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July 21, 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 Reply 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. We have also enclosed a separate copy to be timestamped and delivered the Judge Charles' chambers.

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

IN THE COURT OF COMMON PLEAS OF LEBANON COUNTY PENNSYLVANIA

LEBANON SOLAR I, LLC, Appellant, v. NORTH ANNVILLE TOWNSHIP, Appellee, and GRADY SUMMERS, Intervenor.	)	Civil Division No. 2021-01236 **REPLY BRIEF IN SUPPORT OF LAND USE APPEAL** Filed on behalf of Appellant, Lebanon Solar I, LLC Counsel of Record for this Party: Elizabeth A. Dupuis PA I.D. No. 80149 bdupuis@babstcalland.com Casey Alan Coyle PA I.D. No. 307712 ccoyle@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 BABST, CALLAND, CLEMENTS & ZOMNIR, P.C. 330 Innovation Blvd., Suite 302 State College, PA 16803 (814) 867-8055 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.	)	

REPLY BRIEF IN SUPPORT OF LAND USE APPEAL

NOW COMES Appellant Lebanon Solar I, LLC ("Lebanon Solar")[1], by and through its counsel, Babst, Calland, Clements & Zomnir, P.C., and files this Reply Brief in Support of Land Use Appeal in response to the submissions of the Board and Intervenor in the above captioned matter.

[1] Defined terms in this Reply Brief will have the same meaning as stated in Lebanon Solar's principal Brief in Support of Land Use Appeal.

I. SUMMARY OF REPLY ARGUMENT.

As determined by the Opinion and Order of this Court dated February 13, 2023, a true and correct copy of which is attached hereto and incorporated herein as Attachment "A," this Court is properly exercising its jurisdiction over the Amended Notice of Land Use Appeal filed by Lebanon Solar contesting the denial of its Conditional Use Application for a single Solar Farm within the Township. The Board erroneously denied the Application based on allegations that Lebanon Solar failed to meet certain specific criteria contained in its Zoning Ordinance based almost entirely on the definition of the term "lot" without regard to the remainder of its Zoning Ordinance. In addition, the Board alleges that it was under no obligation to address or render specific findings related to the expert testimony and evidence set forth by Lebanon Solar, this is patently untrue. It is clear that the Board, rather than consider and weigh the arguments presented by Lebanon Solar chose to ignore them, resulting in a Decision which is not based on any substantial evidence of record and therefore invalid and reversable.

II. REPLY ARGUMENT

A. This Court Has Already Determined that it has Jurisdiction over the Notice of Land Use Appeal Filed by Lebanon Solar Pursuant to the Pennsylvania Municipalities Planning Code.

The Board and Intervenor both spend several pages of their briefs attempting to relitigate this Court's decision in denying the Motion to Quash Lebanon Solar's Appeal. In an attempt to once again divest this Court of jurisdiction over this Appeal they argue, again, that Lebanon Solar's Notice of Land Use Appeal, and Amended Notice of Land Use Appeal filed on May 5, 2022, and June 17, 2022, respectively, are both premature and too late. The parties have already fully briefed and argued this issue, resulting in this Court's well-reasoned fourteen-page Opinion, dated February 13, 2023, in which it concluded that Lebanon Solar's Appeal would be allowed to proceed. *See* Attachment "A" at 14.[2] This Court, as articulated at the time of filing and throughout the previous submissions of Lebanon Solar is the Court of Common Pleas situated in the County in which the Township exists, and in which the Property is located. It is clearly the proper venue for this Appeal, and that this Court clearly has jurisdiction over the same under Sections 1001-A and 1002-A(a), 53 P.S. §11001-A, 53 P.S. §11002-A(a), which was thoroughly discussed by the

[2] Because Intervenor primarily attempts to nit pick clerical errors as opposed to laying out legal arguments, its arguments related to jurisdiction or other matters will not be thoroughly addressed here. It bears noting that Lebanon Solar filed a Notice of Land Use Appeal pursuant to the Pennsylvania Municipalities Planning Code, 53 P.S. §§10101 *et seq.* ("MPC") as repeatedly reiterated in the multitudinous filings set forth before this Court over the past year. Intervenor's allegation that this Appeal is somehow an impermissible appeal of a mandamus case which has been withdrawn because Lebanon Solar incorporated its flings in the mandamus action in its principal brief is unfounded and bizarre.

parties and determined in this Court's February 13, 2023, Opinion. *See* Attachment A.

B. The Zoning Ordinance Does Not Require that Every Participating Parcel Must Meet the Criteria of Section 522 Individually.

The Board alleges that the "Zoning Ordinance's definition of 'lot' unambiguously expresses that the criteria of Section 522 must apply to each of the twelve participating lots of the Application individually and explicitly precludes the concept of a collective 'campus of lots.'" *See* Board Brief at 13-14. It points to the definition of "lot," (undisputedly a "legally defined tract, parcel or plot of land, whether occupied or capable of being occupied by buildings") but does not point to any portion of the ordinance that insinuates, let alone "unambiguously expresses" that "the criteria of Section 522 must apply to each of the twelve participating lots of the Application individually" or that it "explicitly precludes" the "concept of a collective 'campus of lots.'" *See id.* To the contrary, Section 522 applies to a "Solar Farm," not "each lot in a Solar Farm" and the Board has pointed to nothing that indicates that a "Solar Farm" cannot be situated on more than one zoning lot or tax parcel. In fact, by Ordinance No. 1-2021, the Board amended its Zoning Ordinance to contain the requirements it alleges were already expressly contained in the Zoning Ordinance in effect for this Application. For example, Section 522(2) of the Zoning Ordinance is now Section 522(b) and reads "The minimum lot size for the establishment of any Solar Farm shall be fifty (50) acres and all fifty acres must be

located on one lot and the lot must be entirely in the township Agricultural zoning district." (emphasis added).[3]

In addition, in an apparent attempt to justify its determination that a "campus concept" is impermissible, the Board points to a variety of cases related to the doctrine of merger of estate in land in which a lesser estate is merged into a greater estate when two estates meet in the same person. *See e.g., Tinicum Township v. Jones*, 723 A.2d 1068 (Pa. Cmwlth. 1998); *Daley v. Zoning Hearing Board*, 770 A.2d 815 (Pa. Cmwlth. 2001); *Springfield Township v. Halderman*, 840 A.2d 528 (Pa. Cmwlth. 2004). At no time has Lebanon Solar argued that the Participating Parcels were merged into a single zoning lot – it is simply arguing that the Ordinance does not require that a Solar Farm be on one lot, and that Section 522 requires that those conditions be met for the entire Solar Farm, not for each individual tax parcel that makes up the same.

In fact, several of the provisions appear to contemplate that multiple lots be utilized for one Solar Farm. *See e.g.,* Zoning Ordinance §522(3) "... any solar panels shall be set back a minimum of fifty (50) feet from any adjacent lot line."); §522(5) ("The maximum lot coverage may not exceed fifty (50%) percent of the total lot size."). Why include the terms "adjacent" and "total" if only one lot was

[3] Even where not technically made part of the record, 42 Pa.C.S. §6107(a) requires that ordinances "*shall* be judicially noticed."

contemplated? As discussed in Lebanon Solar's principal brief, the Board accepted one single Conditional Use Application for a single Solar Farm on twelve parcels, if each parcel needed to separately meet each of the criteria of Section 522, why did it not require twelve applications? If each lot had to meet all criteria, why did the Decision only address certain lots and not examine each parcel's qualifications individually under the Ordinance? Why did it find that Lebanon Solar met criteria number 6 by providing a single certificate of insurance in the amount of $1,000,000.00 per incident and $2,000,00.00 per aggregate rather than twelve certificates of insurance for a total of $12 million per incident and $24 million aggregate? *See* Decision at Conclusion ¶24. It is clear that the *express* terms of the Ordinance do not prohibit what Lebanon Solar proposed, the Board simply wished it did.

C. The Board Was Required to Base its Conclusions of Law on Substantial Evidence and Could Not Disregard Competent Expert Testimony.

Under Section 913.2(b)(1) of the MPC the Board was required to render a written decision on the Application and, because it was contested and denied, accompany its decision with "findings of fact or conclusions based thereon, together with any reasons therefor." *See* 53 P.S. §10913.2(b)(1). "Conclusions based on any provisions of this act or of any ordinance, rule or regulation shall contain a reference to the provision relied on **and the reasons why the conclusion is deemed**

appropriate in the light of the facts found." *See id.* The MPC "mandates that the Board issue an opinion, as distinguished from its order or decision disposing of the matter, setting forth the essential findings of fact, conclusions of law, **and sufficient rationale to demonstrate that its action as reasoned and not arbitrary.**" *Allied Servs. for the Handicapped, Inc. v. Zoning & Hearing Board of the City of Scranton*, 459 A.2d 60, 61 (Pa. Cmwlth. 1983) (citing to identical language applicable to hearings before the zoning hearing board in Section 908(9) of the MPC, 53 P.S. §10908(9)) (emphasis added). For the findings of fact and conclusions of law of the Board to be considered sufficient, the Board was required to provide an adequate explanation of its resolution of the factual questions involved and set forth its reasoning in such a way so as to show its decision was reasoned and not arbitrary. *See id.*; *Taliaferro v. Darby Twp. Zoning Hearing Board*, 873 A.2d 807, 816 (Pa. Cmwlth. 2005).

Lebanon Solar does not allege that the Board was required to rearticulate every piece of evidence set forth in the hearings on the Application. However, it is clear that "review for capricious disregard of material, competent evidence is an appropriate component of appellate consideration in zoning matters" and that "a deliberate and baseless disregard of apparently reliable evidence" constitutes a capricious disregard of evidence. *see Taliaferro*, 873 A.2d at 814, 815. The Pennsylvania Supreme Court has adopted the extension of a capricious disregard

standard to zoning proceedings in *Metal Green Inc. v. City of Philadelphia*, 266 A.3d 495, 515 (Pa. 2021) stating:

> In light of the above discussion, while we reaffirm the application by reviewing courts of our traditional review in zoning matters for an abuse of discretion, consistent with *Wintermyer,* **we allow for review of a zoning board's decision for a capricious disregard of the evidence as part of our traditional standard of review, in appropriate cases.** We caution, however, that, where substantial evidence of record supports a zoning board's findings, and the findings in turn support the board's conclusions, it should remain a rare instance where a reviewing court disturbs an adjudication based on a capricious disregard of the evidence standard.

(emphasis added). This is one of the rare instances, analogous to that in *Metal Green*, in which the Court must disturb the arbitrary and capricious findings of the Board.

The Supreme Court in *Metal Green* found that a zoning hearing board capriciously disregarded competent evidence where it "failed to make specific findings of fact, engage in credibility determinations, or offer sufficient rationale as to why" the relevant criteria, in that case for a variance, were not met. *See id.* This Court should note suspicious similarity with the Supreme Court's description of the decision in *Metal Green* with the Decision of the Board:

> Here, the Zoning Board neglected to make explicit credibility determinations, failed to weigh the evidence of record, and did not set forth its reasoning as to why it believed Metal Green did not meet its burden. These failures are especially notable in light of the largely uncontradicted expert testimony offered by Metal Green that seemingly spoke to the minimum variance requirement.

See id. at 517. There, as here, the applicant presented expert testimony which could lead to a determination that the relevant criteria were met. There, as here, the municipality's decision ignored that evidence rather than properly weighing it against any evidence presented to the contrary. There, as here, the municipality relied on "implicit" determinations of credibility not articulated in its decision. *See id.* at 516. In *Metal Green* our Supreme Court expressly rejected the acceptance of such "implicit determinations" the Board is not entitled to rely on the same. *See id.* at 517.

Here, the Board argues in its brief that it properly considered and weighed the expert testimony presented by Lebanon Solar, however its Decision is completely devoid of any such consideration. Lebanon Solar does not argue that the Board is not the entity entrusted with weighing the credibility of witnesses, or that it does not have the discretion to choose to believe one witness over the other. However, it must actually make those determinations, which must be well reasoned and founded on the evidence before it, and it must articulate those determinations in its Decision. It has failed to do so, resulting in what can only be seen as a capricious disregard of the evidence presented by Lebanon Solar.[4]

[4] The Board points to the Commonwealth Court's quotation of the trial lower court in *Kretschmann Farm, LLC v. Township of New Sewickley,* 131 A.3d 1044, 1055 (Pa. Cmwlth. 2016) to allege that it was not required to make any findings of fact related to the expert testimony set forth by Lebanon Solar. *See* Board Brief at 25. Besides being decided before our Supreme Court's precedential

III. 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.

[SIGNATURE PAGE TO FOLLOW]

---

opinion in *Metal Green, supra.*, *Kretschmann* is readily distinguishable. In *Kretschmann*, the court determined that the lower court did not err in finding that speculative opinions and concerns raised by objecting neighbors to not be probative. *See id.* at 1056. It concluded that the concerns raised by landowners in opposition to a natural gas well "did not constitute probative evidence that the well would be harmful to the health, welfare and safety of the neighborhood." *See id.* In *Kretschmann*, the Court also noted that the conditions imposed by the township demonstrated that those concerns raised by the objectors were in fact considered. *See id.* The Court therefore concluded that the township did *not* ignore the comments of the objectors because it responded to the same with the imposition of 33 conditions which related to specific concerns raised. *See id.* That is not the case here where the Board flat out ignored the competent evidence of expert witnesses as well as specific exhibits presented to it.

Date: July 24, 2023

Respectfully submitted,

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

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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.

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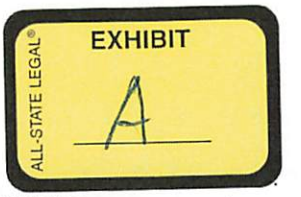

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IN THE COURT OF COMMON PLEAS OF LEBANON COUNTY, PENNSYLVANIA

CIVIL DIVISION

LEBANON SOLAR I, LLC,	:	
Appellant	:	
	:	
v.	:	**2022-00553**
	:	
NORTH ANNVILLE TOWNSHIP BOARD OF SUPERVISORS,	:	
Appellee	:	
	:	
and	:	
	:	
GRADY SUMMERS,	:	
Intervenor	:	

ORDER OF COURT

AND NOW, this 13th day of February, 2023, in accordance with the attached Opinion, the Motion to Quash Appeal filed by North Annville Township is DENIED. All parties are directed to appear for a Pre-Trial Conference before the undersigned on April 6, 2023 at 1:30pm in Courtroom #3.

BY THE COURT:

BHC J.
BRADFORD H. CHARLES

BHC/pmd
cc: Elizabeth Dupuis, Esq.// 330 Innovation Blvd., Ste 302, State College PA 16803
Paul Bametzreider, Esq.// 1601 Cornwall Rd., Lebanon PA 17042
William L. Cluck, Esq.// 587 Showers St., Harrisburg PA 17104
Court Administration

IN THE COURT OF COMMON PLEAS LEBANON COUNTY
PENNSYLVANIA
CIVIL DIVISION

LEBANON SOLAR I, LLC, **Appellant**	:	
v.	:	**2022-00553**
NORTH ANNVILLE TOWNSHIP BOARD OF SUPERVISORS, **Appellee**	:	
and	:	
GRADY SUMMERS, **Intervenor**	:	

APPEARANCES

ELIZABETH DUPUIS, ESQ.	**For Plaintiff Lebanon Solar I, LLC**
PAUL BAMETZREIDER, ESQ.	**For Defendant North Annville Township**
WILLIAM CLUCK, ESQ.	**For Intervenor Grady Summers**

OPINION BY CHARLES, J., February 13, 2023

When in doubt, Courts should err on the side of rendering substantive decisions instead of procedural ones. In this case, Lebanon Solar I, LLC (hereafter LEBANON SOLAR) has always declared its intent to appeal an adverse ruling by the North Annville Township Board of Supervisors (hereafter NORTH ANNVILLE). Unfortunately, LEBANON SOLAR did not

perfect its appeal in an ideal way. As a result, NORTH ANNVILLE has asked this Court to quash LEBANON SOLAR's Appeal. We author this written Opinion to explain why we decline to do so.

I. PROCEDURAL HISTORY

The procedural history of this case is not in serious dispute. In outline form, the following events pertinent to our decision occurred:

- May 3, 2021 – LEBANON SOLAR filed an application for conditional use seeking to construct a large-scale solar-utility facility in North Annville Township.
- January 25, 2022 – A hearing on the conditional use application was commenced.
- January 26, 2022 and February 24, 2022 – Additional testimony and evidence received by NORTH ANNVILLE. NORTH ANNVILLE indicated that it would render a final decision on April 5, 2022.
- March 24, 2022 – Brief solicited by NORTH ANNVILLE were due on or before this date.
- April 5, 2022 – NORTH ANNVILLE Board members deliberated and voted to deny LEBANON SOLAR's application for conditional use. However, no written decision was published.
- May 5, 2022 – LEBANON SOLAR filed a Notice of Land Use Appeal.
- May 12, 2022 – NORTH ANNVILLE issued a written decision.
- June 17, 2022 – LEBANON SOLAR filed a document entitled "Amended Notice of Land Use Appeal."

- September 20, 2022 – NORTH ANNVILLE filed a Motion to Quash Appeal.
- October 11, 2022 – LEBANON SOLAR filed an Answer to NORTH ANNVILLE's Motion and a simultaneous Request to Appeal Nunc Pro Tunc.

Also pertinent to our decision is an exchange that occurred at the end of the final day of testimony presented to NORTH ANNVILLE. At that time, the following occurred:

> "Mr. Bameztreider (NORTH ANNVILLE's attorney): Okay. Fine. So just to get this on record, the transcripts will be produced by the 10th of March. The written briefs, memorandums, whatever will be produced by the 24th of March and we will then have a night of public deliberation on the 5th of April.
>
> Ms. Dupuis: (LEBANON SOLAR's attorney): Just so we're clear so my client understands this, what you mean by public deliberation, it's the Board that's deliberating?
>
> Mr. Bametzreider: Correct.
>
> Ms. Dupuis: There's no - - the record will be closed at that point.
>
> Mr. Bametzreider: The record will be closed. The record is closed. It will just be public deliberation.
>
> Ms. Dupuis: Got ya.
>
> Mr. Bametzreider: So and the written decision itself will be due forty-five days from April 5.
>
> Ms. Dupuis: Okay. I was thinking the 24th, but that's fine. Yes, that's fine.
>
> Mr. Bametzreider: Ok, so you're in agreement with that, Ms. Dupuis. Mr. Cluck, are you in agreement with that?
>
> Mr. Cluck: Yes.
>
> Mr. Tshudy: So it's the 45-days from the April 5th meeting, and then they have the time to make the decision?

> Mr. Bametzreider: No, no, no, the decision will be made on April 5. The written decision will be 45-days thereafter."
>
> (Transcript 2/24/22 N.T. 390-391).

LEBANON SOLAR alleges that the above exchange lead it to believe that an Appeal should be filed within thirty (30) days of April 5.

Also pertinent is the method by which NORTH ANNVILLE served its written decision upon LEBANON SOLAR. Both parties acknowledge that NORTH ANNVILLE's lawyer emailed the written decision to counsel for LEBANON SOLAR within hours after it was published on May 12, 2022. However, LEBANON SOLAR alleges that the written decision was not mailed or delivered personally to one of its representatives. NORTH ANNVILLE does not dispute this allegation and the record submitted to this Court is devoid of any certificate or affidavit of service.

Both sides have filed briefs regarding NORTH ANNVILLE's Motion to Quash Appeal. We conducted oral argument on January 6, 2023. The issue is now before us for disposition.

II. DISCUSSION

A. Positions of the Parties

1. NORTH ANNVILLE's Position

NORTH ANNVILLE alleges that the appeal filed by LEBANON SOLAR on May 5, 2022 was a "nullity" because NORTH ANNVILLE's decision had not yet been published in writing at that

point in time. NORTH ANNVILLE next argues that the "Amended Appeal" filed by LEBANON SOLAR on June 17, 2022 was filed thirty-five (35) days after the written decision was published. Therefore, the "Amended Appeal" was untimely. Effectively, NORTH ANNVILLE alleges that LEBANON SOLAR neglected to properly perfect its appeal, and this Court therefore has no jurisdiction over it.

2. LEBANON SOLAR's Position

LEBANON SOLAR has proffered a cornucopia of arguments in support of the viability of its Appeal. First, LEBANON SOLAR alleges that it filed a proper appeal within thirty (30) days of the date on which NORTH ANNVILLE rendered its final "decision". According to LEBANON SOLAR, NORTH ANNVILLE rendered a final decision – as self-described by its own attorney – on April 5, 2022. LEBANON SOLAR also points out that the Municipalities Planning Code (MPC) requires that a written decision be memorialized no later than one (1) day after the final "decision" is rendered, and if this is not accomplished, then the "deemed decision" provision of the MPC should have been triggered. LEBANON SOLAR also alleges that copies of a township's "final decision" are required to be served upon the applicant personally or by mail and this was never accomplished. Therefore, LEBANON

SOLAR alleges that its Amended Appeal filed on June 17, 2022 was timely. Finally, LEBANON SOLAR seeks to take advantage of an MPC provision that established a thirty (30) day deadline for filing of an appeal "except in cases in which an unconstitutional deprivation of due process would result from its application..." According to LEBANON SOLAR, the totality of what occurred in this case should lead this Court to conclude that strict compliance with appeal deadlines as sought by NORTH ANNVILLE would result in an "unconstitutional deprivation of due process".

B. Legal Principles

Section 908 of the MPC governs the duties of a Township Board rendering decisions regarding conditional use requests. Among other things, § 908 requires a Board to render a "written decision...within forty-five (45) days after the last hearing before the Board or Hearing Officer." If no such decision is rendered, then "the decision shall be deemed to have been rendered in favor of the applicant unless the applicant has agreed in writing or on the record to an extension of time." 53 P.S. § 10908(9). Section 908 also states:

> "A copy of the final decision or, where no decision is called for, of the findings shall be delivered to the applicant

> personally or mailed to him not later than the day following its date."
> 53 P.S. § 10908(10).[1]

Appeals from a Township Board to the Court are governed by the Land Use Appeals chapter of the MPC. *See,* 53 P.S. § 11001-A et sec. Section 1002-A of this chapter requires that all Appeals to a trial court "be filed within thirty (30) days after entry of the decision..." Unfortunately, the Statute itself does not define the term "decision".

Perhaps anticipating that problems will arise procedurally, the General Assembly of Pennsylvania included a Statute entitled "Procedural Defects of Decisions." That Statute prevents strict application of the time deadline for filing of an appeal if "because of the insufficient actual or constructive notice of the decision, the application of the time limitation in § 1002-A(a) would result in an impermissible deprivation of constitutional rights." 53 P.S. § 11002.1-A(b)(2). This section of the MPC also provides that the burden of proving applicability of 53 P.S. § 11002.1-A is on the party seeking to take advantage of that section.

In terms of decisional precedent, we were unable to find any Appellate cases that are identical to the fact pattern now before this Court. Moreover, the decisions cited by the parties are not easy to

[1] The purpose of mandatory time limits for rendering a decision is to protect a land use applicant from dilatory conduct by the municipality. *See,* ***Allstate Signz Company v. Burgettstown Borough***, 154 A.3d 416 (Pa. Cmwlth. 2017).

reconcile. One of those cases even described the state of the law regarding timing of an Appeal to be "uncertain". *See,* ***Peterson v. Amity Township Board of Supervisors***, 804 A.2d 723, 729 (Pa. Cmwlth. 2002).

The gravamen of NORTH ANNVILLE's argument is that LEBANON SOLAR's Appeal filed on May 5, 2022 was "premature" and therefore a "nullity". In support of this argument, NORTH ANNVILLE cites two cases. In ***Snyder v. Zoning Hearing Board of Warminster Township***, 782 A.2d 1088 (Pa. Cmwlth. 2001), the Appellants filed an Appeal before a decision was rendered by the Township.[2] The Commonwealth Court declared that a premature Appeal is invalid and should be quashed. The Court stated:

> "The timeliness of an Appeal relates to the jurisdiction of a Court and its competency to act. The procedures in the Pennsylvania Municipalities Planning Code (MPC) are the exclusive methods for securing review of a zoning decision. Section 1002-A of the MPC provides that all Appeals to the Trial Court from a land use decision "shall be filed within thirty (30) days after entry of the decision..." Here, Appellants filed their Appeal on March 8, 2000, before the Board's March 23, 2000 decision and Order. *See,* 42 Pa.C.S. § 5572 (Stating that the date of service of an Order of a governmental unit shall be the date of mailing if service is by mail.) Additionally, Appellants never filed a subsequent Appeal within thirty (30) days after the entry of the decision as required by the MPC. Therefore, Appellants' March 8, 2000 Appeal of the

[2] The record in this case is silent as to whether the Township afforded Appellant with verbal notice of its decision, or whether the verbal indications of what the Township would decide were considered "final".

> Board's decision to the Trial Court was premature, and the Trial Court should have quashed that Appeal."
>
> **Id** at page 1090 (emphasis in original; citations omitted).

NORTH ANNVILLE also relies on ***EDF Renewable Energy v. Foster Township Zoning Hearing Board***, 150 A.3d 538 (Pa. Cmwlth. 2016). In ***EDF***, the Appellants also filed an Appeal prior to the date on which the Board's written decision was published. However, the Appellants also filed a Supplemental Notice of Appeal twenty-five (25) days after the Board's written decision was filed. The Commonwealth Court held that the supplemental filing of an Appeal cured any defect that the "premature" filing may have triggered. The Court stated:

> "Based on the date and language of the ZHB's decision, we conclude that the Trial Court did not err in denying the Motion to Quash the Appeal as premature. While EDF's second filing is entitled "Supplemental Notice of Land Use Appeal", it was filed after January 5, 2015, and within the thirty (30) day Appeal period. Although the ZHB argues that a premature Appeal cannot be "supplemented", we conclude that the second Notice of Appeal cured any jurisdictional defect."
>
> **Id** at page 545.

NORTH ANNVILLE argues that EDF supports this position because the proposed Amended Appeal filed by LEBANON SOLAR was filed beyond the thirty (30) days following the written decision.

LEBANON SOLAR relies upon the case of ***Peterson v. Amity Township Board of Supervisors***, 804 A.2d 723 (Pa. Cmwlth. 2002). In

Peterson, the Board did not render a written decision. The Appellant filed an Appeal more than thirty (30) days after the Board had rendered its verbal decision. The Trial Court quashed the Appellant's Appeal as untimely. The Commonwealth Court reversed and stated:

> Here, the 30–day period in which Peterson had to file his appeal was not triggered by the entry of a written decision because the Board did not reduce its approval of Vanguard's plan to writing. Thus, [the Court of] common pleas applied the last clause of Section 1002–A, which directs that an appeal must be filed within 30 days of "the date upon which notice of [a] deemed decision is given."
>
> A deemed approval of an applicant's subdivision results when a municipality fails to comply with its duty to communicate its decision to a subdivision applicant within the time and in the manner prescribed by Section 508 of the MPC. [The Court of] Common pleas reasoned that Vanguard's preliminary plan was deemed approved on the ninetieth day after Vanguard submitted its application, or June 18, 2000, because the Board failed to reduce its decision to writing and communicate it to Vanguard as required by Section 508. Common pleas then concluded that Peterson had 30 days from June 18, 2000 to file his land use appeal. Thus, common pleas calculated that Peterson's appeal period expired on July 18th, eight days before he filed his appeal on July 26, 2000.
>
> However, when a decision is neither "entered" pursuant to 42 Pa.C.S. § 5572 nor "deemed" pursuant to 53 P.S. 10508(3), the only two circumstances contemplated by Section 1002–A, what event triggers the running of the thirty-day appeal period? We believe that the intent of Section 1002–A was to begin that period when the municipality's decision process has been finalized with sufficient clarity that any party aggrieved by the decision can evaluate whether or not to appeal. An oral approval by the Board meets this standard. Moreover, causing the appeal time to be triggered by expiration of the time for delivery of a written decision is problematic. First, a written decision is served on the applicant, not the objecting neighbor. In addition, an applicant may extend

> the time within which the Board must reduce its oral approval to writing, or waive the requirement altogether. In this circumstance, an aggrieved objector would be left to guess when his appeal time has begun to run or, worse, the time might never begin to run at all. Accordingly, *we hold that the formal vote of the municipality to approve a subdivision plan begins the thirty-day period within which an aggrieved objector must appeal, at least to the extent the objector has actual or constructive notice of the decision.*
> ***Peterson***, supra at 726-728 (emphasis supplied)(citations omitted).

Unfortunately for LEBANON SOLAR, ***Peterson*** may no longer be valid precedent. In a 2016 decision, the Commonwealth Court stated:

> Peterson has effectively been overruled by ***Narberth Borough v. Lower Merion Township***, 915 A.2d 626 (Pa. 2007), which holds that all zoning decisions are not final until a written decision is issued, and until a written decision is issued, there is no order to appeal. "The decisional law of this Commonwealth confirms that a final order of a [ZHB] must be reduced to writing."
> ***First Ave. Partners v. City of Pittsburgh Plan. Commission***, 151 A.3d 715 (Pa. Cmwlth. 2016).

The Westlaw Legal Research website considers the above to constitute an "Implied Overruling" of ***Peterson***. This is despite the fact that the Court in ***Narberth*** specifically declined to "criticize" the Peterson Court "for its approach under the difficult facts of that case..." **Id** at page 646.

C. Analysis

It is within this relatively confusing environment that we must decide whether to permit LEBANON SOLAR's Appeal. As we contemplate this issue, we confess that our sympathies are with LEBANON SOLAR. From

the outset of this dispute, LEBANON SOLAR's desire to Appeal an adverse decision was crystal clear. It is plainly apparent that LEBANON SOLAR considered the proclamation by NORTH ANNVILLE's lawyer that the April 5, 2022 decision of the Board would be a final one to trigger the Appeal period. It even re-affirmed its desire to Appeal by filing a supplemental document thirty-five (35) days after the written decision was published.

NORTH ANNVILLE's argument rests upon a technical interpretation of the MPC and the confusing precedent outlined above. We are reluctant to elevate a technical application of procedural requirements over a party's crystal-clear effort to have its substantive rights adjudicated. This is especially true given that there are facts in this case that distinguish the matter now before us from the cases relied upon by NORTH ANNVILLE.

For example, the Court in ***Snyder*** did not mention any verbal decision outlined by the Board in that case, and we do not know the basis upon which the Appellant filed its Appeal or whether the Board in that case referenced that its verbal comments were or were not "final". Here, it is patently clear from Attorney Bametzreider's comments that the vote on April 5, 2022 was a "final" decision. There is simply no indication in

Snyder whether a similar declaration by the Board in that case was ever articulated.

In ***EDF***, the so-called "premature Appeal" was deemed to be cured by a subsequent amendment. The amendment in ***EDF*** was filed within thirty (30) days following the date of the written decision, but there was no allegation that the written decision was not served in accordance with the MPC. Here, LEBANON SOLAR alleges that NORTH ANNVILLE did not personally serve or mail a copy of its decision to LEBANON SOLAR within twenty-four (24) hours after it was rendered. Effectively, LEBANON SOLAR alleges that NORTH ANNVILLE itself failed to strictly comply with the mandates of the MPC by failing to adhere to its service requirements.

On top of the above, there is a Commonwealth Court case -***Peterson***- that favors LEBANON SOLAR's argument. The continuing efficacy of ***Peterson*** has certainly been called into question but the decision that purportedly overruled ***Peterson***, ***Narberth v. Lower Merion Township***, supra, did not itself declare ***Peterson*** to be overruled.

We certainly understand NORTH ANNVILLE's argument. Viewing the record now before us from a hyper-technical perspective, there is a logical legal argument that would support quashing LEBANON SOLAR's Appeal.

That said, we cannot ignore the following...

-That the MPC requires an Appeal within thirty (30) days of a final decision.

-That Attorney Bametzreider clearly characterized the April 5, 2022 vote of the Board as a final decision.

-That LEBANON SOLAR filed an Appeal within thirty (30) days of April 5, 2022.

-That nothing in the MPC equates a final decision with a written one.

-That LEBANON SOLAR took the extra step of filing an Amended Appeal following a written decision that was never properly served in accordance with the MPC; and

-That the decisional precedent cited by the parties is murky enough that we cannot justify throwing out a party's substantive rights based upon it.

Based on the above, we will permit LEBANON SOLAR's Appeal to proceed to that its substantive rights can be adjudicated. An Order to accomplish this will be entered today's date.

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 21st day of **July, 2023**, via First Class U.S. Mail upon the following:

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By: _____
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