degree of probability that the adverse impacts from the proposed landfill would exceed those normally associated with a landfill use. The Supervisors conditioned their approval on, among other things, DEP's grant of a permit for the proposed sanitary landfill facility.

However, the Supervisors disagreed as to whether a landfill could be considered a "structure" subject to the 40-foot height restriction. Specifically, two Supervisors determined that the landfill constituted a structure under the zoning ordinance. However, one Supervisor dissented, concluding the landfill did not fall within the zoning ordinance's definition of a structure. As a result, the two-Supervisor majority agreed that the 40-foot height restriction applied to the proposed landfill. Further, the two-Supervisor majority stated that whether Tri-County may be entitled to a variance from the height limitation was not a matter before the Supervisors. Thus, the two-Supervisor majority declined to rule on Tri-County's right, if any, to any relief by reason of an unrequested variance.

On the other hand, the dissenting Supervisor stated the proposed landfill was not subject to the 40-foot height restriction because the zoning ordinance's definition of a "structure" was ambiguous and should be interpreted in Tri-County's favor. The dissenting Supervisor also determined the 40-foot height restriction was invalid because it would effectively bar the construction of landfills in Liberty Township. Tri-County appealed the Supervisors' determinations regarding the applicability of the 40-foot height restriction to the trial court. No party appealed the Supervisors' grant of conditional use approval.

On appeal, the trial court remanded for the Supervisors to make more specific findings of fact. The Supervisors then issued a decision containing specific findings (labeled "Supplementary/Explanatory" (S/E) Findings of Fact). However, only two Supervisors[4] participated in the remand decision. The third Supervisor recused. The two remaining Supervisors confirmed the Supervisors' original decision that Tri-County demonstrated compliance with the conditional use criteria for landfills, and that Objectors did not meet their burden of showing to a high degree of probability that any adverse effects associated with the proposed landfill would exceed those normally associated with such use. However, the two Supervisors disagreed as to whether the proposed landfill constituted a structure under the zoning ordinance and, therefore, subject to the 40-foot height restriction. Tri-County again appealed to the trial court.

At the outset of its decision, the trial court explained that Objectors, through their brief and at oral argument, asked the trial court to overturn the Supervisors' conditional use approval. The trial court declined to address this argument because Objectors did not file a timely appeal following the Supervisors' grant of conditional use approval.

Turning to the issue of whether the proposed landfill constituted a structure, after a lengthy analysis, the trial court determined the proposed landfill "clearly and unambiguously falls within the [z]oning [o]rdinance's definition of

[4] The Supervisors that participated in the remand decision were Ronald Faull and Robert Pebbles. Charles N. Larish, a former supervisor who participated in the initial hearing and decision, was no longer a sitting Supervisor; he was replaced by Anthony Sunseri, who recused, because he did not participate in the original hearings and decision.

'structure.'" Tr. Ct., Slip Op., 1/16/13, at 11. The trial court also rejected Tri-County's argument that the Solid Waste Management Act (SWMA)[5] preempted the zoning height restriction. Finally, with regard to Tri-County's argument that application of the zoning 40-foot height restriction effectively excluded landfills throughout Liberty Township, the trial court stated that Tri-County did not request a variance from the height limitation in its application to the Supervisors. Therefore, the trial court determined the Supervisors properly declined to rule on whether application of the 40-foot height restriction impermissibly excluded landfills in Liberty Township. The trial court explained that the grant of a variance would negate the need to address this issue. Explaining that the Supervisors did not take testimony on this issue, the trial court remanded this matter to the Liberty Township ZHB to determine if Tri-County was entitled to a variance, and, if not, whether the zoning ordinance impermissibly excluded landfills from Liberty Township. This appeal by Tri-County followed.[6]

II. Discussion

A. Issues

Tri-County first contends the Supervisors properly granted conditional use approval to allow a landfill in Liberty Township's single IS zoning district, the only area where the zoning ordinance permits landfills. It argues that no party appealed the Supervisors' grant of conditional use approval. Tri-County points out that in considering whether or not the zoning ordinance's definition of "structure"

[5] Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §§6018.101-6018.1003.

[6] Where, as here, the trial court did not take additional evidence, our review is limited to determining whether the Supervisors abused their discretion or committed an error of law. Aldridge v. Jackson Twp., 983 A.2d 247 (Pa. Cmwlth. 2009).

can be read to encompass landfills, and whether or not to subject a landfill to the 40-foot height restriction, the Supervisors disagreed.

Tri-County argues that the trial court's decision was limited to review of the structure/height restriction issue. Without citing its full text or considering the doubt reflected in the Supervisors' differing views, Tri-County asserts, the trial court found the definition was "unambiguous" and that a landfill is a "structure." Tri-County contends the zoning ordinance's definition of "structure" contains general terms describing a "structure" and a list of examples, which does not include "landfill." In referring only to the definition's general terms, the trial court ignored the enumerated items and failed to recognize the ambiguity—that the definition may—or may not be—read to encompass a landfill. Because it did not recognize the inherent doubt in the zoning ordinance's intended meaning, Tri-County maintains, the trial court failed to comply with the MPC's mandate that "where doubt exists," the language must be interpreted to favor a broader use of land—and against any implied restriction.

Tri-County asserts the trial court also failed to consider the relevant rules of statutory construction, which confirm that "structure" cannot be construed to include landfills. Further, Tri-County argues, because it showed the imposition of a height restriction would result in an unconstitutional exclusion of the landfill use, the trial court failed to accept the reasonable and constitutional interpretation—that a landfill is not a "structure."

Finally, Tri-County argues, the trial court's direction of a remand to Liberty Township's ZHB, which had no involvement or jurisdiction in this proceeding, reflects a confusion of the distinct roles of the Supervisors and the ZHB, and is procedurally flawed. Tri-County asks this Court to reverse the trial court's decision.

Objectors first respond that Tri-County requires conditional use approval from the Supervisors, and a variance and other approvals from the Pine Township ZHB, to site its proposed landfill and to construct the landfill to a height of 140 feet. Objectors argue that, as discussed in the related appeal in Tri-County Landfill, Inc. v. Pine Township Zoning Hearing Board, ___ A.3d ___, (Pa. Cmwlth., No. 176 C.D. 2013, filed January 9, 2014), the Pine Township ZHB denied Tri-County the approvals necessary for the portion of the proposed landfill in Pine Township, and Tri-County's appeal from that decision was denied. Without approval from the Pine Township ZHB, Objectors assert, Tri-County cannot construct the proposed landfill in Liberty Township as presented in the conditional use application. Therefore, Tri-County's instant appeal should be dismissed as moot.

Objectors further contend, even if this Court reviews the Supervisors' conditional use approval, the Supervisors' inclusion as a condition of that approval that Tri-County restrict the height of its proposed landfill to 40 feet must be upheld. Objectors argue the Supervisors' conclusion that the proposed landfill is a "structure" subject to the 40-foot height limit reflects a reasonable interpretation of an unambiguous zoning ordinance, and is supported by substantial evidence.

Objectors maintain the proposed landfill, as a matter of fact, falls within the zoning ordinance's definition of "structure." Further, even if the definition is ambiguous, the Supervisors' interpretation is both reasonable and fact-based, and neither the MPC nor the rules of statutory construction compel reversal.

Objectors further assert that Tri-County's argument that the Supervisors' interpretation of the zoning ordinance results in a *de facto* exclusion of landfills amounts to a request for a dimensional variance, which the Supervisors have no authority to grant and which they properly declined to address. Moreover, Tri-County's economic viability argument fails as a matter of law because the zoning ordinance explicitly provides for landfill and solid waste uses in the Township, and Tri-County failed to prove that no landfill and no other solid waste facility would be economically viable when limited to 40 feet in height.

Objectors contend Tri-County's argument attempts to introduce ambiguity in a zoning ordinance where none exists. Its argument also fails because Liberty Township is part of a multi-municipal plan and other municipalities that are a part of the plan provide for landfill use, and Tri-County did not address additional sites at which a landfill could be located. Finally, even if this Court was to consider the factual basis for Tri-County's economic viability argument, the evidence revealed that, based on reasonable assumptions, a landfill would be profitable at a height of 40 feet when the calculations did not include costs associated with completing final closure on the old, closed landfill at the site, which must be borne by the former landfill and cannot be attributed to the proposed landfill.

In addition to joining in the brief filed by Objectors, Individual Objectors filed a separate brief in which they argue that construction of the landfill at the proposed location would violate state and federal regulations relating to the siting of landfills in proximity to airports. Thus, the proposed landfill would pose a substantial threat to the safety of the air traveling public at the Grove City Airport. Supplemental Reproduced Record (S.R.R.) at 1c-16c.[7]

[7] Individual Objectors contend that John J. Blazosky, a consultant for Tri-County, testified that the landfill is located approximately 6,300 feet from the Airport. Supplemental Reproduced Record (S.R.R.) at 38c. State and federal laws provide that a landfill cannot be constructed within 10,000 feet of an airport. More specifically, 49 U.S.C. §44718(d) states that no landfill may be constructed within six miles of an airport unless the aviation agency of the state in which the airport is located requests that the administrator of the Federal Aviation Administration (FAA) exempt that landfill from that provision. Individual Objectors further maintain that 25 Pa. Code §271.201(9) states that a new municipal landfill subject to 49 U.S.C. §44718(d) may be exempted if the administrator from the FAA has determined that the exemption of the landfill from the application of this federal statute would have no adverse impact on aviation safety. Individual Objectors assert Tri-County has not filed a request for an exemption with the FAA or the state aviation agency. S.R.R. at 36c- 41c. Further, the state aviation agency has not applied to the FAA for the exemption, nor has the FAA granted an exemption. As such, Individual Objectors maintain, this Court should find that Tri-County cannot build a landfill within the 10,000 feet of an airport. S.R.R. at 36c-38c.

Individual Objectors further assert the "bird control plan" for the proposed Tri-County landfill was authored by Dr. Rolf Davis. S.R.R. at 24c. Dr. Davis is the same individual that prepared the plan that was implemented in Atlantic City with respect to the Atlantic City landfill and airport. At that landfill there were a total of 450 bird/aircraft collisions in the last 10 years.

Individual Objectors contend that Liberty Township adopted its current zoning ordinance on February 8, 2001. As set forth in Section 101, the zoning ordinance's stated purpose is to promote the health, safety and welfare and to protect the public from adverse secondary effects of various activities and to secure the public from fire, panic and other dangers. Individual Objectors argue the location of the proposed landfill within 10,000 feet of the Grove City Airport poses a substantial threat to the safety of the air traveling public and those that use the Grove City Airport. S.R.R. at 22c. They assert this Court should hold the landfill cannot be constructed within 10,000 feet of the airport because it poses a substantial threat to the safety of the air traveling public and users of the Grove City Airport in violation of Section 101 of the zoning ordinance.

B. Analysis

1. Appealability of Trial Court's Order/Propriety of Trial Court's Remand

As a threshold procedural matter, by order dated April 26, 2013, this Court directed the parties, in their briefs on the merits, to address whether the trial court's order, which included a remand to the Liberty Township ZHB, is appealable. The parties agree that the trial court erred in ordering a remand to the ZHB where Tri-County did not seek a variance or any other zoning approval within the jurisdiction of the ZHB. As a result, no party claims the trial court's order is unappealable.

Rule 341(b) of the Pennsylvania Rules of Appellate Procedure, which defines a final order, provides:

> **(b) Definition of Final Order.** A final order is any order that:
>
> (1) disposes of all claims and of all parties; or
>
> (2) any order that is expressly defined as a final order by statute; or
>
> (3) any order entered as a final order pursuant to subdivision (c) of this rule [permitting entry of a final order as to less than all of the claims or parties upon the express determination by a court or governmental unit that an immediate appeal would facilitate resolution of the entire case].

Pa. R.A.P. 341(b).

Our review of the trial court's order reveals that it essentially issued a final order because it disposed of the claims raised by the parties. Specifically, the trial court affirmed the Supervisors' grant of conditional use approval for Tri-

County's proposed landfill, and it determined the proposed landfill was a structure under the zoning ordinance, and, therefore, subject to the 40-foot height restriction. Nevertheless, the trial court remanded to the Liberty Township ZHB for consideration of whether Tri-County was entitled to a variance from the height restriction, and, if not, whether the zoning ordinance effectively excluded landfill use.

The remand component of the trial court's order is problematic given that the parties agree that Tri-County did not apply for a variance or any other type of relief within the jurisdiction of the Liberty Township ZHB. Under these circumstances, the trial court's remand to an administrative tribunal from which no relief was sought is erroneous as it is unclear how that tribunal would have authority to consider Tri-County's entitlement to relief it did not request. As such, we vacate that portion of the trial court's order that required a remand to the Liberty Township ZHB.[8]

[8] Alternatively, review of the trial court's order is appropriate pursuant to Pa. R.A.P. 311(f)(2), which states: "**(f) Administrative remand.** An appeal may be taken as of right from … (2) an order of a common pleas court … remanding a matter to an administrative agency … that decides an issue which would ultimately evade appellate review if an immediate appeal is not allowed."

Here, even if a remand was authorized and appropriate, any proceeding before the Liberty Township Zoning Hearing Board (ZHB) and any subsequent appeal from a ZHB decision would involve a separate record from the record created before the Supervisors. Under these circumstances, it is unclear that the portion of the trial court's order that denied Tri-County's appeal and determined the proposed landfill is a "structure," which is subject to the 40-foot height restriction, would be reviewable on appeal from the Liberty Township ZHB's decision. Additionally, the issue of whether the trial court had authority to remand this matter to the ZHB in the first instance would evade review if the trial court's order is deemed not appealable here. Thus, even if the trial court's order is not a final order under Pa. R.A.P. 341(b), we would deem it appealable under Pa. R.A.P. 311(f)(2) because it decided issues that could ultimately evade appellate review if an immediate appeal were not allowed.

2. Scope of Issues on Appeal

As an additional procedural matter, after filing its appeal to this Court, Tri-County filed a motion to quash and/or strike, seeking to preclude Objectors from challenging the Supervisors' conditional use approval and the suitability of the landfill on the landfill site by quashing any such challenges and striking those portions of the Objectors' brief that raised such challenges as well as striking Individual Objectors' brief in its entirety. The basis for Tri-County's motion was that neither Objectors nor Individual Objectors filed a timely appeal or cross-appeal from the trial court's decision or the underlying Supervisors' decision granting conditional use approval.

Ultimately, a single judge of this Court granted Tri-County's motion to quash and/or strike, stating:

> The issues in this appeal shall be limited to those issues raised in [Tri-County's] brief, that is, whether the ordinance's definition of structure encompasses landfills, whether the trial court erred in failing to consider the unconstitutional and exclusionary effect of the height limitation, and whether the trial court's remand was in error. To the extent [Objectors/Individual Objectors] seek to raise issues beyond those raised by [Tri-County], said issues are surplusage and are a collateral attack on the underlying trial court order.

Commonwealth Court Order of 9/5/13 (Quigley, S.J.).

As to the effect of a single-judge order, in Great Valley School District v. Zoning Hearing Board of East Whiteland Township, 863 A.2d 74, 80-81 (Pa. Cmwlth. 2004), this Court previously explained (with emphasis added):

> Pursuant to Pa. R.A.P. 123(e), a single judge of this Court may grant or deny any request for relief which under the rules may properly be sought by application. The action of a single judge may be reviewed by the full court. Pa. R.A.P. 123(e). A party may seek review of the decision of a single judge by requesting reconsideration by the full court pursuant to Pa. R.A.P. 2541-2547 instead of later when the full court considers the merits of the appeal thereby avoiding the 'law of the case doctrine.' Larocca v. Workmen's Compensation Appeal Board (the Pittsburgh Press), 592 A.2d 757 (Pa. Cmwlth.), petition for allowance of appeal denied, 529 Pa. 659, 604 A.2d 251 (1991). 'This doctrine has traditionally been used where a court has ruled on a question, that same court will normally not reverse that determination upon consideration of another phase of the case.' Smiths Implements, Inc. v. Workmen's Compensation Appeal Board (Leonard), 673 A.2d 1039, 1042 (Pa. Cmwlth. 1996) (citing Hughes v. Pennsylvania State Police, 619 A.2d 390, 392 n.1 (Pa. Cmwlth. 1992), petition for allowance of appeal denied, 536 Pa. 633, 637 A.2d 293 (1993). When no petition for reconsideration from an order of a single judge is filed, that order is binding unless palpably erroneous. Curley v. Board of School Directors of the Greater Johnstown School District, 641 A.2d 719 (Pa. Cmwlth. 1994).

Here, following the single-judge order granting Tri-County's motion to quash and/or strike, which precluded Objectors and Individual Objectors from raising issues beyond those raised by Tri-County, neither Objectors nor Individual Objectors sought reconsideration. Thus, the single judge order granting Tri-County's motion to quash and/or strike is binding, Great Valley School District; Curley; see also Domagalski v. Szilli, 812 A.2d 747 (Pa. Cmwlth. 2002), thereby limiting the issues in this appeal to those raised in Tri-County's brief.[9]

[9] In any event, no party appealed the Supervisors' grant of conditional use approval to the trial court; thus, any issues related to that approval are not before this Court.

Further, as to Individual Objectors' contentions, which primarily relate to safety concerns over siting the proposed landfill in proximity of the Grove City Airport, the Supervisors declined to make any findings on these issues on the ground that such issues are within DEP's
(Footnote continued on next page…)

3. Whether a Landfill is a "Structure" Under the Zoning Ordinance

As in the related case of Tri-County Landfill, Inc. v. Pine Township Zoning Hearing Board, the central issue raised by Tri-County in its appeal is whether the Supervisors and the trial court erred in determining the proposed landfill is a "structure" as defined by the zoning ordinance, rendering it subject to the 40-foot height restriction.

Like statutes, the primary objective of interpreting ordinances is to determine the intent of the legislative body that enacted the ordinance. See 1 Pa. C.S. §1921; Bailey v. Zoning Bd. of Adjustment of City of Phila., 569 Pa. 147, 801 A.2d 492 (2002); Malt Beverages Distribs. Ass'n v. Pa. Liquor Control Bd., 918 A.2d 171 (Pa. Cmwlth. 2007) (en banc), aff'd, 601 Pa. 449, 974 A.2d 1144 (2009). In pursuing that end, we are mindful that a statute's plain language generally provides the best indication of legislative intent. Id. Thus, statutory construction begins with examination of the text itself. Id.

In reading the plain language of a statute, "[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage." 1 Pa. C.S. §1903(a). Further, every statute shall be construed, if possible, to give effect to all its provisions so that no provision is "mere surplusage." 1 Pa. C.S. §1921(a). Where the words in an ordinance are free from

---

(continued…)

jurisdiction. See, e.g., Leatherwood v. Dep't of Envtl. Prot., 819 A.2d 604 (Pa. Cmwlth. 2003) (discussing state and federal statutes and regulations that govern the permitting of landfills in proximity to airports based on risk of bird strikes in context of appeal from Environmental Hearing Board decision following permitting action by DEP).

all ambiguity, the letter of the ordinance may not be disregarded under the pretext of pursuing its spirit. 1 Pa. C.S. §1921.

Thus, if we determine the ordinance provision at issue is unambiguous, we must apply it directly as written. Bowman v. Sunoco, Inc., ___ Pa. ___, 65 A.3d 901 (2013); see 1 Pa. C.S. §1921(b). However, if we deem the language of the ordinance ambiguous, we must then ascertain the legislative body's intent by statutory analysis, wherein we may consider numerous relevant factors. Id. An ambiguity exists when language is subject to two or more reasonable interpretations and not merely because two conflicting interpretations may be suggested. Adams Outdoor Adver., L.P. v. Zoning Hearing Bd. of Smithfield Twp., 909 A.2d 469 (Pa. Cmwlth. 2006).

Further, "[w]hile it is true that zoning ordinances are to be liberally construed to allow the broadest possible use of land, it is also true that zoning ordinances are to be construed in accordance with the plain and ordinary meaning of their words." Zappala Grp., Inc. v. Zoning Hearing Bd. of Town of McCandless, 810 A.2d 708, 710 (Pa. Cmwlth. 2002).

A board of supervisors is entitled to considerable deference in interpreting its zoning ordinance. Aldridge v. Jackson Twp., 983 A.2d 247 (Pa. Cmwlth. 2009); Caln Nether Co., L.P. v. Bd. of Supervisors of Thornbury Twp., 840 A.2d 484 (Pa. Cmwlth. 2004); Montgomery Crossing Assocs. v. Twp. of L. Gwynedd, 758 A.2d 285 (Pa. Cmwlth. 2000).

Section 301 of the zoning ordinance defines the term "structure" as: "A combination of materials forming a construction for occupancy and/or use including among other[s], a building, stadium, reviewing stand, platform, staging, observation tower, radio tower, water tank, trestle, pier, wharf, open shed, coal bin, shelter, fence, wall and a sign." Id.; ZHB Op., 11/10/11, Finding of Fact (F.F.) No. 21. Of further note, Section 107 of the MPC defines a "structure" as "any man-made object having an ascertainable stationary location on or in land or water, whether or not affixed to the land." 53 P.S. §10107.

In resolving the issue of whether the proposed landfill constitutes a "structure" as defined by the zoning ordinance, the Supervisors ultimately split on this issue. In their original decision (which was reaffirmed by one of two Supervisors on remand), a majority of the Supervisors determined the proposed landfill was a structure, explaining (with emphasis added):

> After considering the definition of 'structure' set forth in the [zoning ordinance], and the testimony given and exhibits received into evidence, it is the finding and conclusion of the undersigned that the landfill as proposed to be constructed by Tri-County in Liberty Township is a structure subject to the 40 foot height limitation set forth in the [zoning ordinance]. …
>
> All of the witnesses called to testify by [Tri-County] and [O]bjectors alike, agreed in their description of the manner and method by which the landfill in question is to be constructed. The basic component of the landfill is 'municipal waste' an all inclusive [sic] term that includes all varieties of man made [sic] materials discarded on a daily basis by households in every community.
>
> The landfill is not simply a mound of earthen material shaped by machines. It is not simply a spoil pile of dirt or excavated materials left from some prior grading operation. It

is not a man made [sic] graded and excavated mound of earth to be used for some industrial, commercial, recreational or farming purpose.

Rather, as described by all experts for all parties, the landfill consists of geotextiles, placed throughout the landfill, with the initial waste first deposited atop a geotextile/geosynthetic membrane in a series of highly engineered cells. There will be both a primary and secondary liner with the waste deposited in a controlled manner until the final height is achieved. The landfill once completed, is then fully enclosed from the top to the bottom and along the sides with a plastic like material with all seams welded into place. It thus becomes a fully encapsulated man made [sic] object that consists of all varieties of man made [sic] materials. Even the density of the residential waste is highly controlled by the operator to achieve maximum density and volume of materials.

Imbedded and constructed through out [sic] the mass of the landfill is a highly engineered system of sump pumps, exhaust/distribution fans, leachate piping system, ground water monitoring system, and a gas collection system that runs from the near bottom of the landfill to the near top of the landfill. Once completed the landfill will have approximately 138 flares that will rise approximately 3 ft[.] above the enclosed top of the landfill. In addition, a series of gas wells are proposed to be installed. A flare stack itself could be 20 or 30 ft[.] higher than the landfill itself. As set forth in the [f]indings of [f]act above the flare stacks are often preassembled on site, and are constructed of a combination of man made [sic] materials. The extraction well[s] themselves will run most of the depth of a cell, and could run 150-200 feet, considering the amount of the fill that will be placed below grade and above ground.

The definition of 'structure' includes not only a combination of materials that are constructed for 'occupancy' but also includes a combination of materials for a construction that is to be 'used'. The inclusion of the term 'use,' in the opinion of the undersigned, expressly includes any combination of materials that is constructed for some use, whether that use be specifically set forth in the definition or not.

> The undersigned find that the definition is neither vague nor ambiguous. Further, had the drafters of the zoning ordinance intended to exempt landfills from the 40 ft[.] height limitation, it is logical to conclude that section 801.1.1 of [the zoning ordinance (containing exemptions from the height regulations for certain specific structures)] would have specifically included landfills as exempt from the height limitation.
>
> In rendering a conclusion that the landfill is a structure, the undersigned find that the definition of the term 'structure' is clear and free from any ambiguity. Even applying the definition of 'structure' contained in the MPC, to wit: ['] any man-made object having an ascertainable stationary location on or in land or water, whether or not affixed to the land,' (See MPC §107), the undersigned would still conclude that the Sanitary Landfill as proposed is a 'structure.' By definition, it is an ascertainable stationary location on land, and meets the definition whether or not we conclude it is affixed to the land. …

Supervisors' Op. at 51-53.

Further, in its opinion concluding the landfill is a "structure" under the zoning ordinance, the trial court stated:

> Modern landfills today … are man-made objects that are built through long-term construction projects.
>
> The construction of the [p]roposed [l]andfill as described by all the experts for all the parties may be summarized as follows:
>
> Tri-County's [p]roposed [l]andfill consists of many acres and it will not be constructed at one time. The [p]roposed [l]andfill will be constructed in cells. In order to construct these cells, a double-liner system is first constructed to protect the groundwater from being contaminated. The liner is made … up [of] rolls of a high-density polyethylene. These rolls of polyethylene are laid out adjacent to each other on top of a

> geosynthetic subbase. These rolls are welded together and waste is then placed on top of these liners until it reaches its final grade. Once this final grade has been met, the cell is capped with a plastic liner so that the waste is fully encapsulated from the top to the bottom with a plastic like material with all seems welded together. Included in this fully encapsulated waste are many objects that are built into the final product. These objects include: pumps, sumps, pipes, wells, vacuums, and blowers that all help prevent the landfill from contaminating the surrounding area.
>
> The Court finds whether the waste inside the landfill uses the ground for support is irrelevant. The waste inside the [p]roposed [l]andfill is not what converts the [l]andfill into a 'structure.' The [p]roposed [l]andfill is a structure because it is a combination of material that is constructed to contain the waste. The [zoning] [o]rdinance's definition of 'structure' only requires that the object be a construction for some type of use. The Court finds, therefore that the proposed [l]andfill is a 'structure' under the [z]oning [o]rdinance.

Tr. Ct., Slip Op., 1/16/13, at 13.

Based on the plain language of the definition of "structure" found in Section 301 of the zoning ordinance, we discern no error in the above-determinations that the proposed modern landfill constitutes a "structure." Reproduced Record at 69a, 100a-103a, 106a-10a, 180a-81a. In particular, based on the above determinations regarding the construction and composition of the proposed modern landfill, it clearly qualifies as "[a] combination of materials forming a construction[[10]] for occupancy and/or use."

[10] Black's Law Dictionary defines "construction," in relevant part as, "[t]he act of building by combining or arranging parts or elements; the thing so built." BLACK'S LAW DICTIONARY 332 (8th ed. 2004); see also MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 248 (10th ed. 2001) ("the process, art, or manner of constructing something; *also***:** a thing constructed").

Nevertheless, Tri-County argues, the use of the language "including" preceding the list of enumerated examples of structures in the definition, coupled with the absence of a specific mention of "landfills," renders the definition ambiguous.

Contrary to Tri-County's assertions, the zoning ordinance's definition of a structure is not ambiguous. As explained above, based on the determinations of the "majority Supervisors" and the subsequent determination of Supervisor Pebbles regarding the components and composition of the proposed landfill, we agree with the trial court that the proposed landfill falls within this unambiguous plain language.

Further, Tri-County's argument neglects the fact that the term "including" in the zoning ordinance's definition of a "structure" is followed by the words "among other[s]." Id. As our Supreme Court explains,

> the term 'include' is 'to be dealt with as a word of 'enlargement and not limitation' … this [is] 'especially true' when followed by the phrase 'but not limited to.' … [T]he introductory verbiage 'including, but not limited to,' generally reflects the intent of the legislature to broaden the reach of a statute, rather than a purpose to limit the scope of the law to those matters enumerated therein.

Dechert, LLP v. Commonwealth, 606 Pa. 334, 343, 998 A.2d 575, 580-81 (2010) (quoting Pennsylvania Human Relations Comm'n v. Alto-Reste Park Cemetery Ass'n, 453 Pa. 124, 130-31, 306 A.2d 881, 885 (1973)) (emphasis added). Indeed, in Aldine Apartments, Inc. v. Commonwealth, 395 A.2d 299, 302 (Pa. Cmwlth. 1978), which our Supreme Court cited approvingly in Dechert, this Court stated,

"the statutory language 'including, but not limited to' … is a clear indication that the Legislature intended to exclude nothing, implicitly or otherwise, by the language which follows those words." (Emphasis added.); see also Commonwealth v. Conklin, 587 Pa. 140, 156, 897 A.2d 1168, 1176 n.16 (2006) (noting that, in the psychology practice act, exceptions set forth following the language "including but not limited to" are illustrative and not exhaustive).

Here, the fact that Section 301 of the zoning ordinance contains a non-exhaustive list of examples of structures, which does not specifically include landfills, does not render it ambiguous. Rather, like the phrase "including, but not limited to," the use of the phrase "including among other[s]," generally evidences a legislative intent to broaden the reach of the ordinance, "rather than a purpose to limit the scope of the law to those matters enumerated therein." Dechert, 606 Pa. at 343, 998 A.2d at 581.

Further, in Dechert, our Supreme Court rejected an argument similar to that presented by Tri-County here. Specifically, in Dechert, the Court rejected an argument that a statute was "automatically" ambiguous and, therefore, should be construed in a taxpayer's favor where it used the phrase "including but not limited" followed by several enumerated examples, which did not include the specific item subject to taxation. Id. at 344-45, 998 A.2d at 582 ("[T]he fact that the General Assembly did not specifically list canned computer software in its definition of tangible personal property … does not automatically render the statute ambiguous.").

Moreover, McClellan v. Health Maintenance Organization of Pennsylvania, 546 Pa. 463, 686 A.2d 801 (1996), a decision of an evenly-divided Supreme Court on which Tri-County relies, does not compel a different result. There, the Court was asked whether a health maintenance organization (HMO) organized under the individual practice association (IPA) structural model pursuant to former Pennsylvania regulations, could be considered a "professional health care provider" under Section 2 of the Peer Review Protection Act (Peer Review Act),[11] which defined that term as follows:

> 'Professional health care provider' means individuals or organizations who are approved, licensed, or otherwise regulated to practice or operate in the health care field under the law of the Commonwealth, *including, but not limited to,* the following individuals or organizations:
>
> (1) A physician.
>
> (2) A dentist.
>
> (3) A podiatrist.
>
> (4) A chiropractor.
>
> (5) An optometrist.
>
> (6) A psychologist.
>
> (7) A pharmacist.
>
> (8) A registered or practical nurse.
>
> (9) A physical therapist.

[11] Act of July 20, 1974, P.L. 564, No. 193, as amended, 63 P.S. §425.2.

> (10) An administrator of a hospital, a nursing or convalescent home, or other health care facility.
>
> (11) *A corporation or other organization operating a hospital, a nursing or convalescent home or other health care facility.*

McClellan, 546 Pa. at 470-71, 686 A.2d at 804-05 (quoting 63 P.S. §425.2) (emphasis in original).

The divided Court stated that while the definition of "professional health care provider" did not specifically include an entity such as an IPA model HMO, its terms were broad enough that "we may or may not read the [Peer Review] Act as explicitly excluding such organizations. The words of the [Peer Review] Act defining 'health care provider,' then, are ambiguous." Id. at 471, 686 A.2d at 805. The divided Court further stated: "It is widely accepted that general expressions such as 'including, but not limited to' that precede a specific list of included items should not be construed in their widest context, but apply only to persons or things of the same general kind or class as those specifically mentioned in the list of examples." Id. at 472, 686 A.2d at 805 (citing decisions of the New Hampshire Supreme Court and the Massachusetts Court of Appeals). The Court then recited the doctrine of *ejusdem generis*, stating that where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. Further, where the opposite sequence is found, specific words following general ones, the doctrine is equally applicable, and restricts application of the general term to things that are similar to those enumerated. Id.

Applying those principles to its interpretation of Section 2 of the Peer Review Act, the Court stated that of the eleven listed terms included in the statute's definition of professional health care provider, nine are titles of individual health care workers. The remaining two are an administrator, and a corporation or other organization operating or administering a hospital, a nursing or convalescent home or other health care facility. Thus, the list of health care providers in Section 2 of the Peer Review Act included only (1) immediate or direct health care practitioners, and (2) administrators of medical facilities, be they individuals or organizations. Ultimately, the Court concluded the HMO was neither a direct or immediate health care provider nor an administrator of a medical facility.

We reject Tri-County's reliance on McClellan for several reasons. First, McClellan, which was the product of an evenly divided Court, lacks precedential value. See Commonwealth v. Baldwin, 604 Pa. 34, 985 A.2d 830 (2009) (observing that a plurality decision of the Supreme Court has no precedential weight); Weiley v. Albert Einstein Med. Ctr., 51 A.3d 202 (Pa. Super. 2012) (where the Supreme Court is divided evenly, its opinion lacks precedential value, although it has persuasive value).

Next, unlike in McClellan, where the statutory provision at issue identified specific individuals or entities, which essentially fell within two readily definable categories, following the "including, but not limited to" language, here the enumerated examples that follow the "including among other[s]" language in the zoning ordinance's definition of a "structure" cannot be distilled into distinct categories like the direct health care practitioners and administrators of medical

facilities. Rather, the list of enumerated examples is varied ("a building, stadium, reviewing stand, platform, staging, observation tower, radio tower, water tank, trestle, pier, wharf, open shed, coal bin, shelter, fence, wall and a sign"), suggesting a broader interpretation is appropriate.

Finally, and more importantly, as noted above, in a 2010 decision, 14 years after the plurality opinion in McClellan, our Supreme Court rejected arguments similar to those presented by Tri-County here, specifically stating that the introductory verbiage "including, but not limited to," generally reflects the intent of the legislature to broaden the reach of a statute, rather than a purpose to limit the scope of the law to those matters enumerated therein.[12] See Dechert.

---

[12] We also reject Tri-County's reliance (in a footnote) on this Court's decision in Department of Environmental Protection v. Cumberland Coal Resources, L.P., 29 A.3d 414 (Pa. Cmwlth. 2011) (en banc), appeal granted, ___ Pa. ___, 63 A.3d 252 (2013), in which we found an ambiguity in the definition of the term "accident" in Section 104 of the Bituminous Coal Mine Safety Act, Act of July 7, 2008, P.L. 654, 52 P.S. §690-104. That statutory provision defines an accident as "[a]n unanticipated event, including any of the following …" preceding a list of events. Id. at 423. In determining this language was ambiguous, we explained:

> DEP asserts that the key language in the definition is '[a]n unanticipated event.' DEP contends that this language reflects a legislative judgment that the list is not exhaustive. Also, the General Assembly used the word 'including,' which maybe interpreted 'as a word of enlargement or of illustrative application.' Black's Law Dictionary 763 (6th ed.1990); *see* Velocity [Express v. Pa. Human Relations Commission, 853 A.2d 1182, 1186 (Pa. Cmwlth. 2004)] (holding that General Assembly's use of word 'includes' before specific list meant list plus others of 'same general kind or class'). The definition, however, also uses the word 'any' to modify the list of identified events the General Assembly included in the definition of the term 'accident.' The General Assembly's use of the word 'any' suggests that the General Assembly might have intended that the list is exclusive. Both interpretations are reasonable, and, consequently, we conclude that the provision is ambiguous.

Id. at 423-24 (emphasis added).

(Footnote continued on next page…)

Relying on the doctrines of *ejusdem generis* or *noscitur a sociis*,[13] Tri-County also argues that we must look to what it alleges are the common characteristics of the enumerated examples in the "structure" definition. To that end, Tri-County asserts the enumerated examples all have an ascertainable stationary location, on a limited construction site, and a structural element that is affixed to the ground or man-made materials designed to provide engineering support. Further, each enumerated item could be razed and removed from the site on which it is constructed, leaving the ground behind generally as it existed before the structure was built. This argument fails for several reasons.

First, Tri-County's arguments regarding the asserted common criteria among the enumerated examples appear to be an attempt to craft a new definition of the term "structure." Indeed, Tri-County's alleged criteria are not consistent with the broader definition of the term "structure" that precedes the enumerated examples contained in the zoning ordinance.

(continued…)

Unlike the statutory definition at issue in Cumberland Coal Resources, which utilized the phrase "including any of the following" preceding a list of events making it unclear whether the list was exhaustive or illustrative, here the zoning ordinance's definition of the term "structure" uses the phrase "including among other[s]" preceding a list of various examples of structures. Section 301 of the zoning ordinance. As set forth above, our Supreme Court holds the introductory verbiage "including, but not limited to," generally reflects a legislative intent to broaden the reach of a statute, rather than a purpose to limit the scope of the law to those matters enumerated therein. Dechert, LLP v. Commonwealth, 606 Pa. 334, 998 A.2d 575 (2010).

[13] "The ancient maxim 'noscitur a sociis' summarizes the rule that the meaning of words may be indicated or controlled by those words with which they are associated. Words are known by the company they keep." Commonwealth ex rel. Fisher v. Phillip Morris, Inc., 4 A.3d 749, 756 n.9 (Pa. Cmwlth. 2010) (citation omitted).

In addition, Tri-County's asserted criteria do not even apply to all of the enumerated examples of structures in the zoning ordinance definition. For example, the definition includes a "wall" as a structure; however, under Tri-County's theory, a wall constructed of layers of stone piled on top of each other, where the bottom layer rests on the ground, would not be a "structure" because it is not "affixed to the ground or man-made materials that are designed to provide engineering support." Appellant's Br. at 32. Further, several of the "example" structures in the zoning ordinance definition are not necessarily affixed to the ground or man-made materials that are designed to provide engineering support, including a "coal bin," an "open shed," a "reviewing stand" and "a sign."

Finally, it appears that a landfill would, in fact, fall within the common characteristics between the enumerated examples alleged by Tri-County. Specifically: (1) a landfill has an ascertainable location; (2) a modern landfill has a man-made engineered liner foundation; and, (3) a landfill could be closed and/or removed. For all these reasons, we reject Tri-County's arguments premised on the doctrines of *ejusdem generis* or *noscitur a sociis*.

Tri-County also argues that Section 703.1(5) of the zoning ordinance confirms that a landfill is not a structure because this section distinguishes among "buildings, other structures, [and] active landfilling areas in approved sanitary landfills." Id. Tri-County contends that if a landfill were unambiguously a structure under the zoning ordinance, there would be no need to reference "active landfilling areas in approved sanitary landfills" as distinct from "other structures."

Id. Thus, Tri-County argues, the only way to give meaning to Section 703.1(5) is to recognize that a "landfill" is not an "other structure."

Section 703.1(5) of the zoning ordinance, which is set forth within the "Additional I Industrial District Regulations," states:

> Section 703: Development Regulations
>
> 703.1: Provisions of Use — Any permitted principal and/or accessory use shall be subject to the following use regulations:
>
> * * * *
>
> (5) Any part or portion of a lot developed for industrial uses which is not used for buildings, other structures, active landfilling areas in approved sanitary landfills, parking or loading spaces, or aisles, driveways, sidewalks, and designated storage areas shall be planted and maintained with grass or other all season ground cover vegetation. Grass shall be kept neatly mowed. Landscaping with trees and shrubs is permitted and encouraged.

Id. Contrary to Tri-County's assertions, it is not clear how the language of this provision, which requires maintenance of grass or vegetation on properties in industrial districts aside from those portions of properties used for buildings, other structures, or active landfilling areas, requires an interpretation of the term "structure" as excluding landfills from the clear definition of a "structure" in Section 301, or otherwise renders the term "structure" ambiguous. This provision has no bearing on the issue of whether a landfill is a structure under the definition provided in the zoning ordinance.

Moreover, Tri-County's interpretation of Section 703.1(5) is problematic because under that reading "buildings" would not be considered "structures" because they are listed separately. Clearly, such an interpretation is flawed given that a "building" is specifically mentioned in Section 301 of the zoning ordinance's definition of the term "structure." Id.

Also, to the extent Tri-County argues the omission of a height restriction in Section 701.8 of the zoning ordinance (setting forth additional criteria for specified permitted uses including sanitary landfills) renders the definition of a "structure" ambiguous, we reject this argument. Contrary to Tri-County's contentions, the zoning ordinance is organized in such a manner that the "maximum building/structure height restrictions" are provided in a separate article of the zoning ordinance rather than in the ordinance provisions that address specific permitted uses. See Section Article VI of the zoning ordinance (setting forth Lot, Yard, & Height Requirements). Of further note, Section 801.1(1) of the zoning ordinance exempts certain specified principle structures from the 40-foot height restriction, and this provision does not include sanitary landfills. Presumably, if the local governing body intended to exempt landfills from the height restriction, it would have done so.

Further, while Tri-County points to the definition of "facility" set forth in the SWMA and DEP regulations, as Objectors point out, neither the zoning ordinance nor the MPC cross-reference the SWMA or DEP regulations. More importantly, it is unclear how the fact that the SWMA and DEP regulations define

a different term, *i.e.*, "facility," informs an interpretation of the zoning ordinance express definition of the term "structure."

For all these reasons, we conclude Tri-County's proposed, modern landfill falls within the unambiguous definition of "structure" found in Section 301 of the zoning ordinance. Based on our determination that Section 301 of the zoning ordinance is unambiguous, we reject Tri-County's argument premised on Section 603.1 of the MPC. That Section states:

> In interpreting the language of zoning ordinances to determine the extent of the restriction upon the use of the property, the language shall be interpreted, where doubt exists as to the intended meaning of the language written and enacted by the governing body, in favor of the property owner and against any implied extension of the restriction.

53 P.S. §10603.1[14] (emphasis added).

"Of particular import here … this rule of construction is inapplicable where … the words of the zoning ordinance are clear and free from any ambiguity." Adams Outdoor Adver, 909 A.2d at 484 (quoting Isaacs v. Wilkes-Barre City Zoning Hearing Bd., 612 A.2d 559, 561 (Pa. Cmwlth. 1992)); see also City of Hope v. Sadsbury Twp. Zoning Hearing Bd., 890 A.2d 1137 (Pa. Cmwlth. 2006); Risker v. Smith Twp. Zoning Hearing Bd., 886 A.2d 727 (Pa. Cmwlth. 2005). As explained above, we reject Tri-County's arguments that the language of Section 301 of the zoning ordinance is ambiguous; therefore, this rule of construction is inapplicable here. Id.

[14] Section 603.1 of the MPC was added by the Act of December 21, 1988, P.L. 1329.

4. Constitutional Interpretation of Zoning Ordinance

Tri-County also maintains that, because a zoning ordinance must be given a constitutional interpretation, the trial court erred in failing to consider the unconstitutional and exclusionary effect of a 40-foot height limitation on landfill use. To that end, Tri-County argues the zoning ordinance allows for landfills by conditional use in the Township's IS District. The ordinance thus, on its face, does not exclude landfills. As reflected in the dissenting Supervisor's findings, the zoning ordinance can be interpreted in a constitutional manner—by not reading "landfill" into the definition of "structure" and by not imposing the 40-foot height limitation. For this reason, Tri-County maintains, it did not file an exclusionary challenge with the Supervisors. However, Tri-County asserts, when the question of height arose during the conditional use hearings, it presented substantial evidence showing the exclusionary consequence of construing the zoning ordinance's definition of "structure" to include "landfills."

Tri-County maintains that imposing a 40-foot height limitation would have the effect of totally preventing the development of an economically viable landfill anywhere in the Township. It argues that, as its expert explained, the landfill site is the only site in the Township where a landfill is permitted. The costs associated with a 40-foot high landfill on the landfill site would be $79 million and the potential revenue only $49 to $60 million. Thus, Tri-County urged the Supervisors to interpret the zoning ordinance to avoid the unconstitutional restriction of a 40-foot height limitation and to recognize the reasonable—and constitutional—interpretation: a landfill is not a "structure."

Tri-County argues the trial court did not address the rule of statutory construction that requires a constitutional interpretation. Instead, it faulted Tri-County for not seeking a variance or filing a validity challenge, apparently assuming those forms of relief could cure the exclusion. The Supervisors and the trial court were constrained, however, to interpret the zoning ordinance in a manner that did not create a constitutional violation and any uncertainty was to be resolved in favor of the constitutional interpretation.

Tri-County's argument regarding the alleged *de facto* exclusion of landfills in Liberty Township is problematic because, although permitted to do so under the MPC,[15] it did not file a substantive validity challenge (together with a curative amendment) to the zoning ordinance with the Supervisors here. See Appellant's Br. at 38 ("Tri-County did not file an exclusionary challenge with the Supervisors.") (emphasis added). Rather, before the Supervisors, Tri-County sought permission to construct and operate its proposed landfill as a conditional use. Thus, the Supervisors did not make findings on any alleged *de facto* exclusion.

In addition, Tri-County's argument is premised on the principle of statutory construction that: "In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used: … (3) That the General Assembly does not intend to violate the Constitution

[15] See Sections 609.1, 916.1(a)(2) of the MPC, as amended, 53 P.S. §§10609.1, 10916.1(a)(2). Section 609.1 was added by the Act of June 1, 1972, P.L. 333. Section 916.1 was added by the Act of December 21, 1988, P.L. 1329.

of the United States or of this Commonwealth." 1 Pa. C.S. §1922(3); U. Salford Twp. v. Collins, 542 Pa. 608, 610, 669 A.2d 335, 336 (1995) ("Uncertainties in the interpretation of an ordinance are to be resolved in favor of a construction which renders the ordinance constitutional.") (Emphasis added.) Here, however, as explained above, the unambiguous language of the zoning ordinance can be reasonably read to encompass landfills within its broad definition of "structures." Thus, it is unnecessary to resort to legislative intent here. See, e.g., Mohamed v. Dep't of Transp., Bureau of Motor Vehicles, 615 Pa. 6, 18, 40 A.3d 1186, 1193 (2012) ("In discerning [legislative] intent, the court first resorts to the language of the statute itself. If the language of the statute clearly and unambiguously sets forth the legislative intent, it is the duty of the court to apply that intent to the case at hand and not look beyond the statutory language to ascertain its meaning. ... Relatedly, it is well established that resort to the rules of statutory construction is to be made only when there is an ambiguity in the provision.") (Citation and quotations omitted.)

Additionally, unlike a *de jure* (or facial) challenge, the applicability of the rule that uncertainties in an ordinance be interpreted in a manner that renders the ordinance constitutional to a *de facto* (or as-applied) challenge, such as that referenced by Tri-County here, is unclear.[16]

[16] In a *de jure* case, the challenger contends an ordinance bans a use on its face. To establish a *de facto* exclusion, the challenger must show an ordinance permits a use on its face but when applied acts to prohibit the use throughout the municipality. Smith v. Hanover Zoning Hearing Bd., ___ A.3d ___ (Pa. Cmwlth., 211 C.D. 2013, filed October 16, 2013), 2013 WL 5634245.

To that end, in Montgomery Crossing Associates, this Court, citing the Supreme Court's decision in Upper Salford Township, stated: "In determining whether an ordinance creates a *de jure* exclusion, '[u]ncertainties in the interpretation of an ordinance are to be resolved in favor of a construction which renders the ordinance constitutional.'" Id. at 288 (quoting U. Salford Twp, 542 Pa. at 610, 669 A.2d at 636) (emphasis added). Further, the other case cited by Tri-County for the principle that uncertainty in the interpretation of an ordinance is to be resolved in favor of a construction which renders the ordinance constitutional, also involved a *de jure* challenge. See Kratzer v. Bd. of Supervisors of Fermanagh Twp., 611 A.2d 809 (Pa. Cmwlth. 1992). Because Tri-County does not allege a *de jure* (or facial) challenge to the zoning ordinance, application of this principle is unclear. For these reasons, we reject Tri-County's argument on this point.

Based on the foregoing, we agree with the trial court that Tri-County's proposed, modern landfill falls within the zoning ordinance's broad, unambiguous definition of the term "structure," rendering it subject to the 40-foot height limitation. However, we conclude the trial court erred in remanding this matter to the ZHB; thus, we vacate that portion of the trial court's order.

ROBERT SIMPSON, Judge

Judge McCullough did not participate in the decision in this case.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Tri-County Landfill, Inc., Appellant	:	
v.	:	No. 175 C.D. 2013
Liberty Township Board of Supervisors	:	
v.	:	
Dr. Ray Yourd, Diana Hardisky, Eric & Polly Lindh, Bill & Lisa Pritchard, Anne & Dave Dayton, Doug Bashline & The Grove City Factory Shops Limited Partnership	:	

O R D E R

AND NOW, this 9th day of January, 2014, the order of the Court of Common Pleas of Mercer County is **AFFIRMED in part, and VACATED in part**, in accordance with the foregoing opinion.

ROBERT SIMPSON, Judge