

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

CASES CONSOLIDATED
Nos. 189 C.D. 2024, 191 C.D. 2024, and 255 C.D. 2024

LEBANON SOLAR I, LLC,

Designated Appellant,

v.

NORTH ANNVILLE TOWNSHIP BOARD OF SUPERVISORS and
GRADY SUMMERS,

Designated Appellees.

BRIEF OF DESIGNATED APPELLANT LEBANON SOLAR I, LLC

Appeal from the Order of Court of the Honorable of the Court of Common Pleas of Lebanon County dated January 26, 2024, at Docket No. 2022-00553 affirming the decision of North Annville Township to deny the conditional use application of Lebanon Solar I, LLC.

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STATEMENT OF JURISDICTION

Pursuant to 42 Pa. C.S.A. §933, this is a direct appeal from the final Order of the Court of Common Pleas of Lebanon County dated January 26, 2024, affirming the North Annville Township Board of Supervisor's denial of Designated Appellant Lebanon Solar I, LLC's conditional use application.

This Court has exclusive jurisdiction over this direct appeal pursuant to 42 Pa. C.S.A. §762(a)(4)(i)(A), and Pennsylvania Rule of Appellate Procedure 341, as it is an appeal from an action or proceeding of a municipal or political subdivision concerning the enforcement of an ordinance or land use regulations.

ORDER IN QUESTION

The January 26, 2024, Order of the Court of Common Pleas of Lebanon County, Pennsylvania, (Lower Court Order and Opinion, attached hereto as “Appendix A”), upon which this appeal is premised, reads as follows, in its entirety:

ORDER OF COURT

AND NOW, this 26th day of January, 2024, in accordance with the attached Opinion upon consideration of the Land Use Appeal filed by Lebanon Solar I, LLC, and upon consideration of the arguments and information presented by the parties, the Order of this Court is as follows:

1. The decision of the North Annville Township Board of Supervisors that the conditional use application of Lebanon Solar I, LLC (LEBANON SOLAR) was deficient relating to bonding and stormwater management is **AFFIRMED**. The decision of North Annville Township to deny the conditional use application of LEBANON SOLAR is therefore **AFFIRMED**.
2. All other grounds relied upon by North Annville Township to deny the application of LEBANON SOLAR are rejected.
3. All parties are advised that they have thirty (30) days from today’s date in which to appeal the decisions we have rendered today.
4. Copies of this Opinion and Order are to be served upon all counsel of record. North Annville Township is directed to post a copy of this Order and Opinion at a conspicuous location within the Township’s office for a period of at least thirty (30) days from today’s date.

BY THE COURT:

 J.
BRADFORD H. CHARLES

BHC/pmd

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SCOPE AND STANDARD OF REVIEW

The principal issues in this zoning appeal involve the sufficiency of the evidence before the Township and consequently the scope of review is whether the Township committed a manifest 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 Township'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 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).

A trial court's failure to address issues does not stand as an impediment to the Commonwealth Court's ability to address the issues because it is the local agency's decision which is to be inspected by the Court rather than the trial court's opinion.

City of Clairton v. Zoning Hearing Bd. of City of Clairton, 246 A.3d 890, 897 n.8 (Pa. Cmwlth. 2021). Moreover, when the issues presented involve questions of law, the Commonwealth Court’s standard of review is *de novo* and its scope of review is plenary. *Id.*

STATEMENT OF THE QUESTIONS INVOLVED

1. Did the Lower Court err when it upheld North Annville Township’s denial of Lebanon Solar I, LLC’s conditional use application on the basis of a *sua sponte* application of *Brookview Solar I, LLC v. Mount Joy Township Board of Supervisors*, 305 A.3d 1222 (Pa. Cmwlth. 2023), which was not raised or cited by any party, and which is both factually and legally distinguishable from the matter at hand?

Suggested answer in the affirmative.

2. Did North Annville Township err when it denied Lebanon Solar I, LLC’s conditional use application on the basis that it failed to comply with requirements set forth in two Township Zoning Ordinance sections, which requirements were demonstrably not possible for Lebanon Solar to meet at the zoning application stage?

Suggested answer in the affirmative.

3. Did North Annville Township err when it denied Lebanon Solar I, LLC’s conditional use application where the Township’s denial was not based on substantial evidence and the Township capriciously disregarded competent evidence?

Suggested answer in the affirmative.

STATEMENT OF THE CASE

A. Procedural History

This matter relates to an application for conditional use (the “Application”) submitted by Lebanon Solar I, LLC (“Lebanon Solar”) to allow the construction of a single solar farm in North Annville Township (the “Township”). Upon receipt of the Application, the Township held a series of public hearings where both Lebanon Solar and a series of property owners, including Grady Summers (“Intervenor”) (collectively, the “Objectors”), presented evidence and testimony from a myriad of witnesses. Thereafter, the Township denied the Application (“Decision”). Lebanon Solar then timely appealed to the Court of Common Pleas for Lebanon County (the “Lower Court”). Ultimately, the Lower Court upheld the Decision. Of note, however, the Lower Court validated only two of the Township’s bases for denial, and explicitly rejected the remaining grounds for denial set forth in the Decision (the Lower Court “Opinion”).

Lebanon Solar and Intervenor timely filed Notices of Appeal before this Court. The Township subsequently timely cross-appealed. After the submission of a Motion to Consolidate filed on behalf of Lebanon Solar, and submission of a related Motion in Opposition filed by the Objectors, this Court Ordered that the three appeals be consolidated, and that Lebanon Solar proceed as the designated Appellant pursuant to Pa. R.A.P. 2136.

By letter dated July 16, 2024, the Commonwealth Court set forth a deadline of August 26, 2024, for the submission of Lebanon Solar’s Brief and Reproduced Record. This Brief is submitted in conformance therewith.

B. Statement of Facts

Pursuant to a 2019 Township Zoning Ordinance Amendment,¹ solar farms are permitted in the Township’s A-1 Agricultural Zoning District (the “A-1 District”) as a conditional use. The Zoning Ordinance² identifies eight (8) use-specific criteria for the solar farm use:

1. No Solar Farm may be established upon any farmland 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.

¹ 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.” *See* RR000136a-39a. A true and correct copy of Ordinance No. 2-2019 is attached hereto and incorporated herein as Appendix “B.”

² The Township subsequently amended the Zoning Ordinance by Ordinance No. 1-2021. *See* North Annville Township, Ordinance, <https://nannvilletwp.com/wp-content/uploads/2021/11/Ordinance-No.-1-2021-Commercial-Solar-Use.pdf> (last visited August 26, 2024).

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.

See, North Annville Township Ordinance No. 2-2019 at Appendix “B” and R.000136a-39a.

North Annville Township does not have its own Subdivision and Land Development Ordinance, but rather is governed by the Subdivision and Land Development Ordinance of Lebanon County (the “County SALDO”).³ Lebanon

³ “The ordinances of municipal corporation of this Commonwealth shall be judicially noticed.” 42 Pa.C.S. § 6107(a). Further, “[t]he tribunal may inform itself of such ordinances in such manner as it may deem proper and the tribunal may call upon counsel to aid it in obtaining such information.” 42 Pa.C.S. § 6107(b). Section 6107 of the Judicial Code is intended to remove any discretion of the court in determining whether to take judicial notice of an ordinance and provide the court with the authority to take whatever steps it deems necessary to apply an ordinance. *Dream Mile Club, Inc. v. Tobyhanna Township Board of Supervisors*, 615 A.2d 931 (Pa. Cmwlth. 1992). The County SALDO is published on the County’s publicly available website. See Lebanon County, <https://www.lebanoncountypa.gov/getmedia/85cc0245-fa68-44d6-830e-6674f8f4fa00/SALDO-Ord-49-December-5,-2013.pdf>, (last visited August 26, 2024). The County Stormwater Management Ordinance is similarly published. See Lebanon County,

County (the “County”) administers the County SALDO. The Township also does not have its own Stormwater Management Ordinance, and instead, the County Stormwater Management Ordinance (“County SWMO”) administered by the County, applies. *See* County SWMO. In accordance therewith, the County is responsible for review and approval of all North Annville Township subdivision, land development, and stormwater management plans. Of great importance here, in accordance with typical land use practice, the County reviews stormwater management plans as part of the land development application. As the County SWMO states “[t]he storm water management site plan shall be an integral part of each subdivision and land development plan at the preliminary and final plan stage.” *See* County SWMO §301. As the County SALDO states “[t]his Ordinance shall be used in conjunction with the Lebanon County Stormwater Ordinance.” *See* County SALDO §1.02 (emphasis in original).

Lebanon Solar filed the Application at issue with North Annville Township Supervisors on May 3, 2021. The Application sought approval for Lebanon Solar to create a single 1,234-acre solar farm in the Township (the “Project”) ⁴ across 12

<https://www.lebanoncountypa.gov/getmedia/b2265841-fb4f-41a8-b5f7-3129c2108809/Adopted-SWMO-updated-2-1-24.pdf>, (last visited August 26, 2024). In addition they both ordinances are published on the Township’s own website. *See* North Annville Township, Ordinances, <https://nannvilletwp.com/index.php/ordinances/> (last visited August 26, 2024).

⁴ The Application initially sought approval for installation of a 1,234-acre solar farm but was ultimately amended to seek approval for an 858-acre project.

contiguous tax parcels in the Township's A-1 District (collectively the "Property"). R.000140a-42a. The Township accepted a single application and application fee for the Project and at no time indicated each individual parcel would be treated or reviewed individually. R.000140a-42a.

A series of public hearings on the Application were held on four distinct dates between January 25, 2022, and April 5, 2022 (collectively, the "Public Hearing"), which were, of note, collectively the first public hearing ever held in North Annville Township. *See generally*, R.000454a-859a.

During the Public Hearing Lebanon Solar presented the testimony of Mr. Eric Holton, project manager for Enel Green Power North America, Inc., which represented Lebanon Solar on the Project; 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; Richard Kirkland, owner of Kirkland Appraisals, LLC., a company based in Raleigh, North Carolina, and testified as an expert in general appraisal and has obtained the designation as a Member of the Appraisal Institute (MAI); and Mr. Jonathan Dimitriou, the project engineer for the Project.⁵ RR000465a-547;

⁵ The Objectors presented only the lay testimony only of themselves and the purported expert testimony of Mr. Lawrence Lahr, a land planning and design consultant. R.000574a-607a, 000611a-677a, 000711a-714a. Objectors' testimony consisted almost entirely of baseless and speculative fears and concerns. R.000574a-607a, 000639-677a, 000711a-714a. Mr. Lahr's testimony was speculative at best and in most instances did not contradict that offered by Lebanon Solar's experts.

RR000746a-840. In its Application, and during the course of the public hearing, Lebanon Solar presented uncontroverted testimonial and documentary evidence conclusively establishing that the Project would meet all of the eight (8) 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, (the "Proposed Findings and Conclusions") Lebanon Solar offered five (5) conditions of approval to address community concerns and to demonstrate its continued cooperation with the Township related to its operations. For ease of reference, a copy of Lebanon Solar's Proposed Findings and Conclusions is attached as Appendix "C."

On April 5, 2022, without any public deliberation, the Township voted to deny the Application. Written notice of the Township's decision was not transmitted to Lebanon Solar the following day as required by Section 908(10) of the MPC. *See* 53 P.S. §10908(10); 53 P.S. §10603(b)(2) ("Notice of hearings on conditional uses shall be provided in accordance with section 908(1), and notice of the decision shall be provided in accordance with section 908(10)"). Written findings of fact and conclusions of law in support of the Township's Decision to deny the Application were transmitted to Lebanon Solar on May 12, 2022. For the Court's convenience, a copy of the Decision is attached as Appendix "D."

The Township’s May 12, 2022 Decision was, in short, based on three alleged defects in the Application: (1) the inability to construct the Project and meet all ordinance criteria on each of the distinct 12 proposed tax parcels individually; (2) the failure of Lebanon Solar to submit either a bond or approved stormwater management plan at the time of application; and (3) the alleged insufficiency of Lebanon Solar’s buffering proposal included with the Application. *See* Appendix “D” and R.000922a-929a.

Lebanon Solar appealed the Decision to the Lower Court, which ultimately issued an Order and Opinion relative thereto on January 26, 2024. *See* “Appendix A.” The Lower Court upheld the Decision exclusively on the grounds that Lebanon Solar’s Application was purportedly deficient relating to bonding and stormwater management, and explicitly rejected all other grounds relied upon by the Township to deny the Application. *Id.* Notably, the Lower Court found that the Township’s allegation that each of the twelve tax parcels within the Project were required to meet all Ordinance criteria individually was without merit. R.000975a-81a.

In its Opinion, specifically regarding the alleged bonding and stormwater management deficiencies associated with the Application, the Lower Court relied heavily on *Brookview Solar I, LLC v. Mount Joy Township Bd. of Supervisors*, 305 A.3d 1222 (Pa. Cmwlth. 2023). Of import, the facts and legal issues present in the *Brookview Solar* case are distinct from those facts and legal issues underlying this

present action. Also of note, the Court’s application of *Brookview Solar* was *sua sponte* in nature, as the *Brookview Solar* decision was handed down on November 30, 2023, during the pendency of the underlying action, and after the parties submitted briefs to the Lower Court. RR.0000001-7. *Brookview Solar* is not cited anywhere in any pleading of any party before the Lower Court.

Independent of its reliance on *Brookview Solar*, in its affirmation of the Township’s Decision, the Lower Court explicitly acknowledges that the two conditions that the Township insisted Lebanon Solar meet precedent to the issuance of approval – i.e., submission of bonding and submission of an approved stormwater management plan – were two conditions that Lebanon Solar could not provide at the initial phase of the land development process. *See* Appendix A. Therefore, despite its otherwise well-reasoned assessment of the deficiencies in the Township’s Decision, the Lower Court erred in interpreting the ordinance in a manner impossible of execution which runs contrary to well established rules of statutory and ordinance construction. *See* 1 Pa.C.S. § 1922(1),(2); *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...”)

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. Lebanon Solar presented competent evidence establishing that the Project would meet all such criteria once constructed, and the Township 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. The Lower Court on appeal issued a thorough and thoughtful Opinion, which correctly concluded that Lebanon Solar had in fact met its burden of demonstrating compliance with all but two (2) criteria. Unfortunately, the Lower Court made a single error in its *sua sponte* reliance on *Brookview Solar, supra*, to conclude that the Township properly denied Lebanon Solar's Application on the basis of Lebanon Solar's failure to provide, at the time of submission of its zoning application, a stormwater management plan (to be approved by Lebanon County) and bonding for the Project.

The Township erred in denying Lebanon Solar's Application based on its alleged failure to comply with Township Zoning Ordinance criteria more appropriately imposed as conditions of approval or addressed during the land development phase. The bonding and stormwater management requirements of the Township Zoning Ordinance were, as the Lower Court correctly noted, impossible to comply with at the time of the Application's submission. Those criteria required

third party financial and permitting approvals which could be obtained only after zoning approval was received and site development design progressed. This Court's longstanding and precedential jurisprudence dictates that those two criteria should have been made conditions of approval and were not proper grounds for denial of the Application. Further, the Township Zoning Ordinance terms and evidence presented at the Public Hearing are readily distinguishable from the ordinance and facts of *Brookview Solar, supra*, the singular case relied upon by the Lower Court to justify the Township's denial of the Application on those grounds.

Finally, the remaining grounds for denial cited by the Township are unsupported by the record and cannot stand. The Township erred in concluding that the defined and plain meaning of the term "lot" in the Township 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 Township impermissibly deviated from the express terms of the Township Zoning Ordinance to conclude that a "campus concept" in which the Project would be reviewed as a whole, was not permitted. In doing so, the Township impermissibly narrowed the terms of the Township Zoning Ordinance, failed to follow express requirements of ordinance construction contained in the MPC, and made arbitrary conclusions in blatant disregard of unchallenged and uncontradicted expert testimony provided by Lebanon Solar.

ARGUMENT

A. The Lower Court Erred in its *Sua Sponte* Reliance on Brookview Solar Which Does Not Support Affirmation of the Township's Decision.

The Lower Court found that the Township's Decision to deny the Application was correctly made only as to the issue of compliance with Sections 522(7) and (8) of the Ordinance, related to bonding and stormwater management. In forming that conclusion, the Lower Court relied heavily on *Brookview Solar I, LLC v. Mount Joy Township Board of Supervisors*, 305 A.3d 1222. Not only are the facts and legal issues in *Brookview Solar* incomparable to those at bar, but said issues were improperly raised *sua sponte* by the Lower Court. Indeed, the decision in the *Brookview Solar* case was handed down after briefing and argument before the Lower Court concluded. Had that case been decided prior to the conclusion of briefing before the Lower Court, Lebanon Solar could have readily distinguished it from the matter at hand.

The facts and issues in *Brookview Solar* are wholly distinguishable from those before the Court today. Of greatest import, in *Brookview Solar*, the township itself administered the stormwater ordinance in question, and the ordinance specifically required submission of a site plan “[d]emonstrating compliance with Chapter 81, Stormwater Management, of the Code of the Township of Mount Joy.” 305 A.3d 1238. It did not require stormwater plan approval be obtained prior to zoning, but

that a plan that complied with the township’s stormwater management criteria be provided. As discussed further below, the North Annville Township Zoning Ordinance did not simply require that an applicant submit a stormwater management plan demonstrating compliance with its own ordinances. Instead, the Township Zoning Ordinance required that Lebanon Solar provide a Stormwater Management Plan already approved by a third party, in this case, Lebanon County. *See* Appendix “B.” *Brookview Solar*, did not involve or address instances in which an ordinance, as is the case here, requires third party permitting. It therefore does not disturb precedential cases such as *Delchester Developers, LP v. London Grove Township Board of Supervisors*, 161 A.3d 1106 (Pa. Cmwlth. 2017), or *Morris v. South Coventry Township Board of Supervisors*, 161 A.3d 1106 (Pa. Cmwlth. 2003), both of which hold that where an outside agency’s approval is required the municipality should condition approval upon obtaining the necessary permit from the outside agency, rather than denying approval.⁶

In addition, where the applicant in *Brookview Solar* failed to even address stormwater management in its application, Lebanon Solar asserted its willingness, ability and intention to complete all required land development processes, including

⁶ Notably this is in line with this Court’s recent holding in *PC Land LLC v. Board of Commissioners of Bethlehem Township*, 2024 WL 3306958 (Pa. Cmwlth. July 5, 2024), which although it pertained to land development clearly reiterates this concept in recognizing “this Court’s longstanding precedent that a municipality cannot deny a land development application based on an applicant’s failure to comply with laws or regulations overseen by outside governmental agencies.”

stormwater management planning as part of the land development application process, as expressly contemplated by the County SALDO and SWMO. *See* County SWMO §301; County SALDO §1.02.

Also, in stark contrast to the facts of record established by Lebanon Solar before the Township, in *Brookview Solar*, the applicant's own engineer testified that preliminary stormwater planning could have been completed to demonstrate the location of stormwater management facilities and the preliminary stormwater planning required by the ordinance was possible in that instance. In contrast, the engineer, project manager, and land development expert witnesses testifying for Lebanon Solar at the Conditional Use Hearing all, without fluctuation, testified that provision of an approved stormwater management plan was not feasible at the time of the Conditional Use Hearing. *See* R. 00478a, 798a, 810a, 812a. Indeed, there is no evidence of record to suggest that Lebanon Solar could have demonstrated compliance with the Township Zoning Ordinance vis-à-vis its Application any more than it did. "An interpretation of an ordinance which produces an absurd result is contrary to the rules of statutory construction." *Quaker Valley School District v. Leet Township Zoning Hearing Board*, 309 A.3d 279, 286 (Pa. Cmwlth. 2024) *citing In re Thompson*, 896 A.2d at 669. To construe the Ordinance as allowing denial of an application on the exclusive grounds of the applicant's failure to comply with terms admittedly impossible at time of the hearing, is an absurd result which cannot be

allowed. *Com. v. Shiffler*, 879 A.2d at 189–90 (“...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...”) (emphasis added).

It is clear that *Brookview Solar* is inapposite here, but Lebanon Solar was not provided the opportunity to address these important distinctions before the Lower Court. When the Lower Court inserted its interpretation of *Brookview Solar*’s applicability to the facts and issues before it, absent opportunity for Lebanon Solar to address the same, it committed reversible error. It has long been established that courts may not raise issues *sua sponte* that do not involve the court’s subject matter jurisdiction. *Orange Stones Co. v. Borough of Hamburg Zoning Hearing Bd.*, 991 A.2d 996, 999 (Pa. Cmwlth. 2010). “Sue sponte consideration of an issue deprives counsel of the opportunity to brief and argue the issue[s] and the [zoning hearing b]oard the benefit of counsel’s advocacy.” *Miller v. Workmen’s Comp. Appeal Bd. (Giant Food Stores, Inc.)*, 715 A.2d 564, 566 (Pa. Cmwlth 1998) (quoting *Follett v. Workmen’s Comp. Appeal Bd. (Mass Mut. Ins. Co.)*, 551 A.2d 616, 621 (Pa. Cmwlth. 1988)). Moreover, “raising issues *sua sponte* after the record is closed and without notice to the parties constitutes a due process violation.” *Department of Transportation, Bureau of Traffic Safety v. Malone*, 520 A.2d 120, 122 (Pa. Cmwlth.

1987). As such, the trial court's decision in terms of its reliance on *Brookview Solar* was in error and this Court should not itself err in reliance on the same.

Not only is *Brookview Solar* readily distinguishable from the facts at issue in this matter, but it represented a departure from fundamental land use jurisprudence; a departure which this Court quickly abandoned a few months later in *Quaker Valley School District v. Leet Township Zoning Hearing Board*, 309 A.3d 279. Fundamental cases such as *In re Thompson*, 896 A.2d 659 (Pa. Cmwlth), and *Schatz v. New Britain Township Zoning Hearing Board*, 596 A.2d 294 (Pa. Cmwlth. 1991), hold that conditional use proceedings involved only the proposed use of the land and do not involve the particular details of the design of the proposed development, and that the Township is not permitted to impose such requirements on an applicant at the zoning phase where such issues are to be addressed further along in the permitting and approval process. Satisfying the criteria for conditional use is just one step of the land development approval process. *See In re Thompson*, 896 A.2d at 670. In fact, land development approval cannot be granted until the conditional use approval is first obtained. *See id. see also Residents Against Matrix v. Lower Makefield Township*, 845 A.2d 908 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 813 A.2d 847 (Pa. 2002) (a governing body cannot approve an application for final subdivision and land development when the applicant did not first apply for the intended use). These cases have been routinely used to prohibit the imposition

of zoning ordinance provisions which should properly have been included in the relevant subdivision and land development ordinance. *See e.g. In re Brickstone Realty*, 789 A.2d 333, 339 (Pa. Cmwlth. 2001) (design information such as floor plans, even though required by the ordinance, was not relevant to the consideration of a special exception or conditional use application; rather, all the ordinance required for approval of the use was information indicating the nature, size and location of the proposed use).

Brookview Solar appeared to hold that if a zoning ordinance provision requires demonstration of compliance with an ordinance typically handled later in the development process (in this case as well as that, the stormwater ordinance) the applicant must demonstrate compliance with that ordinance at the time of zoning approval. However, a few months later, this Court in *Quaker Valley School District*, reaffirmed the more traditional land use permitting process when it reiterated that, in accordance with *In re Thompson, supra*, and *Schatz, supra*, “the specific details regarding development and construction . . . should be addressed further along in the land development and permitting process.” Again, that is the process contemplated by Lebanon County, which is the entity that administers and enforces stormwater management activities within the Township. *See* County SWMO §301; County SALDO §1.02.

The holding in *Brookview Solar*, an apparently brief departure from the norm, could not have been anticipated by Lebanon Solar when it filed its Application before the Township over two years prior to this Court issuing its opinion in *Brookview Solar*. Lebanon Solar reasonably relied on the state of the law at the time of submission of its Application, and *Brookview Solar*, therefore should not apply retroactively to Lebanon Solar’s Application. *Passarello v. Grumbine*, 87 A.3d 285 (Pa. 2014) (establishing a three-factor test for consideration of when a decision will be applied retroactively or prospectively: (1) the purpose to be served by the new rule; (2) the extent of reliance on the old rule; and (3) the effect on administration of justice by retroactive application of the new rule.)

B. The Township Erred When It Denied Lebanon Solar’s Application Based on a Failure to Provide a Bond and Approved Stormwater Management Plan with its Application.

The law on conditional uses is well established. A conditional use is “a use permitted in a particular zoning district.” 53 P.S. § 10107(a). A governing body, i.e., a Township Board of Supervisors, has the authority to grant a conditional use “pursuant to express standards and criteria set forth in the zoning ordinance.” 53 P.S. § 10603(c)(2). Certain requirements for conditional uses, even if included within a zoning ordinance, should be imposed as conditions of approval, rather than grounds for denial. For example, 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. *See Delchester Developers, L.P.*, 161 A.3d at 1113-13 n.11; *see also, Morris*, 836 A.2d at 1026 (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. 2021) (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).

In addition, as has long been the case in this Commonwealth, "conditional use proceedings involve only the proposed use of the land, and do not involve the particular details of the design of the proposed development." *In re Thompson*, 896 A.2d at 670; *see also Schatz*, 696 A.2d at 298; *Joseph v. North Whitehall Township Board of Supervisors*, 16 A.3d 1209, 1215 (Pa. Cmwlth. 2011). Even where the zoning ordinance attempts to impose development-type regulations at the conditional use phase, the details of such design are not relevant to the consideration of a conditional use application, all that is required for approval of the use is information indicating the nature, size and location of the proposed use. *In re Brickstone Realty*, 789 A.2d at 339.

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...” *See* Appendix “B” and R.000138a (emphasis added).⁷ Lebanon Solar adequately demonstrated that the Project would be adequately bonded; what it did not do was provide bonding along with its Application. At the public hearing, Lebanon Solar presented evidence via the testimony of Mr. Holton that credibly demonstrated Lebanon Solar’s ability and willingness to provide adequate bonding at the proper time. R.000477a-478, 530a. As Mr. Holton explained, proper and adequate financial security cannot be properly determined at the conditional use phase of a project, but rather once design of the proposed project is complete – a stage of project development that post-dates conditional use approval. R.000477a-78a, 530a, 798a. The Lower Court credited this testimony and agreed with the premise. *See* Appendix “A” and R.000984a. The Ordinance may not be interpreted in a manner impossible of execution. *See* 1 Pa.C.S. § 1922(1),(2); *Com. v. Shiffler*, 879 A.2d at 189–90.

In addition Lebanon Solar provided the testimony of Mr. Dimitriou, the project engineer, who credibly testified as to decommissioning and the bonding

⁷ The Lower Court’s comments regarding other types of information Lebanon Solar could have provided, for example, regarding its financial condition are entirely irrelevant. Lebanon Solar was required to present evidence of compliance with express terms of the Ordinance only, as discussed at length below.

calculations relative thereto. *See* R.000540a.⁸ Further, Lebanon Solar was willing to consent to the imposition of a binding and enforceable condition of approval that would require said bonding to be in place prior to construction. R.000479a. This is not, therefore, a situation of unwillingness, inability, or weak promises to comply in the future. It was one of demonstrated willingness, ability, and commitment to compliance, burdened only by the factual inability to hand over financial security at the time of the Conditional Use Hearing for a project that, as of that date, did not yet exist. Logic dictates that a municipality may not impose regulations on legitimate land uses that are in fact impossible to comply with at the time of zoning approval.

Law dictates that an ordinance must be construed to avoid such absurd results. *Quaker Valley School District*, 309 A.3d at 286; *citing In re Thompson*, 896 A.2d at 669. To hold that Lebanon Solar was required to hand over financial security for this Project prior to receipt of any approvals would be absurd, unreasonable, and in blind disregard to the realities not just of land development procedure, but of finance. This Court should not read the Ordinance in a manner that creates a provision so absurd, impossible of execution or unreasonable. *See Commonwealth v. Shiffler*, 879 A.2d at 189–90 (“...in ascertaining legislative intent, courts may apply, inter alia,

⁸ The Objectors presented only the expert testimony of Mr. Lahr who was unable to offer any opinion as to whether or not adequate bonding could be provided at this stage in the permitting process. R.000632a. 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.

the following presumptions: that the legislature does not intend a result that is absurd, impossible of execution, or unreasonable...”).

Similarly, the requirement in Section 522(8) of the Township Zoning Ordinance that an applicant provide an approved Stormwater Management Plan as required by the Lebanon County Stormwater Management Ordinance prior to receipt of zoning approval is equally as absurd. At the public hearing, Mr. Holton provided demonstrable evidence that indicated the quantity and area of coverage anticipated for each impervious item. R.000152a-169a. Lebanon Solar demonstrated at the Conditional Use Hearing that it could and would obtain all relevant third-party permitting, including the approval of a Stormwater Management Plan at the proper time. R.000798a. Lebanon Solar’s testimony at the Conditional Use Hearing was encapsulated by their expert, Mr. Staub, a professional with decades of experience in land development, who confirmed that both bonding and stormwater management were not appropriately required as prerequisites for conditional use approval, but rather should be imposed as conditions approval that would remain in effect throughout the life of the project. R.000798a.

The evidence presented by Lebanon Solar was the only credible evidence of record on this issue, as Objectors’ purported expert (who was not qualified as such on the record), could not offer any 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 the plans prior to conditional use approval. R.000633a. Once again, this was not an instance of unwillingness, inability, or a mere promise of compliance. Lebanon Solar was already compelled by the County SALDO and Stormwater Management Ordinance to obtain approval of a stormwater management plan for the Project. It was not merely promising, but was under legal obligation, to obtain one in conjunction with its land development application. *See* County SWMO §301; County SALDO §1.02. Once again, the only deterrent to providing the requested information at the hearing was timing.⁹

C. The Township’s Decision must be overturned because the denial of the Application was arbitrary, not based on substantial evidence and the Township capriciously disregarded competent evidence.

As previously discussed, conditional uses are uses expressly permitted, provided that the applicant meets the specific standards set forth in the zoning

⁹ All testimony reflected that zoning approval comes before land development approval. Stormwater management is necessarily a part of the land development approval process. *See* County SWMO §301; County SALDO §1.02. This proposition has long been accepted by this Court. *See Residents Against Matrix*, 845 A.2d 908 (a governing body cannot approve an application for final subdivision and land development when the applicant did not first apply for the intended use). “[S]torm 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.” *Schatz*, 596 A.2d at 298. (emphasis added). Hence, if the Township and the Objectors view of the Zoning Ordinance is correct, any applicant would be in the proverbial “which comes first, the chicken or the egg,” and not be able to obtain any approvals for the Project.

ordinance.¹⁰ 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 at Appendix “D”. The Zoning Ordinance, at the time the Application was filed, did not set forth any additional general or “health and safety” criteria applicable to all conditional uses, and therefore the only criteria applicable to the Application are those contained in Section 522, adopted by the

¹⁰ “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 at 670. 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).

Township by Ordinance 2-2019.¹¹ *See generally* Appendix “B”. The Township 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* Appendix “D” at Conclusions ¶¶11-26.

Specifically, in its Decision, the Township 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.

¹¹ 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.

Appendix “D” at Conclusions ¶¶11-14. The Township’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. Appendix “D” at Conclusions ¶¶16-22. Specifically, the Township concluded that: two (2) of the twelve (12) individual tax parcels were individually under fifty-acres in violation of Section 522(2), (Appendix “D” 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) (Appendix “D” 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), (Appendix “D” 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 (“Appendix “D” at Conclusions ¶¶22, 23). While the Township’s Decision, not the Lower Court’s, is the subject of this Court’s review, it is notable that the Lower Court found the Township’s argument on these issues to be without merit. *See* Appendix “A” (“In the opinion of this Court, the Ordinance does not come close to addressing whether the term “Lot” must be limited to what is depicted on a tax map, nor does it indicate whether the term “Lot can be deemed to include numerous parcels of property that a developer plans to lease or acquire in order to complete a

development project... To the extent that TOWNSHIP argues that the definition of “Lot” found in the Ordinance requires this Court to adopt its argument about segregation of parcels for purposes of compliance with Section 522, we reject TOWNSHIP’s argument... We therefore reject TOWNSHIP’s effort to require every one of the twelve (12) parcels that comprise LEBANON SOLAR’s project to individually comply with the specifications of conditional use.”)

The Township’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 Township’s decision to deny the Application on these grounds constitutes an abuse of discretion or error of law and must be overturned.

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

While the Township’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). Municipalities 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 Township 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 and accepted by the Township as complete. Because the Township’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.

Assuming, *arguendo*, that the Zoning Ordinance’s silence on the “campus concept” 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 Township 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.” Appendix “D” 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.”¹² This definition does not address whether multiple “lots” or tax 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 Zoning Ordinance addresses either of these issues and the Zoning 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; R.000793a. 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.

¹² While the Township 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).

2001). It is an abuse of discretion for a zoning hearing board or governing body to narrow the terms of an 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 *Latimore supra* and *Riverfront Development Group, LLC v. City of Harrisburg Zoning Hearing Bd.*, 109 A.3d 358, 366 (Pa. Cmwlth. 2015). Therefore, the Township, 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 Zoning Ordinance to further restrict the use of the Property. *See Reihner*, 176 A.3d 396.

The Township, in its Decision, further misconstrues the issue at hand by focusing on the definition of “lot” without considering an interpretation of Section 522 as a whole. The Township 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 Township’s statement, Lebanon Solar argued before the Township, as it now argues before this Court, that nothing in the Ordinance prohibited it from utilizing multiple tax parcels for one “Solar Farm” and nothing in the Ordinance requires each tax parcel to individually and independently meet the requirements of Section 522. R.000793a-94a. 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 Zoning 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 Solar consider the requirements of Section 522 separately as to each parcel.

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

In addition to the issues discussed above, 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.

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. 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.” Appendix “D” 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). R.000470a-471a, 146a.

Lebanon Solar presented the expert testimony of Mr. Staub¹³ regarding ordinance interpretation, and in particular the applicability of each requirement of Section 522 of the Zoning Ordinance to the Project. R.000787a-791a. 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. R.000793a. The Board made zero findings of fact or conclusions of law relative to Mr. Staub’s testimony. *See generally* Appendix “D”. In fact, it

¹³ 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. R. 000780a-781a, 442a. Mr. Staub presented his credentials and training in planning, including evidence that he authored the Lebanon County Comprehensive Plan in 2007. R.000781a-782a.

does not mention his testimony at all, let alone make any credibility determinations or determinations as to the evidence presented. *See* Appendix “D”; *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) were not met by the Application, he did not provide any opinion as to whether multiple tax parcels could be combined to meet the minimum lot size requirement. R.000617a-620a. 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 reversible 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 reversible. *Berman v. Manchester Twp. Zoning Hearing Bd.*, 540 A.2d 8, 9 (Pa. Cmwlth. 1988), *pet den.* 129 M.D. 1988 (Pa. 1989).

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.

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.” Appendix “D” 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* tax parcels. Appendix “D” 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.” Appendix “D” at ¶20.

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 landowner 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 dictionary definition of this term does not comport with an interpretation that it applies to the boundaries of individual tax parcels interior to the Project. 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 Shiffler*, 879 A.2d at 189–90. 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 Township, 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. Appendix “D” at Finding ¶18-20, R.000147a, 148a, 152a-169a, 472a-473a. Furthermore, Lebanon Solar presented the expert testimony of Mr. Staub who testified as to his interpretation of Section 522(3), in his experience as a certified land use planner with experience in drafting zoning ordinance. R.000794a. Specifically, Mr. Staub opined that the language contained in Section 522(3) was ambiguous, noting that it did not define the term “adjacent lot line.” R.000794a. 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 footprint. R.000794a. 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* Appendix “D”; *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. R.000621a-623a. The Board provided no contrary interpretation of the phrase “adjacent lot lines” or any proposed definition of the

term “adjacent.” *See generally* Appendix “D”. 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.

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.” Appendix “D” 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. R.000143a, 152a-169a. Furthermore, Lebanon Solar demonstrated that additional vegetative screening would be installed in various areas to screen residential viewsheds. R. 000143a, 152a-169a. 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. R.794a-795a. 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. R.000795a. Again, the Board did not make any findings of credibility as to Mr. Staub’s testimony, nor did it even acknowledge it in its Decision. Consequently, it capriciously disregarded the same which is a reversible 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). R.000625a-26a. However, this testimony disregards the plain language of the Zoning Ordinance

which expressly permits fencing which accomplishes the same purpose. *See* Appendix “B” §522(4).

Moreover, the Board’s Decision regarding Section 522(4) 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.

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 Township was 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 Township 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.” Appendix “D” at Conclusion ¶22. In addition, the Township 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.” Appendix “D” 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.” *See* County SALDO §2.02. Lebanon Solar presented the testimony of Mr. Holton, as to how lot coverage and impervious surfaces were interpreted within the meaning of the Zoning Ordinance, the County SALDO, and the Pennsylvania Department of Environmental Protection (“DEP”). R.000465a, 474a-475a, 501a. 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. R.000475a.

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. R.000475a. 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. R.000152a-69a. On cross-examination Mr. Holton testified as to the conservative estimates utilized in determining the total amount of impervious lot

coverage. R.000495a-96. He further testified as to the inclusion of access roads in the total impervious surface calculation. R.000527a-28a. 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 on 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." Appendix "D" 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. R.000152a-69a, 475a, 495a-510a. 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. R.000446a, 834a. 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. R.000446a, 834a. 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.

CONCLUSION

The Lower Court erred when it based its *sua sponte* reliance on Brookview Solar in upholding the Township's decision relative to Lebanon Solar's alleged failure to meet the bonding and stormwater management requirements in the Ordinance. Moreover, said requirements were not possible for Lebanon Solar to meet at the time of the Conditional Use Application and Hearing, and rather than serve as reasons for denial, should have instead been imposed as conditions of approval. The remainder of the grounds for denial identified by the Township in its Decision are not supported by the record and are instead based on a capricious disregard of the evidence presented. For those reasons, and all the reasons set forth herein, this Court should reverse the decision of the Township.

Respectfully submitted,

Date: August 26, 2024

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Appendix “A”

Lower Court Order and Opinion

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

CIVIL ACTION – LAW

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
Paul Bametzreider, Esq.	For North Annville Township Board of Supervisors
William Cluck, Esq.	For Grady Summers

OPINION BY CHARLES, J., January 26, 2024

This is a dispute that implicates money, politics, zoning principles and the ability of landowners to use their own property as they deem appropriate. The North Annville Township (TOWNSHIP) Board of Supervisors found itself in the middle of these conflicting considerations.

proposed 858-acre solar farm will hereafter be referred to as "THE PROJECT").

THE PROJECT was comprised of twelve (12) separate lots owned by seventeen (17) different individuals or entities. All of the lots were located in TOWNSHIP's A-1 Agricultural Zone. An Ordinance was passed by TOWNSHIP in 2019 that *permits* solar farms as a conditional use within the A-1 Agricultural Zone. However, the permitted use is subject to conditions outlined in § 5.22 of the Ordinance. That section states:

"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%) 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.

the project. (N.T. 290). These agreements explicitly provided LEBANON SOLAR with permission to make proposals related to the project on behalf of all landowners. (N.T. 294).

Also addressed at the Conditional Use Hearing was the adequacy of LEBANON SOLAR's bonding and stormwater management plans. From the beginning, LEBANON SOLAR took the position that "An adequate amount of financial security can only be determined once a design of the proposed development is finalized." (N.T. 25; Proposed Finding 31). Similarly, LEBANON SOLAR promised that it would provide a stormwater management plan suitable to the County of Lebanon. (N.T. 26; Proposed Finding 32). On rebuttal, LEBANON SOLAR presented an expert who testified that issues such as bonding and stormwater management should all be considered "as part of the land development process after the Conditional Use Hearing determines whether the use is allowed in that district." (N.T. 342). That same expert testified that it would be impossible for LEBANON SOLAR to definitively determine bonding or stormwater management issues at a Conditional Use Hearing stage because THE PROJECT planning was still "incomplete". (N.T. 354, 356).

It is apparent from the record that the Conditional Use Hearing was conducted before a standing-room only audience. When public comment was solicited, numerous people came forward. Most opposed THE PROJECT. Some favored it. Fairly summarized, those who opposed THE PROJECT were concerned about water run-off (N.T. 193), impairment of

(3) The fact that LEBANON SOLAR's buffering proposal was deficient.

LEBANON SOLAR immediately indicated its desire to appeal TOWNSHIP's decision. What occurred next was a cascade of legal filings pertaining to the manner by which LEBANON SOLAR went about communicating its desire to appeal. Eventually, this Court rendered a written Opinion on February 13, 2023 that afforded LEBANON SOLAR the ability to have its substantive legal rights adjudicated by this Court. To the extent necessary, we incorporate by reference the entirety of our February 13, 2023, Opinion regarding the procedural aspects of LEBANON SOLAR's appeal.

A Pre-Trial Conference was conducted with counsel on April 6, 2023. We established a briefing schedule. All briefs were received by this Court by August 1, 2023. The issues raised by the parties are now before this Court for disposition.³

³ This case represents the second time in the 24-year career of this jurist that he has not rendered a decision within 120 days following receipt of the parties' argument. We self-reported our tardiness to Pennsylvania's Association of Pennsylvania Courts together with our promise that we would render a decision by February 15, 2024. We also wrote a letter to all counsel explaining our tardiness. We will not comment further, except to say that the record produced to this Court was massive and the arguments were nuanced.

"The 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 1, Section 1 of the Pennsylvania Constitution (protecting as an 'inherent right of mankind...acquiring, possessing and protecting property')."

In Re: Realen Valley Forge Green Association, 838 A.2d 718, 727 (Pa. 2003).

Our Commonwealth Court has expanded upon this general proclamation by stating that local governmental authorities "must remember that property owners have certain rights which are ordained, protected and preserved in our Constitution and which neither zeal nor worthwhile objectives can impinge upon or abolish." ***Cleaver v. Board of Adjustment of Tredyffrin Township***, 200 A.2d 408, Note 4 (Pa. 1964).

Perhaps because of these fundamental precepts, our Commonwealth Court has recognized that:

"[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 Board of Adjustment, 86 A.3d 330, 336 (Pa. Cmwlth. 2014), citing ***Rabenold v. Zoning Hearing Board of Palmerton Township***, 777 A.2d 1257 (Pa. Cmwlth. 2001).

Thus, courts must interpret "ambiguous language" in a manner "in favor of the property owner and against any implied extension of a restriction." ***Williams Holding Group LLC v. Board of Supervisors of West Hanover Township***, 101 A.3d 1202, 1213 (Pa. Cmwlth. 2014).

Procedurally, conditional use disputes fall within the jurisdiction of the Municipal governing board – in this case the Township Supervisors – rather than a Zoning Hearing Board. *In Re: Thompson*, 896 A.2d 659 (Pa. Cmwlth. 2006). There is law indicating that because conditional use litigation and disputes involving special exceptions are similar in nature, the standards governing litigation of each should be identical. See, *Sheetz Inc. v. Phoenixville Borough Council*, 804 A.2d 113, Note 5 (Pa. Cmwlth. 2002).

In this case, the TOWNSHIP has declared that LEBANON SOLAR's application did not comply with the conditions established in its Ordinance as foundational for creation of a solar farm. In denying the application, TOWNSHIP did not conclude that the conditional use is somehow contrary to the general health, safety or welfare of surrounding landowners. Thus, the sole question now before this Court is whether THE PROJECT complies with all conditions established by the Zoning Ordinance for creation and operation of a solar farm.

C. Scope of Review

This Court did not receive any additional factual testimony beyond that which was presented to the TOWNSHIP Board of Supervisors at three (3) public meetings. Because of this, we are bound to accept all credibility determinations rendered by the TOWNSHIP. See, 53 P.S. §11005-A; *Petition of Dolington Land Group*, 839 A.2d 1021 (Pa. 2003). That said,

TOWNSHIP's Board of Supervisors of impermissible bias: "From the initial submittal of LEBANON SOLAR's application, it was beleaguered by bias and pre-judgment from members of the Board which resulted in the violation of its due process rights to an unbiased decision-making tribunal." (LEBANON SOLAR's Brief at page 43). On the other hand, INTERVENOR's brief accused LEBANON SOLAR of "misrepresentation" because it had the temerity to argue that the TOWNSHIP accepted its conditional use application for one solar farm project instead of twelve (12) separate smaller projects. (Page 13 of INTERVENOR's Brief). Moreover, TOWNSHIP argued that LEBANON SOLAR "relies on a non-sensical interpretation of the Zoning Ordinance..." (Page 23 of Brief).

We certainly understand the passion that has been stirred up by LEBANON SOLAR's proposed project, but we will not adopt the invective of the parties' rhetoric. In terms of substance, these are the arguments that the parties have presented:

(1) PROJECT as involving one (1) lot or twelve (12)⁴

TOWNSHIP evaluated THE PROJECT as involving twelve (12) separate "lots". TOWNSHIP reasoned that each of the lots that were

⁴ Both sides have included separate sections in their briefs regarding the different ways that LEBANON SOLAR's project would not comply with the conditional use requirements of §522 if the analysis were to be predicated upon twelve (12) separate lots instead of one (1). For example, there is no dispute that some of the individual lots that make up the solar farm project are less than fifty (50) acres in area. We see no point in separately addressing all of the specific arguments as to why the requirements of §522 cannot be met if one considers each of the twelve (12) individual plots of land to be "lots". Suffice it to say that if TOWNSHIP's interpretation of THE PROJECT as requiring compliance on a lot-by-lot basis is correct, LEBANON SOLAR's application is doomed.

2. Buffering

Section 522 requires that a solar farm applicant provide: "A permanent evergreen vegetative buffer...or fencing which accomplishes the same purpose". In addition to its finding of non-compliance based upon the precept that all twelve (12) parcels require separate buffering, TOWNSHIP also included in its decision that "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..." Once again, LEBANON SOLAR argues that final decisions regarding buffering should be deferred until the land development phase of THE PROJECT. In addition, LEBANON SOLAR presented drawings and testimony that the entire 865-acre project would be buffered.

3. Stormwater Management/Bonding

Everyone agrees that LEBANON SOLAR has committed to comply with all applicable stormwater management regulations governing its project. LEBANON SOLAR also committed to provide a bond in an amount "suitable to the Township." TOWNSHIP believes that this is not enough. According to TOWNSHIP, a "future promise" to comply with a conditional use requirement is not enough under applicable case law. LEBANON SOLAR responds that it is typical in projects such as this for bonding and stormwater management to be addressed once final plans are completed and submitted to the County. LEBANON SOLAR states that its commitment

proceeding. Thus, whatever occurred at that Planning Commission meeting is irrelevant to what is now before the Court.

IV. ANALYSIS

A. Definition of "Lot"

The parties' dispute over the definition of the term "Lot" is unique. We have not been able to locate any Pennsylvania Appellate decision that governs this question, although numerous cases impact it in a way that is more than merely collateral.

TOWNSHIP argues that the term "Lot" is specifically defined in the Ordinance. That much is true. The Ordinance defines "Lot" as "a legally defined tract, parcel or plot of land, whether occupied or capable of being occupied by buildings." TOWNSHIP's expert argued that this definition is not ambiguous and that twelve (12) parcels of land cannot legally create one single "Lot". (N.T. 163-164). In response, LEBANON SOLAR's expert described the term "Lot" as ambiguous because it could have specifically included the word "individual" or it could have specifically prohibited an aggregation of parcels.

In the opinion of this Court, the Ordinance does not come close to addressing whether the term "Lot" must be limited to what is depicted on a tax map, nor does it indicate whether the term "Lot" can be deemed to include numerous parcels of property that a developer plans to lease or acquire in order to complete a development project.

Zoning Board of Adjustment, 86 A.3d 330,336 (Pa. Cmwlth. 2014), citing **Rabenold v. Zoning Hearing Board of Palmerton Township**, 777 A.2d 1257 (Pa. Cmwlth. 2001).

To the extent that TOWNSHIP argues that the definition of “Lot” found in the Ordinance requires this Court to adopt its argument about segregation of parcels for purposes of compliance with Section 522, we reject TOWNSHIP’s argument. At a minimum, the Ordinance is silent as to whether a “Lot” can be an aggregate of many parcels. At the very least, the definition of “Lot” found in the Ordinance is ambiguous. Either way, we reject TOWNSHIP’s argument that the definition of “Lot” in the Ordinance requires us to rule in its favor.

TOWNSHIP also argues that a “lot” for purposes of a solar farm application cannot by common law be created by aggregating different parcels of land. Once again, TOWNSHIP does not present any specific statute or decisional precedent that would support this argument, nor have we found any. We are aware that the MPC defines the term “Applicant” as any person or entity having a proprietary interest in land. 53 P.S.10107. We also have located a case where a lease option holder was held to have a “proprietary interest” in land. See, **SBA Towers v. Unity Township Zoning Hearing Board**, 179 A.3d 652 (Pa. Cmwlth. 2018). In addition, we also found a case that decried a myopic focus upon the word “site” without consideration of the overall scheme created by the Ordinance. See, **Borough of Pleasant Hills v. Zoning Board of Adjustment of Pleasant**

conditional use for the entire project based upon one (1) application. In one of its legal briefs, LEBANON SOLAR used the term “estoppel” to argue that TOWNSHIP should be prevented from rendering a decision that effectively required separate applications by each separate landowner.

Estoppel is a concept applied most frequently by courts in equity. Estoppel is an equitable doctrine based upon the French word “estoup”, which was employed to close the mouth of an individual who attempts to speak or act inconsistent with prior positions. (See, Black’s Law Dictionary (9th. Ed.), definition of estoppel found at page 629). Courts deciding land use disputes have used the moniker of “estoppel” to apply principles of fundamental fairness in regulating land use. See, e.g. **Springfield Township v. Kim**, 792 A.2d 717 (Pa. Cmwlth. 2002). The case of **In Re: Kreider**, 808 A.2d 340 (Pa. Cmwlth. 2002) stated that three different estoppel-based arguments can be applicable in land use disputes:

- (1) Estoppel based upon a “vested right” that was created by affirmative action on the part of a municipality;
- (2) Estoppel based upon a municipality’s acquiescence and inaction in the face of a known and obvious zoning infraction; and
- (3) Estoppel based upon intentional or negligent misrepresentations by a municipality.

We are not completely sure that TOWNSHIP’s ministerial act of accepting one application from LEBANON SOLAR triggers the concept of estoppel. It was, after all, LEBANON SOLAR’s choice to submit one single

landowner from using his/her property in a manner that is specifically permitted by an Ordinance.

For all of the reasons outlined above, we will err on the side of respecting the rights of landowners to freely use their property, and we will reject the effort of TOWNSHIP to apply a novel legal theory to prevent a use that was conditionally approved in its own Ordinance. We therefore reject TOWNSHIP's effort to require every one of the twelve (12) parcels that comprise LEBANON SOLAR's project to individually comply with the specifications of conditional use.

Having chosen to accept LEBANON SOLAR's application as a single unitary proposal, we have examined the record to ascertain whether the totality of THE PROJECT complies with all of the conditions specified in Section 522.⁶ LEBANON SOLAR presented copious evidence that THE PROJECT encompassed more than fifty (50) acres. (See, e.g. N.T. 17). LEBANON SOLAR also presented evidence about its setback compliance as it relates to the outer boundaries of THE PROJECT. (N.T. 20). No one, including INTERVENOR, expressed serious opposition to LEBANON SOLAR's arguments regarding the size of its project or setback requirements from outer boundaries.

The issue of lot coverage was challenged. LEBANON SOLAR presented testimony at the initial hearing that impervious surfaces associated with THE PROJECT would comprise only 25.2 acres, which

⁶ The conclusions of TOWNSHIP regarding bonding, stormwater management and buffering will be addressed separately in other sections.

for buffering and fencing, although the “exact type and location will be determined later.” (N.T. 20-21). LEBANON SOLAR promised that the entire project would be encased in vegetation and fencing. However, LEBANON SOLAR admitted: “We cannot represent that we have succeeded 100% in doing that [protecting residential “viewsheds”]”. (N.T. 72).

At the Conditional Use Hearing, numerous residents complained about having to look at unsightly solar panels. (See, N.T. 194; 199; 208; 215; 220). INTERVENOR’s expert testified that vegetative buffering should not be “at the discretion of the applicant”. (N.T. 172). He stated that the purpose of buffering “is to assuage the view or the visibility of the solar panel from the adjoining property owners.” (N.T. 172). Even LEBANON SOLAR’s expert was not comfortable with the language of the Ordinance. He stated: “I don’t like the fact that it’s a vegetative buffer and/or...fencing because there are two different – serves two purposes...Fencing is used for security. Buffering is used to protect against adjoining property owners.” (N.T. 339).

TOWNSHIP may have regrets in terms of how it worded the language of its Ordinance regarding buffering. However, the language of Criterion 4 requires vegetative buffer or fencing. The language is “either-or”; it does not require both fencing for protection and vegetation to protect what the experts refer to as “viewsheds”.

For purposes of our decision today, we must only discern whether LEBANON SOLAR’s proposal complies with Section 522. Although

LEBANON SOLAR argues that bonding and stormwater management are issues that can and should be deferred until the land development phase that THE PROJECT must still transition through. LEBANON SOLAR's project manager stated: "An adequate amount of financial security can only be determined once a design of the proposed development is finalized." (N.T. 25). LEBANON SOLAR's expert testified that bonding issues are typically "considered as part of the land development process after the Conditional Use Hearing determines whether or not the use is allowed in that district." (N.T. 342). LEBANON SOLAR promised in its presentation to provide bonding, a letter of credit or other financial security "acceptable to the Township." (N.T. 26).

As it relates to stormwater management, LEBANON SOLAR similarly promised to create a stormwater management plan in accordance with Lebanon County's Subdivision and Land Development Ordinance (SALDO) during the development phase of THE PROJECT (N.T. 25-26). LEBANON SOLAR's expert argued that stormwater management is an issue that is ordinarily addressed after conditional use is determined. (N.T. 341-343).

The INTERVENOR presented an expert who opined that LEBANON SOLAR's bonding proposal constituted nothing more than a "promise of future compliance" that is inadequate to comply with Section 522 of the Ordinance. (N.T. 178). Similarly, the expert for INTERVENOR described all of the Chesapeake Bay Watershed as "an incredibly sensitive area" and was critical of LEBANON SOLAR's unwillingness to provide more definitive

issues “are to be addressed further along the permitting and approval process.” *Id* at page 671.

Another case cited by both parties is ***Schatz v. New Britain Township Zoning Hearing Board***, 596 A.2d 294 (Pa. Cmwlth. 1991). In ***Schatz***, the Appellant applied for a special exception seeking to construct an inpatient drug and alcohol rehabilitation facility. The Zoning Hearing Board of New Britain Township determined that the proposed use fit the description of a “convalescent home” as defined in the Ordinance. However, the Board held that the applicant “did not meet his burden of proof regarding the special and general requirements for a special exception.” The applicant appealed to the Court of Common Pleas, which took no additional evidence. The Court of Common Pleas ruled in favor of the applicant, and New Britain Township appealed. Pennsylvania’s Commonwealth Court addressed numerous issues. Most pertinent to the case now before this Court was the Township’s concerns about stormwater management. As it related to that issue, the Commonwealth Court stated:

“We agree with Common Pleas that an application for special exception is not required to address such issues. Such issues are to be addressed further along in the permitting and approval process. Zoning only regulates the use of land and not the particulars of development and construction.”

Id at page 298 (citations omitted; emphasis in original).

We searched diligently for a case that could clarify the proclamations in ***Thompson*** and ***Schatz***, and enlighten us as to whether and to what extent bonding and stormwater management must be addressed in a

Id at page 749 (citations omitted).

In assessing the suitability of plans submitted at a conditional use proceeding, the Court in *Richboro* focused upon the degree of detail submitted in the application. Citing the case of *In Re: Drumore Crossings*, 984 A.2d 589 (Pa. Cmwlth. 2009), the Court held that it would be error for a municipality to require “detail that went far beyond the Zoning Ordinance requirements for the use of land and reached into the mechanics and operations of that use.” **Id** at page 750. Ultimately, the Commonwealth Court concluded:

“While Richboro cannot be required to submit a plan that details compliance with every aspect of the SALDO in order to obtain conditional use approval, Richboro cannot obtain conditional use approval with a VOD plan that makes compliance with the SALDO impossible and is directly at odds with the express criteria set forth in the Ordinance...Under this Ordinance, an applicant for a conditional use in the VOD must demonstrate that its plan complies with the applicable sections of the SALDO and the conditional use application may be denied if it does not comply.”

Id at page 750.

Based upon this analysis, the Commonwealth Court rejected Richboro’s plan as insufficient to comply with the mandates of the Ordinance.

The second case that provides instruction pertaining to the amount of detail required in a conditional use application is *Brookview Solar I, LLC v. Mount Joy Township Board of Supervisors*, 2023 WL8264544 (Pa. Cmwlth. Nov. 30, 2023). *Brookview* also involved creation of solar power infrastructure, though the plan in *Brookview* did not appear to be as

stormwater plan that would demonstrate the location of facilities on the property'...He explained, however, that it was 'too speculative to be able to provide detail as to stormwater' at this stage...By not addressing stormwater management, Brookview's application did not satisfy a specific conditional use requirement [of the Zoning Ordinance]. Accordingly, the trial court did not err in determining that Brookview's application was properly denied."

In this case, TOWNSHIP rendered two findings related to bonding and stormwater management. Those findings are:

"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."

(Page 7 of TOWNSHIP's written decision.)

LEBANON SOLAR asks us today to overturn TOWNSHIP's decision not to accept its promises of future compliance. We simply cannot and will not blithely reject TOWNSHIP's insistence upon compliance with the letter of its solar farm conditional use Ordinance.

We understand and accept LEBANON SOLAR's position that detailed bonding and detailed stormwater management plans cannot be proffered at this initial phase of the land development process. At the conditional use phase of development, detailed plans depicting the locations of all solar

decommissioning? What would be necessary to return the land involved back to a state suitable for agriculture?

- What experience does LEBANON SOLAR have with stormwater management, especially related to other solar farms? Has LEBANON SOLAR contracted with a company that has expertise in developing stormwater management systems? Has such a company conducted even a preliminary survey of the land designated for THE PROJECT?
- Is it possible to create a stormwater management plan that would assure adjoining landowners that stormwater run-off would not affect their farming activities? Does the company hired by LEBANON SOLAR to address stormwater management have experience in protecting adjacent farms from water run-off issues?

We are confident that there are probably hundreds of other preliminary questions that LEBANON SOLAR could have addressed in their conditional use application proposal. Even general information as outlined above would have been extremely helpful to TOWNSHIP and its residents. However, no such information was presented. Instead, LEBANON SOLAR merely stated: "Trust us. We will do it correctly." As LEBANON SOLAR no doubt learned during the Conditional Use Hearing, residents of North Annville Township have very little trust in LEBANON SOLAR. Obviously, neither did TOWNSHIP's Supervisors.

regarding bias on the part of the Supervisors, nor did any witness testify about specific statements made by Supervisors in opposition to THE PROJECT.

The key case regarding bias on the part of a Township Supervisor tasked with serving as an adjudicator emanated from Lebanon County. In the case of *In Re: Arnold*, 984 A.2d 1 (Pa. Cmwlth. 2009), a Township Supervisor for North Cornwall Township was accused of bias because he met privately with representatives of Wal-Mart regarding a proposed development in his Township and he issued statements to local newspapers that he believed the Wal-Mart development would actually improve traffic conditions in his Township. The Supervisor promised that he could impartially adjudicate a conditional use application. This Court agreed that the Supervisor could serve in adjudicatory capacity. When the application was approved, objectors appealed based upon their allegations of bias against the Supervisor. Pennsylvania's Commonwealth Court affirmed the decision of this Court and stated:

"Due process requires a local governing body in the performance of its quasi-judicial functions to avoid even the appearance of bias or impropriety. A showing of actual bias is unnecessary in order to assert a cognizable due process claim; the mere potential for bias or the appearance of non-objectivity may be sufficient to constitute a violation of due process. However, 'while an appearance of non-objectivity is sufficient to trigger judicial scrutiny, the significant remedy of invalidation often depends on something more tangible.' Recusal is required only where the record demonstrates bias, prejudice, capricious disbelief or prejudgment. If a Supervisor thinks he is capable of hearing a case fairly,

V. CONCLUSION

There is quite a bit that we do not know about LEBANON SOLAR's project and its etiology. Some questions, such as why the same Board of Supervisors who passed an Ordinance in 2019 to permit a solar farm turned around and relied upon a tortured interpretation of the Ordinance in order to deny permission to construct one, we do not need to know. However, there are other questions, particularly those related to bonding and stormwater management, that would be essential for us to know in order to approve THE PROJECT. One of the TOWNSHIP residents who appeared at the Conditional Use Hearing stated: "We can't get answers. The answer's always, those details will come later, we'll give those details later". We sympathize with Aaron Miller's statement.

Ultimately, we will affirm the decision of TOWNSHIP to deny LEBANON SOLAR's conditional use application. However, we do so because we find LEBANON SOLAR's application presentation to be inadequate, not because we believe that mobilized and angry residents of North Annville Township should have the ability to prevent twelve (12) of their fellow citizens from pursuing their ability to create a solar farm that was conditionally approved by TOWNSHIP's elected representatives.

We have a great deal of sympathy for the twelve (12) farmers who sought to utilize their own land in a way that was economically advantageous to their families. Nevertheless, we cannot with intellectual honesty approve a project as consequential as the one proposed by

Appendix “B”

**North Annville Township Ordinance
No. 2-2019**

ORDINANCE NO. 2-2019

AN ORDINANCE OF THE TOWNSHIP OF NORTH ANNVILLE AMENDING THE NORTH ANNVILLE TOWNSHIP ZONING ORDINANCE 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:

**NORTH ANNVILLE TOWNSHIP
SUPERVISORS**

Adam D. Wolf

Randall H. Lauer
Chairman

Charles B. Meyer
Vice Chairman

Appendix “C”

Lebanon Solar’s Proposed Findings and Conclusions

**BEFORE THE BOARD OF SUPERVISORS OF
NORTH ANNVILLE TOWNSHIP**

IN RE:)
)
Conditional Use Application of)
Lebanon Solar I, LLC)

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

AND NOW, comes Applicant, Lebanon Solar I, LLC (“Lebanon Solar”), by its counsel, Babst, Calland, Clements & Zomnir, P.C., and submits the following Proposed Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I. Preliminary Matters

1. Lebanon Solar submitted a conditional use application to North Annville Township (“Township”) on May 3, 2021, for development and operation of an eight hundred and fifty eight (858) acre Solar Farm (the “Project”). The Project is proposed to be located on property comprised of 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 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 and 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”).

2. The Township Board of Supervisors (“Board”) advertised and conducted public hearings on January 25, 2022¹, January 26, 2022², and February 24, 2022³, during which the parties were afforded an opportunity to present witnesses and exhibits into evidence. The public hearing was closed on February 24, 2022.

3. Appearing for Lebanon Solar were Steven M. Lucas, Esquire, and Elizabeth A. Dupuis, Esquire.

4. Members of the Board who heard the evidence presented were:

¹ The transcript for the January 25, 2022, hearing is referred throughout as “Tr. 1/25/22.”
² The transcript for the January 26, 2022, hearing is referred throughout as “Tr. 1/26/22.”
³ The transcript for the February 24, 2022, hearing is referred throughout as “Tr. 2/24/22.”

- i. Randy Leisure, Chairman; and
- ii. Clyde Meyer; and
- iii. Adam Wolfe

5. Paul Bametzreider, Esquire, is the Board's Solicitor.

6. At the commencement of the public hearing on January 25, 2022, several Township residents, jointly sought party status. Lebanon Solar did not object to the standing of any of the objecting residents. The following Township residents were jointly granted party status by the Board as objectors ("Objectors"):

- i. Grady Summers;
- ii. Larry Buffenmeyer;
- iii. Brenda Buffenmeyer;
- iv. Suzanne Forney;
- v. Aaron Miller, III;
- vi. John Shaver; and
- vii. Brenda Shaver.

7. At the commencement of the public hearing on January 25, 2022, an additional Township resident, Brian Tshudy, ("Mr. Tshudy") entered his appearance. Hereinafter all objecting parties may collectively be referred to as "Objectors."

8. The following witnesses testified on behalf of Lebanon Solar on January 25, 2022:

- i. For Lebanon Solar, Eric Holton, direct and cross-examination; and
- ii. For Lebanon Solar, Jonathan Dimitriou, direct and cross-examination.

9. The following witnesses testified on behalf of the Objectors on January 26, 2022:

- viii. Grady Summers, objector, direct and cross-examination;
- ix. Lawrence Lahr, expert witness, direct and cross-examination;
- x. Larry Buffenmeyer, objector, direct examination;
- xi. Brenda Buffenmeyer, objector, direct examination;
- xii. Suzanne Forney, objector, direct examination;
- xiii. Aaron Miller, III, objector, direct examination;
- xiv. John Shaver, direct examination;
- xv. Brenda Shaver, direct examination; and
- xvi. Brian Tshudy, individual objector, direct testimony and cross-examination.

10. The following witnesses testified on February 24, 2022:

- i. For Lebanon Solar, Eric Holton, direct and cross-examination;
- ii. For Lebanon Solar, Richard Kirkland, direct and cross-examination;
- iii. For Lebanon Solar, Timothy Staub, direct and cross-examination and redirect; and

iv. For Lebanon Solar, Jonathan Dimitriou, direct and cross-examination.

11. On January 25 and January 26, 2022, members of the public made comments which were included in the transcript and record before the Board.

12. During the course of the hearings, the Township, Lebanon Solar, the Objector, and members of the public introduced, or attempted to introduce, into the record various exhibits. A list of these exhibits is attached as Appendix “A”. The Board may cite to these exhibits as relevant in its findings of fact and conclusions of law.

II. Township Zoning Ordinance

13. The Township is a Second Class Township, organized and existing under the Second Class Township Code, Act 69 of 1933, P.L. 103; 53 P.S. §65101 *et seq.*

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

15. 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 Township Supervisors following a public hearing held by the Township Supervisors.

16. The Zoning Ordinance does not set forth any additional general “health and safety” criteria applicable to all conditional uses, and therefore the only criteria applicable to the Application are those contained in Section 522.

III. Lebanon Solar Application

Lebanon Solar submitted its application for the solar farm on May 3, 2021, as thereafter amended and supplemented as permitted by the Township ordinances and by law.

17. The Township Planning Commission reviewed the Application on June 7, 2021 and recommended denial of the Application.

V. Case of Lebanon Solar

Witness—Eric Holton

18. Mr. Holton is the project manager for Enel Green Power, representing Lebanon Solar on its proposed location in the Township. Tr. 1/25/22, at 12, 48.

19. Lebanon Solar has submitted a conditional use application to establish one solar farm in the Agricultural zoning district, pursuant to Sections 401.10 and 552 of the Township’s zoning ordinance. Tr. 1/25/22, at 15.

20. The project has a proposed generating capacity size of 70 to 100 megawatts alternative current (“AC”) and is designed to interconnect with the existing on-site transmission line that runs across the southern part of the project parcel. Tr. 1/25/22, at 14; Lebanon Solar Exhibits A-1 and A-2.

21. The existing transmission line and infrastructure was one of the primary reasons for selecting the Township and the particular parcels of land for the solar project. There are no plans to build a new transmission line. Tr. 1/25/22, at 14.

22. Currently, the project is in the preliminary design and permitting phase, which includes any required zoning and use approvals. Once all additional design and permitting steps, such as land development and stormwater management approval from Lebanon County (“County”), are completed, construction of the project could be begin as soon as the end of 2022. Tr. 1/25/22, at 14.

23. Further coordination, studies, investigations, and surveys will take place as the project continues forward after completion of the preliminary design and permitting phases. Tr. 1/25/22, at 14.

24. Mr. Holton reviewed each of the eight criteria for solar farms that are set forth in the Township zoning ordinance to demonstrate how Lebanon Solar complies with each of the criteria. Tr. 1/25/22, at 12-13, 15.

25. Criterion one, contained in Section 552(1) of the Zoning Ordinance, does not permit solar farms to be constructed upon any farmland or agriculturally-zoned land which has a current agricultural conservation easement filed against it. Mr. Holton indicated that Lebanon Solar has title commitments available that demonstrate that none of the participating properties have agricultural conservation easements filed against them. Tr. 1/25/22, at 15-16; Lebanon Solar Exhibit A-3.

26. Criterion two, contained in Section 522(2) of the Zoning Ordinance, requires a 50-acre minimum lot size for the construction of a solar farm. The proposed solar farm will be constructed on approximately 858 acres and will be situated on a total of twelve participating parcels. Tr. 1/25/22, at 17-18; Lebanon Solar Exhibit A-4.

27. Criterion three, contained in Section 522(3) of the Zoning Ordinance, requires solar panels and other implements to be set back a minimum of 50 feet from any adjacent lot line. Mr. Holton stated not only will the solar panels and implements be set back at least 50 feet from any adjacent lot line, Lebanon Solar voluntarily ensures that no solar panels or other implements will be located within 150 feet of any occupied residential dwelling. Tr. 1/25/22, at 18-19; Lebanon Solar Exhibits A-5 and A-6.

28. Criterion four, contained in Section 522(4) of the Zoning Ordinance, requires a permanent evergreen vegetative buffer or fencing that will accomplish the same purpose of buffering. Perimeter fencing will be installed around the solar panels and other implements and will serve as the required protective buffer. In addition, Lebanon Solar will voluntarily install

vegetative screening in various areas to provide additional screening to residential viewsheds. Tr. 1/25/22, at 20-21; Lebanon Solar Exhibit A-1.

29. Criterion five, contained in Section 522(5) of the Zoning Ordinance, indicates that the maximum lot coverage, as it relates to impervious surface or impervious area, cannot exceed 50 percent of the total lot size. The proposed project consists of less than three percent impervious lot coverage, as the Pennsylvania Department of Environmental Protection (“DEP”) considers solar panels as pervious surface since solar panels are elevated above the ground, with separation between the rows to allow water to flow underneath and in between. The total acreage of the impervious surfaces associated with the proposed project is 25.2 acres, or approximately 2.9 percent, of the approximate 858 acres that comprise the project site. Tr. 1/25/22, at 21-23. Even if solar panels were considered impervious surfaces necessitating inclusion in the maximum lot coverage calculation, the total lot coverage would total 20.4%. Tr. 2/24/22, at 378, Lebanon Solar Exhibit A-17.

30. Criterion six, contained in Section 522(6) of the Zoning Ordinance, requires applicants to provide documentation that it has adequate liability insurance in minimum amounts of one million dollars per incident and two million dollars per aggregate, in place. Since final insurance policy issuance is contingent upon land development plan approval, Lebanon Solar will provide the Township with insurance certificates in the required minimum amounts following approval of its land development plan. Tr. 1/25/22, at 23-24, 26. In the interim, Lebanon Solar has submitted insurance certificates according to the required coverage amounts with the understanding that the certificates are subject to change once the land development approval process is completed. Tr. 1/25/22, at 24, 26; Lebanon Solar Exhibit A-7.

31. Criterion seven, contained in Section 522(7) of the Zoning Ordinance, requires applicants to provide adequate bonding, which will remain in place to be used by the Township if an applicant ceases operation and fails to remove any solar panels and other implements related to the use within 100 days of the cessation of the operation. Lebanon Solar will provide a decommissioning plan and an adequate amount of financial security upon approval of its land development plan. Tr. 1/25/22, at 24-26.

32. Criterion eight, contained in Section 522(8) of the Zoning Ordinance, requires an approved stormwater management plan as required by the Lebanon County Stormwater Management Ordinance. Following the land development permitting phase, Lebanon Solar will provide the Township with its approved stormwater management plan. Tr. 1/25/22, at 25-27.

33. Prior to any construction, Lebanon Solar will submit a land development plan that demonstrates compliance with the applicable zoning ordinance provisions. Tr. 1/25/22, at 27.

34. The Zoning Ordinance contains no additional criteria, whether general or specific, which apply to this use.

Witness—Jonathan Dimitriou

35. Mr. Dimitriou is employed by Enel Green Power of America and is the project engineer for the Lebanon Solar project. Tr. 1/25/22, at 86.

36. Mr. Dimitriou provided information regarding what an inverter looks like and its function on a project site. An inverter essentially contains electrical equipment that takes the direct current (“DC”) from solar panels to an AC side so it can be moved onto the electric grid. Tr. 1/25/22, at 86.

37. A decommissioning plan essentially provides an economic analysis that takes into account the cost to deconstruct the project on aboveground facilities and also takes into account the salvage value of the project. Tr. 1/25/22, at 87.

38. If an individual was 200 feet away, the substation noise would be roughly the equivalent to the sound of a private small office. The noise dissipates the farther away an individual is from the substation. Tr. 1/25/22, at 87, 89.

39. Noise associated with the switchyard, since there is not a transformer in the switchyard, would be the typical high voltage transmission hum that would be heard if walking down the road. Tr. 1/25/22, at 87-88.

VI. Cases of the Individual Objectors

Witness—Grady Summers

40. Mr. Summers is a party objector who resides at 585 Palmyra-Bellegrove Road, Annville, PA. Mr. Summers testified that from his property, Nolt’s lot, identified by the applicant as Lot 12, would be in his direct line of sight. Tr. 1/26/22, at 122. Mr. Summers testified regarding his general opinions and concerns related to the Lebanon Solar project. Tr. 1/26/22, at 122-148.

41. Mr. Summers testified regarding his concerns related to how the project would impact his views and ability to entertain family and friends. He also expressed his concerns regarding how the project’s fencing or vegetative buffer would impact the ability of the deer to access or cross the project’s properties. Tr. 1/16/22, at 125-127.

42. Mr. Summers has concerns with regards to the installation of any chain link fences on the project properties and its impact on scenic roadways in the Township. Tr. 1/26/22, at 129-132; Objector’s Exhibit 3.

43. Mr. Summers also has concerns related to the use of farmland for the project, the existence of three cemeteries on two of the properties, the use of natural areas identified in the Regional Comprehensive Plan, and the scope of the proposed project. Tr. 1/26/22, at 133-153; Objector’s Exhibits 6 and 7.

44. Mr. Summers acknowledged his concerns pertained to the proposed project design and that those concerns also pertain to the conceptual site plan. Tr. 1/26/22, at 154.

Witness—Lawrence Lahr

45. Mr. Lahr is a land planning and design consultant who testified as an expert in land use planning and zoning.. Tr. 1/26/22, at 155, 158.

46. Mr. Lahr testified that he had reviewed the Township’s zoning ordinance, the 2019 zoning amendment that added regulations for solar farms and stated that he is familiar with the Regional Comprehensive Plan. Tr. 1/26/22, at 158-160.

47. Mr. Lahr agreed that planning pertains to policy and that comprehensive plans do not have the force of law and that zoning ordinances do contain regulations that do have the force of law. Tr. 1/26/22, at 182-183.

48. Mr. Lahr confirmed that he is not a land-use attorney and testified that he was provided with interpretations to land use law with respect to the solar regulations relative to the Lebanon Solar application. Tr. 1/26/22, at 183-184.

49. Mr. Lahr acknowledged that the land development plan process with respect to project design is dependent upon an applicant knowing whether or not the particular use is approved or allowed before spending money on engineering and design. Tr. 1/26/22, at 184.

50. Mr. Lahr testified that through his experiences working on projects for his clients that they typically do not go through the design phase before receiving any required conditional use or special exception approvals. Tr. 1/26/22, at 184-185.

Witness—Larry Buffenmeyer

51. Mr. Buffenmeyer is an objector who resides at 1540 North State Route 934, Bellegrove, PA. Mr. Buffenmeyer stated that his property is approximately 150 feet from the Lots identified as 5 and 8 and stated that he can also see the hilltop of Lot 6 from his property. Tr. 1/26/22, at 186-187. Mr. Buffenmeyer testified regarding his general opinions and concerns related to the Lebanon Solar project but did not present any new additional factual evidence. Tr. 1/26/22, at 189-195.

52. Mr. Buffenmyer testified regarding his concerns related to property values, the negative impact to farmland, pollution, negative aesthetic value to his property, liability insurance, possible future problems for farmers, and the potential damage to public roads and private water wells. Tr. 1/26/22, at 189-194.

Witness—Brenda Buffenmeyer

53. Mrs. Buffenmeyer is an objector who resides at 1540 North State Route 934, Bellegrove, PA. Ms. Buffenmeyer testified regarding her general opinions and concerns related to the Lebanon Solar project but did not present any new additional factual evidence. Tr. 1/26/22, at 196-198.

54. Mrs. Buffenmyer testified regarding her concerns related to taxes, the recycling of damaged solar panels, the potential removal of farmlands for hunting, and the use and enjoyment of her property specifically with respect to the aesthetic values of the community. Tr. 1/26/22, at 196-198.

Witness—Suzanne Forney

55. Ms. Forney is an objector who resides at 595 Steelstown Road, Annville, PA. Ms. Forney testified regarding her general opinions and concerns related to the Lebanon Solar project but did not present any new additional factual evidence. Tr. 1/26/22, at 199-205.

56. Ms. Forney testified regarding her concerns related to noise, electromagnetic radiation, aesthetics associated with solar project sites, the pervious and impervious classification of solar panels, recycling, and the various acreages of the project parcels. Tr. 1/26/22, at 199-204.

Witness—Aaron Miller, III

57. Mr. Miller is an objector who resides at 721 Palmyra-Bellegrove Road. Mr. Miller stated that the Lot identified as 12 is visible from his property. Mr. Miller testified regarding his general opinions and concerns related to the Lebanon Solar project but did not present any new additional factual evidence. Tr. 1/26/22, at 206-214.

58. Mr. Miller testified regarding his concerns related to how the project will physically divide the neighborhood, aesthetic values, property values, lighting at the project site, batteries on the site and the impact on the environment in the future, and the possibility of onsite fuel storage. Tr. 1/26/22, at 207-213.

Witness—John Shaver

59. Mr. Shaver is an objector who resides at 1740 Blacks Bridge Road. Mr. Shaver stated that the Lots identified as 5 and 8 are visible from his property. Mr. Shaver testified regarding his general opinions and concerns related to the Lebanon Solar project but did not present any new additional factual evidence. Tr. 1/26/22, at 214-217.

60. Mr. Shaver testified regarding his concerns related to the views from his property, the impact of the project fencing on the traveling and hunting patterns of the wildlife, the appearance of the project fencing and the potential for trash to be caught up against it, potential battery fires, electromagnetic radiation and fields, and the lot sizes of Lots 5 and 8. Tr. 1/26/22, at 214-216.

Witness—Brenda Shaver

61. Mrs. Shaver is an objector who resides at 1740 Blacks Bridge Road. Mrs. Shaver stated that the Lots identified as 5 and 8 are visible from her property. Mrs. Shaver testified regarding her general opinions and concerns related to the Lebanon Solar project but did not present any new additional factual evidence. Tr. 1/26/22, at 218-224.

62. Mrs. Shaver testified regarding her concerns related to the impact on the views from her property, perceived health hazards and cancer, safety related to the batteries, and the safety of the panels during high-wind events. Tr. 1/26/22, at 218-224.

VII. Case of Brian Tshudy

Witness—Brian Tshudy

63. Mr. Tshudy is an objector who resides at 1740 Blacks Bridge Road. Mr. Tshudy entered his appearance for the proceedings at the commencement of the January 24, 2022, public hearing. Mr. Tshudy testified regarding his general opinions and concerns related to the Lebanon Solar project but did not present any new additional factual evidence. Tr. 1/26/22, at 226-228.

64. Mr. Tshudy testified regarding his concerns related to the safety of wildlife crossing the road and being hit by vehicles, the potential for farmland and livestock damage caused by wildlife being fenced in, battery leakage, and drainage from the project site. Tr. 1/26/22, at 226-228.

VIII. Lebanon Solar Rebuttal Case

Additional Exhibits

65. During the course of its rebuttal case, Lebanon Solar introduced the following additional exhibits, which were admitted without objection.

- a. Various option agreements with land owners. Lebanon Solar Exhibit A-13.
- b. Resume of Richard Kirkland, Jr. Lebanon Solar Exhibit A-14.
- c. Resume of Timothy J. Staub. Lebanon Solar Exhibit A-15.
- d. Resume of Jonathan Dimitriou. Lebanon Solar Exhibit A-16.
- e. Criterion number 5, estimated lot coverage. Lebanon Solar Exhibit A-17; and
- f. Battery energy storage systems informational sheet. Lebanon Solar Exhibit A-18.

Witness—Eric Holton

66. Mr. Holton is the Regional Director of Development for Lebanon Solar. Tr. 2/24/22, at 290.

67. Mr. Holton confirmed that the set of option agreements for the participating landowners were not the recorded memoranda but the actual private agreements with commercial, proprietary, and confidential information redacted. Lebanon Solar was providing these private agreements because the Board may find that the recorded memoranda do not provide sufficient evidence to establish Lebanon Solar's interest rights to the properties. The redactions do not impact the pertinent sections and provisions that establish Lebanon Solar's interest rights to the properties. Tr. 2/24/22, at 290-291; Lebanon Solar Exhibit A-13.

68. Mr. Kirkland is an appraiser and the owner of Kirkland Appraisals, LLC., a company based in Raleigh, North Carolina, and testified as an expert in general appraisal and has obtained the designation as a Member of the Appraisal Institute (MAI). Mr. Kirkland has been an appraiser for 26 years and is certified as a general appraiser in several states, including Pennsylvania. Mr. Kirkland is also an MAI, which is a national designation by the Appraisal Institute to recognize additional peer-review study, additional course work, and demonstration of higher learning. Tr. 2/24/22, at 299-300; Lebanon Solar Exhibit A-14.

69. Mr. Kirkland testified that he performed an appraisal for a Dover Solar project in Pennsylvania and concluded a finding of no impact on property values for that particular project. Tr. 2/24/22, at 302.

70. Mr. Kirkland testified that he has performed appraisals on approximately 900 solar farms over the past 13 years in 20 different states, including Pennsylvania. He stated that he has never testified that a solar farm has adversely impacted property values. Tr. 2/24/22, at 303-304, 306.

71. Mr. Kirkland discussed the research that his company has been undertaking the past 13 years in order to understand the impact of solar farms on property values. Various factors, such as what the solar farms look like, quantifying size based upon acreage and megawatts, reviewing adjacent land uses, and the proximity of any adjacent homes in order to have an accurate snapshot of what solar farms are and where they are being located, homes are part of the research. Tr. 2/24/22, at 306.

72. Mr. Kirkland performs what is called a “matched pair analysis” or “paired sales analysis” that looks at the sales of homes next to solar farms as well as agricultural land next to solar farms. This includes evaluating the sales of homes sold next to solar farms and comparing that sale to a similar home sold nearby in the same time frame but not next to a solar farm in measure any impact on property value. Tr. 2/24/22, at 307.

73. Mr. Kirkland’s firm has also interviewed the lead researchers from university studies on the subject of the impact solar farms have on property values to better understand the findings. Additionally, his firm has interviewed brokers involved in home sales next to solar farms to obtain additional information to focus on the match pair analysis that his firm has been doing on its own. Tr. 2/24/22, at 307.

74. In his research, Mr. Kirkland has found that the most common adjoining use to a solar farm, if looking at based on acreage, is agricultural. In looking at the most common adjoining use to a solar farm, if looking based on the number of parcels, the use would be residential. He further added that commercial and industrial uses typically make up less than ten percent of the adjoining uses next to a solar farm. Tr. 2/24/22, at 307-308.

75. Mr. Kirkland has found that when looking at solar projects, the match pairs methodology shows a broad range of impact on property values, with some sales showing a slight negative impact and some showing a positive impact. Overall, taking into account outliers on

either the negative or positive extreme, his research concluded most of the sales fall very close to the zero percent impact. Tr. 2/24/22, at 308.

76. When compiling an aggregate of all findings, roughly one percent suggests a mild impact on home sales next to solar farms. However, 80 percent of the data points reflected no impact on property values. Tr. 2/24/22, at 308-309, 320.

77. Mr. Kirkland's firm also prepares impact analyses on various uses aside from solar farms, including wastewater treatment plants, rock quarries, schools, soccer fields, and outdoor amphitheaters. The analysis looks at a hierarchy of impacts and the things that cause large impacts to property values. Hazardous materials constitute the number one impact on property values, then odor, noise, traffic, adult establishments, and things of nature. Solar farms do not have any of these characteristics and thus do not trigger any of these impacts. Tr. 2/24/22, at 309-310.

78. The impact of appearance, which is typically the smallest impact to measure, is one factor that solar farms do trigger. Mr. Kirkland stated that he believes the reason the matched pair analysis shows little to no impact on property values is that solar farms are often subject to significant setback and landscaping buffer requirements that aid in screening the use. Tr. 2/24/22, at 310.

79. Relative to distance to properties, Mr. Kirkland confirmed that he has specifically looked at the proposed Lebanon Solar project in the Township. Tr. 2/24/22, at 310. He indicated that the closest homes are approximately 150 feet away, which he stated is not atypical, and that he has matched pair analyses that show homes as close as 105 feet, as measured from the closest panel to the closest point on a house, where no impacts on value occurred. Tr. 2/24/22, at 311.

80. His findings are that there were no impacts on property values at that distance for new home construction on homes being built next to an existing solar farm. Tr. 2/24/22, at 311. His findings included a similar development in New Jersey with 1.2 to 1.6 million dollar homes being built 200 feet from the home to the nearest solar panel with no impact on property values. Tr. 2/24/22, at 311.

81. Mr. Kirkland stated that the data concludes that requirements such as setbacks and buffers are sufficient to maintain aesthetic and property values. Tr. 2/24/22, at 311-12.

82. Mr. Kirkland testified that he has performed several analyses of substation impact on property values, and has not seen a negative impact on home sales next to a substation. Tr. 2/24/22, at 322-323.

83. It is Mr. Kirkland's professional opinion that the location of Lebanon Solar's solar farm, as proposed, will be in harmony with the area and will not have a negative impact on adjoining property values. Tr. 2/24/22, at 313.

Witness—Timothy Staub

84. Mr. Staub is an assistant vice president with Herbert, Rowland, and Grubic ("HRG") and testified as an expert in land planning. Mr. Staub has over 25 years of community planning experience in Pennsylvania and has worked for HRG for five years. Prior to his joining

HRG, he was employed by Rettew Associates in Lancaster County for 18 years. Tr. 2/24/22, at 324-25; Lebanon Solar Exhibit A-15.

85. Mr. Staub presently serves as the chairman of the Springettsbury Township Planning Commission and is a member of the York County Land Bank Authority. He has published articles in the Township News and the Borough News and has given training on zoning and subdivision and land development ordinances to local government academies and the Pennsylvania State Association of Township Supervisors (“PSATS.”) He has published over 100 planning documents within the Commonwealth and authored the Lebanon County Comprehensive Plan in 2007. Tr. 2/24/22, at 325-26.

86. He also worked on the preparation of a number of municipal ordinances in Lebanon County, including the Union Township and Swatara Township zoning ordinances, parts of the North Cornwell Township and South Annville Township zoning ordinances, and parts of the Palmyra Township and North Cornwall Township comprehensive plans. He currently is writing zoning ordinances for Lower Paxton Township in Dauphin County, New Cumberland Borough in Cumberland County, and Cumberland Township in Union County. Tr. 2/24/22, at 326, 328.

87. Mr. Staub discussed the process when working on zoning amendments and also the preparation of comprehensive plans. Comprehensive plans are policy documents that should be updated every ten years, whereas zoning ordinances are regulatory documents. Zoning ordinances should be prepared after a municipality has its comprehensive plan in place. Tr. 2/24/22, at 328-31.

88. Mr. Staub discussed various uses found in a zoning ordinance, including conditional uses, and the general and conditional use standards that are found in zoning ordinances for identified uses. These standards should have specific objective criteria and quantitative, measurable requirements. Tr. 2/24/22, at 331-32.

89. Definitions should be associated with the identified objectives. In the absence of a defined term, the objective is left to interpretation by the Board. Tr. 2/24/22, at 332-33.

90. The Township’s zoning ordinance in Section 201.3 has a provision for “Terms, Phrases and Words Not Defined” that states “When terms, phrases or words are not defined they shall have their ordinarily accepted meanings or such as the context may imply.” Tr. 2/24/22, at 333.

91. Section 603.1 of the Pennsylvania Municipalities Planning Code (“MPC”) indicates that when interpreting the language of a zoning ordinance to determine the extent of the restriction upon the use of a property, the language is to 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 those restrictions. Tr. 2/24/22, at 334.

92. The Township adopted a zoning ordinance amendment in 2019 to add criteria for solar farms. Mr. Staub discussed the applicability of each criterion to the Lebanon Solar project. Tr. 2/24/22, at 334-335.

93. Criterion one refers to agricultural easements, which are not completely defined with regard to what is specifically being requested by the applicant. Mr. Staub testified that it was

his interpretation that if a project is in an agriculturally-zoned district, the applicant needs to confirm if the property has an agricultural preservation or a conservation preservation easement associated therein. Tr. 2/24/22, at 335.

94. Parcel data and deeds from the County's land title records may provide evidence of any agricultural or conservation preservation easement designated for a particular property. Tr. 2/24/22, at 335. There is no requirement in the ordinance for the submission of any specific title information as part of the application. Tr. 2/24/22, at 363.

95. An agricultural security area is basically in place to protect property owners from nuisance laws against farming and not necessarily for the preservation of a farm, as the defined area is reviewed every seven years. Tr. 2/24/22, at 336. While an agricultural security area is property specific, it is not an easement. Tr. 2/24/22, at 336.

96. Criterion two refers to the minimum lot size of 50 acres for the establishment of a solar farm. In addition it does not include a term such as "individual" which could indicate whether or not the definition referred to a single tax parcel or zoning lot, or whether individual parcels could be combined under a "campus" concept. Tr. 2/24/22 pg. 337.

97. Criterion three refers to the setback of solar panels or other implements to adjacent lot area or lot line. Mr. Staub stated that the language in the ordinance is ambiguous relative to the words "adjacent lot line" as the term is not defined. It would be reasonable for an applicant to assume that "adjacent lot lines" are those that are adjacent to the solar farm as opposed to properties within the solar farm. Tr. 2/24/22, at 338.

98. Criterion four requires "A permanent evergreen vegetative buffer must be provided or fencing which accomplishes the same purpose of buffering.", with the term "buffer" not being defined. Tr. 2/24/22, at 338, 340. Mr. Staub stated that as written, this criterion provides an "either/or" option for an applicant with regard to the installation of a vegetative buffer or fencing. Tr. 2/24/22, at 338. Lebanon Solar's plans exceed these requirements as its plans include the installation of both fencing and the placement of vegetative screening around the residential properties. Tr. 2/24/22, at 339.

99. Criterion five establishes the maximum lot coverage for solar farms. The definition of "maximum lot coverage" indicates that it is the "percentage of lot area which may be covered by impervious material including roofs, drives, patios, walls, etcetera." Mr. Staub testified that he had looked at the Lebanon County Subdivision and Land Development Ordinance ("County SALDO") which defines an impervious area as a surface that prevents the infiltration of water into the ground. He indicated that this definition is typical of those normally found in other SALDOs. Tr. 2/24/22, at 340-341.

100. The County SALDO and Township's solar ordinance amendment does not state whether or not solar panels are considered impervious surface areas. However, the County Planning Office made a contrary statement that the panels would be considered impervious. Tr. 2/24/22, at 341; Board Exhibit 3. Mr. Staub testified that in his experience outside of the Township, solar panels have not been determined to be impervious. Tr. 2/24/22, at 341.

101. Mr. Staub testified that criteria five (relative to maximum lot coverage), six (relative to proof of liability insurance), seven (relative to bonding), and eight (relative to the submission of a stormwater management plan) would all be considered as part of the land development process that would commence only if conditional use approval is received. The Board would be permitted to impose conditions as part of any conditional use approval that an applicant meets criteria five, six, seven, and eight, or their conditional use approval is not fully approved. Tr. 2/24/22, at 342.

102. Mr. Staub testified that it is normally his experience that an applicant goes through the conditional use process before proceeding with any land development process. An applicant could not proceed in building a solar farm unless it obtains conditional use approval prior to land development plan approval. Tr. 2/24/22, at 342.

Witness—Jonathan Dimitriou

103. Mr. Dimitriou is a project engineer with Enel. He began his career with Black and Veatch in high voltage transmission line design, and then moved onto Tradewind Energy where he focused on utility-scale renewable energy development projects focused mainly on wind energy. Prior to working at Tradewind, Mr. Dimitriou worked at Savion, focusing on solar energy project engineering. Tr. 2/24/22, at 366; Lebanon Solar Exhibit A-16.

104. Mr. Dimitriou testified that he is familiar with the average size of the solar projects that Enel has in development or operation. He stated that Enel currently has seven operating solar projects, four currently under construction, and approximately 65 projects in development in Pennsylvania and across the United States. Tr. 2/24/22, at 367-368.

105. The average size of the operating projects is 200 megawatts, and the four projects currently under construction are on average approximately 365 megawatts. The estimated size of this Project is approximately 70 to 100 megawatts. Tr. 2/24/22, at 368.

106. Interconnection filings are utility-scale projects that have the ability to interconnect to the grid. An application must be made to the grid operator who manages and operates the grid. Based on his review of the interconnection filings, Mr. Dimitriou indicated that there are approximately 40 other projects in Pennsylvania that are approximately at least 70 megawatts in size, in addition to a number of utility-scale solar projects under development in Pennsylvania that are three to nine times larger in size than this Project. Tr. 2/24/22, at 368-369.

107. Enel has 20 active battery storage projects in North America. Mr. Dimitriou provided information on the Battery Energy Storage Systems (“BESS”) proposed to be used on this project. Tr. 2/24/22, at 370-71; Lebanon Solar Exhibit A-18.

108. The Lebanon Solar utility-scale battery storage project consists of a series of lithium-ion batteries that are connected in a series as scaled that is equivalent to a utility. The lithium-ion battery is the type of battery that individuals use on a daily basis, including cellphones which essentially use the same type of battery. Tr. 2/24/22, at 371.

109. The small lithium-ion batteries are put into a series of racks. The number of racks containing the batteries is determined by the project size, and racks can be added to accommodate various project sizes. Tr. 2/24/22, at 371.

110. The battery systems are contained within their own units. The systems come in cube-like structures and are designed to meet Underwriters Laboratory (“UL”) national standards. In a rare situation where leakage would occur, any leakage would be self-contained within the unit. Tr. 2/24/22, at 371-372.

111. Enel has received commitments since 2020 from all of its battery suppliers that all batteries will be recycled at the end of their life. Tr. 2/24/22, at 372.

112. There are multiple protection controls and mechanisms in place within the battery storage unit to detect and suppress any potential fire hazards. Enel works with local municipalities, fire departments, and volunteer fire departments to set up training or communication systems in the event any potential hazards or emergency situations arise. Tr. 2/24/22, at 373.

113. The National Fire Protection Association Standard 855 provides the fire safety standards for the battery storage unit. These standards provide the requirements to mitigate fire hazards. Tr. 2/24/22, at 373-74.

114. In addition to the notification systems that can be built, the systems themselves have various fire suppression systems that can be used in order to extinguish any fire that may occur. Tr. 2/24/22, at 374.

115. Systems monitoring, which includes all electrical characteristics, temperature regulation, and other system controls, takes place 24/7. The project site will have a manager on-site every day during operations. Tr. 2/24/22, at 374-75, 382.

116. The site will go through periodic inspections, including field and aerial drone inspections, which include a process for detecting and replacing any damaged solar panels. Tr. 2/24/22, at 375.

117. Any broken solar panels will be replaced by spare modules that are kept in storage. The broken module is recycled once it has been replaced. Tr. 2/24/22, at 375.

118. Mr. Dimitriou testified that solar panels do not shatter when they break, as they are designed similar to safety glass or automobile windshields. There is no explosive type breakage, and the majority of the time the break consists of microfractures within the top sheet of the glass. Tr. 2/24/22, at 375-76.

119. With regard to the pervious or impervious nature of solar panels, Mr. Dimitriou testified that when taking into consideration the pervious versus impervious nature of a solar panel, the whole project site is taken into account. Essentially when water or snow sheds off of the panel, there is vegetation underneath the panel that allows for the water to dissipate into the ground. This allows the solar panels to be determined to be pervious. Tr. 2/24/22, at 377.

120. At nighttime, the panels lay flat at zero degrees. As the day starts to rise, the panels will rotate approximately 52 degrees to match the sun as it goes from east to west. Tr. 2/24/22, at 377-78. Water would still be shed from the panels while it is at zero degrees during the night. Tr. 2/24/22, at 378.

121. Mr. Dimitriou testified that if the Board and/or County determines that the panels are to be counted as impervious surfaces, within the project area of 858 acres, the impervious area lot coverage would still only be 20.4 percent. Tr. 2/24/22, at 378; Lebanon Solar Exhibit A-17. The 20.4 percent calculation includes access roads, inverter pads, switching station gravel area, BESS gravel area, and the substation gravel area. Tr. 2/24/22, at 378.

CONCLUSIONS OF LAW

A. Rules, Admissibility, and Sufficiency of Evidence.

1. Under the MPC, the formal rules of evidence do not apply to zoning proceedings before the zoning hearing board or governing body of the municipality, but, irrelevant, immaterial, or unduly repetitious evidence may be excluded. 53 P.S. § 10808(5); *see Town & Country Management Corp. v. Zoning Hearing Bd. of Borough of Emmaus*, 671 A.2d 790 (Pa. Cmwlth. 1996). This relaxation of the rules of evidence is intended to allow for the free participation of residents in proceedings involving their neighborhoods. Robert S. Ryan, *Pennsylvania Zoning Law and Practice* § 9.4.14 (2003).

2. The Board acknowledges the Objectors' objections to, and motions to strike Lebanon Solar Exhibits A-9, A-10, and 9-11. Tr. 1/26/22, at 111. The objections and motion were properly rejected at the hearing as the formal Rules of Evidence do not apply, and the Objectors' allegation that any due process rights were infringed by Lebanon Solar's transmittal of the requested documentation at 10:04 a.m., rather than 10:00 a.m., are without merit. Tr. 1/26/22 pg. 111. Furthermore, the Objectors' motion to deny the Application "on the basis that none of [Lebanon Solar's] Exhibits have been moved into evidence," was properly rejected by the Board as the Formal Rules of Evidence did not apply. Tr. 1/26/22, at 114.

3. In addition to receiving evidence put forth by the Parties in the matter, the Board is required under the MPC to provide opportunity for public comment and relevant public comments made at a public hearing may constitute competent evidence. *See* 53 P.S. §10908; 53 P.S. §10103 (definition of "Public hearing," "a formal meeting held pursuant to public notice by the governing body or planning agency, intended to inform and obtain public comment, prior to taking action in accordance with this act."); *see e.g. Zangrilli v. Zoning Hearing Bd. of Borough of Dormont*, 692 A.2d 656 (Pa. Cmwlth. 1997) ("Landowners next argue that the ZHB erred in allowing public comment at the hearing, which Landowners allege prejudiced their rights; however, they present no citations to support this viewpoint. On the other hand, the ZHB contends that pursuant to Section 908 of the MPC, its meetings are open and advertised to permit public participation... Again, the ZHB did not err by allowing public comment.")

4. While evidentiary rules are relaxed in a zoning matter, decisions of the Board must still be supported by substantial, competent evidence, and a decision made absent the support of substantial competent evidence is reversible. *Berman v. Manchester Twp. Zoning Hearing Bd.*,

540 A.2d 8, 9 (Pa. Cmwlth. 1988), *pet den.* 129 M.D. 1988 (Pa. 1989). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support its conclusion. *Valley View Civic Ass'n v. Zoning Bd. of Adj.*, 462 A.2d 637, 639 (Pa. 1983). In addition, decisions in zoning matters may be reversed where the Board, deliberately ignores relevant, competent evidence. *Taliaferro v. Darby Twp. Zoning Hearing Bd.*, 873 A.2d 807, 814 (Pa. Cmwlth. 2005), *pet den.* No. 574 MAL 2005 (Pa. 2005).

5. Finally, in zoning proceedings, hearsay evidence “must be sufficiently corroborated by other evidence in order to be considered competent evidence.” *Lake Adventure Community Association, Inc. v. Dingman Township Zoning Hearing Bd.* 79 A.3d 708, 714 n. 4 (Pa. Cmwlth. 2013) *appeal denied*, 84 A.3d 1065 (Pa. 2014). Hearsay evidence is a “statement that (1) the declarant does not make while testifying at the current... hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.” Pa. R.E. 801(c). The Board therefore is precluded from considering hearsay evidence where it is offered without sufficient corroborating evidence. As the formal rules of evidence do not apply, an objection to hearsay evidence at the time of the hearing is not required.

6. In accordance with the requirements of the MPC, the Sunshine Act, 53 P.S. §701 *et seq.*, and any other law or interpretation thereof, the Board has carefully reviewed and considered all evidence put forth by Lebanon Solar and the Objectors, as well as the duly sworn public comment offered by residents of the Township, and has made certain determinations within its discretion related to credibility and sufficiency.

B. Recommendation of the Planning Commission.

7. The Board appreciates the recommendation of the Township Planning Commission, and the time and effort its members took in reviewing the Application; however, it is not bound by its decision. The recommendation of an advisory body, such as the Planning Commission has no binding effect on the governing body. *See Atherton Dev. Co. v. Twp. of Ferguson*, 29 A.3d 1197, 1213 (Pa. Cmwlth. 2011) (“[a] planning commission is no more than an advisory body whose recommendations have no binding effect on the governing body...[township] Supervisors [are] not bound by planning commission recommendations.” 29 A.3d at 1213-14. The final decision in zoning matters rests in the legislative body and not in a planning commission. *See Cleaver v. Bd. of Adj. of Tredyffrin Twp.*, 200 A.2d 408, 413 (Pa. 1964). Therefore, while the Board did carefully review and consider the Commission’s recommendation, it was obligated to make its own determinations on the matter and is authorized to come to a different conclusion.

8. The Board noted the objection of Lebanon Solar to the introduction of a supplemental recommendation of the Township Planning Commission dated February 7, 2022. Tr. 2/24/22 pg. 288. This recommendation was entered into the record as Township Exhibit 3. Tr. 2/24/22 pg. 288. Upon further review the Board acknowledges that the consideration of the Application by the Commission, after the commencement of the hearings, and absent any notice to Lebanon Solar to participate in the meeting and therefore absent any opportunity for Lebanon Solar to object to the same was improper and violated the procedures set forth in the MPC, the Pennsylvania Sunshine Act, 65 P.S. § 701 *et seq.*, and Lebanon Solar’s due process rights under the United States and Pennsylvania constitutions. The recommendation of the Planning Commission required by the MPC was already adequately relayed to the Board in its original recommendation letter, as read into the record by Supervisor Wolfe, and the supplemental

document is therefore unduly repetitious. The Board therefore, following further review of the issues, in its sole discretion, excludes Township Exhibit 3 from the record.

C. The Board Must Construe Ambiguous Terms in Favor of the Applicant.

9. Where a zoning ordinance term is open to differing interpretations in its application to particular facts, Pennsylvania Courts have consistently held that the ambiguous term is to be construed in favor of the landowner and the least restrictive use of the land. *Kleinman v. Lower Merion Township Zoning Hearing Board*, 916 A.2d 726 (Pa.Cmwlt.2006); *see SPC Company, Inc. v. Zoning Board of Adjustment of the City of Philadelphia*, 773 A.2d 209, 213 (Pa.Cmwlt. 2001); *see also Turchi v. Philadelphia Bd. of License & Inspection Rev.*, No. 658 C.D. 2014, 2015 WL 5437160, at *7 (Pa. Commw. Ct. May 15, 2015) (“the phrase ‘in significant part’ is not defined by the Ordinance and is subject to multiple reasonable interpretations, making it ambiguous; therefore, it must be interpreted in favor of Landowners and the least restrictive use of the land.”) *see also Alleman v. N. Newton Twp. Bd. of Supervisors*, No. 1511 C.D. 2018, 2019 WL 5208606, at *3 (Pa. Commw. Ct. Oct. 16, 2019) (“Because the language of the Ordinance supports these two reasonable but conflicting interpretations, the language is ambiguous. Section 603.1 of the MPC requires us to resolve that ambiguity in favor of Weaver as the landowner.”)

10. Section 603.1 of the MPC provides:

In interpreting the language of zoning ordinances 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.

11. 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 *citing Latimore supra* and *Riverfront Development Group, LLC v. City of Harrisburg Zoning Hearing Bd.*, 109 A.3d 358, 366 (Pa. Cmwlt. 2015). Consequently, requirements not expressly contained within the zoning ordinance may not be added by the Board when it is exercising its quasi-judicial function during a conditional use hearing. *See MarkWest, supra.*; *see also Atlantic Wind, LLC v. Zoning Hearing Bd. of Penn Forest Twp.*, 2022 WL 108437 (Pa. Cmwlt. Jan 12, 2022) (zoning hearing board erred by requiring noise levels of wind turbines be measured using an Lmax metric where the zoning ordinance was silent on what metric was to be used)

D. The Board May Only Regulate Where the Use Occurs Not How it Occurs.

12. While “Section 601 of the MPC, 53 P.S. §10601, expressly authorizes municipalities to enact zoning ordinances designating what land uses are permitted in what districts for the purpose of planned community development (i.e., the where), the MPC does not authorize those municipalities to dictate specific business operations (i.e. the how) under the guise of zoning regulation.” *MarkWest Liberty Midstream and Resources, LLC v. Cecil Township Zoning Hearing Bd.*, 184 3d 1048, 1060-61 (Pa. Cmwlt. 2018).

13. As detailed by the Court in *MarkWest Liberty Midstream and Resources, LLC v. Cecil Township Zoning Hearing Bd.*, a long line of Pennsylvania appellate cases have made it clear, that zoning ordinances, and the bodies that enforce them, may only regulate where a use occurs and never how it occurs. *See id.*; *In re Thompson*, 896 A.2d at 670 (“Special exception ... proceedings involve only the proposed use of the land, and do not involve the particular details of the design of the proposed development.”); *see also Van Sciver v. Zoning Bd. of Adjustment of Phila.*, 396 Pa. 646, 152 A.2d 717, 724 (1959) (Variance conditions, inter alia, limiting a self-serve laundromat’s unmanned nature and operating hours in the interest of crime prevention nevertheless constituted unreasonable “intermeddling with the applicant’s ownership of his property.”); *Appeal of Sawdey*, 369 Pa. 19, 85 A.2d 28, 32 (1951) (An ordinance (or condition) that “permitted a butcher shop ... in an area but prohibited its sale of pork, or a drugstore but prohibited its sale of candy, or a grocery store but prohibited its sale of bread, would surely be regarded a[s] unreasonable legislation on details of a business ...”); *Gorsline v. Bd. of Supervisors of Fairfield Twp.*, 123 A.3d 1142, 1149 (Pa.Cmwlt. 2015) (“A [special exception] involves the use of the land, as opposed to the particular design details of the development.”); *Land Acquisition, Servs., Inc. v. Clarion Cty. Bd. of Comm’rs*, 146 Pa.Cmwlt. 293, 605 A.2d 465 (1992) (Where an ordinance’s primary objective is to regulate and control the operational aspects of a business, the ordinance is not a zoning ordinance.); *Schatz v. New Britain Twp. Zoning Hearing Bd. of Adjustment*, 141 Pa.Cmwlt. 525, 596 A.2d 294, 298 (1991) (“Zoning only regulates the use of land and not the particulars of development and construction.”); *Kulak v. Zoning Hearing Bd. of Bristol Twp.*, 128 Pa.Cmwlt. 457, 563 A.2d 978, 980 (1989) (“[A] board may not attach a condition to a special exception which essentially serves a non-zoning purpose[.]”)

14. Although Lebanon Solar was not required to do so at the conditional use phase, it put forth the testimony relating to the design and operation of the Project. For example, it put forth the testimony of Mr. Jonathan Dimitriou, the project engineer or engineering manager for the Project, employed by Enel Green Power of America. Tr. 1/25/22 at 86. Mr. Dimitriou testified as to what certain equipment or facilities utilized in a solar farm looked like and how they operated. For example he provided testimony as to what an inverter looks like, Tr. 1/25/22, at 86, decommissioning, Tr. 1/25/22, at 87, and noise associated with the facilities, Tr. 1/25/22, at 87-98. In addition, Mr. Dimitriou testified as to various design requirements on cross examination, such as the configuration and location of the switching station, the height thereof, and compliance with safety codes. Tr. 1/25/22 pg. 90-94. The Board found this testimony credible and relevant in addressing resident concerns about the Project.

15. Consequently, based on the voluminous body of case law discussed above, the Board recognizes that any action taken in this matter which attempts to regulate *how* Lebanon Solar operates the proposed solar farm, compared to *where* within the Township it is permitted to do so would be beyond its authority. The Board has carefully considered the testimony of the Objectors and the public comment received, and is sympathetic to the concerns raised; however it acknowledges the limitations of its authority at this stage in the approval process and understands that many concerns raised will be otherwise adequately addressed by other agencies or political subdivisions such as Lebanon County, or will be addressed through further permitting by the Township.

E. Supplemental Information to Demonstrate Compliance Does Not Constitute a New Application.

16. After a municipality accepts a conditional use application, “technical requirements and interpretations may be addressed collaboratively as ordinance compliance is assessed.” *Nextel Partners, Inc. v. Clarks Summit Borough/Clarks Summit Borough Council*, 958 A.2d 594 (Pa. Cmwlth. 2008). (Nextel sought conditional use approval to install a 150 foot monopole, and after its application was accepted, it submitted supplemental information to expand the leased site and the court determined this supplemental information was clearly submitted *as part of the original conditional use application process*). *See also Evers v. Clarks Summit Borough*, No. 871 C.D. 2010, 2011 WL 5118305, at *6–7 (Pa. Commw. Ct. Sept. 22, 2011) (“[A]ny supplementation [provided] thereafter [by the applicant] is not a new application requiring the clock to be reset but rather additional information in support of the original application which dates from the date of acceptance by the Borough.”)

17. Counsel for the Objectors raised certain questions related to revisions to the plans originally submitted with the Application as appear on Lebanon Solar Exhibit A-1. Tr. 1/25/22, at 37. Mr. Holton testified as to the changes in symbology, or how certain features were represented, as well as additional details added to the exhibit based on new features discovered since the application was submitted. Tr. 1/25/22, at 37. Mr. Holton testified that the same parcels were represented on each document and had not changed, and the Objector presented no evidence to indicate the type of use proposed had changed. Tr. 1/25/22, at 38-39. Counsel for the Objectors raised questions relating to the type of fencing proposed. Tr. 1/25/22, at 39-40. Upon consideration and review, the objection of counsel for Lebanon Solar as to the relevancy of this issue is sustained, and the Board finds the question as to type of fencing irrelevant to the conditional use proceeding as it relates to the particular details of design rather than the use of the Property. Tr. 1/25/22, at 39-40; *see In re Thompson*, 896 A.2d at 670; *Gorsline*, 123 A.3d at 1149 (special exception and conditional use proceedings involve only the proposed use of the land, and do not involve the particular details of the design of the proposed development); *see also Town & Country Management Corp.*, 671 A.2d 790 (the Board may exclude immaterial or irrelevant evidence).

F. Lebanon Solar Has Demonstrated a Sufficient Proprietary Interest in the Property

18. Counsel for the Objector raised certain questions and objections relating to the interest of Lebanon Solar in each parcel comprising the Property. Tr. 1/25/22, at 52-56. At the request of the Board, Lebanon Solar has provided sufficient evidence, in the form of memorandums of option agreements or easements for each of the twelve (12) parcels, Lebanon Solar Exhibit A-11, title commitments, Lebanon Solar Exhibit A-9, and an authorization affidavit executed by the project entity authorizing Lebanon Solar to apply for permits related to the property, Lebanon Solar Exhibit A-10. In addition, Lebanon Solar provided, as Lebanon Solar Exhibit A-13, individual private Option Agreements between Lebanon Solar and the participating landowners. Tr. 2/24/22, at 290-91. Upon review of the same, and consideration of the objections of counsel for the Objectors, the Board finds the testimony and evidence presented to be authentic, credible, and sufficient to show that Lebanon Solar meets the definition of “Applicant” contained in Section 107 of the MPC. *See* 53 P.S. §10107 (definition of applicant includes any other person having a proprietary interest in the land); *Tioga Preservation Group v. Tioga County Planning Com’n*, 970 A.2d 1200 (Pa. Cmwlth. 2009) *appeal denied* 982 A.2d 1229 (Pa. 2009) (finding that

where a lease option holder has been granted a proprietary interest in the subject properties, the holder has applicant standing under the MPC); *SBA Towers IX, LLC v. Unity Twp. Zoning Hearing Bd.*, 179 A.3d 652 (Pa. Cmwlth. 2018) (applicant status is conferred to holder of an option to lease property where the property owner has granted the power to “obtain any necessary governmental licenses or authorizations required for the construction and use of the property,” as that makes clear the holder was more than just a potential leaseholder and authorized the holder to exercise the rights of the property owner.)

G. Conditional Use Standards.

19. It is well-settled that special exceptions and conditional uses are not actual exceptions or variances from a zoning ordinance, but rather are uses permitted by right as long as the standards enumerated in the zoning ordinance are met. *Bray v. Zoning Bd. of Adjustment*, 410 A.2d 909, 911 (Pa. Cmwlth. 1980). The fact that a use is permitted as a conditional use evidences a legislative decision that the particular type of use is consistent with the health, safety and welfare of the community. “An applicant is entitled to a conditional use 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.’” *In re Drumore Crossings, L.P.*, 984 A.2d 589, 595 (Pa. Cmwlth. 2009).⁴

20. In considering whether a conditional use is to be granted, the Board had to address three inquiries: (1) whether the applicant’s use falls within the parameters of the conditional use being sought; (2) whether the “specific” requirements of the ordinance applicable to that conditional use have been met; and (3) whether the “general”, non-specific or non-objective requirements and purposes of the ordinance have been satisfied. *See Bray*, 419 A.2d at 912-13.

21. Under *Bray* and its progeny, it was Lebanon Solar’s burden, as the applicant, to prove that it satisfied the first two inquiries. Therefore Lebanon Solar was only required to present evidence as to (1) whether the proposed solar farm use falls within the parameters of the conditional use being sought; and (2) whether any “specific” requirements contained in the ordinance have been met. *See id.*

H. Specific Ordinance Criteria

22. It is not disputed that the proposed Project falls within the definition of “solar farm”, as that term is defined in Section 201.4 of the Zoning Ordinance. Accordingly, the Project is an authorized use in the A-1 District in which the Property is located.

23. However, the Objector claims that Lebanon Solar has failed to meet any of the eight (8) specific ordinance criteria contained in the Zoning Ordinance. After careful review of these contentions, the Board concludes that they are without merit, and that Lebanon Solar has proven, through the presentation of sufficient competent factual evidence, that it meets all applicable specific ordinance criteria as outlined in Section 522 of the Zoning Ordinance.

⁴ Because the law regarding conditional uses and special exceptions is virtually identical, the burden of proof standards are the same for both. *Sheetz, Inc. v. Phoenixville Borough Council*, 804 A.2d 113 (Pa. Cmwlth. 2002).

The Project is not Established Upon any Land Under an Agricultural Conservation Easement.

24. Section 522(1) of the Zoning Ordinance requires that no solar farm be established upon any farm land or agriculturally zoned land which has an Agricultural Conservation Easement filed against it which remains in effect. Lebanon Solar has presented sufficient competent evidence to show that this requirement is met and the Property is not subject to any such easement.

25. Specifically, Lebanon Solar provided title commitments demonstrating that none of the participating properties making up the Property have any Agricultural Conservation Easements filed against them which remain in effect. Lebanon Solar Exhibits A-8, A-9. The Board finds the title commitments credible and sufficient to demonstrate that no Agricultural Conservation Easements exist on the Property which remain in effect.

26. Lebanon Solar presented the testimony of Eric Holton, an employee of Enel North America, who testified as to the Project's compliance with Section 522(1), and provided and explained demonstrative evidence, entered into the record as Lebanon Solar Exhibit A-3, showing the location of nearby Agricultural Conservation Easements in comparison to the footprint of the property. Lebanon Solar Exhibit A-3, Tr. 1/25/22 pg. 12-17. The Board finds the testimony of Mr. Holton credible and sufficient to demonstrate that no Agricultural Conservation Easements exist on the Property which remain in effect.

27. In addition, Lebanon Solar presented the expert testimony of Mr. Staub who testified as to his interpretation of Section 522(1) in his experience as a certified land use planner with experience in drafting zoning ordinances. Tr. 2/24/22 pg. 335-36. Mr. Staub's interpretation of Section 522(1) supports that put forth by Mr. Holton.

28. The Objectors have presented no evidence to suggest that this requirement has not been met. The Board acknowledges that counsel for the Objectors objected to the submission of Lebanon Solar Exhibit A-3, *see* Tr. 1/25/22 p. 17, however as no reason was given to support the objection it is overruled. The Board finds no merit in the various contentions of the Objectors that the documentation provided by Lebanon Solar was insufficient to demonstrate that no Agricultural Conservation Easement exists on the Property.

29. The Board therefore finds that Lebanon Solar has met its burdens of presentation and persuasion and has established that the criteria outlined in Section 522(1) of the Zoning Ordinance is met and no part of the Project will be located on land subject to a current Agricultural Conservation Easement.

The Project Meets the Minimum Lot Size of Fifty (50) Acres.

30. Section 522(2) of the Zoning Ordinance requires that the minimum lot size for the establishment of any solar farm shall be fifty (50) acres. The Objectors allege that this requirement has not been met because the Property is comprised of multiple individual tax parcels some of which are less than fifty (50) acres when measured individually. Tr. 1/25/22, at 61. Upon review of the Zoning Ordinance, the arguments and evidence presented by the Objectors as well as that presented by Lebanon Solar, the Board concludes that the Zoning Ordinance does not require that

all individual tax parcels which make up the total Property to be utilized as a solar farm be greater than fifty (50) acres, but only that the total Property of the solar farm be a minimum fifty (50) acres.

31. The Zoning Ordinance does not specify whether or not individual tax parcels or zoning lots may be combined to meet the minimum lot size requirement contained in Section 522(2). The Board recognizes that the practice of combining individual tax parcels to meet minimum lot requirements is common-place and has been utilized by the Township for other types of uses. The Board acknowledges that this practice can be referred to as a “campus” concept. The Board acknowledges that because this practice is neither expressly permitted nor prohibited by the Zoning Ordinance, the Ordinance is ambiguous as to this issue, and that ambiguities are to be construed in favor of the applicant. In addition, the Board acknowledges that the Application was accepted by the Township for the purpose of establishing a **single** solar farm spanning multiple tax parcels, signaling its approval of a “campus” concept.

32. As mentioned above, under Section C of these Conclusions of Law, the MPC mandates that any ambiguities in a zoning ordinance are to be construed in the light most favorable to the applicant. 53 P.S. §10603.1 (“[i]n interpreting the language of zoning ordinances to determine the extent of the restriction upon the use of 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.”) Further, Pennsylvania courts frequently reiterate that “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)).

33. 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 citing *Latimore supra* and *Riverfront Development Group, LLC v. City of Harrisburg Zoning Hearing Bd.*, 109 A.3d 358, 366 (Pa. Cmwlth. 2015). Consequently, requirements not expressly contained within the zoning ordinance may not be added by the Board when it is exercising its quasi-judicial function during a conditional use hearing. *See MarkWest, supra.*; *see also Atlantic Wind, LLC v. Zoning Hearing Bd. of Penn Forest Twp.*, 2022 WL 108437 (Pa. Cmwlth. Jan 12, 2022) (zoning hearing board erred by requiring noise levels of wind turbines be measured using an Lmax metric where the zoning ordinance was silent on what metric was to be used). Because the Board is bound to construe the ordinance in the light most favorable to Lebanon Solar, and is prohibited from narrowing the terms of the ordinance to further restrict the use of the Property, it finds that the Zoning Ordinance only requires that the total acreage of the Property upon which the solar farm is proposed to be situated be greater than fifty (50) acres.

34. Lebanon Solar presented evidence demonstrating that the Application is for the establishment of one (1) solar farm on approximately eight hundred and fifty eight (858) acres of land comprised of multiple parcels, at least one of which, the parcel identified as Lebanon County Map Number 25-2300498-383638-0000, is over fifty (50) acres in size. Lebanon Solar Exhibits A-4 and A-8. The Board finds these exhibits credible and sufficient to demonstrate compliance with Section 522(2) of the Zoning Ordinance.

35. In addition, Lebanon Solar presented the continued testimony of Mr. Holton, who testified as to the Project's compliance with Section 522(2), and provided and explained demonstrative evidence, entered into the record as Lebanon Solar Exhibit A-4, showing the conditional use permit area greatly exceeded fifty (50) acres in total. Lebanon Solar Exhibit A-4, Tr. 1/25/22, at 17-18. The Board finds the testimony of Mr. Holton credible and sufficient to demonstrate that the total lot size of the Property will be greater than fifty (50) acres and therefore in compliance with Section 522(2) of the Zoning ordinance.

36. The Objectors presented the testimony of an expert witness, Mr. Lawrence Lahr, who the Board deems qualified and credible and accepts as an expert witness in the area of land use planning and zoning. Mr. Lahr testified that he did not find the definitions of "lot," "lot area," or "maximum lot coverage" ambiguous. Tr. 1/26/22, at 164. Mr. Lahr expressed that he believed the criteria contained in Section 522(2) was not met. Tr. 1/26/22, at 166-67. However, Mr. Lahr did not provide any opinion on whether under the Zoning Ordinance individual tax parcels could be combined to meet the minimum lot size requirement. The Board is free to reject any testimony that it finds lacking credibility, including the testimony of a purported expert. *See Nettleton v. Zoning Bd. of Adj. of the City of Pittsburgh*, 828 A.2d 1033, 1041 (Pa. 2003); *Graham v. Zoning Hearing Bd. of Upper Allen Twp.*, 555 A.2d 79, 82 (Pa. 1989).

37. Lebanon Solar presented the expert testimony of Mr. Staub who testified as to his interpretation of Section 522(2) in his experience as a certified land use planner with experience in drafting zoning ordinances. Tr. 2/24/22, at 337-38. Mr. Staub opined that the language contained in Section 522(2) was ambiguous, noting that it did not include the term "individual" which would indicate that the minimum lot size designation prohibited a "campus" concept. Per Mr. Staub, the inclusion of "individual" or a similar term, would be an indication that a "campus concept was prohibited, but that no such indication was present here. Tr. 2/24/22, at 337. The Board finds that the testimony of Mr. Staub was credible and supports the interpretation set forth by Lebanon Solar.

38. The Board finds the interpretation of the Zoning Ordinance set forth by Lebanon to be reasonable and supported by competent and credible expert testimony. The Board notes that the Objectors did not present any testimony or evidence suggesting that this interpretation was unreasonable or inapplicable. Given that Pennsylvania case law and the MPC mandate that any ambiguities in a zoning ordinance are to be construed in the light most favorable to the applicant, and therefore, because Lebanon Solar has presented sufficient competent evidence to show that the total lot size of the Property upon which a solar farm is to be established is eight hundred and fifty eight (858) acres, the Board finds that Lebanon Solar has met its burdens of presentation and persuasion and has established that the criteria outlined in Section 522(2) of the Zoning Ordinance is met.

The Project Meets the Required Setbacks.

39. Section 522(3) of the Zoning Ordinance requires that the solar panels and other implements used in the construction and structure of the solar farm, be set back a minimum of fifty (50) feet from any adjacent lot line. The Objector alleges this requirement is not met because the Project does not include setbacks from the tax-parcel lines separating the parcels which make up

the Property from each other, which are internal to the overall footprint of the Project. TR 1/25/22, at 66-67.

40. The Zoning Ordinance requires that this 50-foot setback be met only for “*adjacent* lot lines.” The Zoning 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). 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 Com. 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.

41. Lebanon Solar presented evidence demonstrating that solar panels and other implements will be set back at least fifty (50) feet from any *adjacent* lot line and further voluntarily agreed to place no panels or other implements of the solar farm within one hundred and fifty (150) feet of an occupied residential dwelling. Lebanon Solar Exhibits A-5, A-6, and A-8.

42. In addition, Lebanon Solar presented the continued testimony of Mr. Holton, who testified as to the Project’s compliance with Section 522(3), and provided and explained demonstrative evidence, entered into the record as Lebanon Solar Exhibits A-5 and A-6, showing the location of the buildable area, where solar panels and other implements would be located, would be set back at least fifty (50) feet from any adjacent lot line. Lebanon Solar Exhibits A-5, A-6, Tr. 1/25/22, at 19-20. The Board finds the testimony of Mr. Holton credible and sufficient to demonstrate that no solar panels or other implements would be located within fifty (50) feet of an adjacent lot line.

43. Lebanon Solar also presented the expert testimony of Mr. Staub who testified as to 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. The Board finds that the testimony of Mr. Staub was credible and supports the interpretation set forth by Lebanon Solar.

44. Lebanon Solar has also demonstrated that it obtained waivers from the owners of all parcels comprising the Property, which waived any setback requirements applicable between

them. TR 1/25/22, at 66-67. At the request of the Board, Lebanon Solar presented copies of the relevant waiver agreements. Tr. 1/25/22 pg. 67-68. The Objectors offered the expert testimony of Mr. Lahr, who testified as to the authority to grant waivers, but did not testify as to whether or not the definition of “adjacent lot lines” under the Zoning Ordinance included lot lines internal to the Project area. Tr. 1/26/22, at 168-70. Based on its interpretation of the Zoning Ordinance, the Board concludes that the waivers produced were not required to comply with the enumerated specific criteria of Section 522, but were supplemental private agreements between Lebanon Solar and the landowners of the participating parcels. The Board also notes that the waivers indicate that it is not against the interests of the Participating Landowners to refrain from applying the requirements of Section 522(3) to the lot lines internal to the Property.

45. Lebanon Solar has presented sufficient competent evidence to show that all solar panels and other structures will be located at least fifty (50) feet from all lot lines of properties adjacent to the Property. The Objector has presented no evidence indicating that any solar panels or structures will be located less than fifty (50) feet from any lot line of a property *adjacent* to the Property rather than comprising of or internal to the Property. The Board therefore finds that Lebanon Solar has met its burdens of presentation and persuasion and has established that the criteria outlined in Section 522(3) of the Zoning Ordinance is met.

The Project Includes the Required Buffering.

46. Section 522(4) of the Zoning Ordinance requires that a permanent evergreen buffer or fencing which accomplishes the same purpose of buffering, be provided. Lebanon Solar has presented sufficient competent evidence to show that the Property will be screened and buffered from adjacent properties in accordance with this criterion. Consequently, the Board finds that Lebanon Solar has met its burdens of presentation and persuasion and has established that the criteria outlined in Section 522(3) of the Zoning Ordinance is met.

47. Specifically, Lebanon Solar presented evidence demonstrating that, to comply with the ordinance requirements it will install perimeter fencing around the buildable area (solar panels and implements) as identified in the Conceptual Site Plan, Lebanon Solar Exhibit A-1. Lebanon Solar Exhibits 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 Exhibits A-1 and A-8.

48. Lebanon Solar presented the continued testimony of Mr. Holton, who testified as to the Project’s compliance with Section 522(4), and provided and explained demonstrative evidence, entered into the record as Lebanon Solar Exhibits A-8, showing the anticipated location of the perimeter fencing and proposed vegetative screening. Lebanon Solar Exhibits A-1, A-8, Tr. 1/25/22, at 20-21. The Board finds the testimony of Mr. Holton credible.

49. 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. The Board finds that the testimony of Mr. Staub was credible and supports the interpretation set forth by Lebanon Solar.

50. The Objector presented the expert testimony of Mr. Lahr, who opined 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 of buffering. Furthermore, Mr. Lahr again testified as to the validity of waivers, which is irrelevant in this matter based on a reasonable interpretation of the Zoning Ordinance. Tr. 1/26/22 pg. 173. The Board therefore finds that Lebanon Solar has demonstrated through the provision of sufficient competent evidence, that the Project is in compliance with Section 522(4) of the Zoning ordinance.

Lot Coverage Will Not Exceed 50% of the Total Lot Size.

51. Section 522(5) of the Zoning Ordinance requires the maximum lot coverage of the Project may not exceed fifty (50) percent of the total lot size. 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.” Based on a review of these definitions and the evidence provided by Lebanon Solar, the Board concludes that based on a reasonable interpretation of Section 522(5) of the Zoning Ordinance impervious surfaces may not exceed fifty (50) percent of the total lot size, while pervious surfaces are not to be included in this calculation.

52. Lebanon Solar presented the continued testimony of Mr. Holton, 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 21-22. 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. The Board recognizes that counsel for the Objector raised a question as to the legal impact of the document relied upon by Mr. Holton regarding the DEP’s interpretation of whether solar panels are pervious or impervious. Tr. 1/25/22 at 32-34. The Board has taken into considerations the allegations of perjury levied against Mr. Holton by counsel for the Objector and finds them to be without merit. TR. 1/25/22 at 36. The Board finds the testimony of Mr. Holton credible, and based on the evidence provided concludes that a reasonable interpretation of the Zoning Ordinance is that solar panels may be considered pervious as compared to impervious surfaces.

53. 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 Objector also presented the lay testimony of Ms. Suzanne Forney who alleged that a statement had been made by Mr. Holton at a prior meeting before the Township Planning Commission in June of 2021, in which he stated solar panels would be considered impervious. Tr. 1/26/22 pg. 203. The purported statement was made outside the hearing offered for the truth of the matter asserted and is therefore uncorroborated and inadmissible hearsay upon which the Board may not base its decision. The Board finds Mr. Holton's testimony credible.

54. The Objector presented expert testimony from Mr. Lahr, who opined that maximum lot coverage was required to be shown for each individual parcel comprising the total Property, and that solar panels were not pervious surfaces. Tr. 1/26/22, at 175-76. Mr. Lahr was not accepted as an engineer or an expert in solar panel construction or use. His testimony as to whether or not Section 522(5) was met was expressly based solely on his attendance of the previous nights hearing. He did not provide any support for his interpretation of "pervious" or "impervious" surfaces. The Board therefore finds his testimony as to Section 522(5) of the Zoning Ordinance lacking in credibility.

55. Lebanon Solar presented the expert testimony of Mr. Staub who testified as to his interpretation of Section 522(5) in his experience as a certified land use planner with experience in drafting zoning ordinances. Tr. 2/24/22, at 339-40. Mr. Staub opined as to the language of the Zoning Ordinance and County SALDO related to maximum lot coverage and impervious surfaces. Tr. 2/24/22, at 339-41. The Board finds that the testimony of Mr. Staub was credible and supports the interpretation set forth by Lebanon Solar.

56. Lebanon Solar also presented the testimony of Mr. Dimitriou who testified, from a laypersons perspective, in his experience as the project engineer, as to why solar panels would be considered pervious in this context. Tr. 2/24/22, at 376-77. The Board recognizes the objection of the Objectors, but finds that Mr. Dimitriou's testimony was within his experience as a project engineer and did not arise to a level of technical expertise necessitating qualification as an expert witness. It therefore finds Mr. Dimitriou's testimony on question of an impervious versus pervious surface characterization of solar panels to be credible.

57. Mr. Dimitriou also testified as to Lebanon Solar Exhibit A-17, a calculation of the current conceptual design for the Project with the solar panels included in the total *impervious* surface calculation. Tr. 2/24/22, at 378. Lebanon Solar Exhibit A-17, as supported by the explanation of Mr. Dimitriou demonstrated that even if solar panels were considered *impervious*, the lot coverage of the project would be twenty point four percent (20.4%) of the total lot area.

58. Because Lebanon Solar has demonstrated, by uncontradicted evidence, that the Project meets the maximum lot coverage requirement contained in Section 522(5) *regardless* of whether the solar panels are considered pervious or impervious, it will refrain from making a conclusion as to the same. The Board finds that the evidence presented by Lebanon Solar was sufficient to demonstrate that the maximum lot coverage as defined by the Zoning Ordinance, would be a maximum of 20.4%, and therefore in compliance with Section 522(5).

Proof of Insurance is More Properly Included as a Condition of Approval.

59. Section 522(6) of the Zoning Ordinance requires Lebanon Solar to 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) aggregate. Lebanon Solar has demonstrated that can and will obtain such coverage at the proper time.

60. Lebanon Solar presented continued testimony from Mr. Holton which demonstrated that a final insurance policy issuance was contingent upon approval of the Land Development Plan (“LDP”), but that Lebanon Solar will provide the Township with insurance certificates in the required minimum amounts following approval of the LDP. Tr. 1/25/22, at 23-24. Lebanon Solar entered into the record as its Exhibit A-7 insurance certificates which the Board understands are subject to change once the LDP has been approved. Lebanon Solar Exhibit A-7, Tr. 1/25/22, at 24. The Board finds the testimony of Mr. Holton credible, and the certificates provided as Exhibit A-7 as sufficient evidence to demonstrate Lebanon Solar has adequate liability insurance in minimum amounts of one million (\$1,000,000.00) per incident and two million (\$2,000,000.00) aggregate.

61. The Objectors presented continued expert testimony from Mr. Lahr, who opined that Lebanon Solar was “required to do something that rises to a level that satisfies Item No. 6 to the Board of Supervisors.” Tr. 1/26/22, at 177. He did not address whether or not Exhibit A-7 was sufficient in that regard. When asked if it was “possible to demonstrate that there’s adequate liability insurance without a promise of future compliance,” Mr. Lahr stated “[i]n all good faith, I don’t know,” Tr. 1/26/22, at 177, and continued “[b]ecause I’m just not savvy enough to speak to that.” Tr. 1/26/22, at 177. Based on Mr. Lahr’s own admission that he did not possess the knowledge or experience necessary to render a valid opinion on whether or not Section 522(6) of the Zoning Ordinance was possible to be complied with at that time, the Board finds his testimony lacking in credibility as to insurance requirements.

62. Lebanon Solar presented the expert testimony of Mr. Staub who testified as to his interpretation of Section 522(6) in his experience as a certified land use planner with experience in drafting zoning ordinances. Tr. 2/24/22, at 342. Mr. Staub opined as to the general operations of events in obtaining conditional use and land development approvals. Tr. 2/24/22, at 342. He stated that an applicant cannot determine what insurance levels it needs at the conditional use level because the project has not been defined completely. Tr. 2/24/22, at 355. The Board finds that the testimony of Mr. Staub was credible and supports the interpretation set forth by Lebanon Solar.

63. The Board recognizes that 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). The Board acknowledges that obtaining insurance coverage requires approval by an insurer which in turn will require a project to insure. No evidence put forth by the Objectors indicated that this was impermissible or that there was any other manner in which Lebanon Solar could have complied with Section 522(6) as thoroughly as possible at this point in time. The Board therefore acknowledges that proof of final insurance coverage is more properly included as a condition of approval and that a failure to show adequate coverage of a project that has yet to be approved is not grounds for denial of the application.

Provision of Adequate Bonding is More Properly Included as a Condition of Approval.

64. 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.

65. 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 the LDP. 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*, 596 A.2d 294.

66. 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. Consequently, the Board finds Mr. Lahr’s testimony as to the requirements of Section 522(7) lacking in credibility.

67. 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. The Board finds that the testimony of Mr. Staub was credible as to the order of operations during the permitting period and supports the interpretation set forth by Lebanon Solar.

68. 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.

69. As discussed above, the Board recognizes that 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. As with the insurance requirements contained in Section 522(6), the Board acknowledges that obtaining financial security or requires approval by a financial institution which in turn will require a project to bond. It further recognizes that it would not be possible to determine what constitutes an adequate amount of financial security until after the LDP has been approved. The Board therefore acknowledges that bonding is more properly included as a condition of approval and that a failure to show bonding for a project that has yet to be approved is not grounds for denial of the Application.

Stormwater Management Approval is More Properly Included as a Condition of Approval.

70. 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 has 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.

71. 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 presented the testimony of Mr. Holton on this regulation structure which the Board finds credible.

72. The Objector presented the continued expert testimony of Mr. Lahr who opined as to the importance of stormwater requirements within the Chesapeake Bay area, and stated that he periodically sees a requirement to “perform the stormwater management design requirements as part of the submission.” Tr. 1/26/22, at 180-81. Mr. Lahr 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.

73. Lebanon Solar 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. The Board finds that the testimony of Mr. Staub was credible and supports the interpretation set forth by Lebanon Solar.

74. As discussed above, the Board recognizes that 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 use 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.

I. General Concerns of Public Health, Safety and Welfare

75. The Objectors had the presentation burden with regard to all general policy concerns and general detrimental effects. It is well-settled that once the applicant satisfies the first two inquiries outlined above, objectors seeking to defeat the special exception must show that the impact of the proposed use “will be greater than would normally be expected [for that use] and would pose a substantial threat to the health, safety and welfare of the community. They must provide ‘evidence that there is more than a mere speculation of harm.’” *Szewczyk v. Zoning Bd. of Adjustment*, 654 A.2d 218, 224 (Pa. Cmwlth. 1995), citing *Abbey v. Zoning Hearing Bd.*, 559 A.2d 107, 110 (Pa. Cmwlth. 1989) (emphasis in original). Otherwise stated, when a municipality authorizes a use by conditional use, it is presumed that the governing body has already considered that the use is consistent with the public health, safety or welfare, and burden shifts to objectors to prove to the contrary. *In re Brickstone Realty Corp.*, 789 A.2d 333 (Pa. Cmwlth. 2001).

76. The requirement that objectors bear the burden of evidence presentation as to general ordinance criteria is true regardless of any contrary terms contained in a zoning ordinance. Even where a zoning ordinance places the overall persuasion burden on the applicants with regard to general criteria, the initial evidence presentation burden remains with the objectors. *Greaton Prop., Inc. v. Lower Merion Twp.*, 796 A.2d 1038, 1045-46 (Pa. Cmwlth. 2002); *Bray*, 410 A.2d at 913. Simply stated, a conditional use applicant never has the initial presentation burden with regard to the general, subjective criteria. *Williams Holding Grp., LLC v. Bd. of Supervisors of W. Hanover Twp.*, 101 A.3d 1202, 1212-13 (Pa. Cmwlth. 2014). In *Williams*, the Court stated:

Thus, if a requirement is interpreted as one upon which the burden is placed on an applicant, but the requirement is nonobjective or too vague to afford the applicant knowledge of the means by which to comply, the requirement is either one that is not enforceable . . . , or, if it relates to public detriment, the burden shifts to an objector, who must demonstrate that the applicant’s proposed use would constitute such a detriment.

Id. at 1213. The Court went on to state:

Thus, a key element in evaluating [special exception] decisions . . . is whether requirements contained in the zoning ordinance are

specific and objective or vague and subjective. In the case of the latter, a requirement may be either one that may not be enforced or one for which an applicant bears no initial evidentiary burden.

Id. (emphasis added). Therefore, under *Williams*, *Bray*, and the myriad other cases on the subject, Lebanon Solar only had to present evidence with regard to the public health, safety, or welfare considerations of the Zoning Ordinance, if, and only if, the Objector presented substantial evidence with regard to the same.

77. The Board has, pursuant to its legislative authority, designated solar farms as a permitted conditional use in the A-1 District. It is well-established Pennsylvania law that a zoning ordinance's designation of a use as a conditional use creates a legislative presumption that the particular use is appropriate in the zoning district in question and consistent with the public health, safety and welfare. As emphasized by the Commonwealth Court in *MarkWest Liberty Midstream and Resources, LLC v. Cecil Township Zoning Hearing Bd.*:

[a] special exception is neither special nor an exception, but **a use expressly contemplated that evidences a legislative decision that the particular type of use is consistent with the zoning plan and presumptively consistent with the health, safety and welfare of the community.** [I]t is not the role of the [zoning hearing board] in adjudicating a [special exception] application, let alone for the courts, to second guess the legislative decision underlying the ordinance. Thus, if the ordinance's objective special exception criteria are met, it is presumed that the use is consistent with the health, safety and general welfare of the community.

184 3d 1048, 1059 (Pa. Cmwlth. 2018) (emphasis in original, citations omitted).

78. Because the Board has by ordinance authorized solar farms as a conditional use in the A-1 District, the Township has already decided that solar farms at the location proposed is consistent with the general public health, welfare, and safety. Furthermore, because Lebanon Solar has satisfied its burdens of presentation and proof with respect to the specific objective criteria of the Zoning Ordinance as outlined in Section 522(1) through 522(8) the presumption that the use is consistent with the health, safety, and welfare of the community applies. *See Markwest*, 184 A.3d at 1059; *Allegheny Tower Assoc. v. City of Scranton Zoning Hearing Bd.*, 152 A.3d 1118, 1123-24 (Pa. Cmwlth. 2017); *Greaton Properties v. Lower Merion Twp.*, 796 A.2d 1038, 1045-46 (Pa. Cmwlth. 2002). Consequently, Lebanon Solar was not required to present evidence with respect to the same unless the Objectors presented *substantial* evidence that the proposed use would be detrimental to the general health, safety, and welfare.

79. Lebanon Solar, as the applicant, has made out a prima facie case for a conditional use, and the burden then shifted to the Objector to present sufficient evidence that the proposed use has a detrimental effect on the public health, safety, and welfare. *See In re Brickstone Realty Corp.*, 789 A.2d at 340.

80. "To overcome the presumption [that the use is consistent with the health, safety, and general welfare of the community], objectors' evidence must 'show, to a **high probability**,

that the proposed use would generate adverse impacts **not normally generated by this type of use (i.e., natural gas compressor stations)**...and that those impacts would pose a substantial threat to the health and safety of the community.” *MarkWest*, 184 A.3d at 1059 (citing *Allegheny Tower Associates, LLC*, 152 A.3d at 1125) (emphasis in *MarkWest*). Bald assertions, personal opinions, and speculation do not satisfy this burden. *See Com. Of Pa., Bureau of Corr. v. City of Pittsburgh, Pittsburgh City Council*, 532 A.2d 12, 14 (Pa. 1987).

81. Critically, objectors to a proposed conditional use do not meet their initial presentation burden with respect to the public health, safety, or welfare criteria of a zoning ordinance through mere speculation and expression of fears, “issues,” and “concerns.” *Szewczyk, supra*. Instead, they must come forward with specific factual evidence establishing with a high degree of probability that the use in question will have an impact on the community beyond that normally associated with that use. “Moreover, the degree of harm required to justify denial of the conditional use must be greater than that which normally flows from the proposed use.” *In re Cutler Grp., Inc.*, 880 A.2d 39, 43 (Pa. Cmwlth. 2005) (citing Robert S. Ryan, 1 Pennsylvania Zoning Law and Practice §5.2.6 (2003)).

82. The *Archbishop O’Hara* case established the benchmark for reviewing objections based upon speculative future concerns:

Any traffic increase with its attendant noise, dirt, danger and hazards is unpleasant, yet, such increase is one of the “inevitable accompaniments of suburban progress and of our constantly expanding population” which, standing alone, does not constitute a sufficient reason to refuse a property owner the legitimate use of his land: *Rolling Green Golf Club Case* It is not any anticipated increase in traffic which will justify the refusal of a “special exception” in a zoning case. The anticipated increase in traffic must be of such character that it bears a substantial relation to the health and safety of the community. A prevision of the effect of such an increase in traffic must indicate that not only is there a likelihood but a high degree of probability that it will affect the safety and health of the community, and such prevision must be based on evidence sufficient for the purpose. Until such strong degree of probability is evidence by legally sufficient testimony no court should act in such a way as to deprive a landowner of the otherwise legitimate use of his land.

Appeal of O’Hara, C.S.C. Archbishop of Phila., 131 A.2d 587, 596 (Pa. 1957) (internal citations removed for clarity). *See also, Sunnyside Up Corp. v. City of Lancaster Zoning Hearing Bd.*, 739 A.2d 644 (Pa. Cmwlth. 1999) (speculation as to decrease in property value, even if does occur, insufficient basis for denial of special exception for juvenile detention facility, since it would be no different than that usually associated with such a facility); *Accelerated Enterprises, Inc. v. The Hazle Twp. Zoning Hearing Bd.*, 773 A.2d 824, 827 (Pa. Cmwlth. 2001) (“increase in traffic is generally not grounds for denial of a special exception unless there is a high probability that the proposed use will generate traffic not normally generated by that type of use and that the abnormal traffic threatens safety.”); *Bailey v. Upper Southampton Twp.*, 690 A.2d 1324 (Pa. Cmwlth. 1997).

83. These bedrock principles of Pennsylvania land use law were reiterated by the Pennsylvania Commonwealth Court in *Kretschmann Farm, LLC v. Township of New Sewickley*, 131 A.3d 1044 (Pa. Cmwlth. 2016), *petition for allowance of appeal denied*, 145 A.3d 168 (Pa. 2016), holding that objectors did not meet their burden of presenting substantial evidence in opposition to a conditional use application for a natural gas compressor station. There, an oil and gas operator filed a conditional use application to construct a natural gas compressor station in a township's A-1 Agricultural District on a parcel that was about 46 acres in size. *Kretschmann*, 131 A.3d at 1047. The operator provided testimony and evidence showing that it met the specific objective requirements of the township zoning ordinance. *See id.* at 1047-48. Objectors, the owners of a nearby organic farm, asserted that such facilities did not belong in agricultural areas and that DEP had reported more than 200 cases of water contamination caused by oil and gas development since 2007. *See id.* at 1050. A witness who was a chemical engineer cited a study by EPA that compressor stations can generate a chemical that can cause lung cancer and also stated concerns about how emissions would impact the adjacent organic farm. *See id.* at 1054. Other objectors noted that diesel fumes from trucks in the oil and gas industry are harmful, that Beaver County's air quality was rated "F" by the EPA and that the compressor station would make it worse, and that chemical emissions from the station would contaminate organic produce. *See id.* at 1049. The organic farm owners submitted over 200 form emails from their customers objecting to the proposed compressor station. *See id.* at 1050. The Commonwealth Court found that the objectors had not presented substantial evidence, stating that, "expressions of concern do not constitute probative evidence of harm . . . [I]and owners presented no expert reports or testimony to support their challenge to [the operator's] conditional use application Accordingly, they did not meet their burden of showing that [the operator's] compressor station would adversely affect the public health, safety, and welfare in a way not expected for a usual compressor station." *Id.* at 1055. (emphasis added).

Aesthetic Concerns

84. The Objectors presented the testimony of Mr. Grady Summers, who asserted that if the Project was approved he would be able to see the Property and allegedly the proposed battery storage systems, substation and switching station from his front porch and each window of his house. Tr. 1/26/22, at 122, 125-26. While Mr. Summers may be displeased with the change in his view, he provided no testimony that indicated that this Project would be highly probable to generate a harm abnormal to solar farms. In fact, his alleged harm is one which is not only normal for solar farms, but perhaps is the only quality inherently normal for every use: it is visible from the properties surrounding it. In addition, the testimony of Mr. Holton confirmed that the exact size and locations of the facilities have not been finalized, and any direct impact on Mr. Summers' viewshed are therefore based only on proposed designs. Consequently, his stated concerns are speculative or not highly probable, and do not relate to a harm abnormal to solar farms.

85. Other objectors raised similar concerns related to an impact on the views from their property, or generally the "aesthetic value" of the area. The Objectors also put forth the testimony of Mr. Larry Buffenmeyer, who testified that he would be able to view participating parcel Lots five (5), eight (8) and six (6) from various points on his property. Mr. Buffenmeyer testified that these lots are viewable from the front and sides of his home, but that he does not utilize his front porch due to the existing traffic in the area. Tr. 1/26/22, at 187. He testified that he is retired and he utilizes the back deck of his property to sit outside. Tr. 1/26/ 22, at 187. Mr. Buffenmeyer testified that the solar farm will not block or interfere with his view from the back deck that he

utilizes, but that from the front porch, which he already does not use due to existing traffic unrelated to the Project, and sides of the house he will see solar panels in those three lots. Tr. 1/26/22, at 187-88. Mr. Buffenmeyer expressly stated that he wished to testify to the “concerns that [he] would have if this all goes through.” Tr. 1/26/22, at 188-89.

86. Mr. Buffenmeyer further testified as to what he referred to as “sight view pollution,” stating that it is “negative to the eye to see solar panels everywhere.” Tr. 1/26/22, at 190. While the Board is sympathetic to Mr. Buffenmeyer’s desire to maintain an aesthetic view from his property, he has already stated that his viewshed from the front of his home is inaccessible to him due to existing traffic unrelated to the Project, and that the Project will not be viewable from the back deck which he utilizes. Tr. 1/26/22, at 187-88. Mrs. Brenda Buffenmeyer also raised a general concern related to aesthetics. Tr. 1/26/22, at 196. Neither Mr. nor Mrs. Buffenmeyer presented factual evidence to indicate that the Project would in any way disrupt their current daily use of his property in any manner abnormal to a solar farm use.

87. The Objectors also put forth testimony of Mrs. Suzanne Forney, who testified that the Project would be within view of her property. Tr. 1/26/22, at 199-200. She made statements regarding her concerns over aesthetics but presented no specific factual evidence that the proposed Project would be highly likely to produce a harm abnormal to a solar farm use. Mr. John Shaver and Mrs. Brenda Shaver also testified regarding their aesthetic concerns regarding disruption to the current view from their property. Tr. 1/26/22, at 214-16 and 218-22. Mr. Miller also raised general concerns related to “dividing” the neighborhood, as well as aesthetic concerns and concerns over property values, and light pollution. Tr. 1/26/22, at 208-09. Ms. Dalinda Bohr raised concerns regarding light pollution and aesthetics as well. Tr. 1/26/22, at 232-39. None of this testimony arose to anything more than statements of concern or vague allegations of harm and no factual evidence related to aesthetic harms were submitted which would be sufficient to meet the high burden imposed by law. Furthermore, the alleged aesthetic harm caused by placing solar panels within the view of neighboring property owners is common to and in no way abnormal for a typical solar farm, and Lebanon Solar credibly testified that it would work to provide sufficient fencing or vegetation to protect the views of neighboring property owners. The Board therefore concludes that these statements were insufficient to show any high probability of a harm abnormal to the use.

88. The Board also received public comment in favor of the Project which rebutted certain aesthetic concerns. Mrs. Julia Kaylor, and Mr. Brent Kaylor, participating landowners in the Project, testified as to how they made the decision to enter into the agreement, why they agree with the project, and why they support the project. Tr. 1/26/22, at 240, 263-265. Mrs. Kaylor refuted many of the concerns raised by other residents, including the concerns relating to viewshed interruption or aesthetics. Tr. 1/26/22, at 240-45. In particular, Mrs. Kaylor noted many permitted uses also block views such as storage sheds, barns, chicken houses, hog barns, berms for biosolid storage, berms surrounding a gun range, or even just residential homes, and in comparison solar panels she states will be no taller than a mature stalk of corn will in fact preserve the openness and green space. Tr. 1/26/22, at 245. The Board found this comment compelling.

Wildlife and Traffic Concerns

89. Mr. Summers further testified that he was concerned about deer, fox, and coyote being unable to access the Property and therefore entering his property or traversing the roads therefore creating an increased risk of traffic accidents. Tr. 1/26/22, at 127-28. Ms. Dalinda Bohr

raised concerns regarding traffic, wildlife, and roads, as well. Tr. 1/26/22, at 232-39. Mr. Tshudy raised concerns related to traffic and deer, as well as general damage from or to animals, crops and livestock. However, none of these objectors presented any evidence that any such negative impacts were even reasonably likely to occur, let alone highly probable. The Objectors presented no factual evidence that traffic accidents would increase, or that such an increase would occur in a manner not expected for a usual solar farm. The Objectors presented no evidence or testimony from any traffic expert or wildlife expert to corroborate these concerns. Therefore this testimony was not sufficient to meet the objectors' high burden of overcoming the presumption that the Project is consistent with the public health, safety, and welfare.

90. Mr. Summers testified as to his opinion that the Project would change the aesthetic nature of certain roads which had been designated scenic roads by the Township Comprehensive Plan. As noted above, the Comprehensive Plan is not a binding document and does not have the legal effect of a zoning ordinance, which actually regulates land use as may be recommended by the comprehensive plan, and a municipality does not err in approving a plans allegedly incongruent with the same. *See Saenger v. Planning Commission of Berks County*, 308 A.2d 175, 176-77 (Pa. Cmwlth, 1973) ([i]t is inherent in the recommendatory nature of the comprehensive planning concept that it neither can no[r] does have any specific or litigable impact such as to provide any practical or realistic occasion for judicial intervention. The formulation and adoption of a comprehensive plan are but intermediate and inconclusive steps in the planning process, and in themselves are legally ineffective.") *quoting Supervisors of Warrington Twp.*, 53 Pa. D.&C.2d 329, 332 (Pa. Com. Pls. 1971). 'As admitted by Mr. Summers' own expert witness, Mr. Lahr, comprehensive plans have no force of law. Tr. 1/26/22, at 182.

Concerns Over Damage to Farmland

91. Mr. Summers made statements and interpretations as to the definitions of prime farmland under Section 107 of the MPC, as well as how it is applied by various government agencies. Tr. 1/26/22, at 133-34. Mr. Summers was not offered as an expert witness, and to the Board's knowledge is not an attorney. The Board finds that this testimony was outside the scope of a lay witness and therefore lacks credibility. Mr. Summers further attempted to introduce and interpret the report of an agricultural engineer he identified as John Williamson. The purported report of Mr. Williamson was not authenticated, and Mr. Williamson was not offered as an expert witness, consequently his report constituted a statement made outside of the hearing which was offered for the truth of the matter contained therein and was inadmissible hearsay. Although the formal rules of evidence do not apply to zoning matters hearsay evidence "must be sufficiently corroborated by other evidence in order to be considered competent evidence." *Lake Adventure Community Association, Inc.*, 79 A.3d at 714 n. 4.

92. Mr. Buffenmeyer also stated that "[a]nother concern [he has] is... desecration and pollution of good farmland is another concern I have." Tr. 1/26/22, at 189. Mr. Buffenmeyer alleged that if the board were to "check with any soil scientist" that "whatever else you do to put a solar system in, its definitely going to take away from the value of good farmland." Tr. 1/26/22 at 188-90. Mr. Buffenmeyer was not offered as an expert witness and offered no factual evidence to support these statements. Furthermore, as Mr. Buffenmyer admitted, his concerns for the farmland, willingly leased by the participating property owners, were "none of [his] business," he doesn't own the farms in question or even a farm at all. Tr. 1/26/ 22, at 190. While the Board

appreciates Mr. Buffenmeyer's concerns, it finds these expressions of vague concerns unrelated to himself or his own property to be speculative, and unsupported by any factual evidence.

93. Mr. Buffenmeyer raised additional concerns about whether "all these farmers," apparently the Participating Landowners, "are aware of what they signed up for." Tr. 1/26/22, at 192. This concern is entirely irrelevant to the issue of land use, and it is not for Mr. Buffenmeyer or the Board to step in and prevent a landowner's desired use of land based upon some desire to protect a property owner from themselves. The Board appreciates Mr. Buffenmeyer's concern for his neighbors, but cannot base its decision upon such concerns.

94. Mrs. Kaylor provided public comment as to her, and other farmers, rights to use their properties as they see fit so long as it conforms to the Zoning Ordinance and Conditional Use requirements. Tr. 1/26/22, at 247. The Board found Mrs. Kaylor's presentation compelling. Mr. Kaylor also reiterated his wife's comments and further rebutted Mr. Summers comments relating to the soil quality on the land in question. Tr. 1/26/22, at 266-71. While the Board acknowledges that Mr. Kaylor lacks no more accreditation on the matter than did Mr. Summers and gives his comments no more weight than it did that of Mr. Summers, it does note that the comments made regarding soil quality and damage thereto were rebutted by sworn statements of the same or similar weight. The Board also acknowledges that Mr. Kaylor has a presumed heightened understanding of the soil quality and impact on his own property given that he is currently farming his own land. The Board further notes that Mr. Kaylor provided detailed and compelling statements regarding property rights, aesthetics, and the validity of the project. Tr. 1/26/22, at 271-78.

95. Mrs. Jill Baer, and Mr. Andrew Baer, provided sworn public comment as to how the use of their farm property as an agricultural farm has many of the same alleged ill effects on the soil as had been raised as concerns by other members of the public. Tr. 1/26/22 Pg. 248, Pg. 261-63. The Board found these sworn comments compelling.

Property Value Concerns

96. Mr. Buffenmeyer stated that "[o]ne of the concerns [he has] is property values." Tr. 1/26/22, at 189. Mr. Buffenmeyer alleged that he had spoken to a real estate agent who said "[a solar project] can affect your property values negatively," but that he did not "have anything in writing and whatever." Tr. 1/26/22, at 189. This statement is uncorroborated and therefore inadmissible hearsay and cannot be relied upon by the Board. Mr. Mark Bachman provided public comment on his opinions of Lebanon Solar as an entity as well as property value. Tr. 1/26/22, at 258-262. Mrs. Buffenmeyer also raised concerns regarding property values. Tr. 1/26/22 pg. 200-05. These statements once again did not consist of anything more than statements of concern or speculative harm.

97. Lebanon Solar, on rebuttal, presented the expert testimony of Mr. Richard Kirkland, Jr., a certified general appraiser in multiple states including Pennsylvania, who the Board admitted as an expert in general appraisal and MAI. Tr. 2/24/22, at 304. Mr. Kirkland testified as to his review of over 900 solar farms in multiple states, and explained his processes. Tr. 2/24/22, at 306-07. Mr. Kirkland credibly testified that in general his studies have found a close to zero percent impact on property values surrounding solar farms, with the aggregate showing a mild positive impact. Tr. 2/24/22, at 308-09. Mr. Kirkland also testified that many of the characteristics that tend to negatively impact property values have been shown to not to be present in solar farm uses.

Tr. 2/24/22, at 309-10. For example he noted that solar farms do not have issues with hazardous materials, odor, noise, or stigma. Tr. 2/24/22, at 309-10. He stated that one factor that is triggered, is appearance, but that that is “typically the smallest impact [appraisers] can measure, and that in addition significant setbacks and landscaping buffers help mitigate that issue. Tr. 2/24/22, at 310. He opined that the setbacks proposed for the Project were sufficient to protect property value so long as the landscape buffering is in place. Tr. 2/24/22, at 311. He testified that the demographics for the area are consistent with other areas with solar farms, both in terms of population density, median income and home value. Tr. 2/24/22, at 312. He further testified that his studies indicated that there was no increased impact on property values corresponding to an increased size of the solar farm. The Board finds Mr. Kirkland’s expert testimony to be credible on the matter of impact on property values.

98. The Objectors presented no expert of their own on the issue of property values and consequently the testimony of Mr. Kirkland was unrefuted.

Size Concerns

99. Mr. Summers noted the size of the Project and made statements regarding the size of other solar projects in Pennsylvania and across the country. Tr. 1/26/22, at 150-154. Mr. Summers however failed to provide any evidence as to why the size of the Project would result in a harm to the public health, safety, or welfare, but merely states that the size of the project and the existence of homes in proximity to the same will generate such a harm. There was no evidence presented of correlation let alone causation of size of a solar farm to harm to the community. Furthermore, the Board has already made the legislative determination that a solar farm is a legitimate use in the Agricultural zone. *In re Brickstone Realty Corp.*, 789 A.2d 333. The Ordinance could have placed a maximum lot size limit on solar farms, but it does not. Similarly, the Ordinance could have imposed a larger setback requirement, but it instead imposes only fifty feet. Therefore the arguments related to size and density are irrelevant as to public health, safety, and welfare as the Project’s compliance with the terms of the ordinance on those issues resulted in a presumption that a project which complies with the same is consistent therewith. Furthermore, on a practical level, the Objector failed to provide any specific evidence as to why the size of the Project would be highly probably to result in any harm to the public health, safety or welfare.

100. Lebanon Solar presented the testimony of Mr. John Dimitriou, the project engineer for the Project. Tr. 2/24/22 pg. 365. Mr. Dimitriou testified that there are roughly 40 other projects in Pennsylvania of approximately the same size or larger, some that are larger by a magnitude of 3 to 9 times the size of this Project currently in development. Tr. 2/24/22, at 369. The Board considers the testimony of Mr. Dimitriou to be credible and sufficient to demonstrate that the size of the Project is not abnormal.

Battery, Safety, and Runoff, and Other Miscellaneous Concerns

101. Mr. Miller purported to give testimony regarding recycling and batteries based on his alleged “LEED” accreditation. Tr. 1/26/22, at 211. Mr. Miller, however, was not offered or accepted as an expert witness, and was unable to demonstrate what the accreditation he had received stood for, when he had received it, or what area it qualified him to testify to. Tr. 1/26/22, at 211. The Board finds that Mr. Miller’s testimony related to batteries, fuel storage, or other technical aspects of solar development or decommissioning to be beyond the scope of lay

testimony and lacking in credibility. Mr. and Mrs. Shaver also raised concerns regarding batteries, none of which were corroborated with factual evidence or rose to a level greater than a statement of “concern.” Tr. 1/26/22, at 217 and 223.

102. Mr. Buffenmeyer raised additional concerns, and questions related to runoff, Township expenses and other items. Mrs. Buffenmeyer also raised concerns regarding recycling policies, tax policies, water testing, and property values. Tr. 1/26/22, at 200-05. Mr. Shaver raised concerns regarding electromagnetic radiation, but did not present any factual evidence to indicate any such alleged harms were highly likely to occur. Tr. 1/26/22, at 217. Again, while the Board acknowledges these residents’ concerns, they do not arise to the level of specific evidence that there is a high probability that a harm abnormal to a solar farm use will occur.

103. Mr. Buffenmeyer also stated that “another concern [he] has” is the liability insurance for “if something goes wrong.” Tr. 1/26/22, at 191-92. He provided no testimony to suggest that the insurance provided by Lebanon Solar at the proper time would be insufficient, or that Lebanon Solar was incapable of obtaining sufficient coverage. He provided no testimony to suggest that there was an increased risk of “something going wrong” with this Project. The Board therefore concludes that these statements were insufficient to show any high probability of a harm abnormal to the use.

104. Mr. Tshudy, also provided additional testimony, however the majority of the statements provided did not rise beyond questions or statements of vague concerns. *See e.g.* TR 1/25/22, at 84. In addition, the Board found the responsive testimony provided by Lebanon Solar to the questions and concerns raised by residents and objectors to be credible. For example, Mr. Tshudy raised the following question:

Mr. Tshudy: What I’m concerned about is what’s their maintenance plan for this thing, I mean?”

[continuing]

... is there going to be regular inspection? Is there going to be – I mean, this could be part of the problem with like the health and welfare of the community if those things leak. They are not inspected regularly. There’s some sort of emergency system that’s going to let the company know if something is failing?

...

Mr. Holton: The answer is yes. The project is monitored 24/7 remotely.

Tr. 1/25/22 pg 84-85.

The Board appreciates the participation of Mr. Tshudy but finds that he presented no evidence to indicate that the Application did not meet the Zoning Ordinance criteria or that there was a high probability of an abnormal harm to the general health, safety, and welfare of the community.

105. Mr. Dimitriou also testified as to Lebanon Solar's commitment to recycle batteries at the end of their life, as well as the national standards to which all batteries must be held. Tr. 2/24/22, at 371-72. He further testified as to protection controls, and fire prevention systems and policies. Tr. 2/24/22, at 373-74. Mr. Dimitriou testified as to the procedures used to detect and replace damaged solar panels, including periodic inspections, and drone inspections. Tr. 2/24/22, at 375. He testified as to what happens when a panel "breaks," and how they are replaced. Tr. 2/24/22, at 375-76. The Board finds Mr. Dimitriou's testimony credible, and demonstrative of the general safety of the Project.

106. Mr. Summers also read into the record a letter purported to be written by a Mr. Craig Meyer who was not present at the hearing. Tr. 1/26/22, at 138. While the Board appreciates Mr. Meyer's dedication to public comment, and to local history, and appreciates his concerns, this letter was not appropriately provided to the Board as written public comment, but was entered as testimony by a witness other than Mr. Meyer himself. Tr. 1/26/22, at 140-44. Consequently, the letter constitutes inadmissible hearsay which was not otherwise corroborated and as stated above, cannot be considered by this Board in rendering its decision. Furthermore, as noted by Mr. Summers, neither the letter nor Mr. Summers presented any evidence to indicate that the cemeteries referenced in the letter would be impacted by the Project. Tr. 1/26/22, at 144. Mr. Summers again provided testimony as to the requirements of Pennsylvania law on private cemeteries, which the Board again notes constitutes a legal opinion outside the scope of lay testimony and therefore lacking in credibility.

107. Mrs. Jill Baer also rebutted the letter of Craig Meyer. Tr. 1/26/22 Pg. 249-50. Mrs. Baer stated that the contract she and her husband, as participating landowners in the Project, included a clause that mandated that Lebanon Solar would not touch the cemeteries located on her property. Tr. 1/26/22, at 249. The Board notes that counsel for the Objector attempted to prohibit the testimony of Mrs. Baer and alleged that her statements would be "irrelevant" to its decision. Tr. 1/26/22, at 250. As more thoroughly discussed above, the receipt and consideration of public comment is a statutory requirement for all conditional use proceedings under the MPC, the Board has and will thoroughly consider public comment offered by all residents of the Township who wished to provide it.

108. Other public comment from residents was reviewed and considered by the Board, but ultimately are irrelevant to the matter of whether or not the Lebanon Solar was entitled to a grant of its conditional use application. The Board received and considered the comments of Mr. Melvin Gehman who spoke to his general disfavor of solar power energy in areas not zoned industrial. Tr. 1/25/22, at 99-101. The Board received and considered Mr. Clyde Pershun who spoke to his general disfavor of the project. Tr. 1/26/22, at 230.

109. In summary, it was not enough for the Objectors here to express vague "concerns" about alleged impacts of Lebanon Solar's proposed development, nor was it enough for them to present evidence of alleged adverse impacts from solar farms generally. Instead, they were required to present specific evidence that Lebanon Solar's specific project would create adverse impacts beyond those normally associated with a solar farm. Although the Board is sympathetic to the understandable concerns residents have about what is to them and the Township a new use, the Objectors failed to meet this burdens the Board is required to hold them to by law. Virtually all of the general health and safety issues raised were aimed at alleged impacts of solar farms or renewable energy development generally, not specific to any unusual or abnormal impacts of this

project on this property, or involved broader environmental or operational impacts within the jurisdiction of Lebanon County and other regulatory agencies. This is not to say that these issues are not important, just that they are not within the jurisdiction of the Township and this Board at this juncture.

J. Conditions

110. Finally, although the Board has concluded that Lebanon Solar has satisfied its burden with respect to the specific ordinance criteria, and the Objector has failed to meet his with respect to general health and safety concerns, Lebanon Solar has offered to subject itself to a number of additional conditions and limitations, which are set forth in Appendix “B” to this decision.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was served on the
24th day of **March, 2022**, via electronic mail upon the following:

Paul C. Bametzreider, Esquire
Reilly Wolfson
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info@briantshudy.com
Objector

Appendix A Exhibits

Lebanon Solar Exhibits

- A-1 Conceptual Site Plan
- A-2 Project Overview; Transmission Line
- A-3 Criterion #1 - Agricultural Easements
- A-4 Criterion #2 – CUP Area
- A-5 Criterion #3 – Setbacks from adjacent lot lines
- A-6 Criterion #3 – Close up of 50’ Setbacks
- A-7 Criterion #6 – Insurance Certificates
- A-8 Lebanon Solar Presentation Slides
- A-9 Title Commitments for 12 properties
- A-10 Authorization Letter by Lebanon Solar
- A-11 Memorandum/Easement Agreements for 12 properties
- A-12 Waivers by Hostetter (Dale), Hostetter (Alan), Brightbill (Hilda), Brightbill (Bruce/Hilda), Long (Leonard)
- A-13 Option Agreements
- A-14 Richard Kirkland, Jr.’s Professional Vita
- A-15 Timothy J. Staub Professional Vita
- A-16 Jonathan Dimitriou Professional Vita
- A-17 Maximum Lot Coverage
- A-18 BESS Handout

Objector Exhibits

- O-1 Entry of Appearance
- O-2 Email from Julie Cheyney (Lebanon County Planner)
- O-3 Scenic Roads Map
- O-4 Folder of Materials Related to Soils (Pending Receipt from Objector's Counsel)
- O-5 Statement by Historian (Craig Meyer)
- O-6 Section 6 of Comprehensive Plan (not provided by Objector's Counsel)
- O-7 Pictures of Solar Facilities
- O-8 Vita of Lawrence J. Lahr

Township Exhibits

- T-1 Newspaper Advertising Notice
- T-2 Affidavit of Adam Wolfe as to Posting (un-notarized)
- T-3 Township Letter

Appendix B
Proposed Conditions

- a. Prior to construction, Lebanon Solar will provide the Township with liability insurance certificate in the minimum amounts of one million dollars per incident and two million dollars per aggregate, which shall be updated as necessary.
- b. Prior to construction, Lebanon Solar will provide the Township with adequate bonding, letter of credit, or other financial security, acceptable to the Township, to remain in place and to be used by the Township if the Applicant ceases operation and fails to remove panels and other implements related to the use within 180 days of the cessation of operation.
- c. Prior to construction, Lebanon Solar will provide the Township with the stormwater management plan which has been approved by Lebanon County.
- d. Prior to construction, Lebanon Solar will provide a Land Development Plan that demonstrates compliance with applicable provisions under the Township Zoning Ordinance.
- e. Lebanon Solar place no panels or other implements of the solar farm within one hundred and fifty (150) feet of an occupied residential dwelling.

Appendix “D”

Decision

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

IN RE: CONDITIONAL USE APPLICATION OF LEBANON SOLAR I, LLC
FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

FINDINGS OF FACT

1. Lebanon Solar submitted a Conditional Use Application to North Annville Township (“Township”) on May 3, 2021, for development of a 1234-acre solar farm which was later amended to 858 acres (“The Project”). The Project is proposed to be located on property comprised of 12 individual real estate Lots owned by separate owners. The tax parcels and/or lots 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 (“Landowners”) 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, 25-2300405-381893-0000, 25-2300498-383638-0000, 25-2299851-378128-0000, and 25-2296964-375508-0000 (otherwise referred to as “The Lots”). The Lots are located in the Township’s A-1 Agricultural Zone (“A-1 District”).
2. The Township Board of Supervisors advertised and conducted public hearings on January 25, 2022, January 26, 2022, and February 24, 2022, during which the parties were afforded an opportunity to present witnesses and exhibits into evidence. The public hearing was closed on February 24, 2022.
3. Upon the conclusion of the public hearing on February 24, 2022, the parties agreed to the following schedule for the submission of Briefs, a hearing for deliberation and decision and presentation of written decision of the Board. All parties agreed on the record to following schedule:
 - a. Briefs, including findings of fact and conclusions of law, were to be submitted by March 24, 2022.

- b. April 5, 2022 – Hearing to deliberate and render a decision.
 - c. Written decision due 45 days after April 5, 2022.
(Tr. 2/24/22 at 385-394)
4. Parties' status was granted at the first hearing before the Board to the following individuals:
 - i. Grady Summers;
 - ii. Larry Buffenmeyer;
 - iii. Brenda Buffenmeyer;
 - iv. Suzanne Forney;
 - v. Aaron Miller, III;
 - vi. John Shaver; and
 - vii. Brenda Shaver.
 5. At the first hearing of the Board on January 25, 2022, Township resident Brian Tshudy ("Tshudy") entered his appearance.
 6. The foregoing individuals shall be collectively referred to as "The Objectors".
 7. Township is a township of the second-class, organized and existing under the laws of the Commonwealth of Pennsylvania at 53 P.S. §65101 et. seq.
 8. On or about October 14, 2019, the Supervisors adopted Ordinance No. 2-2019 which amended the Township's Zoning Ordinance in order to create a separate use permitted by conditional use otherwise known as a "Solar Farm" in the Township's A-1 Zoning District.
 9. Applicant submitted its application for approval of a solar farm to the Supervisors on May 3, 2021 to be developed on the lots.
 10. The Township Planning Commission reviewed the application on June 7, 2021 and recommended denial of the application. On February 7, 2022, the Planning Commission again met to review the reduced Solar Farm of 858 acres and again recommended denying the application.
 11. §201.3 of the Zoning Ordinance provides: "when terms, phrases or words are not defined, they shall have their ordinarily accepted meanings or such as the context may imply."
 12. Ordinance 2-2019 amended §201.4 of the Zoning Ordinance by adding the following definition:

Solar farm (“utility scale solar application”): a solar application and/or applications installed on land for the sale of solar energy for the purpose of commercial gain by the landowner or tenant of the subject parcel.

13. Ordinance 2-2019 created a new §522 in the Township Zoning Ordinance establishing solar farms as a conditional use.

14. §522 of the Zoning Ordinance provides as follows:

Solar farms (“utility scale solar applications”) shall be a conditional use subject to the following conditions:

1. No solar farm may be established upon any farmland 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 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 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 50% of 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/or other implements related to the use within 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.

15. Applicant’s witness, Eric Holton, presented title commitments demonstrating that none of the Lots have agricultural conservation easements filed against them which remain in effect (1/25/2022, 15-16). Applicant’s exhibits A-3, A-8 and A-13.

16. Leonard and Michael Long’s lot located at 1749 Blacks Bridge Road consists of 30.48 acres. Property ID 10

17. The lot of Dale and Thelma Hostetter located at 1595 North State Route 934 is only 49.78 acres. Property ID 8. Exhibit A-1.

18. Eric Holton testified that solar panels and other implements would be set back a minimum of 50 feet from adjacent lot lines (1/25/2022, 18-20).

19. The application of applicant specifically states that applicant shall maintain a setback for solar panels of a minimum of 50 feet from any adjacent lot line of non-participating landowners.
20. Exhibit A-12 includes certain waivers executed by some of the landowners waiving the requirement of the 50-foot set back.
21. Applicant's application indicates that applicant will install requisite buffering from non-participating property owners. Additionally, application indicates that the Applicant is attempting to secure waivers from participating landowners to waive the buffering requirement between the respective properties in order to permit a continuous field of solar panels across the property lines of adjacent participating properties.
22. Exhibit A-12 includes waivers executed by participating landowners waiving the requirement of vegetative screening along lot lines of neighboring properties.
23. Eric Holton testified that the total acreage of impervious surfaces is 25.2 acres and the total lot size as outlined is 858 acres. On this basis, he determined that 2.9% would be the total impervious surface which is less than 50%. There was no exhibit showing where impervious structures would be located on individual lots.
24. Applicant failed to submit any kind of drawing or exhibit which would demonstrate exactly where impervious surfaces would be located.
25. Applicant submitted Exhibits A-7 and A-8 which constitutes certificates of insurance in amounts of at least \$1,000,000.00 and \$2,000,000.00 respectively.
26. Applicant testified that Township will be supplied with a decommissioning plan which will include an adequate amount of financial security at the time of the submission and approval of applicant's Land Development Plan (1/25/2022, 24-25). Applicant's Ex. A-8.
27. Applicant testified that applicant will supply Township with a Stormwater Management Plan at the time of land development approval and submission of the Stormwater Management Plan with applicant's Land Development Plan (1/25/2022, 25-26). Applicant's Ex. A-8.
28. Applicant did not supply Township with a Stormwater Management Plan.

CONCLUSIONS OF LAW

1. Any foregoing conclusions of law are incorporated herein by reference as if fully set forth at length.

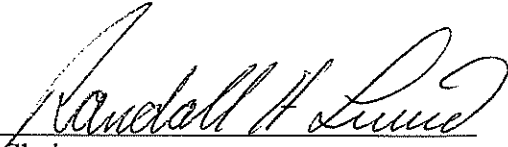
2. The burden of proof in proving compliance with the criteria stated in the Zoning Ordinance for a conditional use rests with the applicant. *Levin v. The Board of Supervisors of Benner Township*, 669 A.2d 1063 (Pa. Cmwlth 1995), aff'd, 547 Pa. 161, 689 A.2d 224 (1997).
3. Township's Zoning Ordinance defines the word "lot" as: "A legally defined tract, parcel, or plot of land, whether occupied or capable of being occupied by buildings".
4. An applicant for conditional use has the burden to demonstrate compliance with the specific criteria of the ordinance. 53 P.S. §10603(c)(2). See also *In re Thompson*, 896 A.2d 659 (Pa. Cmwlth. 2006).
5. Once the applicant seeking conditional use approval meets the requirements of the applicable ordinance, he has made out his prima facie case, and the application must be granted unless the Objectors present sufficient evidence that the proposed use has a detrimental effect on the public health, safety and welfare. 53 P.S. §10603 (c)(2). See also *In re Thomspom*, Supra.
6. The law is well settled where a word or phrase in a zoning ordinance is defined, a Court is bound by the definition. *Slice of Life, LLC v. Hamilton Township Zoning Hearing Board*, 207 A.2d 886, 899 (Pa. 2019).
7. Words must be construed in a zoning ordinance by their plain and ordinary meanings *Markwest Liberty Midstream and RES, LLC v. Cecil Township Zoning Hearing Board*, 102 A.2d A.3d 549 (Pa. Cmwlth 2014).
8. 53 P.S. 912.1 states that where the governing body in a zoning ordinance has stated special exceptions to be granted or denied by express standards and criteria, applications under those provisions must be decided in accordance with the established criteria. See also *Atlantic Wind, LLC v. Zoning Hearing Board of Penn Forest Township* (Pa. Cmwlth 2022).
9. Promises to comply with the criteria as stated in a zoning ordinance do not constitute evidence of compliance with the criteria of that ordinance. *Atlantic Wind, LLC* Supra.
10. Zoning ordinances should receive reasonable and fair construction in light of the subject matter dealt with and the *manifest intention of the local legislative body*. (Emphasis added.) *Northampton Area School Dist. v. ZHB of Tp. Of Lehigh*, 64 A3d 1152 (Pa. Cmwlth. 2013).

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.
15. The Board finds that Applicant has complied with criteria number 1 under Ordinance No. 2-2019 by presenting evidence that there is currently no agricultural conservation easement against any of the lots proposed for the conditional use.
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 2 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 50-foot 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 shall be arrayed on the individual lots.
24. The Board finds that the 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.

DECISION

The Board hereby, on this date, based upon the foregoing findings of fact and conclusions of law determines that the applicant has failed to demonstrate adequate compliance with 6 of the 8 criteria of Ordinance No. 2-2019; and therefore, applicant's application for conditional use is denied.


Chairman

Date: 5/12/22

CERTIFICATION PURSUANT TO PA.R.A.P. 2135(d)

Pursuant to Pa.R.A.P. 2135(d), Designated Appellant hereby certifies that this Brief of Intervenor Appellee was prepared using Microsoft Word and that the word count feature of that program states that this Brief is fewer than 14,000 words.

/s/ Anna S. Jewart, Esquire
Anna S. Jewart, Esquire
Counsel for Designated Appellant
Lebanon Solar I, LLC

CERTIFICATE OF COMPLIANCE

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

/s/ Anna S. Jewart, Esq.
Anna S. Jewart, Esquire
Counsel for Designated Appellant
Lebanon Solar I, LLC