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June 7, 2023

VIA FEDERAL EXPRESS

Lebanon County Prothonotary
Attn: Barbara A. Smith, Prothonotary
Room 104
Municipal Building
400 South 8th Street
Lebanon, PA 17042-6794

Re: Lebanon Solar I, LLC v. North Annville Township Board of Supervisors
No. 2021-01236

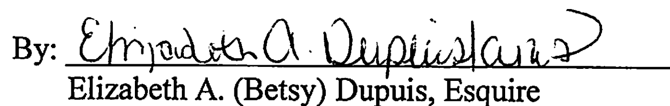
Dear Ms. Smith:

Enclosed please find our Brief in Support of Land Use Appeal for filing along with a copy to be timestamped and returned to our office in the enclosed self-addressed stamped envelope.

Please contact our office with any questions. Thank you.

Very truly yours,

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

By: 
Elizabeth A. (Betsy) Dupuis, Esquire

EAD/ams

Enclosures
cc: Paul Bametzreider, Esquire
William J. Cluck, Esquire

COPY

IN THE COURT OF COMMON PLEAS OF LEBANON COUNTY PENNSYLVANIA

LEBANON SOLAR I, LLC,	)	Civil Division
	)	
Appellant,	)	No. 2021-01236
	)	
v.	)	
	)	**BRIEF IN SUPPORT OF LAND**
NORTH ANNVILLE TOWNSHIP,	)	**USE APPEAL**
	)	
Appellee,	)	Filed on behalf of Appellant,
	)	Lebanon Solar I, LLC
and	)	
	)	Counsel of Record for this Party:
GRADY SUMMERS,	)	
	)	Elizabeth A. Dupuis
Intervenor.	)	PA I.D. No. 80149
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	)	Firm I.D. No. 812

IN THE COURT OF COMMON PLEAS OF LEBANON COUNTY PENNSYLVANIA

LEBANON SOLAR I, LLC,	)	
	)	
Appellant,	)	Civil Division
	)	
v.	)	No. 2021-01236
	)	
NORTH ANNVILLE TOWNSHIP,	)	
	)	
Appellee,	)	
	)	
and	)	
	)	
GRADY SUMMERS,	)	
	)	
Intervenor.	)	

BRIEF IN SUPPORT OF LAND USE APPEAL

NOW COMES Appellant Lebanon Solar I, LLC ("Lebanon Solar"), by and through its counsel, Babst, Calland, Clements & Zomnir, P.C., and files this Brief in Support of Land Use Appeal, challenging the decision of the Board of Supervisors of North Annville Township ("Township") denying Lebanon Solar's conditional use application for the operation of a solar farm in the Township. In this case, the Township Board of Supervisors ("Board") was confronted with a novel use of land through an application to complement the existing agricultural uses with the introduction of solar panels. Instead of following the well-established law on the burden of proof for conditional uses, the Board heeded the calls of detractors to this

new use and denied the application. In doing so, the Board committed multiple reversible errors and Lebanon Solar respectfully requests this Honorable Court reverse the decision of the Township and grant Lebanon Solar's conditional use application.

I. STATEMENT OF JURISDICTION

This Court has subject matter jurisdiction over this matter pursuant to 42 Pa. C.S. §931. Venue is proper in this Court pursuant to Pennsylvania Rules of Civil Procedure 1006(a)(2) and 1092(c)(2), in that the suit is brought in the county in which the subject property and the Appellee Township are located, and equitable relief is sought with respect to this property.

II. ORDER OR OTHER DETERMINATION IN QUESTION

This matter is the appeal of the May 12, 2022, written decision of the Township Board of Supervisors ("Board") entitled "In Re: Conditional Use Application of Lebanon Solar I, LLC, Findings of Fact, Conclusions of Law and Decision," (the "Decision"), a true and correct copy of which is attached to Lebanon Solar's Amended Notice of Land Use Appeal as Exhibit "4" and incorporated herein by reference.

III. STATEMENT OF SCOPE AND STANDARD OF REVIEW

The issues in this zoning appeal involve the sufficiency of the evidence before the Board and consequently the scope of review is whether the Township committed an abuse of discretion or error of law. *In re Realen Valley Forge Greenes Associates,* 838 A.2d 718, 727 (Pa. 2003); *Valley View Civic Association,* 462 A.2d 637, 639-40 (Pa. 1983). An abuse of discretion is found where the Board's findings are not supported by substantial evidence. *Berman v. Manchester Township Zoning Hearing Board,* 540 A.2d 8, 9 (Pa. Cmwlth. 1988), *pet. denied,* 129 M.D. 1988 (Pa. 1989). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support the conclusion. *Valley View Civic Ass'n,* 462 A.2d at 640.

Further, when a factfinder deliberately ignores relevant, competent evidence, the capricious disregard standard of review is applicable to the decisions of administrative agencies and zoning hearing boards. *Leon E. Wintermyer v. Workers' Comp. Appeal Bd.,* 812 A.2d 487 (Pa. 2002); *Taliaferro v. Darby Twp. Zoning Hearing Bd.,* 873 A.2d 807, 814 (Pa. Cmwlth. 2005), *pet. denied,* No. 574 MAL 2005 (Pa. 2005) (a capricious disregard of evidence is a deliberate and baseless disregard of apparently reliable evidence); *see also* 2 Pa. C.S.A. § 754(b) ("In the event a full and complete record of the proceedings before the local agency was made... the court shall affirm the adjudication unless . . . any finding of fact made

by the agency and necessary to support its adjudication is not supported by substantial evidence.").

In addition, as a quasi-judicial decision-making tribunal, the Board must also avoid not only actual bias, but also even the appearance of bias or impropriety and the existence of bias or a lack of impartiality is grounds to find a zoning decision void. *See Horn v. Township of Hilltown,*337 A.2d 858 (1975); *McVay v. Zoning Hearing Board of New Bethlehem Borough,* 496 A.2d. 1328 (Pa. Cmwlth. 1985); *see also Prin v. Council of the Municipality of Monroeville*, 645 A.2d 450 (Pa. Cmwlth. 1994) (invalidating denial of conditional use and site plan due to councilman's previous stated opposition to the project).

IV. STATEMENT OF QUESTIONS INVOLVED

1. Did the Board commit an abuse of discretion, error of law, or capriciously disregard competent evidence by concluding that the Zoning Ordinance required each individual tax parcel to independently meet all eight criteria contained in Section 522 of the Zoning Ordinance and denying the Application on those grounds?

   Suggested answer: Yes.

2. Did the Township otherwise commit an abuse of discretion, error of law, or capriciously disregard competent evidence in denying Lebanon Solar's conditional use application?

   Suggested answer: Yes.

3. Did the Township act upon Lebanon Solar's conditional use application without the appearance of possible prejudice, bias, or impropriety?

   Suggested answer: No.

V. STATEMENT OF THE CASE.

Lebanon Solar hereby incorporates by reference, to be made a part hereof as if fully set forth below, the statements of fact and arguments contained in its Amended Notice of Land Use Appeal attached hereto as Attachment "A." The specific factual and procedural history of the case will therefore not be repeated at length below.[1]

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[1] Following issuance of this Court's Order dated April 6, 2023, several months after this appeal was filed, the Township served Lebanon Solar with a copy of the record in this matter. The Township disputes any obligation to serve the certified record upon Lebanon Solar. The Pennsylvania Municipalities Planning Code ("MPC"), Section 1003-A(b), states:

> "[u]pon filing of a land use appeal, the prothonotary or clerk shall forthwith, as of course, send to the governing body, board or agency whose decision or action has been appealed, by registered or certified mail, the copy of the land use appeal notice, together with a writ of certiorari commanding said governing body, board or agency, within 20 days after receipt thereof, to certify to the court its entire record in the matter in which the land use appeal has been taken, or a true and complete copy thereof, including any transcript of testimony in existence and available to the governing body, board or agency at the time it received the writ of certiorari."

53 P.S. §101003(b).

Under the Pennsylvania Rules of Appellate Procedure, all papers filed by any party which are not to be served by the prothonotary "shall, concurrently with their filing, be served by a party or person acting on behalf of that party or person on all other parties to the matter." Pa. R.A.P. 121(b). Clearly, the obligation to generate, file, and serve the record upon all parties rests with the Township.

Furthermore, Rules 1951 and 1952 of the Pennsylvania Rules of Appellate Procedure govern the record on petitions for review of orders of government units other than courts. *See* Pa. R.A.P. 1951, 1952. Pa. R.A.P. 1952 requires that the government unit, in this instance the Township, certify the contents of the record which shall include "a list of all documents, transcripts of testimony, exhibits and other material comprising the record [and]... shall (1) arrange the documents to be certified in chronological order, (2) number them, and (3) affix to the right or bottom edge of the first page of each document a tab showing the number of that document..." The Township has failed to do so and has provided Lebanon Solar with an improperly organized record which is not bates-stamped and includes no table of contents. Therefore, Lebanon Solar cannot provide proper

Lebanon Solar submitted a conditional use application to the Township on May 3, 2021, (the "Application") for an eight hundred and fifty-eight (858) acre Solar Farm (the "Project"). The Project is proposed to be sited across twelve 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 by the Lebanon County Assessment Office 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 (collectively referred to as the "Property"). The Township accepted and processed the Application as a single application for a single Solar Farm. Tr.1/25/22 at 12, 48. The Property is entirely located in the Township's A-1 Agricultural Zone ("A-1 District").

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references to the record as required by Pa. R.A.P. 2132. Lebanon Solar has consequently designated references to specific documents within the record utilizing intelligible abbreviations as permitted by Rule 2132(b). References to exhibits of Lebanon Solar before the Township shall be referred to as "Lebanon Ex.______," references to exhibits of objecting parties before the Township shall be referred to as "Objector Ex._____," and references to transcripts of hearings before the Township shall be referred to as "Tr.[DATE]____."

The Township Board of Supervisors ("Board") advertised and conducted a public hearing on January 25, January 26, and February 24, 2022. The public hearing was closed on February 24, 2022. At the commencement of the public hearing eight (8) Township residents were granted party status by the Board, one of which, Mr. Grady Summers has intervened in this Appeal (collectively the "Objectors"). The Application was denied at a public meeting held on April 5, 2022, and the Board transmitted its written Decision to Lebanon Solar on May 12, 2022. *See* Exhibit 4 to Attachment "A."

VI. SUMMARY OF ARGUMENT.

As the applicant for a conditional use, Lebanon Solar was required to prove the Project met any specific, objective criteria contained in the Township Zoning Ordinance.[2] Lebanon Solar presented competent evidence establishing that it had done so, and the Board erred as a matter of law in finding that Lebanon Solar did not meet six (6) of the eight (8) specific criteria contained in the Township Zoning Ordinance. Most notably, the Township erred in concluding that the defined and plain meaning of the term "lot" in the Zoning Ordinance meant that each of the twelve (12) individual participating tax parcels which make up the Property were required to comply with all eight (8) ordinance criteria individually. The Board impermissibly deviated from the express terms of the Ordinance to conclude that a "campus concept" in which the Project would be reviewed as a whole, was not permitted, despite there being no such requirement in the Ordinance and no evidence in the record which indicated that was the intent or requirement of the Ordinance. Further, the Board accepted a single Application from Lebanon Solar for the Property rather than accepting separate applications for each parcel. In doing so, the

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[2] On October 14, 2019, in accordance with the Pennsylvania Municipalities Planning Code, 53 P.S. §10101 *et seq.*, (the "MPC"), the Township adopted Ordinance No. 2-2019, amending the Township Zoning Ordinance of 1973, as amended to address the "Solar Farm" use. The Township Zoning Ordinance of 1973, as amended by Ordinance No. 2-2019, being the ordinance in effect as of the date the Application was submitted on May 3, 2021, shall be referred to hereafter as the "Zoning Ordinance" or the "Ordinance." The Township has failed to include a copy of the Township Zoning Ordinance of 1973 or Ordinance 2-2019 in the certified record. Consequently, a true and correct copy of Ordinance No. 2-2019 is attached hereto and incorporated herein as Attachment "B."

Board impermissibly narrowed the terms of the Zoning Ordinance, failed to follow express requirements of ordinance construction contained in the MPC, and made arbitrary conclusions in contradiction to unchallenged and uncontradicted expert testimony provided by Lebanon Solar.

The Board also erred in denying Lebanon Solar's Application based on its alleged failure to comply with ordinance criteria which must, pursuant to Pennsylvania law, be imposed as conditions of approval and may not be grounds for denial of a zoning application, or which are properly addressed during the land development phase.

Finally, the Decision capriciously disregards competent evidence set forth by Lebanon Solar and is founded upon bias and lack of impartiality which deprived Lebanon Solar of its due process right to an impartial decision-making tribunal.

VII. ARGUMENT

As the Pennsylvania Supreme Court has definitively stated "[t]he right of landowners in this Commonwealth to use their property as they wish, unfettered by governmental interference except as necessary to protect the interests of the public and of neighboring property owners, is of ancient origin, recognized in the Magna Carta, and now memorialized in Article I, Section 1 of the Pennsylvania Constitution (protecting as an 'inherent right of mankind... acquiring, possessing and protecting property')." *In re Realen Valley Forge Greenes Association*, 838 A.2d 718, 727 (Pa. 2003). While the natural or zealous desire of the Township to protect, improve and develop its community and to conserve the "tone" or "nature" of that community is commendable; the Township "must remember that property owners have certain rights which are ordained, protected and preserved in our Constitution and which neither zeal nor worthwhile objectives cam impinge upon or abolish." *Cleaver v. Board of Adjustment of Tredyffrin Township*, 200 A.2d 408, 413 n.4 (Pa. 1964). Here, it is clear from the record that the individual Participating Landowners, through Lebanon Solar, sought to utilize their properties in a manner expressly permitted by the Township Zoning Ordinance. However, rather than apply the Ordinance as written, the Board engaged in mental gymnastics to interpret its Ordinance in an illogical manner in order to prohibit the Project, favoring politics over the Constitutional rights of its own residents to "use their property as they

wish…" *In re Realen Valley Forge*, 838 A.2d at 727. As set forth below, the Board made several critical errors which resulted in a Decision that contradicts both the record before it and time-tested rules of ordinance interpretation and therefore must be reversed.

A. The Board Committed an Abuse of Discretion and Error of Law in Determining that Each Participating Tax Parcel Must Individually Meet all Criteria Contained in Section 522 of the Zoning Ordinance.

Conditional uses are uses expressly permitted, provided that the applicant meets the specific standards set forth in the zoning ordinance.[3] *See Bray v. Zoning Board of Adjustment*, 410 A.2d 909, 911 (Pa. Cmwlth. 1980). An applicant is entitled to conditional use approval as a matter of right unless it is determined "that the use does not satisfy the specific, objective criteria in the zoning ordinance for that conditional use," or the presumption that the use is consistent with the public health, safety, and welfare is rebutted by any objectors. *See In re Drumore Crossing, L.P.*, 984 A.2d 589, 595 (Pa. Cmwlth. 2009); *MarkWest Liberty Midstream and Resources, LLC v. Cecil Township Zoning Hearing Board,* 184 A.3d 1048, 1059 (Pa. Cmwlth. 2018) (*citing Allegheny Tower Associates, LLC v. City of Scranton Zoning Hearing Board*, 152 A.3d 1118, 1125 (Pa. Cmwlth. 2017)).

There is no dispute that Lebanon Solar's Application proposed a Solar Farm as defined under the Zoning Ordinance, or that Solar Farms are permitted within the A-1 District. *See generally* Decision. The Zoning Ordinance, at the time the Application was filed, did not set forth any additional general or "health and safety"

[3] "A conditional use is nothing more than a special exception which falls within the jurisdiction of the municipal governing body rather than the zoning hearing board." *In re Thompson*, 896 A.2d 659, 670 (Pa. Cmwlth. 2006). Because the law regarding conditional uses and special exceptions is virtually identical, the burdens of proof are the same. *Sheetz, Inc. v. Phoenixville Borough Council*, 804 A.2d 113, 115 n. 5 (Pa. Cmwlth. 2002).

criteria applicable to all conditional uses, and therefore the only criteria applicable to the Application are those contained in Section 522, adopted by the Township by Ordinance 2-2019.[4] *See generally* Zoning Ordinance. The Board did not raise any health, safety, or welfare concerns in its Decision and denied the Application solely on the grounds that Lebanon Solar allegedly failed to meet six (6) of the eight (8) use specific criteria contained in Section 522 of the Zoning Ordinance. *See* Decision at Conclusions ¶¶11-26.

At the time the Application was submitted, Section 522 of the Zoning Ordinance, which set forth the exclusive provisions applicable to the Application, stated:

> a. Section 522 – As of the effective date of this Ordinance, 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,

[4] Per Section 917 of the MPC, "[w]hen an application for... a conditional use has been filed with...the... governing body... and the subject matter of such application would ultimately constitute either a land development... or a subdivision... no change or amendment of the zoning, subdivision or other governing ordinance or plans shall affect the decision on such application adversely to the applicant..." 53 P.S. §10917.

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%) 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 million ($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.

Zoning Ordinance §522.

In its Decision, the Board concluded that:

> 11. The Board finds that in accordance with the definition of the term "lot" under its ordinance, applicant's application for conditional use relates to 12 separate defined lots, tracts, parcels or plots of land and not one lot.
>
> 12. The Board finds that in accordance with the plain meaning of the Word "lot", Applicant' s application relates to 12 separate lots and not one lot and therefore all lots must individually comply with the criteria of the ordinance.

13. The Board finds that the Applicant has failed to meet its burden re the compliance of each of the 12 separate lots with the 8 criteria of the ordinance.

14. The Board finds that its intention was that each lot be considered individually under its zoning ordinance and not that a "Campus" of lots be considered as one lot as represented by the Applicant.

Decision at Conclusions ¶¶11-14. The Board's purported interpretation of the term "lot" led it to conclude that Lebanon Solar failed to meet Sections 522(2), 522(3), 522(4) and 522(5) of the Zoning Ordinance. Decision at Conclusions ¶¶16-22. Specifically, the Board concluded that: two (2) of the twelve (12) individual tax parcels were individually under fifty-acres in violation of Section 522(2), Decision at Conclusions ¶¶16, 17; that fifty-foot setbacks were not proposed between certain participating parcels internal to the Project in alleged violation of Section 522(3), Decision at Conclusions ¶¶18,19, 20; that vegetative buffering was not proposed between participating parcels internal to the Project in alleged violation of Section 522(4), Decision at Conclusions ¶21; and that Lebanon Solar allegedly failed to comply with the fifty percent (50%) maximum lot coverage requirement by providing insufficient evidence and failing to account for the panels themselves in the calculation of lot coverage, Decision at Conclusions ¶¶22, 23.

The Board's interpretation of the Ordinance is unreasonable, in contradiction to well established rules of ordinance construction and interpretation, not founded

on any evidence of record, impermissibly exceeds the express terms of the Zoning Ordinance, and otherwise constitutes an abuse of discretion or error of law as set forth below. Consequently, the Board's decision to deny the Application on these grounds constitutes an abuse of discretion or error of law and must be overturned. Further, the Board accepted a single Application from Lebanon which signaled that the respective twelve parcels would be considered together rather than separately as suggested by the Decision. At the time of the Application, this approach made sense given that when you look at a "farm" you generally do not consider lot lines created by government entities (tax parcels as an example) or by deed; you consider the farm as a whole.

1. **The Board was Prohibited from Imposing Restrictions not Contained in the Express Terms of the Zoning Ordinance.**

While the Board's interpretation of its Ordinance is normally entitled to deference, its interpretation must be discarded because it acted arbitrarily and abused its discretion when it mandated compliance with requirements not expressly set forth in the Zoning Ordinance. *See MarkWest*, 102 A.3d at 563-64; *see also Atlantic Wind*, 272 A.3d 994 (Table).

Boards are required to apply the terms of zoning ordinances as written, rather than deviating from those terms based on an unexpressed policy. *See Greth Development Group, Inc. v. Zoning Hearing Board of Lower Heidelberg Township*, 918 A.2d 181, 187 (Pa. Cmwlth. 2007); *see also See Luke v. Cataldi*, 932 A.2d 45,

53 (Pa. 2007) (quoting Robert S. Ryan, Pennsylvania Zoning Law and Practice §§9.1.1, 5.1.5 (2001 & Supp. 2007) (when acting upon a conditional use application the governing body of the municipality is acting in its adjudicatory, quasi-judicial, not legislative function)). When a zoning ordinance does not contain the requirement the adjudicating body ascribes to it, that conclusion has no basis in law or fact and thus, cannot stand. *See Atlantic Wind*, 272 A.3d 994 (Table) (citing *MarkWest, supra*).

The Board committed reversible error when it failed to apply the terms of the Zoning Ordinance as written and denied the Application on grounds not contained in the express terms of the Zoning Ordinance. *See MarkWest*, 102 A.3d 549 at 560-64. Lebanon Solar was only required to prove compliance with any specific, objective conditional use criteria *explicitly* set forth in the Zoning Ordinance. *See Marquise Inv., Inc. v. City of Pittsburgh*, 11 A.3d 607, 613 (Pa. Cmwlth. 2010); *In re AMA/American Marketing Ass'n, Inc.*, 142 A.3d 923, 932 (Pa. Cmwlth. 2016). The Ordinance does not require a Solar Farm to be located on a single tax parcel or zoning lot nor does it require that each of the individual tax parcels which make up a Solar Farm meet the minimum lot size, setbacks, screening, or maximum lot coverage requirements in Sections 522(2), (3), (4), and (5). Lebanon Solar cannot be expected to provide an application that complies with requirements not described in the Ordinance. *See Markwest*, 102 A.3d at 560 ("[W]ithout a specific mandate in

the [ordinance] [the applicant] was not on notice to supply any additional evidence. Thus, there is no authority for the Board's mandate or legal conclusions and the Board erred in its Conclusion 17.") Further, Lebanon Solar could not expect that each of the parcels comprising the Property would be treated singly rather than collectively when only one Application was required.

Because the Board's Conclusions of Law identified as numbers 11-14 and 16-22 are founded on requirements not expressly set forth in the Zoning Ordinance, denial of the Application on these grounds constitutes a clear error of law and are grounds for reversal. *See MarkWest*, 102 A.3d 549 at 563-64.

2. Any Ambiguity in the Zoning Ordinance Must be Construed in Favor of the Lebanon Solar and the Least Restrictive Use of the Land.

As discussed above, it is clear that no express provisions of the Zoning Ordinance require each individual tax parcel within the Project to comply with the Section 522 criteria, and therefore the Board was prohibited from reading beyond the terms of the Ordinance to impose the same upon Lebanon Solar. *See MarkWest, supra*. However, assuming, *arguendo*, that the Ordinance's silence on the issue, or the definition or plain meaning of the term "lot" *could* suggest each individual tax parcel was required to independently comply with all the criteria contained in Section 522, the Zoning Ordinance is, at best, ambiguous as to that issue. The Court must interpret such ambiguity in favor of Lebanon Solar and the least restrictive use of the land.

In general, appellate courts reviewing a governing body's adjudication of a conditional use application should defer to the interpretation of the governing body. *Williams Holding Group, LLC v. Board of Supervisors of West Hanover Township*, 101 A.3d 1202, 1213 (Pa. Cmwlth. 2014). However, this rule must bend to a second rule, contained in Section 603.1 of the MPC, which provides:

> [i]n interpreting the language of the zoning ordinance 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; *Williams Holding*, 101 A.3d at 1213.

Section 603.1 requires that courts "interpret ambiguous language in an ordinance in favor of the property owner and against any implied extension of the restriction." *Williams Holding*, 101 A.3d at 1213 (quoting *Isaacs v. Wilkes-Barre City Zoning Hearing Board*, 612 A.2d 559, 561 (Pa. Cmwlth. 1992)). A zoning ordinance is ambiguous if the pertinent provision is susceptible to more than one reasonable interpretation, or when the language is vague, uncertain, or indefinite. *Kohl v. New Sewickley Township Zoning Hearing Board*, 108 A.3d 961, 968 (Pa. Cmwlth. 2015) (citing *Adams Outdoor Advertising, L.P. v. Zoning Hearing Board of Smithfield Township*, 909 A.2d 469, 483 (Pa. Cmwlth. 2006)).

The Board alleges that both the plain meaning and Ordinance definition of the term "lot" support its determination that "all lots must individually comply with the

criteria of the ordinance." Decision at Conclusions ¶11, 12. Section 201.4 of the Zoning Ordinance defines "Lot" as "A legally defined tract, parcel or plot of land, whether occupied or capable of being occupied by buildings."[5] This definition does not address whether multiple lots or parcels may be utilized as a single Solar Farm or whether each "lot" must comply with the provisions of Section 522. In fact, as addressed above, nothing in Section 522, nor the remainder of the Ordinance addresses either of these issues and the Ordinance is therefore, at a minimum, ambiguous – susceptible to more than one meaning, or uncertain – as to both points. *See Kohl*, 108 A.3d at 968; Tr.2/24/22 at 337. Any ambiguities must be construed in favor of Lebanon Solar. *Williams Holding*, 101 A.3d at 1213.

In addition, Zoning "ordinances must be construed expansively so as to afford the landowner the broadest possible use and enjoyment of his land." *THW Group, LLC v. Zoning Bd. of Adjustment*, 86 A.3d 330, 336 (Pa. Cmwlth. 2014) (citing *Rabenold v. Zoning Hearing Bd. of Palmerton Twp.*, 777 A.2d 1257 (Pa. Cmwlth. 2001). It is an abuse of discretion for a zoning hearing board or governing body, to narrow the terms of its ordinance and further restrict the use of a property. *Reihner v. City of Scranton Zoning Hearing Bd.*, 176 A.3d 396 (Pa. Cmwlth. 2017) *citing*

[5] While the Board also apparently relies on the "plain meaning" of the term lot, it fails to state what that "plain meaning" is. In addition, where a word or phrase in a zoning ordinance *is* defined, the Court is bound by that definition, the "plain meaning" is irrelevant. *See Slice of Life, LLC v. Hamilton Township Zoning Hearing Board*, 207 A.3d 886, 899 (Pa. 2019).

Latimore supra and *Riverfront Development Group, LLC v. City of Harrisburg Zoning Hearing Bd.*, 109 A.3d 358, 366 (Pa. Cmwlth. 2015). Therefore, the Board, and this Court are bound to construe the Zoning Ordinance in the light most favorable to Lebanon Solar and are prohibited from narrowing the terms of the Ordinance to further restrict the use of the Property. *See Reihner*, 176 A.3d 396.

The Board, in its Decision, misconstrues the issue at hand by focusing on the definition of "lot" without considering an interpretation of Section 522 as a whole. The Board incorrectly states that Lebanon Solar argued that a "campus" of lots should be considered as one lot. Decision at Conclusion ⁋14. As discussed below, contrary to the Board's statement, Lebanon Solar argued before the Board, as it now argues before this Court, that nothing in the Ordinance prohibited it from utilizing multiple tax parcels in its Project and that nothing in the Ordinance requires that each of those parcels individually and independently meet the requirements of Section 522. Tr. 2/24/22 at 337-38. The Court must therefore look at Section 522 as a whole, not at the individual term "lot." *See Borough of Pleasant Hills v. Zoning Board of Adjustment of Borough of Pleasant Hills*, 669 A.2d 428, 410 (Pa. Cmwlth. 1995) (finding zoning board and lower court erred by placing the word "site" in a vacuum and interpreting the meaning of the word by itself, not as part of the relevant phrase). Any other interpretation is an unlawful narrowing of the Ordinance. Indeed, the acceptance of a single Application by the Township for a solar farm suggests that

the Township anticipated considering the Project together. Nothing in the Ordinance nor in the Township's actions prior to the Decision would suggest that Lebanon consider the requirements of Section 522 separately as to each parcel.

B. The Board Committed an Abuse of Discretion and Error of Law Determining the Application Did Not Meet the Requirements of Section 522.

As discussed above, the primary reasoning underlying the Board's Decision was that each individual tax parcel making up the Solar Farm Project was required to individually and independently meet all criteria contained in the Zoning Ordinance. *See* Decision at Conclusions ¶11-14. Because this underlying conclusion, as articulated in Conclusions of Law 11-14 of the Decision, was made in clear error, the Board's decision cannot stand, and any ambiguity as to the requirements of Section 522 must be construed in favor of Lebanon Solar and the least restrictive use of the land. *See Reihner*, 176 A.3d 396. Furthermore, the Board's conclusions related to the Application's compliance with the specific provisions of Section 522 are unsupported by the record, capriciously disregard competent evidence presented by Lebanon Solar, and otherwise constitute an abuse of discretion and error of law. For the following reasons the Board's denial of the Application on the grounds identified in Conclusions of Law ¶16-23 of the Decision is in error and must be overturned.

1. The Board Erred in Concluding the Application did not meet the Minimum Lot Size Requirement in Section 522(2).

Section 522 (2) of the Zoning Ordinance states that "The minimum lot size for the establishment of any Solar Farm shall be fifty (50) acres." As discussed above, neither this Section, nor any other provision of the Zoning Ordinance state that a Solar Farm cannot be comprised of more than one individual tax parcel or "lot" or that multiple tax parcels or "lots" cannot be combined to meet the minimum lot size requirement. In fact, the Township has numerous properties which are considered farms for agricultural purposes but are not necessarily single tax parcels. Nevertheless, the Board concluded that two (2) of the twelve (12) tax parcels in the Solar Farm's footprint were under 50 acres (one of which rang in at 49.78 acres individually), and therefore those lots "may not be approved for conditional use under criterion number 2." *See* Decision at Conclusion ¶16, 17. It is uncontested that the total acreage of the Solar Farm will be eight hundred and fifty-eight acres (858) over seventeen times the "minimum" set forth by Section 522(2). Tr. 1/25/22, at 17-18; Lebanon Solar Ex. A-4.

Lebanon Solar presented the expert testimony of Mr. Timothy Staub, Assistant Vice President with Herbert, Rowland, and Grubic, who testified as an expert in land planning with over 25 years of community planning experience in Pennsylvania. Tr. 2/24/22 at 324-25; Lebanon Solar Ex. A-15. Mr. Staub presented his credentials and training in planning, including evidence that he authored the Lebanon County Comprehensive Plan in 2007. Tr. 2/24/22 at 325-26. Mr. Staub

provided credible testimony regarding ordinance interpretation, and in particular the applicability of each requirement of Section 522 of the Zoning Ordinance to the Project. Tr. 2/24/22 at 331-335.

In particular, Mr. Staub testified that Section 522(2) refers to a minimum lot size of 50-acres for the establishment of a Solar Farm. He identified that Section 522(2) does not include terms such as "individual" which would indicate whether or not it referred to a single tax parcel or zoning lot, or whether individual parcels could be combined under a "campus" concept. Tr. 2/24/22 at 337. The Board made zero findings of fact or conclusions of law relative to Mr. Staub's testimony. *See generally* Decision. In fact, it does not mention his testimony at all, let alone make any credibility determinations or determinations as to the evidence presented. *See Metal Green Inc. v. City of Phila.*, 266 A3d. 495, 515 (Pa. 2021) (the board must provide sufficient findings of fact, including credibility and weight-of-evidence determinations as well as conclusions based on those facts which offer sufficient rationale as to why a decision was made).

While the Objectors' expert, Mr. Lawrence Lahr, testified that he did not find the definition of the terms "lot," "lot area" or "maximum lot coverage" to be ambiguous and expressed a belief that the criteria in Section 522(2) was not met, he did not provide any opinion as to whether multiple tax parcels could be combined to meet the minimum lot size requirement. Tr. 1/26/22 at 164-67. Consequently, zero

evidence was presented to indicate that a "campus concept" was not permitted under Section 522(2), and the Board's deliberate disregard for Mr. Staub's uncontested expert testimony constituted a capricious disregard of the same which is a reversable error. *See Wintermyer*, 812 A.2d at 487; *Taliaferro v. Darby Township Zoning Hearing Board*, 873 A.2d 807, 814 (Pa. Cmwlth. 2005), *pet. denied* No. 574 MAL 2005 (Pa. 2005) (A capricious disregard of evidence is a deliberate and baseless disregard of apparently reliable evidence); *see also Silva v. Zoning Hearing Board of Lower Gwynedd Township*, No. 332 C.D. 2008, 2009 WL 9102305 at *5 (Pa. Cmwlth) (holding that rejection of the findings of a civil engineer who testified without any contrary evidence amounts to capricious disregard).

The Board's findings related to Section 522(2) therefore not only were impermissibly founded on restrictions not expressly contained in the Zoning Ordinance (*see MarkWest, supra*), but not founded on any competent evidence of record, and are therefore reversable. *Berman v. Manchester Twp. Zoning Hearing Bd.*, 540 A.2d 8, 9 (Pa. Cmwlth. 1988), *pet den.* 129 M.D. 1988 (Pa. 1989).

Finally, although a substantive ordinance validity challenge is not presently pending, this Court is constrained to interpret the Zoning Ordinance in a fashion that avoids an interpretation likely to render it exclusionary and unconstitutional. *Upper Salford Twp. v. Collins*, 669 A.2d 335, 336 (Pa. 1995) ("Uncertainties in the interpretation of an ordinance are to be resolved in favor of a construction which

renders the ordinance constitutional."); *Ficco v. Bd. of Sup'rs of Hempfield Twp.*, 677 A.2d 897, 900–01 (Pa. Cmwlth. 1996) ("Where an ordinance is reasonably susceptible of two conflicting constructions, a court should adopt that interpretation which would uphold the validity of the ordinance.") Typically, a utility-scale solar facility requires hundreds of acres of land as demonstrated by the Application. Given the typical size of such facilities the Ordinance must be interpreted to permit a "campus concept" to allow multiple lots to be utilized as a single Solar Farm site.

2. The Board Erred in Concluding the Application did not meet the 50-Foot Setback Requirement of Section 522(3).

Section 522(3) of the Zoning Ordinance States: "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." The Board found that Lebanon Solar provided testimony that all solar panels and other implements would be set back a minimum of fifty (50) feet from "any adjacent lot lines of non-participating landowners." Decision at Finding ¶18,19. However, it concluded that Lebanon Solar failed to demonstrate compliance with Section 522(3) by failing to provide setbacks between *participating* properties. Decision at Conclusion ¶18-20. Specifically, the Board concluded that "Applicant's proposal to comply with the setback requirement only with exterior adjacent lots fails to comply with criterion #3." Decision at ¶20.

As with the "campus concept" issue described above, nothing in the Zoning Ordinance indicates that a setback is imposed along lot lines interior to the Project and the Board cannot impose restrictions beyond those expressly established by the Ordinance. *See MarkWest, supra.* Section 522(3) requires a 50-foot setback for all "*adjacent* lot lines." (emphasis added). The Ordinance does not define the term "adjacent" or "adjacent lot line." An undefined term in a zoning ordinance is given its plain meaning, and any doubt must be resolved in favor of the land owner and the least restrictive use of the land. *River's Edge Funeral Chapel and Crematory, Inc. v. Zoning Hearing Bd. of Tullytown Borough*, 150 A.3d 132 (Pa. Cmwlth. 2016). To define an undefined term the Court may consult definitions in statutes, regulations, or the dictionary for assistance. *Caln Nether Co., L.P. v. Bd. of Sup'rs, Thornbury Twp.*, 840 A.2d 484, 491 (Pa. Cmwlth. 2004). Black's Law Dictionary defines "adjacent" as "[l]ying near or close to, but not necessarily touching." ADJACENT, Black's Law Dictionary (11th ed. 2019). The plain meaning of this term does not comport with an interpretation that it applies to lot lines located within the Property. In addition, it is a well-settled principle of statutory (and ordinance) construction, that legislation should not be interpreted in a fashion leading to absurd results. *See* 1 Pa.C.S. § 1922(1),(2); *see also Commonwealth v. Shiffler*, 879 A.2d 185, 189–90 (Pa. 2005) ("...in ascertaining legislative intent, courts may apply, inter alia, the following presumptions: that the legislature does not intend a result that is absurd,

impossible of execution, or unreasonable…"). It would be absurd, and incongruous with the purposes of the Zoning Ordinance to require that the setback requirements be applied within the footprint of the Project where to do so would serve no purpose other than to separate solar panels from other solar panels owned and operated by the same entity. Moreover, assuming *arguendo* this minimum setback requirement is ambiguous because the Zoning Ordinance does not define the term "adjacent" or "adjacent lot line," the law requires that these ambiguities be construed in the light most favorable to Lebanon Solar as the applicant. *See Caln Nether*, 840 A.2d at 491; *Kleinman v. Lower Merion Township Zoning Hearing Board,* 916 A.2d 726 (Pa. Cmwlth. 2006); *see SPC Company, Inc. v. Zoning Board of Adjustment of the City of Philadelphia,* 773 A.2d 209, 213 (Pa. Cmwlth. 2001).

As acknowledged by the Board, Lebanon Solar presented evidence demonstrating that the solar panels and other implements will be set back at least 50 feet from the lot lines *adjacent to the Project*, and further voluntarily agreed not to place any panels or other implements within one hundred and fifty (150) feet of any occupied residential dwelling. Decision at Finding ¶18-20; Lebanon Solar Ex. A-5, A-6, A-8, Tr. 1/25/22 at 19-20. Furthermore, Lebanon Solar presented the expert testimony of Mr. Staub who testified that his interpretation of Section 522(3), in his experience as a certified land use planner with experience in drafting zoning ordinances. Tr. 2/24/22, at 338. Mr. Staub opined that the language contained in

Section 522(3) was ambiguous, noting that it did not define the term "adjacent lot line." Tr. 2/24/22, at 338. Mr. Staub opined that it would be reasonable for an applicant to assume that "adjacent lot lines" are those that are adjacent uses to the Solar Farm as opposed to properties within the solar farm. Tr. 2/24/22, at 338. As stated above, the Board failed to address any of Mr. Staub's testimony in its Decision constituting a capricious disregard for the same. *See Wintermyer*, 812 A.2d at 487; *Taliaferro*, 873 A.2d at 814. The Objectors' expert Mr. Lahr did not present any testimony as to whether the definition of "adjacent lot lines" under the Zoning Ordinance included lot lines internal to the Project Area. 1/26/22 at 168-70. The Board provided no contrary interpretation of the phrase "adjacent lot lines," or proposed definition of the term "adjacent." *See generally* Decision. Consequently, its conclusion that the establishment of setbacks only along the "exterior adjacent lots" does not comply with Section 522(3) is not based on any competent evidence of record, and constitutes an abuse of discretion or error of law which must be overturned. *See Berman,* 540 A.2d at 9.

3. The Board Erred in Concluding the Application did not meet the Buffering Requirement of Section 522(4).

Section 522(4) of the Zoning Ordinance states that "A permanent evergreen vegetative buffer must be provided or fencing which accomplishes the same purpose of buffering." The Board concluded that Lebanon Solar "failed to meet its burden that it will provide a suitable vegetative buffer or fence which accomplishes the same

thing between all of the lots which are parts of the applicant's application for the same reason as state in [Conclusions] 17-19." Decision at Conclusion ¶21. Again, nothing in Section 522(4) nor in the Ordinance generally requires that buffering be imposed between all individual tax parcels and the Board is precluded from adding that requirement while acting in its adjudicative function. *See MarkWest, supra.* Furthermore, the Board's reliance on the definition of "lot" as it relates Section 522(4) is entirely illogical – the word "lot" does not appear in Section 522(4) at all. Section 522(4) only requires that a permanent evergreen buffer or fencing be provided, it does not provide any indication where such buffering or fencing is required, or what amount or type of buffering or fencing is required. Because Section 522(4) is clearly ambiguous, any ambiguity must be construed in favor of Lebanon Solar and the least restrictive use of the Property.

Lebanon Solar provided competent and credible evidence that it would "provide a permanent evergreen buffer" or "fencing which accomplishes the same purpose as buffering" by installing perimeter fencing around the buildable area (solar panels and implements) as identified in its Conceptual Site Plan. Lebanon Solar Ex. A-1 and A-8. Furthermore, Lebanon Solar demonstrated that additional vegetative screening would be installed in various areas to screen residential viewsheds. Lebanon Solar Ex. A-1 and A-8. Lebanon Solar also presented the expert testimony of Mr. Staub who testified as to his interpretation of Section 522(4)

in his experience as a certified land use planner with experience in drafting zoning ordinances. Tr. 2/24/22, at 338-39. Mr. Staub opined that the language contained in Section 522(4) would be reasonably interpreted as an "either/or" and that Lebanon Solar appeared to be exceeding these requirements as it intended to provide both vegetative screening and fencing. Tr. 2/24/22, at 339. Again, the Board did not make any findings of credibility as to Mr. Staub's testimony, nor did it even acknowledge the same in its Decision. Consequently, it capriciously disregarded the same which is a reversable error. *See Wintermyer*, 812 A.2d at 487; *Taliaferro*, 873 A.2d at 814. The Objectors' expert, Mr. Lahr, did opine that fencing would not comply with Section 522(4). Tr. 1/26/22 at 172-73. However, this testimony disregards the plain language of the Zoning Ordinance which expressly permits fencing which accomplishes the same purpose. *See* Zoning Ordinance §522(4).

As articulated above, the Board was prohibited from narrowing the terms of the Ordinance to require specific areas of the Project to include specific types of fencing, or buffering, or to require that the internal lot lines between participating parcels be screened or buffered. *See MarkWest, supra.* Lebanon Solar provided competent evidence of compliance with the letter of Section 522(4). Moreover, the Board's Decision on this issue runs afoul of established Pennsylvania case law which prohibits making land use decisions based on aesthetic concerns alone. *See White Advertising Metro, Inc. v. Zoning Hearing Bd. of Susquehanna Twp.*, 453 A.2d 29,

35 (Pa. Cmwlth, 1982) (while municipalities have a legitimate interest in advancing their aesthetic goals as part of its protection of the general welfare, purely aesthetic judgments are far too subjective to alone carry the burden of showing detriment to the public interest); *Republic First Bank v. Marple Twp. Zoning Hearing Bd.*, 242 A.3d 999 (Table), 2020 WL 7334364 (Pa. Cmwlth. Dec. 14, 2020) ("While aesthetics is a valid consideration, it is well established that aesthetics alone cannot be the sole basis for denying zoning relief.") As aesthetic considerations are only properly included as part of the Township's protection of the general welfare, the burden was on the Objectors to show the proposed buffering or fencing was not "sufficient" and would produce an abnormal detrimental effect on the aesthetics of the community, not on the Applicant to show that it was adequate. *See Allegheny Tower*, 152 A.3d at 1125.

4. The Board Erred in Concluding the Application did not meet the Maximum 50% Lot Coverage Requirement of Section 522(5).

Section 522(5) of the Zoning Ordinance States "[t]he maximum lot coverage may not exceed fifty (50%) of the total lot size." As discussed above, nothing in the Zoning Ordinance prohibits the Solar Farm from being sited on multiple individual tax parcels, nor does it require that each individual tax parcel independently meet the requirements of Section 522. The Board is therefore precluded from reading such a requirement into the ordinance thereby narrowing its express terms. *See MarkWest, supra.* In addition, any ambiguity as to Section 522(5) must be read in

favor of Lebanon Solar and the least restrictive use of the Property. *See Caln Nether*, 840 A.2d at 491.

The Board concluded that the "Applicants have failed to comply with the lot coverage requirement because they have failed to present sufficient evidence upon which the Board can determine whether or not the applicant complies with the requirement of maximum lot coverage which shall not exceed 50% of the total lot size on each of the lots included within the applicant's application." Decision at Conclusion ¶22. In addition, the Board found "that solar panels must be included in the calculation of lot coverage and Applicant fails to include panels in his [sic] calculations and show how the panels shall be arrayed on the individual lots." Decision at Conclusions ¶23. These conclusions are in clear error and capriciously disregard the competent and uncontradicted evidence set forth by Lebanon Solar.

Maximum lot coverage is a defined term in the Zoning Ordinance under Section 202, as "[a] percentage of lot area which may be covered by *impervious materials* including roofs, drives, patios, walls etc." (emphasis added). Impervious surfaces or impervious area is not defined by the Zoning Ordinance, but is defined by the County SALDO as "a surface that prevents the infiltration of water into the ground." Lebanon Solar presented the testimony of Mr. Eric Holton, project manager for Enel Green Power which represented Lebanon Solar on the Project, who testified as to how lot coverage and impervious surfaces were interpreted by the

Zoning Ordinance, the County SALDO, and the Pennsylvania Department of Environmental Protection ("DEP"). Tr. 1/25/22, at 12, 21-22, 48. Mr. Holton testified that the DEP interprets solar panels as pervious, rather than impervious surfaces due in part to the fact that they are elevated above the ground and have separation between the rows to allow water to flow underneath and between. Tr. 1/25/22 at 22.

Mr. Holton further testified that there are impervious surfaces associated with the project, including tracker piles or pylons holding up the panels, as well as some equipment pads, roads, and any other surfaces installed on the ground that impedes the flow of water. Tr. 1/25/22 at 22. Mr. Holton testified that the project consists of less than three percent (3%) impervious lot coverage for a total of twenty-five and two-tenths (25.2) acres against the total lot size of eight hundred and fifty-eight (858) acres. Mr. Holton also provided demonstrative evidence, contained in Lebanon Solar Exhibit A-8, indicating the quantity and area of coverage anticipated for each impervious item. Lebanon Solar Exhibit A-8. On cross-examination Mr. Holton testified as to the conservative estimates utilized in determining the total amount of impervious lot coverage. Tr. 1/25/22 at 42-46. He further testified as to the inclusion of access roads in the total impervious surface calculation. Tr. 1/25/22 at 74-57. The Board made no findings as to the credibility of Mr. Holton's testimony. *See Metal Green Inc. v. City of Phila.*, 266 A3d. 515.

The Board found that "there was no exhibit showing where impervious structures would be located om individual lots," and that the "Applicant failed to submit any kind of drawing or exhibit which would demonstrate exactly where impervious surfaces would be located." Decision at Finding ¶¶23,24. These findings are patently untrue. Lebanon Solar Exhibit A-8, introduced and presented by Mr. Holton, provided demonstrable evidence which indicated the quantity and area of coverage anticipated for each impervious item. Lebanon Solar Ex. A-8, Tr.1/25/22 at 22, 42-57. In addition, Lebanon Solar Exhibit A-17 provided a calculation of the current conceptual design for the Project *with solar panels included in the total impervious surface calculation.* Lebanon Solar Ex. A-17, Tr. 2/24/22 at 378. Lebanon Solar Exhibit A-17 demonstrated that even if solar panels were considered *impervious* as the Board alleges they must be, the total lot coverage of the project would be twenty point four percent (20.4%) of the total lot area of the Project. Lebanon Solar Ex. A-17, Tr. 2/24/22 at 378. The Board ignored and capriciously disregarded the testimony of Mr. Holton, additional expert testimony of Mr. Staub, testimony from Mr. Jonathan Dimitriou, the project engineer for the Project, as well as the demonstrative evidence provided in Exhibits A-8 and A-17. *See Taliaferro*, 873 A.2d 816 (capricious disregard of evidence occurs when an agency deliberately ignores relevant, competent evidence). Consequently, its determinations regarding

the Application's compliance with Section 522(4) are not based on substantial evidence, constitute an abuse of discretion or an error of law and must be overturned.

5. The Board Erred in Requiring Compliance with Sections 522(7) and 522(8) Rather Than Including the Same as Conditions of Approval.

Certain requirements, even if included within the Zoning Ordinance should be imposed as conditions of approval, rather than grounds for denial. For example, the courts have repeatedly held, that "[w]here an outside agency's approval is required, the municipality should condition final approval upon obtaining a permit, rather than denying" the application. *Delchester Developers, L.P. v. London Grove Twp. Bd. of Sup'rs*, 161 A.3d 1106, 1113-14 n. 11 (Pa. Cmwlth, 2017); *Morris v. South Coventry Twp. Bd. of Sup'rs*, 836 A.2d 1015, 1026 (Pa. Cmwlth. 2003) ("Further, courts have long held that, where an outside agency's approval is required, the municipality should condition final approval upon obtaining a permit, rather than denying preliminary approval"); *Bloomsburg Industrial Ventures, LLC v. Town of Bloomsburg Zoning Hearing Bd.*, 247 A.3d 1197 (Table), 2021 WL 269923 (Pa. Cmwlth. Jan. 27, 2021) ("As this Court has acknowledged, where zoning approval requires a permit or license from an outside agency, conditional zoning approval based on the issuance of such permit or license is appropriate.") citing *Kohr v. L. Windsor Twp. Bd. of Supervisors*, 910 A.2d 152, 159 (Pa. Cmwlth. 2006).

Section 522(7) of the Zoning Ordinance requires Lebanon Solar to 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 within one hundred (180) days of the cessation of operation. Lebanon Solar has demonstrated that it can and will meet such bonding requirements *at the proper time*. Lebanon Solar presented the continued testimony of Mr. Holton, who demonstrated that an adequate amount of financial security could not be determined at the time of the hearing or during the conditional use phase, but could only be determined once design of the proposed development has been finalized which could occur following approval of a Land Development Plan. Tr. 1/25/22, at 24-25. Lebanon Solar also presented demonstrative evidence and legal authority in support of its contentions in its Exhibit A-8. Lebanon Solar Exhibit A-8, *citing Schatz v. New Britain Twp. Zoning Hearing Bd. of Adjustment*, 141 Pa.Cmwlth. 525, 596 A.2d 294, 298 (1991) ("Zoning only regulates the use of land and not the particulars of development and construction."). In addition, although it was not required to do so at the conditional use phase, Lebanon Solar provided the testimony of Mr. Dimitriou, the project engineer, who testified as to decommissioning and bonding in response to questions from the Objector as to how bonding would be calculated. Tr. 1/25/22 pg. 87-89.

Lebanon Solar presented the expert testimony of Mr. Staub who testified as to his interpretation of Section 522(7) in his experience as a certified land use planner with experience in drafting zoning ordinances. Tr. 2/24/22, at 342. Mr. Staub opined

that an applicant cannot determine adequate bonding at the conditional use level because the project has not been designed completely. Tr. 2/24/22, at 356. Once again, the Objector presented the expert testimony of Mr. Lahr who, as with his purported expert testimony as to insurance requirements, was unable to offer any opinion as to whether or not adequate bonding could be provided at this stage in the permitting process. Tr. 1/26/22, at 179. Mr. Lahr was not offered as an expert in financing or bonding, nor is he credentialed as an engineer, the type of professional the Objector argued was required to offer an opinion as to questions of bonding. Again, the Board did not make any findings related to Mr. Staub's testimony and capriciously disregarded the same, which constitutes a reversable error.

Similarly, Section 522(8) of the Zoning Ordinance requires Lebanon Solar to have an approved Stormwater Management Plan as required by the Lebanon County Stormwater Management Ordinance. Lebanon Solar demonstrated that it can and will obtain relevant third-party permitting, including approval of a Stormwater Management Plan by Lebanon County at the proper time. The Township does not have a stormwater management ordinance and does not review stormwater management plans for land development activities within the Township. Instead, the Stormwater Management Ordinance or Stormwater Ordinance adopted by Lebanon County applies. Lebanon County then uses the Stormwater Ordinance in conjunction with the County SALDO during the land development phase.

Lebanon Solar again presented the expert testimony of Mr. Staub who testified as to his interpretation of Section 522(8) in his experience as a certified land use planner with experience in drafting zoning ordinances. Tr. 2/24/22, at 342. Mr. Staub opined that a stormwater management plan could not be developed at this time because the site has not been fully designed. Tr. 2/24/22, at 356. Objectors again relied on the testimony of Mr. Lahr who offered no opinion as to how an applicant could provide approved stormwater management plans at the conditional use phase when Lebanon County, the third-party agency required to approve said plans, would not review them prior to conditional use approval.

As discussed above, certain requirements, even if included within the Zoning Ordinance should be imposed as conditions of approval, rather than grounds for denial. *See Delchester Developers, L.P.*, 161 A.3d at 1113-14 n. 11; *Morris*, 836 A.2d at 1026. "[C]onditional use proceedings involve only the proposed sue of the land, and do not involve the particular details of the design of the proposed development." *In re Thompson*, 896 A.2d at 670. The Board is not permitted to impose requirements upon an applicant at this stage, where such issues are to be addressed further along in the permitting and approval process. *See Schatz*, 596 A.2d 294. It would be an error to require Lebanon Solar to show it meets County stormwater management requirements at this time because "*storm water management ... requirements ... are to be addressed further along in the permitting*

and approval process [and] [z]oning only regulates the *use* of the land and not the particulars of development and construction." *Id.* at 298. (emphasis added). Furthermore, as discussed above, "courts have long held that, where an outside agency's approval is required, the municipality should condition final approval upon obtaining a permit, rather than denying preliminary approval." *Morris*, 836 A.2d at 1026. Because the requested Stormwater Management Plan requires approval by Lebanon County, it is more properly included as a condition of approval, and a failure to show approval of a stormwater plan for a project that has yet to be approved is not proper grounds for denial of the application.

C. The Board Failed to act as an Unbiased Decision-Making Tribunal and Violated Lebanon Solar's Due Process Right to a Fair Hearing.

As articulated above, the procedural history of this matter is detailed in Lebanon Solar's Amended Notice of Land Use Appeal which is attached hereto as Attachment "A." In addition, so as not to beleaguer this Court with repetitious information, the Complaint in Mandamus filed on October 11, 2021, under Docket Number 2021-01236, is incorporated herein by reference. As set forth more thoroughly in the above-referenced pleadings, from the initial submittal of Lebanon Solar's Application it was beleaguered by bias and prejudgment from members of the Board which resulted in the violation of its due process rights to an unbiased decision-making tribunal.

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *Schlesinger Appeal*, 172 A.2d 835, 850-51 (Pa. 1961) (Jones, J. concurring) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). In considering Lebanon Solar's conditional use application, the Board was acting in a quasi-judicial capacity and was bound by these same obligations. "[A] governmental body charged with certain decision-making functions . . . must avoid the appearance of possible prejudice, be it from its members or from those who advise it or represent parties before it." *Horn v. Hilltown Twp.*, 337 A.2d 858, 860 (Pa. 1975) (ruling that it is improper for the same person to serve as the zoning board solicitor and to appear before the board on behalf of the municipality in opposition to a variance application).

Impermissible bias can take several forms. It can be manifested in statements indicating opposition to a development application. For example, in *McVay v. Zoning Hearing Board of New Bethlehem Borough,* 496 A.2d. 1328 (Pa. Cmwlth. 1985), the Pennsylvania Commonwealth Court, citing to *Horn*, ruled that a zoning hearing board's denial of a special exception was void for bias because of previous statements by board members in opposition to a related rezoning request. As a result, the Commonwealth Court remanded the appeal to the court of common pleas, with the direction that it make independent findings of fact upon the existing record in

order to reach conclusions of law and decision on the merits. *See also Prin v. Council of the Municipality of Monroeville*, 645 A.2d 450 (Pa. Cmwlth. 1994) (invalidating denial of conditional use and site plan due to councilman's previous stated opposition to the project).

Due process also demands that a municipal governing body not comingle its quasi-judicial role with that of advocate. As stated by the Commonwealth Court in *Marshall v. Charlestown Board of Supervisors*, 169 A.3d 162, 166 (Pa. Cmwlth. 2017):

> We recognize that in the context of a conditional use hearing, Section 913.2 of the MPC and case law treat the governing board and the municipality as separate entities. This is necessary, however, in the context of a conditional use hearing before the board of supervisors, because at that level, the board cannot simultaneously fulfill both of its roles as an adjudicator and as the governing body representing the municipality. At that level, the board and the municipality must be treated as separate entities, because the board must avoid even the appearance of bias or impropriety.

See also Horn, supra; Kresge v. Pocono Twp. Supervisors, 501 A.2d 345 (Pa. Cmwlth. 1985) (landowners denied due process when township solicitor comingles functions of zoning advocate for township and advisor to board of supervisors); *Orange Stones Co. v. Borough of Hamburg Zoning Hearing Bd.*, 991 A.2d. 996, 1000 (Pa. Cmwlth. 2010) ("Although clarifying the issues is among the functions of the Board, 'that function does not cast in the role of advocate.'").

Here, the Board participated in unlawful deliberation on the Application at the June 7, 2021, Planning Commission meeting, expressing opposition to the Project, in public, in clear violation of both the Pennsylvania Sunshine Act, 65 P.S. § 701 *et seq.*, and its obligations as a quasi-judicial body. During the pendency of the hearings, the Board went so far as directing the Township Planning Commission to issue a supplemental recommendation on the Application, dated February 7, 2022, and absent any notice to Lebanon Solar which would have allowed it to participate in the Planning Commission meeting. While Lebanon Solar objected to the introduction of the Planning Commissions supplemental February 7, 2022, "recommendation," the Board made no finding or determination on that objection. The Township was not an objecting party to the Application. It could have hired a hearing officer and allowed its Solicitor to advocate against the Project, but it did not do so. Consequently, it was acting solely in its quasi-judicial role and was required to remain *impartial*. A review of the record and transcripts cannot find that the Board succeeded in avoiding even the appearance of bias against the Project.

CONCLUSION

WHEREFORE, Lebanon Solar I, LLC respectfully requests this Honorable Court find that the Board's Decision is not based on substantial evidence, and otherwise constitutes an abuse of discretion or error of law, and that it overrule the

same and remand this matter to the Board with direction to issue a Conditional Use Permit for the Project.

Date: June 7th, 2023

Respectfully submitted,

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

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(814) 867-8055

Attorneys for Plaintiff,
Lebanon Solar I, LLC

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.

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

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Attorneys for Plaintiff,
Lebanon Solar I, LLC

IN THE COURT OF COMMON PLEAS OF LEBANON COUNTY PENNSYLVANIA

LEBANON SOLAR I, LLC,	)	Civil Division
Appellant,	)	No. 2022-00553
v.	)	**AMENDED NOTICE OF LAND USE APPEAL**
NORTH ANNVILLE TOWNSHIP BOARD OF SUPERVISORS,	)	Filed on behalf of Appellant, Lebanon Solar I, LLC
Appellee.	)	Counsel of Record for this Party:
	)	Elizabeth A. Dupuis PA I.D. No. 80149 bdupuis@babstcalland.com Sean R. Keegan, Esquire PA I.D. No. 316707 skeegan@babstcalland.com Anna S. Jewart, Esquire PA I.D. No. 328008 ajewart@babstcalland.com
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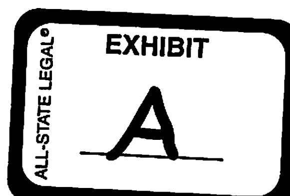

**IN THE COURT OF COMMON PLEAS OF LEBANON COUNTY
PENNSYLVANIA**

LEBANON SOLAR I, LLC,	)	Civil Division
	)	
Appellant,	)	No.
	)	
v.	)	
	)	
NORTH ANNVILLE TOWNSHIP BOARD OF SUPERVISORS,	)	
	)	
Appellee.	)	
	)	

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.

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[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) the 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

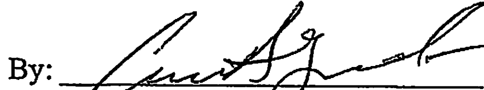
consider the vast majority of the testimony and evidence provided, and because the conclusions of the Board so clearly deliberately ignore relevant and competent evidence, Lebanon Solar requests that this Court undertake a *de novo* review of the record. It is clear upon receipt of the Findings and Conclusions 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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Lebanon Solar I, LLC

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:

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
Reilly Wolfson
1601 Cornwall Road
Lebanon, PA 17042-7406
paulb@reillywolfson.com
Attorney for Appellee Township

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

By:
Anna S. Jewart, Esquire

ORDINANCE NO. 2-2019

AN ORDINANCE OF THE TOWNSHIP OF NORTH ANNVILLE AMENDING THE NORTH ANNVILLE TOWNSHIP ZONING ORDINACE OF 1973 IN ORDER TO PROVIDE FOR A DEFINITION OF "SOLAR FARM" AND AMENDING THE AGRICULTURAL ZONE OF THE NORTH ANNVILLE TOWNSHIP ZONING ORDINANCE TO PROVIDE FOR A CONDITIONAL USE FOR SOLAR FARMS. ARTICLE 5 IN THE SUPPLEMENTAL DISTRICT REGULATIONS IS AMENDED TO CREATE A NEW SECTION 522, WHICH PROVIDES CONDITIONS FOR THE ESTABLISHMENT OF A SOLAR FARM IN NORTH ANNVILLE TOWNSHIP.

WHEREAS, North Annville Township adopted the North Annville Township Zoning Ordinance of 1973;

WHEREAS, North Annville Township has a large area within its borders which is zoned Agricultural;

WHEREAS, the Township has recently had a number of land owners who have demonstrated interest in the establishment of Solar Farms within the Township;

WHEREAS, Solar farms exist for the creation of electrical power from the sun for sale of that power to the commercial market;

WHEREAS, the Township believes it is in the best interest of the Township to provide a location within the Township zoning map for the establishment of Solar Farms along with regulations for the establishment of such uses in the Township.

AND NOW, BE and it **HEREBY** is **ORDAINED** and **ENACTED** by the North Annville Township Board of Supervisors amending the North Annville Township Zoning Ordinance of 1973, as follows:

1. **DEFINITION:** Article II, Section 201.4, is hereby amended by the addition of the following definition:

   a. 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.

2. **CONDITIONAL PERMITTED USE:** Article IV, Section 401.1 is hereby amended by the addition of sub-section O. O shall include a new use permitted under certain conditions and stated as follows:

   O. Solar Farms upon compliance with certain conditions defined in Section 5.22 and after Notice and Hearing before the North Annville Township Board of Supervisors. Said Hearing shall be held upon requisite Notice under the Municipalities Planning Code and opportunity for comment by the Planning Commission.

3. **CONDITIONS**: Article 5, Supplemental District Regulations, is amended to include a new Section as follows:

   a. Section 522 – As of the effective date of this Ordinance, 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 million ($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.

4. **REPEALER:** All Ordinances or parts of Ordinances that are inconsistent herewith, shall be and the same are expressly repealed.

5. **SEVERABILITY:** In the event any provision, section, sentence, clause or part of this Ordinance shall be held to be invalid, such invalidity shall not affect or impair any remaining provision, section, sentence, clause or part of this Ordinance, it being the intent of this local government unit that such remainder shall be and shall remain in full force and effect.

6. **EFFECTIVENESS:** This Ordinance shall become effective in accordance with law.

DULY ENACTED AND ORDAINED, this 14 day of Oct., 2019, by the governing body of this Township, in lawful session duly assembled.

ATTEST:

Adam D. Wolfe

NORTH ANNVILLE TOWNSHIP SUPERVISORS

Randall H. Leese
Chairman

Clyde B. Meyer
Vice Chairman

IN THE COURT OF COMMON PLEAS OF LEBANON COUNTY PENNSYLVANIA

LEBANON SOLAR I, LLC,	)	
	)	
Plaintiff,	)	Civil Division
	)	
v.	)	No. 2021-01236
	)	
NORTH ANNVILLE TOWNSHIP,	)	
	)	
Defendant.	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was served on the 7th day of **June, 2023**, via First Class U.S. Mail upon the following:

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Barley Snyder
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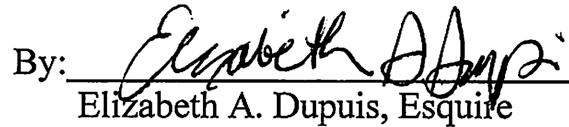
Attorney for Appellee Township

William J. Cluck, Esquire
Law Office of William J. Cluck
587 Showers Street
Harrisburg, PA 17104
Attorney for Intervenor

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

By: 
Elizabeth A. Dupuis, Esquire