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IN THE COURT OF COMMON PLEAS OF LEBANON COUNTY, PENNSYLVANIA

LEBANON SOLAR I, LLC, Appellant, v. NORTH ANNVILLE TOWNSHIP BOARD OF SUPERVISORS, Appellee, and GRADY SUMMERS, Intervenor.	CIVIL DIVISION No. 2022-00553

BRIEF OF APPELLEE, NORTH ANNVILLE TOWNSHIP BOARD OF SUPERVISORS, IN OPPOSITION TO LAND USE APPEAL

NOW COMES Appellee, North Annville Township Board of Supervisors ("Township"), by and through its attorneys, Barley Snyder LLP, and files this Brief in Opposition to Land Use Appeal of Appellant, Lebanon Solar I, LLC ("Lebanon Solar").

In this case, the Township's Board of Supervisors ("Board") applied the express meaning of the applicable zoning ordinance and properly denied Lebanon Solar's Conditional Use Application ("Application"). Where the trial court takes no evidence, the standard of review of a Zoning Hearing Board's decision is limited to whether the board abused its discretion or erred as a matter of law. The zoning hearing board is the sole judge of credibility with power to resolve conflicts in testimony and to reject even uncontradicted testimony that it finds to be lacking in credibility. *Petition of Dolington Land Group*, 576 Pa. 519, 839 A. 2d 1021 (2003). Therefore, this Court should uphold the Township's decision and deny Lebanon Solar's Application.

I. COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

A. WHETHER THE APPELLANTS' APPEAL SHOULD BE DISMISSED BECAUSE THE BOARD PROPERLY CONCLUDED THAT THE ZONING ORDINANCE REQUIRES EACH INDIVIDUAL LOT TO MEET ALL CRITERIA SET FORTH IN SECTION 522 OF THE ZONING ORDINANCE AND PETITIONER FAILED TO MEET THAT CRITERIA?

SUGGESTED ANSWER: ***In the Affirmative.***

B. WHETHER THE BOARD ACTED AS AN UNBIASED DECISION-MAKING TRIBUNAL AND PROVIDED LEBANON SOLAR WITH ITS DUE PROCESS RIGHT TO A FAIR HEARING?

SUGGESTED ANSWER: ***In the Affirmative.***

II. COUNTER-STATEMENT OF THE CASE

On May 3, 2021, Appellant Lebanon Solar submitted a Conditional Use Application ("Application") to North Annville Township ("Township") for development of a 1234-acre solar farm, which was later amended to 858 acres ("Project"). The Project was to be located on twelve individual adjacent lots owned by separate owners. The lots are all located in the Township's A-1 Agricultural Zone and are owned by the following individuals: 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 II and otherwise identified respectively 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, 215-2300405-381893-0000, 25-2300498-383638-0000, 25-2299851-378128-0000, and 25-2296964-375508-0000.

The Board advertised public hearings on the Application. The public hearings were conducted on January 25, 2022, January 26, 2022, and February 24, 2022. During the hearings, Lebanon Solar was provided with the opportunity to fully present its Application to the Board. Lebanon Solar presented witnesses and entered exhibits into evidence, which the Board afforded all due consideration. Lebanon Solar was also permitted to present its proposed findings of fact and conclusions of law to the Board by March 24, 2022.

After deliberation, the Board rendered a decision denying the Application on April 5, 2022. Soon after, on May 12, 2022, the Board issued its findings of fact and conclusions of law.

III. COUNTER-STATEMENT OF JURISDICTION

This Court lacks jurisdiction over Lebanon Solar's Land Use Appeal because Lebanon Solar failed to comply with the requisite procedures of the Pennsylvania Municipalities Planning Code ("MPC"). The MPC provides that "[t]he procedures set forth in this article shall constitute the exclusive mode for securing review of any decision rendered pursuant to Article IX or deemed to have been made under this

act." 53 P.S. § 11001-A. The Board's written decision denying Lebanon Solar's application for conditional use was issued timely pursuant to Article IX of the MPC. The MPC further provides:

> "All appeals from all land use decisions rendered pursuant to Article IX shall be taken to the court of common pleas of the judicial district wherein the land is located and shall be filed within 30 days after entry of the decision as provided in 42 Pa.C.S. § 5572 (relating to time of entry of order) or, in the case of a deemed decision, within 30 days after the date upon which notice of said deemed decision is given as set forth in section 908(9)2 of this act. It is the express intent of the General Assembly that, except in cases in which an unconstitutional deprivation of due process would result from its application, the 30-day limitation in this section should be applied in all appeals from decisions." 53 P.S. § 11002-A.

The Commonwealth Court has held that "the timeliness of an appeal relates to the jurisdiction of a court and its competency to act." *In re Order of Nether Providence Zoning Hearing Board Dated April 28, 1975,* 358 A.2d 874, 876 (Pa. Cmwlth. 1976).

Here, Lebanon Solar failed to comply with the time for appeal established by the MPC. First, Lebanon Solar filed its Notice of Appeal of Land Use Decision on May 5, 2022 – seven days before the Board issued its Findings of Fact, Conclusions of Law and Decision on May 12, 2022. Next, Lebanon Solar failed to file its Amended Notice of Land Use Appeal until June 17, 2022 – more than 30 days after the Board's written decision was issued. Accordingly, because Lebanon Solar failed

to comply with the Section 11002-A of the MPC, this Court lacks jurisdiction over the instant matter. The Board incorporates its Motion to Quash Appeal and supporting Brief in support of its counterstatement on jurisdiction.

IV. SUMMARY OF ARGUMENT

Under Pennsylvania law, "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 P.S. § 1921. This critical maxim is also applicable to zoning ordinances, which "are to be construed in accordance with the plain and ordinary meaning of their words." *Tri-Cnty. Landfill, Inc. v. Pine Twp. Zoning Hearing Bd.*, 83 A.3d 488, 510 (Pa. Cmwlth. Ct. 2014). Accordingly, "[w]here a word or phrase in a zoning ordinance is defined, a court is bound by the definition." *Slice of Life, LLC v. Hamilton Twp. Zoning Hearing Bd.*, 207 A.3d 886, 899 (Pa. 2019). An applicant for a conditional use "has the initial burden of proving compliance with the specific requirements in the zoning ordinance." *Levin v. Bd. of Sup'rs of Benner Twp.*, Ctr. Cnty., 669 A.2d 1063, 1069 (Pa. Cmwlth. Ct. 1995), aff'd, 689 A.2d 224 (Pa. 1997). Pursuant to the Pennsylvania Municipalities Planning Code ("MPC"), "[w]here the governing body, in the zoning ordinance, has stated special exceptions to be granted or denied by the board pursuant to express standards and criteria, the board shall hear and decide requests for such special exceptions in accordance with

such standards and criteria." 53 P.S. § 10912.1. Such standard applies to conditional uses heard by the governing body. 53 P.S. §10913.2(a).

Here, the Board applied the explicit and unambiguous definition of "lot" as set forth in the Zoning Ordinance to determine that Lebanon Solar's Application must be denied because it did not comply with the requisite criteria. Additionally, Lebanon Solar failed to provide any evidence on the record of the Board's alleged bias or appearance of bias. Accordingly, this Court should affirm the Board's decision to deny the Application.

V. ARGUMENT

A. LEBANON SOLAR'S APPEAL SHOULD BE DISMISSED BECAUSE THE TOWNSHIP CORRECTLY DETERMINED THAT EACH LOT IN THE APPLICATION MUST INDIVIDUALLY SATISFY THE CRITERIA OF THE ZONING ORDINANCE AND PETITIONER FAILED TO DEMONSTRATE THAT EACH LOT FAILED TO MEET THE CRITERIA FOR THE GRANT OF A CONDITIONAL USE

Lebanon Solar in its application to the board for conditional use argued that it could assemble a total of 12 lots with contiguous lot lines and treat them as one lot under the zoning ordinance having them comply with the criteria of the ordinance as one lot instead of as 12 separate lots. The applicant argued that there- fore the individual lots did not individually need to comply with the requirements of the criteria so long as the conglomeration of the 12 lots treated as one unity complied with the criteria. Hence, there did not need to be compliance in that each lot did not need to meet the minimum lot size, the interior lot lines did not need to comply with

the setbacks, there did not need to be buffering between the interior lots and so on. Essentially, the Applicant tried to re-write the township's zoning ordinance. The township rejected this attempt.

The Commonwealth Court was confronted with a similar argument in the case of *Society Hill Civic Assoc. v. Philadelphia Zoning Hearing Board Zoning Board of Adjustment*, 42 A. 3d 1178(Pa. Cmwlth. Ct. 2012). In this case the applicant was attempting to essentially treat two contiguous lots as one for purposes of the zoning ordinance. Judge Simpson's analysis in this case required that for such a "unity of use" theory to apply the must be a finding of 1) that such an agreement is authorized for zoning purposes under the relevant zoning ordinance and 2) that there are factual findings which would demonstrate a unity of use agreement actually exists between the landowners. Such factual findings would include i.e. restrictive covenants between landowners binding future owners to the unity of use and easements allowing for the free flow of traffic between the lots contained within the unity.

In the matter sub judice, there has been no demonstration that the township's zoning ordinance allows for such a unity of use between these 12 lots where they can be treated as one, and no coherent argument has been made by Lebanon Solar to this effect. The township's zoning ordinance provides no authority for Lebanon Solar to combine 12 lots into a unity so that they might be treated as one under the zoning ordinance. Moreover, Lebanon Solar has failed to provide any evidence of

restrictive covenants between the landowners themselves whereby they bind themselves to a unity of use and bind future owners by covenants running with the land. Nor has there been any evidence of easement agreements between the landowners by which traffic would be allowed to flow freely between the lots allowing them to function as one. Lebanon Solar bears the burden in this matter and they failed to present any evidence which would support such a finding. There was testimony as to leases between the landowners and Lebanon Solar, but these leases appear to fall far short of what would be necessary to bind the individual lots together into a unity for zoning purposes. Hence, the township was bound to treat each lot individually, and apply the criteria of the ordinance to each lot individually.[1]

Following upon this reasoning, the Board's denial of the Application was proper, as each of the Application's individual participating lots failed to meet all criteria set forth in the Zoning Ordinance applicable to "Solar Farms." On October 14, 2019, the Township enacted Ordinance No. 2-2019, providing a conditional use

[1] Lebanon Solar attempts to make an argument in their Brief that because the Township accepted their application which included all 12 lots, the Township should now be equitably estopped from considering the lots individually under the ordinance. Such a conclusion is untenable to say the least. Townships accept applications for zoning relief all the time which contain numerous legal theories, some of which are valid and some not. They cannot be equitably estopped from deciding the legal issues raised within these petitions solely because they accepted the petition for consideration.

for solar farms. A "Solar Farm" is defined as "[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." Zoning Ordinance, Article II, Section 201.4(a). The Zoning Ordinance includes as a Conditional Permitted Use "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." Zoning Ordinance, Article IV, Section 401.1(O) (emphasis supplied). The requisite conditions for a Solar Farm to qualify as a Conditional Permitted Use include:

> 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.

Zoning Ordinance, Article V, Section 522(1)-(8).

Applying these criteria to the Application, the Board found numerous instances of non-compliance. Specifically, under the Zoning Ordinance's own definition of "lot", the Board determined that each of the Application's twelve participating lots must individually meet the criteria set forth in Section 522. Decision at Conclusions ¶ 11. The Board observed that two of the participating lots failed to comply with Section 522(2), as both lots were less than the requisite 50 acres. Decision at Conclusions ¶ ¶ 16,17. Additionally, the Board determined that numerous lots failed to comply with the 50-foot set back required by Section 522(3), the vegetation buffer required by Section 522(4), the 50% lot coverage requirement of Section 522(5), the bonding requirement of Section 522(7), and the submission of a Stormwater Management Plan required by Section 522(8). Decision at Conclusions ¶ ¶ 18-26.

To reach these conclusions, the Board interpreted the word "lot" as it is defined by the North Annville Township Zoning Ordinance at Section 201.4 which defines a lot as: "A legally defined tract, parcel or plot of land, whether occupied or capable of being occupied by buildings". N. Annville Tp. 2.0 Section 201.4.

1. The Township's Interpretation of the Zoning Ordinance's Definition of "Lot" Aligns with Statutory and Commonly Held Definitions of "Lot".

The Board's determination that each of the Application's twelve participating lots are individually subject to the criteria of Section 522 of the Zoning Ordinance comports not only with the definition of "lot" within its Zoning Ordinance but also with the statutory and commonly held definitions of "lot". Under Pennsylvania law, "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."1 P.S. § 1921. The MPC defines a "lot" as "a designated parcel, tract or area of land established by a plat or otherwise as permitted by law and to be used, developed or built upon as a unit." 53 P.S. § 10107. In another statute, "lot" is defined as "... a parcel of land used as a building site or intended to be used for building purposes, whether immediate or future, which would not be further subdivided ...". 35 P.S. § 750.2. These statutory definitions closely track the common definition of "lot" found in Black's Law Dictionary: "[a] (usu. rectangular) tract of land, esp. a tract that is a component of a block in a municipal plat. A municipal plat typically divides a tract

of land into rectangular blocks and divides the blocks into regular lots." LOT, Black's Law Dictionary (11th ed. 2019). Notably, the Commonwealth Court "will generally use a dictionary definition to determine the common use of a term." *Header v. Schuylkill Cnty. Zoning Hearing Bd.*, 841 A.2d 641, 645 (Pa. Cmwlth. Ct. 2004). Each of these definitions emphasize the distinct nature of an individual lot, often as shown on a plat. Therefore, the Pennsylvania legislature and the commonly held definition of lot support the Township's interpretation of "lot" as a distinct parcel individually subject to zoning requirements. Moreover, these authorities refute Lebanon Solar's position that a conglomeration of lots constitute a "lot". A "lot" as defined by the aforementioned authorities is a unit subdivided from a larger parcel as defined by a plat.

Here, the Zoning Ordinance echoes the above definitions by defining "lot" as "[a] legally defined tract, parcel, or plot of land, whether occupied or capable of being occupied by buildings." N. Annville Tp. 2.0 Section 201.4. Notably, the Zoning Ordinance's definition emphasizes the "legally defined" nature of a lot. Despite Lebanon Solar's arguments to the contrary, these definitions cannot simply be abandoned to accommodate a "campus concept" wherein, for purposes of the Zoning Ordinance, each of the Application's participating lots are to be considered as a single "campus" rather than as twelve individual and legally distinct parcels. Such an approach is explicitly prohibited by the law of statutory interpretation which

states that "the letter of [the statute] is not to be disregarded under the pretext of pursuing its spirit."1 P.S. § 1921. To do so would be to impermissibly substitute the intention of the legislature, the commonly held definition of "lot", and the Zoning Ordinance's definition of "lot" for a perceived convenience. Furthermore, such an interpretation fails to comply with the plain meaning of the term "lot" as previously defined.

A significant body of Commonwealth Court caselaw further supports the Township's position that the Zoning Ordinance must be applied to each individual lot, and not to a "campus" of lots. For example, in *Tinicum Tp.*, the Court held that "[i]t is well established that mere common ownership of ... adjoining lots does not automatically establish a physical merger of those lots *for the purpose of determining whether those lots comply with the zoning requirements*." *Tinicum Tp. v. Jones*, 723 A.2d 1068, 1071 (Pa. Cmwlth. Ct. 1998) (emphasis supplied); see also *Daley v. Zoning Hearing Bd.*, 770 A.2d 815, 819 (Pa. Cmwlth. Ct. 2001) (finding that "[m]ere common ownership of adjoining lots does not automatically establish a physical merger of those lots for purposes of zoning."). Only in instances where adjacent *non-conforming* lots are brought into common ownership will a Court deem, under specific circumstances which are not instantly present, that the lots may be merged pursuant to the "doctrine of merger" *Springfield Tp. v. Halderman*, 840 A.2d 528, 5301 (Pa. Cmwlth. Ct. 2004).

Here, Lebanon Solar's proposed "campus concept" is not supported only by its common tenancy of the Application's participating lots. The Commonwealth Court has consistently held that common ownership of numerous adjoining lots does not result in a merger for purposes of zoning. *Daley* 770 A.2d at 819; *Tinicum Tp. v. Jones*, 723 A.2d at 1071. In *Halderman*, the Court held that two tracts of land which were "historically and continually ... considered separate" did not merge even after they were conveyed to a common owner by a single deed. *Halderman*, 840 A.2d at 530. Instead, the Court determined that the single deed only had the effect of "re-deed[ing] the two tracts" as separate and distinct tracts. *Id.* As such, despite Lebanon Solar's common ownership of the lots in question and the Application's proposed conglomeration of the lots as a "campus", the twelve participating lots remain distinct and individually subject to the criteria of Section 522 of the Zoning Ordinance. Because the lots fail to meet these criteria, the Board properly denied the Application and Lebanon Solar's appeal should be denied.

2. The Unambiguous and Express Language of the Zoning Ordinance Demonstrates that Each Participating Lot of the Application Must Meet the Criteria of Section 522 Individually and Not as a Collective "Campus" of Lots.

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. It is well settled that "a zoning hearing board's interpretation of its own zoning ordinance is entitled to great weight and deference." *Kohl v. New Sewickley Twp. Zoning Hearing Bd.*, 108 A.3d 961, 968 (Pa. Cmwlth. Ct. 2015). Nevertheless, because "[t]he letter of the ordinance is not to be disregarded under the pretext of pursuing its spirit," the Board was "required to apply the terms of the Zoning Ordinance as written rather than deviating from those terms based on an unexpressed policy." *Balady Farms, LLC v. Paradise Twp. Zoning Hearing Bd.*, 148 A.3d 496, 505 (Pa. Cmwlth. Ct. 2016). Only where doubt exists surrounding *undefined terms* should any discrepancy be "resolved in favor of the landowner and least restrictive use of the land." *Bethlehem Manor Vill., LLC v. Zoning Hearing Bd. of City of Bethlehem*, 251 A.3d 448, 465 (Pa. Cmwlth. Ct. 2021). On the other hand, "[w]here a word or phrase in a zoning ordinance *is defined*, a court is bound by the definition." *Slice of Life,* LLC, 207 A.3d at 899 (emphasis supplied).

Here, the term "lot" is expressly defined in the Zoning Ordinance as "[a] legally defined tract, parcel, or plot of land, whether occupied or capable of being occupied by buildings." N. Annville Tp. 2.0 Section 201.4.. Despite Lebanon Solar's arguments in favor of analyzing the Application as including a "campus concept" rather than individual lots, abundant caselaw demonstrates that the Board was not at liberty to reinterpret the word "lot" and "impose their concept of what the zoning ordinance should be." *Greth Dev. Grp., Inc. v. Zoning Hearing Bd. of Lower*

Heidelberg Twp., 918 A.2d 181, 187 (Pa. Cmlwth. Ct. 2007). Indeed, Lebanon Solar's "campus concept" proposition is a blatant attempt to induce the Board to disregard the letter of the ordinance "under the pretext of pursuing its spirit." *Balady Farms, LLC*, 148 A.3d at 505. Lebanon Solar misapplies caselaw to imply that the Board was obligated to embrace the "campus concept" interpretation, when, in fact, the opposite is true. Only in a case of ambiguity would the Board be entitled to such liberty. *See Bethlehem Manor Vill.,* LLC, 251 A.3d at 465. Here, no such ambiguity exists. The only senses in which lots are "legally defined" is via their status as tax parcels and/or by deed. In no way does the Application ascribe any "legal definition" to the twelve lots as a collective "campus." As such, the Board was required to apply the definition of "lot" according to the express definition set forth in the Zoning Ordinance.

Based on this method of application, Lebanon Solar failed to comply with the conditional use criteria explicitly provided in the Zoning Ordinance. Specifically, the Application includes twelve "lots", each of which must individually satisfy all eight Section 522 criteria. The Board found that Lebanon Solar's Application failed to meet these criteria in the following ways:

> "16. The lot of Leonard Long and Michael Long located at 1749 Blacks Bridge Road contains 30.48 acres; and therefore, fails to meet criterion number of the Ordinance which requires a minimum lot size of 50 acres. Therefore, this lot may not be approved for conditional use under criterion number 2.

17. The property of Dale and Thelma Hostetter located at 1595 North State Route 934 contains 49.78 acres; and therefore, fails to meet criterion number 2 and cannot contain a solar farm as applied for by the applicant.

18. Applicant has failed to demonstrate that applicant can comply with criterion number 3 of the Ordinance which requires a 50-foot set back from adjacent lot lines. The Board would note that the 50foot set back is not provided between 1749 Blacks Bridge Road and 445 Hostetter Lane. Moreover, the 50-foot set back is not complied with between 1595 North State Route 934 and 5501 Valley Glen Road. Failure to provide a 50-foot set back between these properties is a violation and failure to comply with criterion number 3. Applicant has failed to meet its burden regarding compliance with criterion number 3.

19. Moreover, applicant fails to demonstrate compliance with criterion number 3 and the 50-foot set back between the properties of 1754 Blacks Bridge Road and 1675 North State Route 934. Applicant also fails to demonstrate compliance with the 50-foot setback between the properties of 1749 Blacks Bridge Road and 1595 North S.R.934. Additionally, Applicant fails to demonstrate compliance with the 50-foot setback between the properties of 1595 N. S.R. 934 and 1754 Blacks Bridge Rd.

20. Applicant's proposal to comply with the setback requirement only with exterior adjacent lots fails to comply with criterion #3.

21. The Board finds that regarding criterion number 4 of the Ordinance, applicant has failed to meet its burden that it will provide a suitable vegetative buffer or a fence which accomplishes the same thing between all of the lots which are parts of the applicant's application for the same reasons as stated in 17-19. Additionally, the Applicant fails to provide a suitable vegetative buffer or a fence

which accomplishes the same purpose of buffering around the entire exterior perimeter of the project area, except where Applicant proposes to voluntarily install vegetative screening in various areas to screen residential viewsheds.

22.Regarding criterion number 5, the Board finds 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.

23. The Board specifically finds that solar panels must be included in the calculation of lot coverage and Applicant fails to include panels in his calculations and show how the panels should be arrayed on the individual lots.

24. The Board finds that applicant has complied with criterion number 6 by presenting Exhibit A-7 and certificates of insurance which comply with criterion number 6.

25. The Board finds that applicant has failed to comply with criterion number 7 of the Ordinance by failing to submit appropriate bonding as required by criterion number 7 in as much as applicant's promise of future compliance does not meet the criterion.

26. The Board finds that applicant has failed to comply with criterion number 8 of the Ordinance which requires the submission of evidence of an approved Stormwater Management Plan as required by the Lebanon County Stormwater Management Ordinance. A promise of future compliance does not constitute evidence of compliance with criterion number 8.

Because the Board's foregoing conclusions appropriately apply the Zoning Ordinance's definition of "lot", the Board's decision to deny the Application should be upheld and Lebanon Solar's appeal should be denied.

a. The Board Correctly Concluded that the Application did not meet the Requirements of Section 522(2) of the Zoning Ordinance.

Under the Zoning Ordinance, a solar farm is a conditional permitted use in North Annville Township, so long as the solar farm "*compl[ies] with certain conditions defined in Section 5.22.*" N. Annville Tp. 4.0 Section 401.1 (O). (emphasis supplied). "An applicant for conditional use has the burden to demonstrate compliance with the specific criteria of the ordinance." *In re Thompson*, 896 A.2d 659, 670 (Pa. Cmwlth. Ct. 2006) citing *Levin v. Board of Supervisors of Benner Township*, 669 A.2d 1063 (Pa. Cmwlth. Ct. 1995). A condition for a Solar Farm to qualify as a Conditional Permitted Use is that "the minimum lot size for the establishment of any Solar Farm shall be fifty (50) acres." N. Annville Tp.52.0 Section 522 (2). Here, two of the Application's participating lots failed to meet the minimum lot size requirement established by the Zoning Ordinance. Therefore, the Board properly denied the Application.

Section 522(2) of the Zoning Ordinance provides that, for a Solar Farm to qualify for a Conditional Permitted Use, "[t]he minimum lot size for the establishment of any Solar Farm shall be fifty (50) acres." Under the MPC,

"[w]here...the zoning ordinance ... has stated special exceptions to be granted or denied by the board pursuant to express standards and criteria, the board shall hear and decide requests for such special exceptions in accordance with such standards and criteria." 53 P.S. § 10912.1. As stated above, the term "lot" is defined in the Zoning Ordinance as "[a] legally defined tract, parcel, or plot of land, whether occupied or capable of being occupied by buildings." N. Annville Tp. 2.0 Section 201.4.

In its conclusions of law, the Board found that two lots in the Application failed to meet the minimum lot size for a Solar Farm. Decision at Conclusions, ¶ ¶ 15-16. Specifically, the Board determined that the lot located at 1749 Blacks Bridge Road contained 30.48 acres, and the lot located at 1595 North State Route 934 contained 49.78 acres. *See id.* Though the sum acreage of the Application's twelve participating lots is eight-hundred fifty-eight (858) acres, the Zoning Ordinance does not contemplate application of the Section 522 criteria according to a "campus concept." Rather, for the reasons set forth above, the Board was obligated to apply the express definition of "lot" in its determination of whether the Application comported with the minimum lot size requirement set forth in Section 522(2). Because two of the Application's participating lots did not meet the requisite 50 acres, the Board properly denied the Application.

Additionally, Mr. Lawrence Lahr, testifying on behalf of the Township as an expert witness, opined that Lebanon Solar's Application failed to meet the minimum lot requirements of Section 522(2) and that the definition of the word "lot" was unambiguous. Tr. 1/26/2 at 164-67. Contrary to Lebanon Solar's assertion, the Board considered and was unconvinced by the testimony of Mr. Timothy Staub. The Board's interpretation of the zoning ordinance "is entitled to great weight and deference." *Kohl*, 108 A.3d at 968. Based on the plain language of the Zoning Ordinance and expert testimony, the Board concluded that the Application failed to meet the Section 522(2) criterion.

b. The Board Correctly Concluded that the Application did not meet the 50-Foot Setback Requirement of Section 522(3) or the Buffering Requirement of Section 522(4) of the Zoning Ordinance.

Section 522(3) of the Zoning Ordinance provides that "[t]he 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." N. Annville Tp. 5.0 Section 522 (3). Section 522(4) provides that "[a] permanent evergreen vegetative buffer must be provided or fencing which accomplishes the same purpose of buffering." N. Annville Tp. 5.0 Section 522 (4). The Commonwealth Court has held that "[a]n ordinance, like a statute, must be construed, if possible, to give effect to all of its provisions." *Mann v. Lower Makefield Twp.*, 160 Pa. Cmwlth. 208, 215, 634 A.2d 768, 771–72 (1993).

Therefore, "[i]nterpretation of an ordinance which produces an absurd result is contrary to the rules of statutory construction." *Id.* at 773. Finally, "[w]hen statutory language is not explicit, courts should give great weight and deference to the interpretation of a statutory or regulatory provision by the administrative or adjudicatory body that is charged with the duty to execute and apply the provision at issue." *In re Thompson*, 896 A.2d 659, 669 (Pa. Cmwlth. Ct. 2006) Here again, pursuant to the MPC, the Board was obligated to form its conclusion in accordance with the established criteria of the Zoning Ordinance. *See* 53 P.S. § 10912.1. Moreover, the Board's conclusions as to the interpretation of the Zoning Ordinance must be afforded great weight and deference.

Applying the criterion set forth in Section 522(3) and the Zoning Ordinance's definition of "lot", the Board determined that the minimum setback requirement was met by the Application only with respect to the lots forming the exterior perimeter of the proposed 858 acre "campus concept." The Board found that the remaining internal participating lots failed to meet the setback requirement. Decision at Conclusions, ¶ ¶ 18-19. Further, the Board found that Lebanon Solar's "proposal to comply with the setback requirement only with exterior adjacent lots fails to comply with [Section 522(3)]." *Id.* at ¶ 20.

Lebanon Solar's assertion that its Application met the setback requirement of Section 522(3) rests primarily on the fact that the Zoning Ordinance does not provide

an express definition of the phrase "adjacent lot line." *See* Appellant's Brief at 30. This argument does not stand up to scrutiny. True, to define an undefined term, courts "may consult definitions found in statutes, regulations or the dictionary for assistance." *Manor Healthcare v. Lower Moreland Township Zoning Hearing Board*, 590 A.2d 65 (Pa. Cmwlth. Ct. 1991). However, it is impermissible to place a word "in a vacuum and interpret the meaning of the word by itself, and not as part of a phrase." *Borough of Pleasant Hills v. Zoning Bd. of Adjustment of Borough of Pleasant Hills*, 669 A.2d 428, 430 (Pa. Cmwlth. Ct. 1995). Instead, "[a] given phrase must be interpreted in context and read together with the entire ordinance." *H.E. Rohrer, Inc. v. Zoning Hearing Bd. of Jackson Twp.*, 808 A.2d 1014, 1017 (Pa. Cmwlth. Ct. 2002).

Here, Lebanon Solar's interpretation of "adjacent lot line," contradicts and undermines the Zoning Ordinance's clear and unambiguous definition of "lot". The term "adjacent lot line" cannot be held to support Lebanon Solar's "campus concept" without placing the setback requirement at odds with the other Section 522 criteria. An "[i]nterpretation of an ordinance which produces an absurd result is contrary to the rules of statutory construction." *Mann,* 634 A.2d 771–72. Moreover, the Board's interpretation of the phrase "adjacent lot line" must be afforded great weight and deference. *In re Thompson*, 896 A.2d at 669. Therefore, the Board properly

determined that the Application failed to comply with the setback requirement of the Zoning Ordinance.

Lebanon Solar presents a similar argument with respect to the Zoning Ordinance's buffering requirement. Section 522(4) of the Zoning Ordinance states "[a] permanent evergreen vegetative buffer must be provided or fencing which accomplishes the same purpose of buffering." N. Annville Tp. 5.0 Section 522 (4). The Board determined that "... applicant has failed to meet its burden that it will provide a suitable vegetative buffer or a fence which accomplishes the same thing between all of the lots which are parts of the applicant's application ..." Conclusions at Decisions ¶ 21.

Here again, Lebanon Solar relies on a nonsensical interpretation of the Zoning Ordinance by arguing that "the Board was prohibited from narrowing the Ordinance ... to require that the internal lot lines between participating parcels be screened or blocked." Appellant's Brief at 34. Lebanon Solar states that "the Board's reliance on the definition of "lot" as it relates to Section 522 (4) is entirely illogical – the word "lot" does not appear in Section 522 (4) at all." *See id.* at 33. In this assertion, Lebanon Solar has again run afoul of the rules of statutory interpretation. While it is true that the word "lot" does not explicitly appear in Section 522 (4), this does not mean that the buffer requirement is not applicable to each individual participating lot. "A given phrase must be interpreted in context and read together with the entire

ordinance." *H.E. Rohrer, Inc.*, 808 A.2d at 1017. The zoning criteria addressing setback requirements, lot coverage, and minimum size are each explicitly and unambiguously applicable to individual lots. Read in this context, it is evident that the buffering requirement is also applicable to individual lots, and not to a "campus" of lots. A contrary interpretation would lead to an impermissibly incoherent result. *Mann,* 634 A.2d 771–72. For these reasons, the Board properly determined that the Application failed to meet the buffering requirement of the Zoning Ordinance.

c. The Board Correctly Concluded that the Application did not meet the Maximum Lot Coverage Requirement of Section 522(5) of the Zoning Ordinance.

The Board's determination that Lebanon Solar's Application failed to satisfy the 50% maximum lot coverage requirement was proper. Section 522 (5) of the Zoning Ordinance states "[t]he maximum lot coverage may not exceed fifty (50%) percent of the total lot size." N. Annville Tp. 5.0 Section 522 (5). The Board found that "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 Conclusions ¶ 22. The Board further concluded that "solar panels must be included in the calculation of lot coverage and

Applicant fails to include panels in his calculations and show how the panels should be arrayed on the individual lots." *Id.* at ¶ 23.

To reach these conclusions the Board noted in its Findings that "[t]here was no exhibit showing where impervious structures would be located on individual lots," and that "Applicant failed to submit any kind of drawing or exhibit which would demonstrate exactly where impervious structures would be located." Decision at Findings ¶ 23,24. The Board also acknowledged that it considered the testimony of Lebanon Solar's expert, Eric Holton, as to the total coverage of impervious surfaces. *See id.* at 23. Yet, Lebanon Solar contends that the Board "ignored and capriciously disregarded" the testimony and alleged exhibits presented at the hearings. Appellant's Brief at 38. This accusation is unfounded.

The Commonwealth Court has held that a Board's "failure to discuss [testimony given at hearings] in its written decision does not, in and of itself, equate to a failure of the Board to consider the testimony and arguments presented [by the applicant]." *Kretschmann Farm, LLC v. Twp. of New Sewickley*, 131 A.3d 1044, 1055 (Pa. Cmwlth. Ct. 2016). This is because "[t]he Board has the authority to judge the weight and credibility of presented testimony, and if they find that testimony lacking credibility or weight to meet their shifting burden of proof, there is, simply stated, no requirement for the Board to discuss it in its Findings of Fact, Conclusions of Law and Decision." *Id.*

Here, the Board weighed the evidence presented before it and determined that it was insufficient to determine that Lebanon Solar's Application was compliant with the maximum lot coverage requirement of the Zoning Ordinance. The Board noted Mr. Holton's testimony in its findings, even though it was under no obligation to do so. Consequently, Lebanon Solar's argument is unsupportable.

Additionally, the Board's determination that solar panels "must be included in the calculation of lot coverage" is directly within the Board's authority to interpret the Zoning Ordinance. Section 201.4 of the Zoning Ordinance defines "Maximum Lot Coverage" as "[a] percentage of lot area which may be covered by impervious material including roofs, drives, patios, walls, etc." N. Annville Tp. 2.0 Section 204.1. "Impervious" is not defined in the Zoning Ordinance but is commonly defined as "not allowing entrance or passage". IMPERVIOUS, Merriam-Webster.com Dictionary. Moreover, the Lebanon County SALDO defines an "Impervious Surface" as "a surface that prevents the infiltration of water into the ground." Lebanon Co. SALDO 2.0 Section 2.01. Examples of such surfaces include, inter alia, "roofs, ... patios, ... streets, [and] sidewalks ..." *Id.* Mr. Holton testified that the separation between the solar panels allows water to flow underneath them, implying that without such separation, water would not flow underneath. *See* Appellant's Brief at 37. However, water may also flow over a roof, patio, street, or sidewalk and find its way to the ground. Therefore, because the Zoning Ordinance does not define

"impervious" and the Lebanon SALDO suggests that a solar panel is "impervious", it was not unreasonable for the Board, to reach the conclusion that solar panels must be included in the calculation of lot coverage for zoning purposes. The Board's interpretation "is entitled to great weight and deference" and should not be disturbed. *Kohl*, 108 A.3d at 968.

d. The Board Correctly Concluded that the Application did not meet the Zoning Ordinance's Bonding and Storm Water Management Plan Requirements.

The Board properly determined that Lebanon Solar's Application did not meet the criteria set forth in Section 522(7) and (8) of the Zoning Ordinance related to bonding and storm water management. *See* Decision at Conclusions 25-26. In its Conclusions, the Board specifically stated that Lebanon Solar's "promise of future compliance does not constitute evidence of compliance" with the Zoning Ordinance criteria. *See id.* The Board's decision is supported by a significant body of Commonwealth Court caselaw, which holds that that "[a] self-serving declaration of a future intent to comply [with a zoning ordinance] is not sufficient to establish compliance with the criteria contained in the ordinance." *Edgmont Twp. v. Springton Lake Montessori Sch., Inc.*, 622 A.2d 418, 420 (1993). Accordingly, Lebanon Solar's attempt to evade the requirements of Section 522 (7) and (8) by arguing that it will come into compliance with the criteria at a later date is insupportable, and the Board properly denied the Application. *See* Appellant's Brief at 39.

In *Edgmont Twp.*, the Commonwealth Court held that "[t]o be entitled to receive a special exception it was incumbent on the [applicant] to come forward with evidence detailing how it was going to be in compliance with the requirements necessary to obtain a special exception." *Edgmont Twp.*, 622 A.2d at 419. The Court determined that "evidence is not a 'promise' that the applicant will comply because that is a legal conclusion the Board makes once it hears what the applicant intends to do and then determines whether it matches the requirements set forth in the ordinance. *Id.* Rather, "[t]he standard to be observed by the Board is whether the [application] as submitted complies with specific ordinance requirements *at the time the plan comes before it.*" *Id.* at 420 (emphasis supplied). Based on this reasoning, the Court held that a plan submitted by a school which merely promised to come into compliance with four of the requisite zoning ordinance criteria at a future date was "not evidence but a self-serving declaration." *Id.* In ruling against the applicant, the Court stated that "[i]f we were to adopt a rule that to obtain a special exception all that would be required is for an applicant to promise to come into compliance at some future date, it would make Board approval meaningless because once a applicant promises it is entitled to receive the special exception [sic]." *Id.*

Likewise, in *Elizabethtown/Mt. Joy Associates*, the Commonwealth Court held that "[e]ven if an applicant demonstrates that it can comply with the ordinance requirements and promises to do so, the ZHB does not err in denying the

application." *Elizabethtown/Mt. Joy Assocs., L.P. v. Mount Joy Twp. Zoning Hearing Bd.*, 934 A.2d 759, 768 (Pa. Cmwlth. Ct. 2007). There, the zoning ordinance required that a developer submit an exterior lighting plan. *Id.* at 767. However, the lighting plan proposed was "merely conceptual" and the developer stated that it "will" comply with zoning ordinance requirements. *Id.* The Court determined that "a concept plan is insufficient to warrant the granting of a special exception; rather, to be entitled to receive a special exception, the applicant must come forward with evidence detailing its compliance with the necessary requirements." *Id.* at 768.

Similarly, in *Schleicher*, the Commonwealth Court held that "[i]t is not adequate for an applicant to merely testify that, in one fashion or another, he will bring his plans into compliance before the use begins." *Schleicher v. Bowmanstown Borough Zoning Hearing Bd.*, No. 1834 C.D. 2010, 2011 WL 10857727, at *6 (Pa. Cmwlth. Ct. May 4, 2011) (unpublished panel decision). In that case, the applicants asserted that their plan would come into compliance with the borough's zoning ordinance's fencing requirement at a future date. *Id.* Even though the applicants submitted a sketch plan of the existing fence and expert testimony stating that "there would 'either' be a 'fence or the building' that will prevent access to the site," the Court refused to consider these future promises as evidence of compliance." *See id.* Although Schleicher is non-precedential, its holding aligns with the other

Commonwealth Court decisions declining to recognize a future promise as evidence of complying with a zoning ordinance.

Here, Lebanon Solar erroneously asserts that it is permitted to come into compliance with the Zoning Ordinance's stormwater management plan and bonding requirements at a later date. *See* Appellant's Brief at 39-43. Indeed, Lebanon Solar states that it "can and will meet [Section 522(7) of the Zoning Ordinance] at the proper time." *See* Appellant's Brief at 40. Additionally, Lebanon Solar asserts that "it can and will obtain ... approval of a Storm Water Management Plan by Lebanon County at the proper time." *See id.* at 41. Notably, according to the testimony of Lebanon Solar's expert, Mr. Staub, a stormwater management plan has not yet been developed. Tr. 2/24/22, at 356. If the Court considered the existence of a "conceptual" exterior lighting plan to be insufficient for purposes of zoning compliance in *Elizabethtown/Mt. Joy Associates*, the non-existence of a stormwater management plan here strongly suggests that Lebanon Solar has failed to show evidence of compliance with Section 522 (8) of the Zoning Ordinance. *Elizabethtown/Mt. Joy Assocs.*, 934 A.2d at 767. Moreover, the Commonwealth Court has consistently held that such "future promises" do not constitute evidence of compliance. *Edgmont Twp.*, 622 A.2d at 420. Yet, future promises are all Lebanon Solar has presented with respect to the bonding and stormwater management plan

criteria of the Zoning Ordinance. Therefore, the Board properly denied the Application.

In summary, the Township's Ordinance does not authorize a unity of use between individual lots so that they can be treated as one lot for zoning purposes. Moreover, Lebanon Solar has not presented sufficient evidence justifying a finding of a unity of use between the 12 lots. Based on these factors and the plain meaning of the Township's Zoning Ordinance, the analysis of the Board's Decision does not constitute an abuse of discretion.

B. THE BOARD ACTED AS AN UNBIASED DECISION-MAKING TRIBUNAL AND PROVIDED LEBANON SOLAR WITH ITS DUE PROCESS RIGHT TO A FAIR HEARING.

At all times during its consideration of Lebanon Solar' s Application, the Board acted without bias or the appearance of bias and provided Lebanon Solar with its due process rights. Of foremost importance in this regard is that the record is absent of any evidence of bias or the appearance of bias on the part of the Board. The Commonwealth Court has held that "[b]efore it can be said that a judge [or ZHB member] should have recused himself *the record must demonstrate bias, prejudice, capricious disbelief or prejudgment.*" *Appeal of Miller & Son Paving, Inc.*, 636 A.2d 274, 278 (Pa. Cmwlth. Ct. 1993) quoting *In re Blystone*, 600 A.2d 672, 674 (Pa. Cmwlth. Ct. 1991) (emphasis supplied). Moreover, "[i]f a judge [or ZHB member]

thinks he is capable of hearing a case fairly his decision not to withdraw will ordinarily be upheld on appeal." *Id.*

Here, in support of their allegations of bias, Lebanon Solar merely incorporates at length its Amended Notice of Land Use Appeal and asserts the bald allegations set forth therein, without any citations to the record. The Notice of Land Use Appeal is not a verified pleading, and a reply is not mandated by the MPC. 53 P.S. 11003-A(a). Therefore, factual averments contained within Lebanon Solar's Notice should be disregarded. Because this Court is bound to consider only the facts set forth in the record, Lebanon Solar has failed to establish that the Board acted with bias or the appearance thereof, and the township adamantly denies such allegations

Moreover, Lebanon Solar expressly forewent its opportunity to introduce additional facts into the record. Pursuant to Section 11005-A of the MPC, Lebanon Solar had the ability, upon motion, to "sho[w] that proper consideration of the land use appeal requires the presentation of additional evidence." 53 Pa. Stat. Ann. § 11005-A (West). Upon such a showing, "a judge of the court may hold a hearing to receive additional evidence." *Id.* However, Lebanon Solar expressly declined to move for such a hearing. In absence of the presentation of additional evidence, "... the ... findings of fact made by the ... board ... whose decision or action is brought

up for review … shall not be disturbed by the court if supported by substantial evidence." *Id.*

V. CONCLUSION

WHEREFORE, based on the foregoing, the Board properly denied the Lebanon Solar's Application because it failed to comply with the criteria of the Zoning Ordinance. Therefore, this Court should uphold the Board's decision.

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CERTIFICATE OF COMPLIANCE

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

Submitted by:

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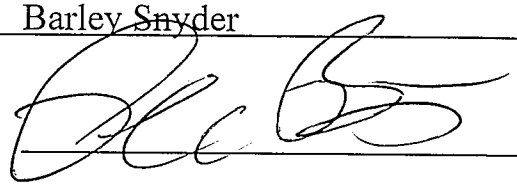
Signature: 

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CERTIFICATE OF SERVICE

I hereby certify that on this date a true and correct copy of the foregoing Brief is being served by First Class Mail at Lebanon, Pennsylvania, addressed as follows:

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