

**IN THE COURT OF COMMON PLEAS OF LEBANON COUNTY
PENNSYLVANIA**

LEBANON SOLAR I, LLC,

Appellant,

v.

NORTH ANNVILLE TOWNSHIP BOARD
OF SUPERVISORS,

Appellee.

) Civil Division

)
) No. 2022-00553

) **AMENDED NOTICE OF LAND USE
) APPEAL**

) Filed on behalf of Appellant,
) Lebanon Solar I, LLC

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**IN THE COURT OF COMMON PLEAS OF LEBANON COUNTY
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LEBANON SOLAR I, LLC,)	Civil Division
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Appellant,)	No.
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Appellee.)	
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AMENDED NOTICE OF LAND USE APPEAL

AND NOW, comes Lebanon Solar I, LLC (“Lebanon Solar”), by and through its counsel, Babst, Calland, Clements & Zomnir, P.C., and files this Amended Notice of Land Use Appeal in the above-captioned matter. This Amended Notice of Land Use Appeal restates and supplements the grounds for appeal set forth in Lebanon Solar’s Notice of Land Use Appeal challenging the decision of the Board of Supervisors of North Annville Township (“Township”) denying Lebanon Solar’s conditional use application, in light of Lebanon Solar’s subsequent receipt of a document entitled “Findings of Fact, Conclusions of Law and Decision” after Lebanon Solar filed the Notice of Land Use Appeal.

1. Appellant Lebanon Solar is a Delaware limited liability company with its principal place of business located at 100 Brickstone Square, Suite 300, Andover, Massachusetts, 01810.
2. Appellee Township is a Second-Class Township and political subdivision of the Commonwealth of Pennsylvania, situated in the County of Lebanon, with its municipal office located at 1020 N. State Route 934, Annville, Pennsylvania 17003, acting by and through the Board of Supervisors of the Township (“Board”).

3. Lebanon Solar is developing a multimillion-dollar solar farm project, a use that is permitted conditionally in the Township, in a manner that benefits the entire community. The project will increase tax revenues, create jobs, and generate long-term payments to local landowners. Nine (9) landowners of twelve (12) parcels in the Township voluntarily negotiated regarding their specific property rights and entered into contracts with Lebanon Solar to participate in the solar farm project.

4. On October 14, 2019, in accordance with the Pennsylvania Municipalities Planning Code, 53 P.S. §10101 et seq. (the “MPC”), the Township Supervisors adopted Ordinance No. 2-2019, amending the Township Zoning Ordinance of 1973, as amended (the “Zoning Ordinance.”) Relevant portions of the Zoning Ordinance are attached as Exhibit “1.”

5. The Zoning Ordinance, as amended, classifies solar farms as a conditional use in the A-1 zoning district, subject to the review and recommendation from the Township Planning Commission and subject to approval by the Board following a public hearing.

6. On or about May 3, 2021, Lebanon Solar filed a single application for Township approval (the “Application”) of a Solar Farm (the “Project.”) The Project, as amended and presented to the Board for approval, would be located upon eight hundred and fifty-eight (858) acres, comprised of twelve (12) individual tax parcels owned by Alan D. Hostetter and Robin D. Hostetter, Dale E. Hostetter and Thelma M. Hostetter, Parke W. Breckbill and Susan J. Breckbill, Brent A. Kaylor and Julia S. Kaylor, Eli E. Nolt and Darla Nolt, Leonard C. Long and Michael L. Long, Bruce Brightbill and Hilda Brightbill, the Baer Brothers Farms, and Elvin M. Hostetter and the Hostetter Family Limited Partnership Two (collectively referred to as “Participating Landowners,”) and otherwise identified as parcel numbers 25-229478-379886-0000, 25-2302207-381436-0000, 25-2299571-378739-0000, 25-2297632-376780-0000, 25-2301670-388452-0000,

25-2299880-373803-0000, 25-2302100-379838-0000, 25-2302257-387871-0000, 25-2300405-381893-0000, 25-2300498-383638-0000, 25-2299851-378128-0000, and 25-2296964-375508-0000 by the Lebanon County Assessment Office (collectively referred to as the “Property.”) The Property is located in the Township’s A-1 Agricultural Zone (“A-1 District.”) The Township accepted the Application as administratively complete and processed it without any objection to the filing of one application for twelve distinct tax parcels.

7. The Township Planning Commission (“Planning Commission”) reviewed the Application on June 7, 2021, and recommended denial of the Application. One Supervisor, Mr. Randy Leisure, is also a member of the Planning Commission. A quorum of the Board was present at the June 7, 2021, Planning Commission meeting and engaged in deliberations on the Application.

8. The Board scheduled, advertised, and commenced a public hearing on January 25, 2022.

9. The Board continued the public hearing and heard additional sworn testimony on January 26, 2022, and February 24, 2022, and closed the hearing at the conclusion of the February 24, 2022, hearing.

10. At the conclusion of the February 24, 2022, hearing, the Board asked Lebanon Solar and interested parties to submit proposed findings of fact and conclusions of law to the Board and stated the Board would reconvene on April 5, 2022, for a decision on the Application.

11. In its Application and during the course of the public hearing, Lebanon Solar presented evidence conclusively establishing that it met all of the eight enumerated requirements of the Ordinance applicable to solar farms. In addition, on March 24, 2022, in its proposed findings of fact and conclusions of law submitted to the Township in accordance with the Township’s stated

deadline for submission, (“Lebanon Solar’s Proposed Findings and Conclusions”) Lebanon Solar offered five (5) conditions as part of the approval of the Application to address even community concerns not addressed by the Ordinance and to demonstrate its continued cooperation with the Township related to its operations. A copy of Lebanon Solar’s Proposed Findings and Conclusions is attached as Exhibit “2.”

12. On March 30, 2022, the Board held an executive session for the purpose of reviewing proposed findings of fact and conclusions of law submitted by Lebanon Solar and certain objecting landowners.

13. At its public meeting held on April 5, 2022, the Board again entered into an additional executive session for the purpose of deliberation on the Application. Following this private deliberation, the Board came back into public session and entertained a motion to deny the Application. At that time, Supervisor Adam Wolfe announced that he intended to abstain from voting due to a conflict of interest because three of the parcels which are part of the proposed project are owned by members of his extended family. Supervisor Wolfe had previously participated in all of the hearings before the Board, and had also attended the Planning Commission meetings, but at no time noted his intent to abstain from participating in the Board’s deliberation and decision. He also participated in all of the executive sessions held by the Board. Supervisor Wolfe did not disclose the nature of his interest as a public record in a written memorandum as required by Section 1103(j) of the Pennsylvania Public Official and Employee Ethics Act, 65 P.S. §1103(j).

14. There was no public discussion or deliberation on the Application, however the Chairman of the Board, Mr. Leisure, stated “I think the members of the Board feel that the Application, the lots, the 12 lots do not meet all of the criteria as listed in the ordinance.” Without

any additional discussion or debate as to the merits of the Application or the proposed conditions, the Board then proceeded to vote, with two board members (Chairman Leisure and Clyde Meyer) voting yes on the motion, and one member (Mr. Wolfe) abstaining. Chairman Leisure then announced that the Application was denied, and the meeting was adjourned (“Decision”). No written decision was provided to Lebanon Solar personally or mailed to it the following day as required by Section 908 (10) of the MPC. 53 §10908(10)¹.

15. On May 5, 2022, Lebanon Solar filed a Notice of Land Use Appeal from the Decision with this Court at the above-captioned docket number. A copy of the Notice of Land Use Appeal is attached as Exhibit “3.” However, because the Board did not notify Lebanon Solar of any specific basis for the action taken, and Lebanon Solar was not in receipt of any findings, conclusions, or other written explanation for the Decision at the time of filing, Lebanon Solar reserved the right to supplement and amend the Notice of Land Use Appeal upon its receipt of the same.

16. Under cover of correspondence dated May 12, 2022, the Township Solicitor transmitted to Lebanon Solar’s legal counsel a document entitled “In Re: Conditional Use Application of Lebanon Solar I, LLC, Findings of Fact, Conclusions of Law and Decision,” (the “Township Findings and Conclusions.”) A true and correct copy of the Township Findings and Conclusions is attached hereto as Exhibit “4.” The Township Findings and Conclusions are only signed by one member of the Board, the Board Chair. Upon information and belief, there was never a vote by the Board at a public meeting to approve the Township Findings and Conclusions.

¹ The MPC defines “decision,” as the “final adjudication of any board or other body granted jurisdiction under any land use ordinance or this act to do so...” Consequently the “decision” of the Board occurred at the time of the vote on April 5, 2022.

Lebanon Solar is unable to discern if the abstaining Board member, Mr. Wolfe, participated in discussion, drafting, or approval of the Township Findings and Conclusions.

17. Despite the ample record and extensive amount of evidence presented at the hearings, the Township Findings and Conclusions are a mere eight (8) pages long and include only twenty-eight (28) findings of fact and twenty-six (26) conclusions of law. The Township Findings and Conclusions allege that Lebanon Solar failed to demonstrate compliance with six (6) of the eight (8) specific criteria of the Zoning Ordinance, yet failed to reference, let alone make credibility or sufficiency determinations on, the majority of the evidence presented by Lebanon Solar in support of its compliance with those criteria.

18. Notably, the Board found that the term “lot” in the Zoning Ordinance meant that each of the twelve (12) individual participating tax parcels were required to comply with all eight (8) ordinance criteria *individually*, and that the Zoning Ordinance did not permit a “campus” concept to be utilized. *See* Township Findings and Conclusions, Ex. 4, Conclusions 11,12, and 13. These three related conclusions, each of which impermissibly narrow the terms of the Zoning Ordinance, fail to follow express requirements of ordinance construction contained in the MPC, and were arbitrarily made in contradiction to unchallenged and uncontradicted expert testimony provided by Lebanon Solar, appear to be the crux of the Board’s denial of the Application.

19. Lebanon Solar hereby appeals and requests that this Court reverse the Board’s Decision on the basis that

- a. It is arbitrary, capricious and an abuse of discretion;
- b. It is not supported by any provision of the Zoning Ordinance or other Township ordinance;
- c. It is not supported by any substantial evidence of record;

- d. The Board concluded absent any evidence of record, that the Application related to twelve (12) separate *lots* as that term is defined under the Zoning Ordinance;
- e. The Board concluded absent any findings on the same or evidence of record, and in contradiction to and capricious disregard of uncontested expert testimony provided by Lebanon Solar, that the Zoning Ordinance does not permit individual tax parcels to be combined under a “campus” concept;
- f. The Board is equitably estopped from arguing that the Zoning Ordinance prohibits a “campus” concept where it accepted and processed the Application for *one* (1) Solar Farm comprising of (12) *twelve* parcels and through its acceptance and processing of that Application as administratively complete and its failure to raise the issue over the course of the eleven (11) months that lapsed in between submission and the Decision, either intentionally or negligently misrepresented to Lebanon Solar that the concept it proposed was acceptable, resulting in Lebanon Solar’s justifiable reliance on that representation, and the loss of significant expenditures made in reliance on that representation;
- g. The Board’s conclusion that a “campus” concept is not permitted under the Zoning Ordinance would result in a *de facto* exclusionary application of the Ordinance as “utility scale” solar farms, expressly permitted by the Zoning Ordinance, require significant acreage which could not be obtained, or could be obtained only in such limited areas of the Township, absent the ability to utilize multiple individual tax parcels for a single project;

- h. The Board concluded absent any findings or any evidence of record that each of the individual twelve (12) tax parcels failed to meet the eight (8) ordinance criteria;
- i. The Board concluded absent any findings or any evidence of record, and in contradiction to and capricious disregard of uncontested expert testimony of Lebanon Solar, that the Project does not comply with the requirement that solar panels and other implements used in the construction and structure of the solar farm be set back fifty (50) feet from any *adjacent* lot line because it does not currently propose fifty-foot setbacks from lot lines *internal* to the Project;
- j. The Board concluded in direct contradiction to all evidence of record, and in reliance on the same flawed conclusion articulated in subparagraph “i” above, that Lebanon Solar failed to demonstrate that it will provide a suitable vegetative buffer or a fence which accomplishes the same purpose *between* the participating tax parcels as opposed to providing screening between *adjacent* properties;
- k. The Board concluded absent any findings and in contradiction to evidence of record that the vegetative buffer or fencing proposed by Lebanon Solar does not meet the requirements of criterion number 4 of the Zoning Ordinance;
- l. The Board concluded in contradiction to and in capricious disregard of competent evidence of record that Lebanon Solar failed to present sufficient evidence upon which the Board could determine whether or not the Project complied with the maximum lot coverage requirement of the Zoning

Ordinance, which requires that *impervious materials* not exceed fifty (50) percent of the total lot size;

- m. The Board concluded in contradiction to and in capricious disregard of competent evidence of record, including expert testimony, that solar panels must be included in the calculation of lot coverage and that Lebanon Solar failed to include panels in its calculations or to show how panels will be arrayed on individual lots. In fact, Lebanon Solar demonstrated through uncontested evidence that if solar panels are included in the definition of "*impervious materials*," the total lot coverage of the Project would be merely 20.4% of the total project area;
- n. The Board denied the Application based on Lebanon Solar's purported failure to meet the lot size, setback, buffering and lot coverage criteria where it more properly should have granted the Application subject to the condition that these criteria be met;
- o. The Board concluded in contradiction to well established Pennsylvania zoning jurisprudence that Lebanon Solar was required to submit appropriate bonding at the conditional use approval stage and improperly denied the Application on that basis rather than including it as a condition of approval;
- p. The Board concluded in contradiction to well established Pennsylvania zoning jurisprudence that Lebanon Solar was required to submit an approved Stormwater Management Plan at the conditional use approval stage and improperly denied the Application on that basis rather than including it as a condition of approval;

- q. The Board failed to make necessary findings of fact and credibility determinations regarding the testimony and evidence provided, including but not limited to findings in support of its undocumented policy and unsupported positions that the Zoning Ordinance prohibits individual tax parcels to be combined under one use in a “campus” concept, and that the term “adjacent” does not mean “adjacent to the use” but includes all internal lot lines;
- r. The Board improperly narrowed the terms of the Zoning Ordinance to include requirements not included therein;
- s. The Board violated Lebanon Solar’s rights to due process and an unbiased decision-making tribunal, untainted by participate up to the eleventh hour by a Board member who then announced his conflict and recusal;
- t. The Decision is otherwise not authorized by and/or otherwise inconsistent with other applicable law;
- u. The Board willfully and deliberately disbelieved competent, relevant, and apparently trustworthy evidence resulting in impermissible capricious disregard of the same, *see Taliaferro v. Darby Township Zoning Hearing Board*, 873 A.2d 807,814-15 (Pa. Cmwlth. 2005), evidenced by and including, but not limited to, its failure to even name, let alone consider the testimony of, three out of the four witnesses put forth by Lebanon Solar in the Findings and Conclusions; and
- v. The Board failed to render sufficient findings of fact and conclusions of law articulating the reasoning behind its decision.

20. The litany of reversible errors set forth above are the culmination of the repeated disregard for procedure and statutory obligations and the continued violation of Lebanon Solar's rights to due process and an unbiased decision-making tribunal, as evidenced by the following:

- a. Repeatedly violated the Pennsylvania Sunshine Act, 65 P.S. §701 *et seq.*, by holding Township Planning Commission meetings at which a quorum of the Board was present and engaged in deliberations on the Application without notice to the Applicant, or opportunity for the Applicant to attend or to provide testimony
- b. Directed the Township Planning Commission to "update its" original recommendation to deny the Application after the hearings had already begun and based upon information presented at those hearings, not only in violation of the Sunshine Act, but evidencing a clear bias against and prejudgment of the Application through a blatant mandate to the Planning Commission to create additional evidence in opposition to the Application. Notably, the recommendation, dated February 8, 2022, expressly states that it was done at the request of Supervisor Wolfe, who later abstained from the Decision, alleging a conflict of interest, and who therefore should not have been involved *at all* in the conditional use process, let alone engaging in actions outside of the hearings to actively oppose the Project, and in addition, upon information and belief a member or members of the Board publicly declared opposition to the Project at one or more public meetings.

21. Because the Board's Findings and Conclusions are so deficient and fail to make adequate findings of fact or credibility determinations, because they fail to summarize or even

consider the vast majority of the testimony and evidence provided, and because the conclusions of the Board so clearly deliberately ignore relevant and competent evidence, Lebanon Solar requests that this Court undertake a *de novo* review of the record. It is clear upon receipt of the Findings and Conclusions that the Board never had any intention of considering the evidence presented by Lebanon Solar, nor did it, and the Board's decision was preordained and made prior to the commencement of any hearing. Because the Board's actions deprived Lebanon Solar of its rights to due process and an unbiased decision-making tribunal, Pennsylvania law supports Lebanon Solar's request that this Court undertake a *de novo* review of the record and making independent findings of fact based on that record, together with any additional evidence deemed necessary by the Court, in order to reach conclusions of law and a decision on the merits of the Application. *McVay v Zoning Hearing Bd. of New Bethlehem Borough*, 496 A.2d. 1328 (Pa. Cmwlth. 1985).

WHEREFORE, Lebanon Solar I, LLC respectfully requests that this Honorable Court conduct a *de novo* hearing and thereafter render independent findings of fact, conclusions of law, and a decision reversing the Decision of the Board and approving Lebanon Solar's Application for a Solar Farm on the Property.

Date: June 16, 2022

Respectfully submitted,

BABST, CALLAND, CLEMENTS & ZOMNIR, P.C.

By: 

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by:

Signature:

A handwritten signature in cursive script, appearing to read 'Anna S. Jewart', written over a horizontal line.

Name: Anna S. Jewart, Esquire

Attorney No. (if applicable): Pa. I.D. 328008

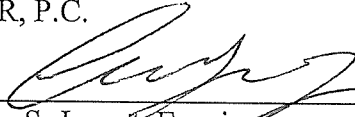
CERTIFICATE OF SERVICE

I, Anna S. Jewart, do hereby certify that a true and correct copy of the foregoing Amended Notice of Land Use Appeal was served in the following manner this 16th Day of June, 2022, upon the following:

Paul C. Bametzreider, Esquire
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Attorney for Appellee Township

BABST, CALLAND, CLEMENTS AND
ZOMNIR, P.C.

By: _____


Anna S. Jewart, Esquire