

**BEFORE THE BOARD OF SUPERVISORS OF
NORTH ANNVILLE TOWNSHIP
LEBANON COUNTY, PENNSYLVANIA**

Application of Lebanon Solar I, LLC
Conditional Use Application

**OBJECTORS' PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
MEMORANDUM OF LAW**

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OBJECTORS' PROPOSED FINDINGS OF FACT

AND NOW come the Objectors, by and through their counsel, Law Office of William J.

Cluck and present the following proposed findings of fact, representing as follows:

BACKGROUND

I. The Parties

1. North Annville Township (“Township”) is a municipal corporation, a township of the Second Class, located in Lebanon County, Pennsylvania.
2. The North Annville Township Board of Supervisors (“Board”) is the duly-elected governing body of the Township, having jurisdiction over conditional use applications filed under the North Annville Township Zoning Ordinance (“ZO”) and the Pennsylvania Municipalities Planning Code, 53 P.S. §10101, *et seq.* (“MPC”).
3. Lebanon Solar I, LLC (“Applicant”) is a Delaware limited liability company that identified its address in the Petition for Conditional Use as 191 University Boulevard, Suite 667, Denver, CO 80206.
4. Applicant holds leases or options to purchase on a dozen parcels of real estate situated in the Township. (Exhibit A-1, A-9, A-10, A-11, A-13)
5. The Board granted party status to the following persons, who collectively provided testimony from both expert and lay witnesses and were represented by their counsel, William J. Cluck (“Objectors”):

Larry & Brenda Buffenmeyer
1540 N State Rt 934
Annville, PA 17003

Glenn & Suzanne Forney
595 Steelstown Rd
Annville, PA 17003

Aaron R Miller III
721 Palmyra Bellegrove Road
Annville, PA 17003

John & Brenda Shaver
1740 Blacks Bridge Road
Annville, PA 17003

Grady & Corinne Summers
585 Palmyra Bellegrove Rd
Annville, PA 17003

Mark Bachman
844 Palmyra Bellegrove Rd
Annville, PA 17003

6. The Board also recognized Brian Tshudy as a party.

II. The Application

7. The Applicant, on May 3, 2021, submitted to the Township a Petition for Conditional Use requesting approval of a Solar Farm (“the May 3 Application”), pursuant to the Township’s Zoning Ordinance, as amended. The May 3 Application was not marked as an exhibit and is not part of the official record.
8. The May 3 Application consisted of a three-page narrative and a site plan depicting the dozen properties participating in the Solar Farm.
9. The May 3 Application included the reasons for the Application and responses to the eight specific criteria set forth in the ZO in order to obtain conditional use approval.
10. The dozen properties are active farms located in the Agriculture Zoning District in the Township proposed to be included in the Solar Farm are as follows:

Brent A. and Julia S. Kaylor
2015 Yordy’s Bridge Road

(the site plan included with the May 3 Application said 154.26 acres, but the revised site plan marked as Applicant’s Exhibit A-1 has the conditional use permit area as 93.4 acres)
The street address listed on Applicant’s Exhibit A-1 and the address noted on the Memorandum of Option Agreement at Applicant’s Exhibit A-11 are different. The Option Agreement produced as Applicant’s Exhibit A-13 is heavily redacted and does not include the street address. The Title Commitment marked as Applicant’s Exhibit 9 does not provide the street address.

Bruce L. Brightbill Jr., single and Hilda P. Brightbill, widow
2008 Yordy’s Bridge Road

(the site plan included with the May 3 Application said 138.06 acres, but the revised site plan marked as Applicant’s Exhibit A-1 has the conditional use permit area as 92.4 acres)

Hilda P. Brightbill, widow
1675 N State Road

(the site plan included with the May 3 Application said 120.86 acres, but the revised site plan marked as Applicant's Exhibit A-1 has the conditional use permit area as 122.3 acres)

Bruce L. Brightbill Jr., single and Hilda P. Brightbill, widow
1754 Blacks Bridge Road

(the site plan included with the May 3 Application said 109.63 acres, but the revised site plan marked as Applicant's Exhibit A-1 has the conditional use permit area as 92.3 acres)

Dale E. Hostetter and Thelma M. Hostetter
1595 N State Road 934

(the site plan included with the May 3 Application said 49.78 acres, but the revised site plan marked as Applicant's Exhibit A-1 has the conditional use permit area as 47.9 acres)

Alan D. Hostetter and Robin D. Hostetter
5501 Valley Glen Road

(the site plan included with the May 3 Application said 83.34 acres, but the revised site plan marked as Applicant's Exhibit A-1 has the conditional use permit area as 82.2 acres)

Dale E. Hostetter and Thelma M. Hostetter
445 Hostetter Lane

(the site plan included with the May 3 Application said 80.3 acres, but the revised site plan marked as Applicant's Exhibit A-1 has the conditional use permit area as 79.3 acres)

Leonard C. Long and Michael L. Long
1749 Blacks Bridge Road

(the site plan included with the May 3 Application said 30.48 acres, but the revised site plan marked as Applicant's Exhibit A-1 has the conditional use permit area as 23.2 acres)

Baer Brothers Farms, a Pennsylvania General Partnership comprised of Donald D. Baer, II and Andrew S. Baer
436 Hostetter Lane

(the site plan included with the May 3 Application said 122.76 acres, but the revised site plan marked as Applicant's Exhibit A-1 has the conditional use permit area as 118.6 acres)

P. Wilmer Breckbill and Susan J. Breckbill
539 Hostetter Lane

(the site plan included with the May 3 Application said 135.1 acres, but the revised site plan marked as Applicant's Exhibit A-1 has the conditional use permit area as 49.5 acres)

Elvin M. Hostetter, in his capacity as General Partner of The Hostetter Family Limited Partnership Two
620 Steelstown Road

(the site plan included with the May 3 Application said 125.34 acres, but the revised site plan marked as Applicant's Exhibit A-1 has the conditional use permit area as 6.7 acres)

Eli E. Nolt and Darla Nolt

550 Palmyra Bellegrove Road
(the site plan included with the May 3 Application said 83.88 acres, but the revised site plan marked as Applicant's Exhibit A-1 has the conditional use permit area as 50.7 acres)

Except as noted above, ownership and address information is provided in Applicant's Exhibits A-1, A-9, A-11 and A-13.

III. North Annville Township Zoning Ordinance

- 11.** The Township Zoning Ordinance of 1973, was amended by Ordinance No. 2-2019 to provide for a definition of Solar Farm, amended the Agricultural Zone to provide for conditional use for Solar Farms and provide conditions for establishment of a Solar Farm. ("ZO").
- 12.** The ZO is based upon and intended to give effect to the policies and objectives set forth in the Comprehensive Plan and is intended to promote public health, safety, morals, and the general welfare by achieving, among others, certain purposes and objectives for the development of the Township, including to encourage the most appropriate use of land, conserve the value of land and buildings, and encourage the harmonious and orderly development of land. *See ZO Section 103.*
- 13.** The basis for the ZO is the Township Comprehensive Plan which enumerates in detail the locally desired community goals and objectives which the ZO seeks to accomplish. *See ZO Section 105.*
- 14.** Section 201.3 of the ZO provides "when terms, phrases or words are not defined, they shall have their ordinarily accepted meanings or such as the context may imply."
- 15.** Ordinance 2-2019 amended Section 201.4 of the ZO by adding the following definition:

Solar Farm (Utility Scale Solar Application): A Solar Application and/or Applications installed on land for the sale of solar energy for the purpose of commercial gain by the Landowner or Tenant of the subject parcel.
- 16.** Ordinance 2-2019 amended Section 401.1 of the ZO to include the following new use permitted under certain conditions:

Solar Farms upon certain conditions defined in Section 522 and after Notice and Hearing before the Board. Said Hearing shall be held upon requisite Notice under the Municipalities Planning Code and opportunity for comment by the Planning Commission.
- 17.** Ordinance 2-2019 included a new Section 522 establishing Solar Farms as a conditional use.

18. Section 522 of the ZO provides as follows:

Solar Farms (Utility Scale Solar Applications) shall be a conditional use subject to the following conditions:

1. No Solar Farm may be established upon any farm land or Agriculturally Zoned land which has an Agricultural Conservation Easement filed against it which remains in effect.
2. The minimum lot size for the establishment of any Solar Farm shall be fifty (50) acres.
3. The solar panels and/or other implements used in the construction and structure of the Solar Farm, including, but not limited to, any solar panels shall be set back a minimum of fifty (50) feet from any adjacent lot line.
4. A permanent evergreen vegetative buffer must be provided or fencing which accomplishes the same purpose of buffering.
5. The maximum lot coverage may not exceed fifty (50%) percent of the total lot size.
6. The Applicant must demonstrate that it has adequate liability insurance in minimum amounts of one million (\$1,000,000.00) per incident and two (\$2,000,000.00) per aggregate.
7. The Applicant must demonstrate and provide adequate bonding to remain in place to be used by the Township if the applicant ceases operation and fails to remove the panels and other implements related to the use within one hundred and eighty (180) days of the cessation of operation.
8. The Applicant must have an approved Stormwater Management Plan as required by the Lebanon County Stormwater Management Ordinance.

IV. The Conditional Use Hearings

19. The hearings were held on January 25, 2022, January 26, 2022 and February 24, 2022.
20. The Township provided Affidavit of Publication from Lebanon Daily News verifying publication of public notice of the hearing on January 11, 2022 and January 18, 2022. *See* Township Exhibit B-1.

21. The Township provided an Affidavit from Adam Wolfe, Secretary of the Board affirming he posted on January 15, 2022 Notice of the Public Hearing to occur January 25 and January 26. *See* Township Exhibit B-2.
22. The Applicant presented the testimony of Eric Holton. (N.T. 1/25/2022, p. 12).
23. Mr. Holton is employed by Enel Green Power representing Lebanon Solar I. *Id.*
24. His presentation was marked as Applicant's Exhibit A-8. The solar project will have a generating capacity estimated as between 70-100 Megawatts AC that will interconnect with First Energy 230 kV transmission line and have a useful life of 30-35 years. (N.T. 1/25/2022, p. 14)
25. A revised conceptual site plan, dated January 19, 2022, identified the dozen participating properties but no longer included the locations of the solar panels. *See* Applicant's Exhibit A-1.
26. The Applicant contends the dozen properties constitute one solar farm as depicted on Applicant's Exhibit A-2. The exhibits refer to a CUP Area, which means conditional use area.
27. Mr. Holton's presentation focused on the eight (8) specific criteria set forth in Section 522 of the ZO. With regard to Criteria 1, the Applicant provided title commitments demonstrating none of the participating properties have Agricultural Conservation Easements filed against them which remain in effect. (N.T. 1/25/2022, p. 15-16) *See* Applicant's Exhibits A-3, A-8 and A-13.
28. Criteria 2 in Section 522 of the ZO provides the minimum lot size for the establishment of any Solar Farm shall be fifty (50) acres. Mr. Holton testified the revised Application (Exhibit A-1) is for the establishment of one Solar Farm on approximately 858 acres. He contends Criteria 2 is met where the proposed Solar Farm is on multiple lots, at least one of which is over 50 acres in size. (N.T. 1/25/2022, p. 17-18) *See* Applicant's Exhibits A-1, A-4 and A-8.
29. Four of the participating properties shown on the revised Application are less than 50 acres in size. Property Id. 5 – 1595 N State Route 934 is only 47.9 acres. Property Id. 8 – 1749 Blacks Bridge Road is only 23.2 acres. Property Id. 10 – 539 Hostetter Lane is only 49.5 acres. Property Id. 11 – 630 Steelstown Road is only 6.7 acres. *See* Applicant's Exhibit A-1.
30. The Board finds that Criteria 2 requires each of the lots to be at least 50 acres. The Applicant's interpretation of Criteria 2 is erroneous and contrary to the plain meaning of the term "minimum lot size."

31. Criteria 3 in Section 522 of the ZO provides as follows:

“The solar panels and/or other implements used in the construction and structure of the Solar Farm, including, but not limited to, any solar panels shall be set back a minimum of fifty (50) feet from any adjacent lot line.”

Mr. Holton testified that the solar panels and other implements will be set back at least fifty (50) feet from any adjacent lot line. (N.T. 1/25/2022, p. 18-20) *See* Applicant’s Exhibits A-5, A-6 and A-8.

32. However, the May 3 Application responded as follows to Criteria 3:

The Applicant proposes to maintain a setback for solar panels of fifty (50) feet from any adjacent lot line of a non-participating landowner. However, the Applicant is in the process of securing a waiver from participating landowners to waive the setback requirement between their respective properties in order to permit a continuous field of solar panels across the property lines of adjacent participating properties, where applicable.

33. The Board does not know if the Applicant intends to comply with Criteria 3 based on Mr. Holton’s testimony and Exhibit A-8 or the response in the May 3 Application. The Applicant marked as Exhibit A-12 certain waivers executed by some of the participating landowners waiving the requirement of a 50 foot setback.

34. To the extent Applicant intends to rely upon the waivers to demonstrate compliance with Criteria 3, the Board is not free to waive or modify the requirements of the ZO when considering a conditional use application. The only body having any authority to grant relief from its requirements is the Zoning Hearing Board by way of a variance. There is no evidence of a variance having been sought in relation to the instant application.

35. Criteria 4 in Section 522 of the ZO provides as follows:

A permanent evergreen vegetative buffer must be provided or fencing which accomplishes the same purpose of buffering.

Mr. Holton testified regarding Criteria 4:

Lebanon Solar will install perimeter fencing around the buildable area, that is the solar panels and other implements, as identified in the conceptual site plan, Exhibit A-1. That perimeter fence will serve as a protective buffer. Thereby on its own satisfying Criterion No. 4. In addition, Lebanon Solar will voluntarily install vegetative screening in various areas to screen residential viewsheds. The exact type and location of that vegetative screening will be determined during the Land Development Plan phase or the LDP phase; but on the Exhibit, which again is Exhibit A-1, the fencing is shown as the yellow hatched line, and the thicker

green line represents the sample vegetative screening locations, but the criterion is satisfied with the perimeter fence that we will install around the buildable area.

(N.T. 1/25/2022, p. 20-21) See Applicant's Exhibit A-8.

- 36.** However, as with Criteria 3, the Applicant provided a different response to Criteria 4 in the May 3 Application:

Applicant will provide the requisite buffering from non-participating property owners. However, the Applicant is in the process of securing a waiver from participating landowners to waive the buffering requirement between their respective properties in order to permit a continuous field of solar panels across the property lines of adjacent participating properties.

- 37.** The Board does not know if the Applicant intends to comply with Criteria 4 based on Mr. Holton's testimony or the response in the May 3 Application. The Applicant marked as Exhibit A-12 certain waivers executed by some of the participating landowners waiving the requirement of vegetative screening along lot lines of neighboring properties.

- 38.** To the extent Applicant intends to rely upon the waivers to demonstrate compliance with Criteria 4, the Board is not free to waive or modify the requirements of the ZO when considering a conditional use application. The only body having any authority to grant relief from its requirements is the Zoning Hearing Board by way of a variance. There is no evidence of a variance having been sought in relation to the instant application.

- 39.** Criteria 5 of Section 522 of the ZO provides as follows:

The maximum lot coverage may not exceed fifty (50%) percent of the total lot size.

Mr. Holton testified as follows:

"The total acreage of those impervious surfaces is 25.2 acres. The total lot size, as I outlined earlier, is 858 acres. 25.2 divided by 858.4 is approximately 2.9 percent which, again, is less than 50 percent. This is how we demonstrate compliance with Criterion No. 5."

(N.T. 1/25/2022, p. 21-23)

- 40.** The Board finds that the Applicant does not comply with Criteria 5 where they calculate maximum lot coverage by aggregating the dozen participating properties rather than each individual lot.

- 41.** Criteria 6 of Section 522 of the ZO provides as follows:

The Applicant must demonstrate that it has adequate liability insurance in minimum amounts of one million (\$1,000,000.00) per incident and two (\$2,000,000.00) per aggregate.

Mr. Holton testified as follows:

As final insurance policy issuance is contingent on approval of the Land Development Plan, Lebanon Solar will provide the Township with insurance certificates in those minimum amounts following approval of the LDP. In the interim, however, we are prepared to submit insurance certificates tonight according to those coverage requirements set forth in this criterion, but they are subject to change once we get through the LDP. If the Township would like those, we do have them available.

(N.T. 1/25/2022, p. 23-24) *See Applicant's Exhibits A-7 and A-8.*

42. Criteria 7 of Section 522 of the ZO provides:

The Applicant must demonstrate and provide adequate bonding to remain in place to be used by the Township if the applicant ceases operation and fails to remove the panels and other implements related to the use within one hundred and eighty (180) days of the cessation of operation.

Mr. Holton testified as follows:

Lebanon Solar will provide the Township with a decommissioning plan and provide an adequate amount of financial security which meets this criterion following approval of Lebanon Solar's LDP [Land Development Plan].

(N.T. 1/25/2022, p. 24-25) *See Applicant's Exhibit A-8.*

43. An applicant for special exception or conditional use must demonstrate that his proposed use meets the applicable requirements of the zoning ordinance when the application is submitted. *Edgmont Township v. Springton Lake Montessori School, Inc.*, 622 A.2d 418 (1993); *Appeal of Baird*, 537 A.2d 976 (1988), *pet. for allowance of appeal denied*, 521 Pa. 613, 557 A.2d 344 (1989). A promise to comply or conditions compelling future compliance cannot cure an otherwise noncompliant application. *Edgmont Township*.

44. Criteria 8 of Section 522 of the ZO provides as follows:

The Applicant must have an approved Stormwater Management Plan as required by the Lebanon County Stormwater Management Ordinance.

Mr. Horton testified as follows:

“Conditional Use proceedings involve only the proposed use of the land and do not involve the particular details of the design of the proposed development.”

“Thus, similar to before, following the LDP phase, Lebanon Solar will provide the Township with its approved stormwater management plan.”

(N.T. 1/25/2022, p. 25-26), *See Applicant's Exhibit A-8.*

45. Applicant made no effort to prepare a Stormwater Management Plan.
46. A promise to comply in the future cannot cure a deficient application.
47. The Board finds the Applicant has failed to comply with Criteria 7 and 8.
48. Objectors offered the expert testimony of Lawrence Lahr (Lahr) as an expert in the area of land use planning and zoning. (N.T. 1/26/2022, p. 158)
49. Lahr's expert testimony was admitted without objection (N.T. 1/26/2022, p. 158).
50. Lahr observed several deficiencies in the Application.
51. Lahr discussed the purposes of Section 604 of the Municipalities Planning Code ("MPC"). A fundamental purpose is to promote, protect and facilitate the public health, safety, morals and the general welfare. (N.T. 1/26/2022, p. 160)
52. Lahr identified another purpose of Section 604 of the MPC is the preservation of the natural, scenic, and historic values in the environment and preservation of forests, wetlands, aquifers and floodplains. *Id.*
53. Lahr identified another purpose of Section 604 of the MPC to preserve prime agriculture and farmland. *Id.*
54. Lahr acknowledged the ZO protects prime agricultural land and the natural and historic features and resources. *Id.*
55. Lahr also reviewed the Township's Comprehensive Plan and testified the Plan includes a section on historic resources protection and another section on natural and scenic resources protection. (N.T. 1/26/2022, p. 161)
56. Lahr reviewed the conceptual site plan and observed it did not include historic resources or scenic resources such as scenic roads. *Id.*
57. Lahr reviewed the definitions of the terms lot, lot area and maximum lot coverage in the ZO. In his professional opinion, those terms are not ambiguous. (N.T. 1/26/2022, p. 163-164)
58. Lahr disagreed with the Applicant's contention that the Application is for one Solar Farm consisting of 12 parcels that are aggregated into one large parcel for conditional use purposes. (N.T. 1/26/2022, p. 165)
59. With respect to the eight specific objective criteria for conditional use, Lahr opined to a reasonable degree of professional certainty that the Application

fails to comply with Criteria 2 where some of the dozen participating properties are not at least 50 acres in size. (N.T. 1/26/2022, p. 166-167)

60. To the extent the Applicant is relying on waivers in order to comply with Criteria 3 and Criteria 4, Lahr opined that landowners can not waive a provision of the ZO. Waivers must be approved by the Zoning Hearing Board. (N.T. 1/26/2022, p. 167-174)
61. Lahr also opined that a promise of future compliance does not satisfy the specific objective criteria of the ZO. Lahr testified the Applicant did not comply with Criteria 3 and Criteria 4. *Id.*
62. Lahr testified that Criteria 5 was not satisfied where the Applicant failed to calculate the maximum lot coverage for each of the 12 lots. (N.T. 1/26/2022, p. 175 -176)
63. The Applicant asserts it will comply with Criteria 8 following land development. Lahr testified that response is a promise of future compliance which does not satisfy the requirements of the ZO. (N.T. 1/26/2022, p. 180)
64. Lahr concluded his expert testimony by giving his opinion to a reasonable degree of professional certainty that the Application failed to meet the specific objective criteria for conditional use approval. (N.T. 1/26/2022, p. 181)
65. The Board finds Lahr's testimony to be credible.
66. The Objectors presented testimony from each Objector.
67. Grady & Corinne Summers, 585 Palmyra Bellegrove Rd are parties to this proceeding. Grady Summers testified about his concerns with the solar farm project. He is particularly concerned the solar panels and implements will be directly opposite his family's home. He testified as follows:

"we'll be looking directly into two acres of battery storage systems and two acre, according to the testimony last night, about approximately a two-acre substation and two-acre switching station, all of which will be visible from my front porch and each window in front of my house."

(N.T. 1/26/2022, p. 122)
68. Summers testified about his concerns with the impact on wildlife once the participating parcels are fenced, his recognition the Comprehensive Plan includes protection of scenic resources including scenic roads, and the loss of prime farmland.

(N.T. 1/26/2022, p. 123-131) Objectors' Exhibit O-3 and Exhibit O-4.

69. Summers also testified about historic resources. He read a letter prepared by Craig Meyer regarding three historic cemeteries located within the Solar Farm. (N.T. 1/26/2022, p. 138-144) *See* Objectors' Exhibit O-5.
70. Summers also noted the Comprehensive Plan contains sections on natural resources and the Township has 3.6 miles of scenic roads. (N.T. 1/26/2022, p. 146-153) Objectors' Exhibits O-6 and O-7.
71. Objector Larry Buffenmeyer and his wife, Brenda, have resided at 1540 North State Route 934 for the last 45 and a 1/2 years. They are parties to this proceeding. (N.T. 1/26/2022, p. 186)
72. Mr. Buffenmeyer testified about his use and enjoyment of his property. The home is across the road from two of the parcels proposed for solar panels. (N.T. 1/26/2022, p. 187-188). He believes there will be a negative impact on the value of his property. *Id.* He values the view from his property and believes the solar farm will interfere with this aesthetic value. (N.T. 1/26/2022, p. 190-191)
73. Brenda Buffenmeyer testified about her enjoyment of her view of the scenic area and how the solar farm will adversely impact that view. (N.T. 1/26/2022, p. 196 -198)
74. Glenn and Suzanne Forney, 595 Steelstown Rd, are parties to this proceeding. Suzanne Forney testified they have lived at this address for the past 43 years. She continues to reside in the area because "It's a place of honesty and integrity and scenic views, and you can go out your backyard and see forever. I can go out my front yard and I don't hear pleasant humming from solar panels or inverters or whatever they are." (N.T. 1/26/2022, p. 199)
75. The Forneys property is across the street from the proposed switching station. They are concerned with the interference with their scenic view. (N.T. 1/26/2022, p. 200)
76. Aaron R Miller III, 721 Palmyra Bellegrove Road is a party to this proceeding and has resided there the last 22 years. He will have a view of the switching station across the street. (N.T. 1/26/2022, p. 201)
77. John & Brenda Shaver, 1740 Blacks Bridge Road, are parties to this proceeding. They are across the street from two of the parcels that will contain solar panels. (N.T. 1/26/2022, p. 214) He spends a lot of time outside enjoying his property and believes the solar farm will interfere with the use and enjoyment of the property. He expressed his concern with reduction in value of his property. (N.T. 1/26/2022, p. 216)
78. Brenda Shaver testified they have lived there for 35 years. Their property will be surrounded on all sides by the solar farm. She testified to her long

lifetime in the community and her enjoyment of her view which will be adversely impacted by the solar farm. (N.T. 1/26/2022, p. 219-220)

79. The Township Planning Commission reviewed the plans as presented at the hearings on January 25 and January 26 at their February 7, 2022 meeting. In a letter to the Board dated February 8, 2022, the Planning Commission updated its recommendation to deny the Lebanon Solar request for conditional use approval. *See* Township Exhibit B-3.

80. The Planning Commission recommended denial of the request for conditional use approval for the following four reasons:

80.1. Lebanon Solar's interpretation of a lot is not consistent with the ordinance

80.2. There are 2 parcels that do not meet the 50-acre minimum

80.3. Lebanon Solar language describing coverage does not conform to the ordinance

80.4. We strongly oppose that Lebanon Solar has taken liberty to write & grant themselves its own waivers.

See Township Exhibit B-3.

81. The Board concurs with the recommendation of the Planning Commission.

82. The Applicant presented additional expert testimony in its rebuttal case on February 24, 2022.

83. Richard Kirkland, Jr. was qualified as an expert in appraisals. He was called as an expert witness in the Applicant's rebuttal case to respond to Objectors' concerns about reduction in property values.

(N.T. 2/24/2022, p. 304)

84. Mr. Kirkland opined that the location and character of the proposed solar project will be in harmony with the area. (N.T. 2/24/2022, p. 313)

85. Mr. Kirkland also opined that the project will not have a negative impact on adjoining property values. *Id.*

86. Mr. Kirkland prepared an impact analysis. He and his counsel refused to produce the impact analysis. (N.T. 2/24/2022, p. 314)

87. The Board finds Mr. Kirkland's testimony to not be credible without revealing the impact analysis he prepared,

88. The Applicant also presented as rebuttal witness Timothy Staub who was admitted without objection as an expert in land planning. (N.T. 2/24/2022, p. 328)
89. Mr. Staub asserted Criteria 2 was ambiguous because the word “minimum” was not defined in the ZO. (N.T. 2/24/2022, p. 337)
90. Mr. Staub also asserted Criteria 3 was ambiguous because the phrase “adjacent lot line” was not defined and could be interpreted as applying to adjacent land uses rather than adjacent properties. (N.T. 2/24/2022, p. 338)
91. The Board finds that Mr. Staub’s testimony was not credible.
92. The Board finds that the Applicant has failed to provide evidence, either in its Application or in its oral testimony that satisfies the specific criteria requirements of the ZO with respect to minimum lot size.
93. The Board finds that the Applicant has failed to provide evidence, either in its Application or in its oral testimony that satisfies the specific criteria requirements of the ZO demonstrating an ability to comply with the set back requirements.
94. The Board finds that the Applicant has failed to provide evidence, either in its Application or in its oral testimony that satisfies the specific criteria requirements of the ZO demonstrating an ability to comply as to maximum lot coverage.
95. The Board finds that the Applicant has failed to provide evidence, either in its Application or in its oral testimony that satisfies the specific criteria requirements of the ZO demonstrating an ability to comply as to insurance, bonding and stormwater management plans. A promise of future compliance does not satisfy the specific criteria.

OBJECTORS’ PROPOSED CONCLUSIONS OF LAW

1. To the extent any findings of fact constitute conclusions of law, they are incorporated herein by reference as if fully set forth at length.
2. The Municipalities Planning Code governs land use matters.
3. Pursuant to the MPC § 913.2 all issues/questions arising from the instant conditional use application were decided by and within the jurisdiction of the Board.
4. The Application for conditional use approval is also subject to the North Annville Township ZO.

- 5.** The Applicant has failed to meet its burden of proving that the Application complies with all specific objective criteria set forth in the ZO for a Solar Farm.
- 6.** The Board finds as a matter of law that the proposed use of the dozen participating properties as a Solar Farm required each property to meet the minimum lot size and set back requirements.
- 7.** The Board finds that to the extent the Applicant relies upon waivers to demonstrate compliance with Criteria 3 and 4, those Criteria have not been met. Waivers of the specific criteria for conditional use must be presented to the Zoning Hearing Board.
- 8.** The Board therefore finds, as a matter of law, that the Applicant has failed to satisfy its burden of proof in presenting its application to the Board as to the specific criteria set forth for Solar Farms.
- 9.** The Board finds that the only body entitled to offer relief from the mandatory language of the ZO is the Township Zoning Hearing Board.
- 10.** The Board is not aware of any request for relief by the Applicant from the provisions of the ZO granted by or pending before the Zoning Hearing Board.
- 11.** The Board finds that the Objectors have met their burden of persuasion such that it can reliably conclude that there are no conditions which could be imposed upon the Applicant's proposal that would sufficiently reduce or eliminate the impacts of the proposed use.
- 12.** The Board finds the testimony and conclusions of Lawrence Lahr credible and reliable as they relate to the Applicant's failure to comply with the specific criteria for conditional use.
- 13.** The Board finds the testimony and evidence submitted by the Applicant as to the interpretation of the ZO lack credibility and reliability.
- 14.** The Board finds that the Applicant's property valuation expert testimony lacks credibility and reliability where the witness refused to produce the underlying impact analysis.
- 15.** The Board finds that the Applicant's expert testimony from its expert on land use planning lacks credibility and reliability where he testified certain criteria were ambiguous when terms or phrases are undefined.
- 16.** The failure by the Applicant to meet the burden of proof in Criteria 2, Criteria 3, Criteria 4, Criteria 5 means that the Application must be denied.
- 17.** The Board finds that the Applicant has failed to meet its burden of proving that the proposed use, through its supporting evidence and testimony, satisfies the specific criteria present in the ZO and therefore the conditional use application must be denied.

18. The Objectors have established that the loss of viewshed, deleterious effects upon regional wildlife, and natural resources and scenic roads have not been adequately measured or mitigated by the Applicant, and they have established through credible testimony that the impacts of the proposed use would have a detrimental impact upon the comfort and convenience of neighboring properties, in part as a result of the close proximity to such a large number of residential properties.

19. The proposed use will detract from the use and enjoyment of the adjoining or nearby properties.

Memorandum of Law

I. Conditional Use Standards and Governing Law

A conditional use is one which evidences a legislative intent that a specific use is permitted under certain conditions, and where the landowner can demonstrate compliance with the specific criteria set forth in the ordinance.

This Application is reviewed by the Board pursuant to the Ordinance and the Municipalities Planning Code §913.2, Governing Body's Functions; Conditional Uses.

(a) Where the governing body, in the zoning ordinances, has stated conditional uses to be granted or denied by the governing body pursuant to express standards and criteria, the governing body shall hold hearings on and decide requests for such conditional uses in accordance with such standards and criteria.

An applicant for conditional use has the burden to demonstrate compliance with the specific criteria of the ordinance. *Levin v. Board of Supervisors of Benner Township*, 669 A.2d 1063 (Pa.Cmwlth 1995), *aff'd*, 547 Pa. 161, 689 A.2d 224 (1997). Once the applicant meets the requirements, he has made out his *prima facie* case and the application must be granted unless the objectors present sufficient evidence that the proposed use has a detrimental effect on the public health, safety, and welfare. *Bailey v. Upper Southampton Township*, 690 A.2d 1324 (Pa.Cmwlth 1997).

An applicant for special exception or conditional use must demonstrate that his proposed use meets the applicable requirements of the zoning ordinance when the application is submitted. *Edgmont Township v. Springton Lake Montessori School, Inc.*, 622 A.2d 418 (1993); *Appeal of Baird*, 537 A.2d 976 (1988), *pet. for allowance of appeal denied*, 521 Pa. 613, 557 A.2d 344 (1989). A promise to comply or conditions compelling future compliance cannot cure an otherwise noncompliant application. *Edgmont Township*. If we were to adopt a rule that to obtain a special exception all that would be required is for an applicant to promise to come into compliance at some future date, it would make the approval process meaningless because once an applicant promises it would be entitled to receive the special exception. *Id.*, 622 A.2d at 420.

In *Sheetz*, the applicant sought a conditional use permit for construction of a service station. The application was denied by borough council on the grounds that the applicant failed

to demonstrate compliance with requisite standards of a “service conditional use.” The application did not show the required 40-foot buffer zone or planted buffer screen, which were required for the conditional use for a service station. The borough council reasoned that the applicant was not entitled to approval of its application by allowing them to establish compliance later in the context of a land development plan application. Thus, the applicant failed in its burden of establishing its application's compliance with the necessary requirements as a precondition to approval. We opined, the applicant “is not permitted to evade these requirements because a service station is a conditional use, and upon review, Borough Council properly denied the application.” *Sheetz*, 804 A.2d at 115.

Only after the applicant has proven that it has complied with the specific, objective criteria in the applicable zoning ordinance does the burden shift to any objectors to the application. But, if the objectors are able to establish that the application fails to satisfy the specific criteria set forth in the ordinance, the governing body’s inquiry may end and the application should be denied on that basis. It is respectfully submitted that the Applicant in this case has failed to demonstrate compliance with several specific criteria set forth in the Ordinance. Those specific areas will be detailed below.

Importantly, in evaluating whether the Applicant has satisfied its burden and determines that the application is deficient as to one or more of the specific standards set forth in the ordinance, then the Board may not use conditions of approval as a means to correct an otherwise deficient application. Said another way, conditions cannot be used to correct omissions on the part of the applicant in establishing compliance. *Elizabethtown/Mt. Joy Associates, L.P. v. Mt. Joy Township Zoning Hearing Board*, 934 A.2d 759, 768 (Pa.Cmwlth. 2007).

It is important to note that the standard for the burden of proof and persuasion is on the Applicant before any burden shifts to the Objectors. Said another way, the Applicant must convince this Board that they have met all of the criteria set forth in the Ordinances before the Board would even begin to analyze the measures of impact. So, if the Applicant failed to meet that burden, then the conclusion of the Board must be to deny the application without regard to conditions of approval.

Determinations as to the credibility of witnesses and the weight to be given evidence are matters left solely to the Board in the performance of its fact-finding role. *Amerikohl Mining*,

Inc. v. Zoning Hearing Board, 597 A.2d 219 (1991).

II. Analysis of Specific Criteria

Pennsylvania Law is clear that the Applicant in a conditional use application has the burden to demonstrate compliance with the objective requirements of the ordinance. *Levin v. Board of Supervisors of Benner Township*, 669 A.2d 1063 (Pa.Cmwlt.1995), *aff'd*, 547 Pa. 161, 689 A.2d 224 (1997). The Applicant for the proposed use here has failed to demonstrate that they are in compliance with a number of specific criteria that the Ordinance sets forth for its application for conditional use. By failing to meet the burden that has been placed upon them **for even one** of these requirements, the Applicant is not entitled to any presumption of legislative acceptance that the use is consistent with the zoning plan.

Section 522 of the ZO establishes eight specific objective criteria the applicant must satisfy to meet its burden in a conditional use proceeding. The Applicant failed to satisfy Criteria 2. Criteria 2 requires “the minimum lot size for the establishment of any Solar Farm shall be fifty (50) acres.” The Applicant interpreted this provision as requiring at least one of the twelve participating properties to meet the 50-acre minimum. Applicant’s land use planning expert opined that this provision was ambiguous because the ZO did not define the term “minimum.” Objectors’ land use planning expert testified that provision was not ambiguous. Four of the participating properties do not meet the 50-acre threshold. See Applicant’s Exhibit A-1. The Board finds the expert testimony of Lawrence Lahr to be more credible and reliable than Applicant’s expert Timothy Shaub.

The Applicant does not appear to have satisfied Criteria 3 regarding set backs and Criteria 4 regarding buffering or fencing. The Board does not agree with Applicant’s land use expert who opined Criteria 3 was ambiguous because the phrase “adjacent lot line” was not defined. He testified the provision was ambiguous because it could be interpreted as adjacent land uses not adjacent lots. The Board agrees with Lahr’s opinion that the provision is not ambiguous and credits his testimony as reliable and more credible than Applicant’s expert. Moreover, it appears the Applicant believes it may satisfy Criteria 3 through waivers signed by certain participating property owners. See Applicant’s Exhibit A-12.

The language of the ordinance is mandatory. Once the Ordinance was adopted in its current form, the only body having any authority to grant relief from its requirements is the Zoning Hearing Board by way of a variance. There is no evidence of a variance having been sought in relation to the instant application.

Similarly, the Applicant produced waivers signed by certain participating landowners to waive the buffering or fencing required by Criteria 4.

Objectors offered the expert testimony of Lawrence Lahr to establish this point without question. There is no discretionary aspect that afforded the Applicant the ability to defer compliance when the clear language of the Ordinance requires otherwise.

The Board also finds the Applicant failed to satisfy Criteria 5. The Applicant interpreted this provision as applying to the entirety of the dozen participating properties instead of each individual property.

In the case of *In re: Richboro CD Partners, L.P.* the Commonwealth Court succinctly stated the governing law stating:

Although a municipal legislative body is entitled to deference in its interpretation of the zoning ordinance, it is axiomatic that an undefined term must be interpreted in accordance with the common and approved usage and that any doubt concerning the meaning of an undefined term should be resolved in favor of the landowner and the least restrictive use. *In re Arnold*, 984 A.2d 1, 10 (Pa.Cmwlth.2009); *Diocese of Altoona–Johnstown v. Zoning Hearing Board of Borough of State College*, 899 A.2d 399, 402 (Pa.Cmwlth.2006); *Pittsburgh Cellular Telephone Co. v. Board of Supervisors of Marshall Township*, 704 A.2d 192, 194 (Pa.Cmwlth.1997). Where possible, an ordinance must be construed to give effect to all of its provisions. *In re Thompson*, 896 A.2d 659, 669 (Pa.Cmwlth.2006); *Mann v. Lower Makefield Township*, 160 Pa.Cmwlth. 208, 634 A.2d 768, 772 (1993); *Appeal of Neshaminy Auto Villa Ltd.*, 25 Pa.Cmwlth. 129, 358 A.2d 433, 435 (1976); *see also* Section 1921 of the Statutory Construction Act of 1972, 1 Pa.C.S. § 1921.

89 A.3d 742 (2014).

Failure to present evidence establishing that these Ordinance requirements have been met effectively ends the inquiry into whether approval for this conditional use should be granted. *See Manor Healthcare Corp. v. Lower Moreland Tp. Zoning Hearing Bd.*, 590 A.2d 65 (Pa.Cmwlth 1991). (“The applicant...has both the duty of presenting evidence and the burden of persuading the...Board that the proposed use satisfies the objective requirements of the ordinance...”).

The Applicant took the position that the general standard is for compliance with Criteria 6, 7 and 8 to be demonstrated a later stage. However, caselaw holdings to that effect did not involve local ordinances where such requirement is specifically identified.

Here, the Applicant has frequently attempted to claim some details will be dealt with in the development phase. A promise to comply, or conditions compelling future compliance cannot cure an otherwise noncompliant application. *In re Thompson*, 896 A.2d 659 (Pa.Cmwlth 2006), *citations omitted*. The Court in *Thompson* quoted some comment on this rule of law: “[i]f we were to adopt a rule that to obtain a special exception all that would be required is for an applicant to promise to come into compliance at some future date, it would make the approval process meaningless because once an applicant promises it, it would be entitled to receive the special exception”. *Id.* The Court’s rationale in *Thompson* is equally applicable to many other areas of the Applicant’s development.

Rather, the Courts have held that great discretion is given to the governing body in its legislative capacity, but the specific requirements of the ordinance will be upheld where the language of the ordinance reflects a legislative intent to ensure compliance at the conditional use stage. As stated above, both the mandatory language in the Ordinance itself, along with the uniqueness of the particular use in question demonstrate a legislative intent to require compliance at the zoning permit stage, i.e. conditional use approval.

Recently, this notion was examined by the Commonwealth Court when it held:

We recognize that this Court has stated that zoning regulates the use of land, not the particulars of development and construction, and that, therefore, typically an application for a special exception need not address the issues of adequate sewage capacity, storm water management or water supply requirements. *Schatz v. New Britain Twp. Zoning Hearing Bd. of Adjustment*, 141 Pa.Cmwlth. 525, 596 A.2d 294 (1991). However, where a zoning ordinance provision requires that the adequacy of such items be addressed, a special exception can be denied if the applicant fails to establish that it can meet the requirements. *See Greth*, 918 A.2d at 186 (holding, “where the provision of sewage capacity is specifically required by the zoning ordinance, a special exception can be denied if the applicant fails to establish that it can meet the sewage treatment requirements”); *E. Manchester Twp. Zoning Hearing Bd. v. Dallmeyer*, 147 Pa.Cmwlth. 671, 609 A.2d 604, 608 (1992) (holding that zoning ordinance requirement “that all mobile homes be supplied with a ‘continuing supply of safe and potable water as approved by the [Department of Environmental Protection]’ is permissible insofar as the

[z]oning [b]oard only considers whether the applicant can supply sufficient potable water to the proposed development”).

Heisler's Egg Farm, Inc. v. Walker Twp. Zoning Hearing Bd., 232 A.3d 1024, 1040 (Pa. Commw. Ct.), *appeal denied*, 241 A.3d 647 (Pa. 2020).

The applicant is required to show compliance with the requirements set forth in the ordinance, and where the applicant fails to do so, denial of application is appropriate. *K. Hovnanian Pennsylvania Acquisitions, LLC v. Newtown Township Board of Supervisors*, 954 A.2d 718 (Pa.Cmwlth 2008)

CONCLUSION

FOR THE FOREGOING REASONS, the Objectors respectfully submit that the Board must deny the conditional use application filed by Lebanon Solar I, LLC, on the basis that the application fails to meet multiple specific objective criteria necessary for approval of a Solar Farm as a conditional use.