IN THE

COMMONWEALTH COURT OF PENNSYLVANIA

Consolidated Docket Numbers
189 CD 2024, 191 CD 2024, 255 CD 2024

LEBANON SOLAR I, LLC
Designated Appellant
vs.

NORTH ANNVILLE TOWNSHIP BOARD OF SUPERVISORS,
GRADY SUMMERS
Designated Appellees

BRIEF OF DESIGNATED APPELLEE NORTH ANNVILLE TOWNSHIP BOARD OF SUPERVISORS

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(Suggested Answer: Yes)

B. Did North Annville Township act in accordance with applicable law in denying Lebanon Solar's application when it failed to provide a bond and approved storm water management plan at the time its application was submitted?

(Suggested Answer: Yes)

C. Did North Annville Township act in accordance with applicable law in denying Lebanon Solar's application when Lebanon Solar failed to properly satisfy the requirements of the ordinance for conditional use?

(Suggested Answer: Yes)

BRIEF OF CROSS APPELLANT

A. Did the lower court err in denying the Motion to Quash when Lebanon Solar failed to file a timely appeal to the decision of North Annville Township?

(Suggested Answer: Yes)

B. Did the lower court err in ruling that the definition of the term "lot" as set forth in the Ordinance allowed the 12 separately owned parcels to be considered jointly as one lot?

(Suggested Answer: Yes)

C. Did the lower court err in its holding that each of the 12 lots were not required individually to meet the specifications of conditional use?

(Suggested Answer: Yes)

D. Did the lower court err in its holding that Lebanon Solar's proposal complied with the requirements of buffering as required by the Ordinance when the proposal provided for buffering of the exterior of the project and not each of the 12 lots?

(Suggested Answer: Yes)

E. Did the lower court err in its holding that North Annville Township was estopped or otherwise prevented from requiring all 12 of the separate lots included within the Appellant's application to comply individually with the specific criteria of the conditional use ordinance?

(Suggested Answer: Yes)

IV. STATEMENT OF THE CASE

On May 3, 2021, Appellant Lebanon Solar I, LLC ("Lebanon Solar") submitted a Conditional Use Application ("Application") to North Annville Township ("Township") for development of a 1234-acre solar farm, which was later reduced to 858 acres ("Project"). The Project was to be located on twelve individual adjacent lots owned by separate owners. The lots are all located in the Township's A-1 Agricultural Zone and are owned by the following individuals: Alan D. Hostetter and Robin D. Hostetter, Dale E. Hostetter and Thelma M. Hostetter, Parke W. Breckbill and Susan J. Breckbill, Brent A. Kaylor and Julia S. Kaylor, Eli E. Nolt and Darla Nolt, Leonard C. Long and Michael L. Long, Bruce Brightbill and Hilda Brightbill, the Baer Brothers Farms, and Elvin M. Hostetter and the Hostetter Family Limited Partnership II and otherwise identified respectively as parcel numbers 25-229478-379886-0000, 25-2302207-381436-0000, 25-2299571-378739-0000, 25-2297632-376780-0000, 25-2301670-388452-0000, 25-2299880-

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The Township advertised public hearings on the Application. The public hearings were conducted over three (3) days on January 25-26, 2022, and February 24, 2022. During the hearings, Lebanon Solar was provided with the opportunity to fully present its Application to the Township. Lebanon Solar presented witnesses and entered exhibits into evidence, which the Township afforded all due consideration. Lebanon Solar was also permitted to present its proposed findings of fact and conclusions of law to the Township by March 24, 2022.

After deliberation, the Township rendered a decision denying the Application on April 5, 2022. On May 5, 2022, Lebanon Solar filed a Notice of Land Use Appeal. On May 12, 2022, the Township issued its written findings of fact and conclusions of law and served them upon Lebanon Solar's

Counsel by email and overnight mail . Receipt of the email was acknowledged by Counsel the same day. Lebanon Solar filed an Amended Land Use Appeal on June 17, 2022.

As a result of the untimely appeal, the Township filed a Motion to Quash on September 20, 2022. The Motion was denied on February 13, 2023. The Land Use Appeal was ultimately affirmed in part on January 26, 2024. The lower court affirmed the denial on the grounds that Lebanon Solar failed to provide appropriate bonding and stormwater management plans. The lower court rejected the denial on all other grounds. This cross-appeal follows.

V. SUMMARY OF ARGUMENT

North Annville Township properly denied the application for conditional use filed by Lebanon Solar. The application was deficient and failed to provide the information necessary to meet the elements of the Zoning Ordinance.

The lower court erred in failing to quash the untimely appeal of North Annville Township's denial for the conditional use. Additionally, the lower court erred in treating the project as one "lot" when it was comprised of twelve separate land parcels. The lower court further erred in finding that the application of Lebanon Solar met the requirements of the Zoning Ordinance and that the Township erred in accepting a single application for the twelve lots.

VI. ARGUMENT

REPLY TO BRIEF OF APPELLANT

A. The trial court ruled appropriately in relying upon binding applicable precedent.

Lebanon Solar has argued that it was error for the trial court to rely upon This Honorable Court's decision in *Brookview Solar I, LLC v. Mount Joy Township Board of Supervisors*, 305 A.3d 1222 (Pa. Cmwlth. 2023). The trial court's analysis was correct and Lebanon Solar's argument is without merit.

The principle of stare decisis is applicable to the within situation. The concept is "a principle as old as the common law itself." *Morrison Informatics, Inc. v. Members 1st Fed. Credit Union*, 139 A.3d 1241, 1249 (2016) (Wecht, J., concurring). The term originates from a Latin adage – "'*stare decisis et non quieta movere*,' which means to stand by the thing decided and not disturb the calm." *Commonwealth v. Alexander*, 243 A.3d 177, 195 (Pa. 2020) *quoting Ramos v.*

Louisiana, 590 U.S. 83, 116 (2020) (Kavanaugh, J., concurring).

"Without stare decisis, there would be no stability in our system of jurisprudence." *Flagiello v. Pennsylvania Hosp.*, 208 A.2d 193, 205 (Pa. 1965). It "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Alexander*, 243 A.3d at 196 *quoting Payne v. Tennessee*, 501 U.S. 808, 827 (1991). The principle of stare decisis binds courts to previous decisions. Application of the principle is stricter in statutory interpretation than it would be in areas of constitutional law. *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services*, 309 A.3d 808, 850 (Pa. 2024).

"A reported opinion of the Commonwealth Court en banc or three-Judge panel may be cited as binding precedent." Pa.R.A.P. 3176(a).

Contrary to Lebanon Solar's arguments, the trial court reasonably and appropriately relied upon the decision made in *Brookview Solar*. The issue as presented in both situations is the same – did Lebanon Solar comply with the specific criteria of the ordinance.

The specific criteria at issue in *Brookview Solar* required that the application for conditional use include a site plan that demonstrated compliance with the Township stormwater management ordinances. 305 A.3d at 1238.

Lebanon Solar cites a subsequent case, *Quaker Valley School District v. Lee Township Zoning Hearing Board*, 309 A.3d 279 (Pa. Cmwlth. 2024), to show that *Brookview Solar's* analysis and applicability was fleeting and, therefore, should not be relied upon. However, there is one significant difference in *Quaker Valley* – the issue with the application therein centered upon an item that was not specific criteria defined under the relevant ordinance. The cases are not analogous.

In *Quaker Valley*, it was undisputed that the ordinance contained no requirement for an emergency management plan that contained an emergency only road ("EOR"). *Id.*, 309 A.3d at 288. Further, the application therein addressed a request for a special exception to build a public high school in a residential zoned district. *Id.*, 309 A.3d at 283.

This Honorable Court's holding included the following: "Simply put, there is no evidence in the record that an EOR is required, let alone that failure to provide an EOR will, to a high degree of probability, generate adverse impacts to public health, safety, and welfare not normally generated by a school use." *Id.*, 309 A.3d at 290.

Herein, there is specific criteria which requires bonding and stormwater management:

> 7. The Applicant must demonstrate and provide adequate bonding to remain in place to be used by the Township if the applicant ceases operation and fails to remove the panels and other implements related to the use within one hundred and eighty (180) days of the cessation of operation.

> 8. The Applicant must have an approved Stormwater Management Plan as required by the Lebanon County Stormwater Management Ordinance.

Zoning Ordinance, Article V, Section 522(7)-(8).

The holdings of *Brookview Solar* and *Quaker Valley* stand-alone without impacting each other as they address different aspects of the application. *Brookview Solar* addressed a deficient application that failed to include a required element. *Quaker Valley* addressed an application that was missing an item that was not required.

Most importantly, it cannot be error for the trial court to analyze recent binding precedent that directly addresses issues raised by the parties. In fact, it would have been error for the trial court NOT to consider such precedent in its analysis. Lebanon Solar's argument to the contrary is without merit.

B. North Annville Township acted appropriately in denying Lebanon Solar's application when it failed to provide a bond and approved storm water management plan in accordance with the ordinance's specific criteria. .

The Township properly determined that Lebanon Solar's Application did not meet the criteria relating to bonding and stormwater management as required by the Zoning Ordinance. Lebanon Solar's argument is without merit.

> For an application for conditional use, the applicant
>
> > must show compliance with the express standards of the zoning ordinance that relate to the specific conditional use. A conditional use is one to which the applicant is entitled provided that the specific standards of the zoning ordinance are met. *Id.* If the applicant demonstrates compliance with the zoning ordinance, the governing body must grant the application unless objectors introduce sufficient evidence that the proposed use has a detrimental effect on the public health, safety, and welfare.

In Re Maibach, LLC, 26 A.3d 1213, 1216 (Pa. Cmwlth. 2011)(internal citations omitted).

By failing to address specific requirements of the conditional use ordinance, the application is not in compliance with the ordinance and was properly denied. *Brookview Solar*, 305 A.3d at 1239.

An application was rejected when it did not satisfy specific requirements in the ordinance that required the

demonstration of a of a safe and potable water supply. *East Manchester Township Zoning Hearing Board v. Dallmeyer*, 609 A.2d 604 (Pa. Cmwlth. 1992).

Additionally,

> [a] self-serving declaration of a future intent to comply is not sufficient to establish compliance with the criteria contained in the ordinance. If we were to adopt a rule that to obtain a special exception all that would be required is for an applicant to promise to come into compliance at some future date, it would make Board approval meaningless because once a applicant [*sic*] promises it is entitled to receive the special exception.

Edgmont Township v. Springton Lake Montessori School, Inc., 622 A.2d 418, 420 (Pa. Cmwlth. 1993)(internal citation omitted).

This Honorable Court held that the applicant would have "to come forward with evidence detailing how it was going to be in compliance with the requirements necessary to obtain a special exception." *Id.,* 622 A.2d at 419. The Court determined that "evidence is not a 'promise' that the applicant will comply because that is a legal conclusion the Board makes once it hears what the applicant intends to do

and then determines whether it matches the requirements set forth in the ordinance." *Id*. Rather, "[t]he standard to be observed by the Board is whether the [application] as submitted complies with specific ordinance requirements *at the time the plan comes before it*." *Id*. at 420 (emphasis supplied).

Similarly, in a later case, the Court reiterated the holding of *Edgmont* and held that "[e]ven if an applicant demonstrates that it can comply with the ordinance requirements and promises to do so, the ZHB does not err in denying the application." *Elizabethtown/Mt. Joy Associates, L.P. v. Mount Joy Twp. Zoning Hearing Board*, 934 A.2d 759, 768 (Pa. Cmwlth. 2007). Therein, the zoning ordinance required that a developer submit an exterior lighting plan. *Id*. at 767. However, the lighting plan proposed was "merely conceptual" and the developer stated that it "will" comply with zoning ordinance requirements. *Id*. The Court determined that "a concept plan is insufficient to warrant the granting of a special exception; rather, to be entitled to

receive a special exception, the applicant must come forward with evidence detailing its compliance with the necessary requirements." *Id*. at 768.

Herein, there is a specific requirement of the application process that addresses bonding and stormwater management:

> 7. The Applicant must demonstrate and provide adequate bonding to remain in place to be used by the Township if the applicant ceases operation and fails to remove the panels and other implements related to the use within one hundred and eighty (180) days of the cessation of operation.
>
> 8. The Applicant must have an approved Stormwater Management Plan as required by the Lebanon County Stormwater Management Ordinance.

Zoning Ordinance, Article V, Section 522(7)-(8).

Lebanon Solar erroneously asserts that it is permitted to come into compliance with the Zoning Ordinance's stormwater management plan and bonding requirements at a later date. *See* Appellant's Brief at 39-43. Indeed, Lebanon Solar states that it "can and will meet [Section 522(7) of the

Zoning Ordinance] at the proper time." *See* Appellant's Brief at 40. Additionally, Lebanon Solar asserts that "it can and will obtain … approval of a Storm Water Management Plan by Lebanon County at the proper time." *See id*. at 41. Notably, according to the testimony of Lebanon Solar's expert, Mr. Staub, a stormwater management plan has not yet been developed. Tr. 2/24/22, at 356.

Lebanon Solar relies upon *Schatz v. New Britain Township Zoning Hearing Board of Adjustment*, 596 A.2d 294 (Pa. Cmwlth. 1991) for its position but ignores the fact that the ordinance at issue did not contain requirements for stormwater plans as exist in North Annville Township. This Honorable Court acknowledges that fact in *Edgmont*. 609 A.2d at 608.[1]

Despite Lebanon Solar's argument to the contrary, This Honorable Court has consistently held that such "future

[1] Lebanon Solar distinguishes *Brookview* by arguing that the Stormwater Ordinance there was a Township Stormwater Ordinance whereas in this matter it is a County Ordinance. This argument is a non-sequitur because Lebanon Solar could apply under the County Ordinance as *Brookview* could the Township Ordinance.

promises" do not constitute evidence of compliance. *Edgmont Twp.,* 622 A.2d at 420. Yet, future promises are all Lebanon Solar has presented with respect to the bonding and stormwater management plan criteria of the Zoning Ordinance. Lebanon Solar's argument is without merit.

C. North Annville Township did not err in denying Lebanon Solar's application when Lebanon Solar failed to properly meet the specific criteria of the conditional use.

The law on conditional uses is well settled. A conditional use is defined as "[a] use permitted in a particular zoning district pursuant to the provisions in Article VI" of the Municipalities Planning Code. 53 P.S. § 10107(a). A governing body has authority to grant a conditional use "pursuant to express standards and criteria set forth in the zoning ordinance." 53 P.S. § 10603(c)(2). Under the MPC, "[w]here…the zoning ordinance … has stated special exceptions to be granted or denied by the board pursuant to express standards and criteria, the board shall hear and

decide requests for such special exceptions in accordance with such standards and criteria." 53 P.S. § 10912.1.

A conditional use involves the use of the land, not specific design details for the development. The standards and burden of proof for a conditional use and a special exception are the same. *Joseph v. North Whitehall Township Board of Supervisors*, 16 A.3d 1209, 1215 (Pa. Cmwlth. 2011).

"An applicant is entitled to a conditional use as a matter of right, unless the governing body determines 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). See also *In re Thompson*, 896 A.2d 659, 670 (Pa. Cmwlth. 2006); *Levin v. Board of Supervisors of Benner Township*, 669 A.2d 1063 (Pa. Cmwlth. 1995).

Further,

> The applicant bears the initial burden of showing that the proposed conditional use satisfies the objective standards set forth in the zoning ordinance, and a proposed use that does so is

> presumptively deemed to be consistent with the health, safety and welfare of the community. Once the applicant satisfies these specific standards, the burden shifts to the objectors to prove that the impact of the proposed use is such that it would violate the other general requirements for land use that are set forth in the zoning ordinance, *i.e.,* that the proposed use would be injurious to the public health, safety, and welfare.

Id.

On October 14, 2019, the Township enacted Ordinance No. 2-2019, providing a conditional use for solar farms. A "Solar Farm" is defined as "[a] Solar Application and/or Applications installed on land for the sale of solar energy for the purpose of commercial gain by the Landowner or Tenant of the subject parcel." Zoning Ordinance, Article II, Section 201.4(a). The Zoning Ordinance includes as a Conditional Permitted Use "Solar Farms *upon compliance with certain conditions defined in Section 5.22* and after Notice and Hearing before the North Annville Township Board of Supervisors." Zoning Ordinance, Article IV, Section 401.1(O) (emphasis supplied). The requisite conditions for a Solar Farm to qualify as a Conditional Permitted Use include:

1. No Solar Farm may be established upon any farm land or Agriculturally Zoned land which has an Agricultural Conservation Easement filed against it which remains in effect.

2. The minimum lot size for the establishment of any Solar Farm shall be fifty (50) acres.

3. The solar panels and/or other implements used in the construction and structure of the Solar Farm, including, but not limited to, any solar panels shall be set back a minimum of fifty (50) feet from any adjacent lot line.

4. A permanent evergreen vegetative buffer must be provided or fencing which accomplishes the same purpose of buffering.

5. The maximum lot coverage may not exceed fifty (50%) percent of the total lot size.

6. The Applicant must demonstrate that it has adequate liability insurance in minimum amounts of one million ($1,000,000.00) per incident and two million ($2,000,000.00) per aggregate.

7. The Applicant must demonstrate and provide adequate bonding to remain in place to be used by the Township if the applicant ceases operation and fails to remove the panels and other implements related to the use within

> one hundred and eighty (180) days of the cessation of operation.
>
> 8. The Applicant must have an approved Stormwater Management Plan as required by the Lebanon County Stormwater Management Ordinance.

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

Applying these criteria to the Application, the Township found numerous instances of non-compliance and rightfully denied the Application. Lebanon Solar's argument to the contrary is without merit.

1. The Township did not impose additional conditions upon Lebanon Solar beyond those set forth in the zoning ordinance.

The level of evidence needed to obtain conditional use approval will be determined on a case-by-case basis, and it will vary depending on the language of the applicable ordinance. *In re Thompson*, 896 A.2d at 670. Further,

> [d]ue to their expertise and experience, a zoning hearing board's interpretation of its own zoning ordinance is entitled to great weight and deference. The general principle that zoning ordinances must be construed so as to give landowners the broadest possible use of their property gives way where the ordinance, read

> rationally and as a whole, clearly signals that a more restrictive meaning was intended.

Cogan Properties, LLC v. East Union Township Zoning Hearing Board, 318 A.3d 981, 985–86 (Pa. Cmwlth. 2024) quoting *Hamilton Hills Group, LLC v. Hamilton Township Zoning Hearing Board*, 4 A.3d 788, 793 (Pa. Cmwlth. 2010).

When interpretation of an ordinance is at issue, "we must begin by focusing on the text of the ordinance itself." *Plum Borough v. Zoning Hearing Board of Borough of Plum*, 310 A.3d 815, 823 (Pa. Cmwlth. 2010). "As a general rule, a zoning board's interpretation of its zoning ordinance is to be afforded great weight, as it represents the construction of a provision by the agency charged with its execution and application." *Id.* Additionally, "we are mindful that ordinances are to be construed expansively, affording the landowner the broadest possible use and enjoyment of his or her land." *Johnson v. Pocono Township Zoning Hearing Board*, 310 A.3d 836, 844–45 (Pa. Cmwlth. 2024).

As discussed in more detail infra, as part of the Township's appeal, the interpretation of the term "lot" appropriately defined it as a single parcel of land. The Township's interpretation did not add additional requirements to the Zoning Ordinance beyond those set forth in the Ordinance itself. The Township, as the enacting body, was the appropriate agency to interpret and enforce the Ordinance. Lebanon Solar's argument to the contrary is without merit.[2]

2. The zoning ordinance did not contain any ambiguities.

Under Pennsylvania law, "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."1 P.S. § 1921. This critical maxim is also applicable to zoning

[2] It is fundamental to zoning law that zoning regulates the use of "lots" and their dimensions. This is explicitly or implicitly stated throughout the Zoning Ordinance at i.e. Sections 101.1, 304.1, 304.2, 304.4, 304.6, 401.3, 402.3, 510 and 511. The bigger question is on what basis does Lebanon Solar believe it has authority to take numerous contiguous but completely unrelated lots and treat them as one lot for zoning purposes. It fails to provide any basis in its' Brief or elsewhere. Moreover, by taking 12 lots and attempting to treat them as one, Lebanon Solar acknowledges that zoning is applied to individual "lots".

ordinances, which "are to be construed in accordance with the plain and ordinary meaning of their words." *Tri-County Landfill, Inc. v. Pine Township Zoning Hearing Board*, 83 A.3d 488, 510 (Pa. Cmwlth. 2014).

As discussed in more detail infra, as part of the Township's appeal, there is no ambiguity in the definition for the term "lot" contained in the Township's Zoning Ordinance. Therefore, there was no need to disregard the plain meaning of the Ordinance beyond its explicit terms. The Township, as the enacting body, was the appropriate agency to interpret and enforce the Ordinance. Lebanon Solar's argument to the contrary is without merit.

3. The Township did not err in determining that Lebanon Solar did not meet the requirements of the zoning ordinance.

Under the Zoning Ordinance, a solar farm is a conditional permitted use in North Annville Township, so long as the solar farm "*compl[ies] with certain conditions defined in Section 5.22*." N. Annville Tp. 4.0 Section 401.1 (O). (emphasis supplied). "An applicant for conditional use

has the burden to demonstrate compliance with the specific criteria of the ordinance." *In re Thompson*, 896 A.2d 659, 670 (Pa. Cmwlth. 2006) citing *Levin v. Board of Supervisors of Benner Township*, 669 A.2d 1063 (Pa. Cmwlth. 1995).

A condition for a Solar Farm to qualify as a Conditional Permitted Use is that "the minimum lot size for the establishment of any Solar Farm shall be fifty (50) acres." N. Annville Tp.52.0 Section 522 (2). Here, two of the Application's participating lots failed to meet the minimum lot size requirement established by the Zoning Ordinance. Therefore, the Board properly denied the Application.

Section 522(3) of the Zoning Ordinance provides that "[t]he solar panels and/or other implements used in the construction and structure of the Solar Farm, including, but not limited to, any solar panels shall be set back a minimum of fifty (50) feet from any adjacent lot line." N. Annville Tp. 5.0 Section 522 (3). Section 522(4) provides that "[a] permanent evergreen vegetative buffer must be provided or

fencing which accomplishes the same purpose of buffering." N. Annville Tp. 5.0 Section 522 (4).

This Honorable Court has held that "[a]n ordinance, like a statute, must be construed, if possible, to give effect to all of its provisions." *Mann v. Lower Makefield Township*, 160 Pa. Cmwlth. 208, 215, 634 A.2d 768, 771–72 (1993). Therefore, "[i]nterpretation of an ordinance which produces an absurd result is contrary to the rules of statutory construction." *Id*. at 773. Finally, "[w]hen statutory language is not explicit, courts should give great weight and deference to the interpretation of a statutory or regulatory provision by the administrative or adjudicatory body that is charged with the duty to execute and apply the provision at issue." *In re Thompson*, 896 A.2d 659, 669 (Pa. Cmwlth. 2006)

Here again, pursuant to the MPC, the Township was obligated to form its conclusion in accordance with the established criteria of the Zoning Ordinance. *See* 53 P.S. § 10912.1. Moreover, the Township's conclusions as to the

interpretation of the Zoning Ordinance must be afforded great weight and deference.

The Township's determination that Lebanon Solar's Application failed to satisfy the 50% maximum lot coverage requirement was proper. Section 522 (5) of the Zoning Ordinance states "[t]he maximum lot coverage may not exceed fifty (50%) percent of the total lot size." N. Annville Tp. 5.0 Section 522 (5). The Township found that "Applicants have failed to comply with the lot coverage requirement because they have failed to present sufficient evidence upon which the Township can determine whether or not the applicant complies with the requirement of maximum lot coverage which shall not exceed 50% of the total lot size on each of the lots included within the applicant's application." Decision at Conclusions ¶ 22. The Township further concluded that "solar panels must be included in the calculation of lot coverage and Applicant fails to include panels in its calculations and show how the panels should be arrayed on the individual lots." *Id*. at ¶ 23.

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

In its application, Lebanon Solar argued that it could assemble a total of 12 lots with contiguous lot lines and treat them as one lot under the zoning ordinance having them comply with the criteria of the ordinance as one lot instead of as 12 separate lots. The applicant argued that therefore the individual lots did not individually need to

comply with the requirements of the criteria so long as the conglomeration of the 12 lots treated as one unity complied with the criteria. Hence, there did not need to be compliance in that each lot did not need to meet the minimum lot size, the interior lot lines did not need to comply with the setbacks, there did not need to be buffering between the interior lots and so on. The Applicant is re-writing the township's zoning ordinance. The township rejected this attempt.

The Commonwealth Court was confronted with a similar argument in the case of *Society Hill Civic Assoc. v. Philadelphia Zoning Hearing Board Zoning Board of Adjustment*, 42 A. 3d 1178(Pa. Cmwlth. 2012). In this case the applicant was attempting to essentially treat two contiguous lots as one for purposes of the zoning ordinance. Judge Simpson's analysis in this case required that for such a "unity of use" theory to apply there must be a finding of 1) that such an agreement is authorized for zoning purposes under the relevant zoning ordinance and 2) that there are

factual findings which would demonstrate a unity of use agreement exists between the landowners. Such factual findings would include i.e. restrictive covenants between landowners binding future owners to the unity of use and easements allowing for the free flow of traffic between the lots contained within the unity. There should also be some over-arching agreement which binds the lots together into a unity.

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

covenants running with the land. Nor has there been any evidence of easement agreements between the landowners by which traffic would be allowed to flow freely between the lots allowing them to function as one. Lebanon Solar bears the burden in this matter, and they failed to present any evidence which would support such a finding. There was testimony as to leases between the landowners and Lebanon Solar, but these leases appear to fall far short of what would be necessary to bind the individual lots together into a unity for zoning purposes. Hence, the township was bound to treat each lot individually, and apply the criteria of the ordinance to each lot individually.[3]

Following upon this reasoning, the Township's denial of the Application was proper, as each of the Application's individual participating lots failed to meet all criteria set forth in the Zoning Ordinance applicable to "Solar Farms".

Specifically, under the Zoning Ordinance's own definition of "lot", the Township determined that each of the

[3] Tellingly, there are 12 separate leases involved in this application. There are 12 separate leases because there are 12 separate lots.

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

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

CROSS APPEAL

A. The lower court erred in denying the Motion to Quash when Lebanon Solar failed to file a timely appeal to the decision of North Annville Township.

The trial court lacked jurisdiction over Lebanon Solar's Land Use Appeal because Lebanon Solar failed to comply with the requisite procedures of the Pennsylvania Municipalities Planning Code ("MPC").

The MPC provides that "[t]he procedures set forth in this article shall constitute the exclusive mode for securing review of any decision rendered pursuant to Article IX or deemed to have been made under this act." 53 P.S. § 11001-A. The Township's written decision denying Lebanon Solar's application for conditional use was issued timely pursuant to Article IX of the MPC. The MPC further provides:

> All appeals from all land use decisions rendered pursuant to Article IX shall be taken to the court of common pleas of the judicial district wherein the land is located and shall be filed within 30 days after entry of the decision as provided in 42 Pa.C.S. § 5572 (relating to time of entry of order) or, in the case of a deemed decision, within 30 days after the date upon which notice of said

> deemed decision is given as set forth in section 908(9)2 of this act. It is the express intent of the General Assembly that, except in cases in which an unconstitutional deprivation of due process would result from its application, the 30-day limitation in this section should be applied in all appeals from decisions.

53 P.S. § 11002-A.

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

The filing of an appeal prior to the Township's written decision, along with the failure to file a proper appeal within thirty (30) days after the actual written decision, should have resulted in the quashing of the appeal. *Snyder v. Zoning Hearing Board of Warminster Township*, 782 A.2d 1088 (Pa. Cmwlth. 2001). "Failure to strictly comply with procedural and time requirements will result in the quashing of a zoning appeal." *Ottaviano v. Society Hill Civic Association*, 457 A.2d 1041 (Pa. Cmwlth. 1983).

Here, Lebanon Solar failed to comply with the time for appeal established by the MPC. First, Lebanon Solar filed its Notice of Appeal of Land Use Decision on May 5, 2022 – seven days before the Township issued its Findings of Fact, Conclusions of Law and Decision on May 12, 2022. The Township's decision was duly served by email and overnight mail which receipt was acknowledged by Lebanon Solar's counsel. Lebanon Solar filed its Amended Notice of Land Use Appeal on June 17, 2022 which was outside the 30 day appeal period, and thus no Notice of Land Use Appeal was filed within the 30 day window required by the M.P.C.

Accordingly, because Lebanon Solar failed to comply with the Section 11002-A of the MPC, the lower court lacked jurisdiction over the instant matter.

B. The lower court erred in ruling that the definition of the term "lot" as set forth in the Ordinance allowed the 12 separately owned parcels to be considered jointly as one lot.

The trial court erred in its conclusion that the definition of the word "lot" defined the project as a whole and not individually owned parcels of property.

It is well settled that "a zoning hearing board's interpretation of its own zoning ordinance is entitled to great weight and deference." *Kohl v. New Sewickley Twp. Zoning Hearing Bd.*, 108 A.3d 961, 968 (Pa. Cmwlth. 2015). Nevertheless, because "[t]he letter of the ordinance is not to be disregarded under the pretext of pursuing its spirit," the Township was "required to apply the terms of the Zoning Ordinance as written rather than deviating from those terms based on an unexpressed policy." *Balady Farms, LLC v. Paradise Township Zoning Hearing Board*, 148 A.3d 496, 505 (Pa. Cmwlth. 2016).

Only where doubt exists surrounding *undefined terms* should any discrepancy be "resolved in favor of the landowner and least restrictive use of the land." *Bethlehem Manor Village, LLC v. Zoning Hearing Board of City of Bethlehem*, 251 A.3d 448, 465 (Pa. Cmwlth. 2021). On the

other hand, "[w]here a word or phrase in a zoning ordinance is defined, a court is bound by the definition." *Slice of Life, LLC v. Hamilton Township Zoning Hearing Board,* 207 A.3d 886, 899 (Pa. 2019).

The Township defined the term "lot" in the North Annville Township Zoning Ordinance at Section 201.4 which defines a lot as: "A legally defined tract, parcel or plot of land, whether occupied or capable of being occupied by buildings". N. Annville Tp. 2.0 Section 201.4.

The MPC defines a "lot" as "a designated parcel, tract or area of land established by a plat or otherwise as permitted by law and to be used, developed or built upon as a unit.**"** 53 P.S. § 10107. In another statute, "lot" is defined as "… a parcel of land used as a building site or intended to be used for building purposes, whether immediate or future, which would not be further subdivided …". 35 P.S. § 750.2.

These statutory definitions closely track the common definition of "lot" found in Black's Law Dictionary: "[a] (usu. rectangular) tract of land, esp. a tract that is a component of

a block in a municipal plat. A municipal plat typically divides a tract of land into rectangular blocks and divides the blocks into regular lots." LOT, Black's Law Dictionary (11th ed. 2019). Notably, This Honorable Court "will generally use a dictionary definition to determine the common use of a term*." Header v. Schuylkill Cnty. Zoning Hearing Bd.*, 841 A.2d 641, 645 (Pa. Cmwlth. 2004).

Each of these definitions emphasize the distinct nature of an individual lot, often as shown on a plat. Therefore, the Pennsylvania legislature and the commonly held definition of lot support the Township's interpretation of "lot" as a distinct parcel individually subject to zoning requirements. Moreover, these authorities refute Lebanon Solar's position that a conglomeration of lots constitute a "lot". A "lot" as defined by the aforementioned authorities is a unit subdivided from a larger parcel as defined by a plat and not capable of further division apart from the subdivision process then legally in effect.

The Township's determination that each of the Application's twelve participating lots are individually subject to the criteria of Section 522 of the Zoning Ordinance comports with the definition of "lot" within its Zoning Ordinance and also with the statutory and commonly held definitions of "lot".

Herein, the Zoning Ordinance echoes the above definitions by defining "lot" as "[a] legally defined tract, parcel, or plot of land, whether occupied or capable of being occupied by buildings." N. Annville Tp. 2.0 Section 201.4. Notably, the Zoning Ordinance's definition emphasizes the "legally defined" nature of a lot.

Despite Lebanon Solar's arguments to the contrary, these definitions cannot simply be abandoned to accommodate a "campus concept" wherein, for purposes of the Zoning Ordinance, each of the Application's participating lots are to be considered as a single "campus" rather than as twelve (12) individual and legally distinct parcels. Such an approach is explicitly prohibited by the law of statutory

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

A significant body of caselaw further supports the Township's position that the Zoning Ordinance must be applied to each individual lot, and not to a "campus" of lots. For example, This Honorable Court has held that "[i]t is well established that mere common ownership of … adjoining lots does not automatically establish a physical merger of those lots *for the purpose of determining whether those lots comply with the zoning requirements*." *Tinicum Township v. Jones*, 723 A.2d 1068, 1071 (Pa. Cmwlth. 1998) (emphasis added); see also *Daley v. Zoning Hearing Board*, 770 A.2d 815, 819 (Pa. Cmwlth. 2001) (finding that "[m]ere common

ownership of adjoining lots does not automatically establish a physical merger of those lots for purposes of zoning.").

Only in instances where adjacent *non-conforming* lots are brought into common ownership will a Court deem, under specific circumstances which are not instantly present, that the lots may be merged pursuant to the "doctrine of merger" *Springfield Township v. Halderman*, 840 A.2d 528, 530 (Pa. Cmwlth. 2004).

More recently, This Honorable Court determined that "lots" were not a single parcel when there were no buildings or improvements that were shared and when the properties had separate tax identification numbers. *Riccio v. Newtown Township Zoning Hearing Board*, 308 A.3d 928 (Pa. Cmwlth. 2024). Further, "substantial objective evidence was presented … to establish that the Property was maintained as a separate lot." *Id.* at 941.

This Honorable Court has consistently held that common ownership of numerous adjoining lots does not result in a merger for purposes of zoning. *Daley* 770 A.2d at 819;

Tinicum Township, 723 A.2d at 1071. In *Springfield Township*, the Court held that two tracts of land which were "historically and continually … considered separate" did not merge even after they were conveyed to a common owner by a single deed. 840 A.2d at 530. Instead, the Court determined that the single deed only had the effect of "re-deed[ing] the two tracts" as separate and distinct tracts. *Id*.[4]

Despite Lebanon Solar's leasehold interest in the lots in question and the Application's proposed conglomeration of the lots as an entire project, the twelve (12) participating lots remain distinct and individually subject to the criteria of Section 522 of the Zoning Ordinance.[5] Because the lots fail to meet these criteria, the lower court erred in holding that there was one lot for purposes of the conditional use application. The lower court's decision must be overturned.

[4] As further authority, see the earlier discussion of Society Civic Hill Assoc., Supra.

[5] Lebanon Solar has no authority to take 12 separately defined lots and treat them as one lot for purposes of zoning. No such authority can be found in the M.P.C., the zoning ordinance or the case law. Nowhere does Lebanon Solar ever demonstrate such authority.

C. The lower court erred in its holding that each of the 12 lots were not required individually to meet the specifications of conditional use.

The Zoning Ordinance's definition of "lot" unambiguously expresses that the criteria of Section 522 must apply to each of the twelve participating lots of the Application individually and explicitly precludes the concept of a collective of lots.

As noted supra, the term "lot" is expressly defined in the Zoning Ordinance as "[a] legally defined tract, parcel, or plot of land, whether occupied or capable of being occupied by buildings." N. Annville Tp. 2.0 Section 201.4.

Despite Lebanon Solar's arguments in favor of analyzing the Application and its entire project rather than individual lots, abundant caselaw demonstrates that the Township was not at liberty to reinterpret the word "lot" and "impose their concept of what the zoning ordinance should be." *Greth Development Group, Inc. v. Zoning Hearing Board of Lower*

Heidelberg Township, 918 A.2d 181, 187 (Pa. Cmwlth. 2007).

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

Based on this method of application, Lebanon Solar failed to comply with the conditional use criteria explicitly

provided in the Zoning Ordinance. Specifically, the Application includes twelve (12) "lots", each of which must individually satisfy all eight (8) Section 522 criteria. The Township found that Lebanon Solar's Application failed to meet these criteria in the following ways:

> 16. The lot of Leonard Long and Michael Long located at 1749 Blacks Bridge Road contains 30.48 acres; and therefore, fails to meet criterion number of the Ordinance which requires a minimum lot size of 50 acres. Therefore, this lot may not be approved for conditional use under criterion number 2.
>
> 17. The property of Dale and Thelma Hostetter located at 1595 North State Route 934 contains 49.78 acres; and therefore, fails to meet criterion number 2 and cannot contain a solar farm as applied for by the applicant.
>
> 18. Applicant has failed to demonstrate that applicant can comply with criterion number 3 of the Ordinance which requires a 50-foot set back from adjacent lot lines. The Board would note that the 50foot set back is not provided between 1749 Blacks Bridge Road and 445 Hostetter Lane. Moreover, the 50-foot set back is not complied with between 1595 North State Route 934 and 5501 Valley Glen Road. Failure to provide a 50-foot set back between these properties is a violation and failure to comply with criterion

number 3. Applicant has failed to meet its burden regarding compliance with criterion number 3.

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

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

21. The Board finds that regarding criterion number 4 of the Ordinance, applicant has failed to meet its burden that it will provide a suitable vegetative buffer or a fence which accomplishes the same thing between all of the lots which are parts of the applicant's application for the same reasons as stated in 17-19. Additionally, the Applicant fails to provide a suitable vegetative buffer or a fence which accomplishes the same purpose of buffering around the entire exterior perimeter of the project area, except where Applicant proposes to voluntarily install vegetative screening in various areas to screen residential viewsheds.

22.Regarding criterion number 5, the Board finds that the Applicants have failed to comply with the lot coverage requirement because they have failed to present sufficient evidence upon which the Board can determine whether or not the applicant complies with the requirement of maximum lot coverage which shall not exceed 50% of the total lot size on each of the lots included within the applicant's application.

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

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

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

26. The Board finds that applicant has failed to comply with criterion number 8 of the Ordinance which requires the submission of evidence of an approved Stormwater Management Plan as required by the Lebanon County Stormwater Management Ordinance. A promise of future

compliance does not constitute evidence of compliance with criterion number 8.

Because the Township's foregoing conclusions appropriately apply the Zoning Ordinance's definition of "lot", the Township's decision to deny the Application should be upheld. The lower court erred in holding otherwise. The lower court's decision must be overturned.

D. The lower court erred in its holding that Lebanon Solar's proposal complied with the requirements of buffering that were required by the Ordinance when the proposal provided for buffering of the exterior of the project and not each of the 12 lots.

The trial court erred in holding that Lebanon Solar had sufficient plans that the project boundaries would be buffered by vegetation or fencing to satisfy the ordinance.

Section 522(4) provides that "[a] permanent evergreen vegetative buffer must be provided or fencing which accomplishes the same purpose of buffering." N. Annville Tp. 5.0 Section 522 (4). The Commonwealth Court has held that "[a]n ordinance, like a statute, must be construed, if

possible, to give effect to all of its provisions." *Mann v. Lower Makefield Township*, 160 Pa. Cmwlth. 208, 215, 634 A.2d 768, 771–72 (1993). Therefore, "[i]nterpretation of an ordinance which produces an absurd result is contrary to the rules of statutory construction." *Id*. at 773. Finally, "[w]hen statutory language is not explicit, courts should give great weight and deference to the interpretation of a statutory or regulatory provision by the administrative or adjudicatory body that is charged with the duty to execute and apply the provision at issue." *In re Thompson*, 896 A.2d 659, 669 (Pa. Cmwlth. 2006). "A given phrase must be interpreted in context and read together with the entire ordinance." *H.E. Rohrer, Inc. v. Zoning Hearing Board of Jackson Township*, 808 A.2d 1014, 1017 (Pa. Cmwlth. 2014).

Here again, pursuant to the MPC, the Township was obligated to form its conclusion in accordance with the established criteria of the Zoning Ordinance. *See* 53 P.S. § 10912.1. Moreover, the Township's conclusions as to the

interpretation of the Zoning Ordinance must be afforded great weight and deference.

Section 522(4) of the Zoning Ordinance states "[a] permanent evergreen vegetative buffer must be provided or fencing which accomplishes the same purpose of buffering." N. Annville Tp. 5.0 Section 522 (4).

Here again, the lower court erred in finding that Lebanon Solar had provided a sufficient plan at this stage. The plan allowed for the buffering of the entirety of the project using the same problematic definition of "lot" as discussed supra. While it is true that the word "lot" does not explicitly appear in Section 522 (4), this does not mean that the buffer requirement is not applicable to each individual participating lot. Lebanon Solar also 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 Application.

The zoning criteria addressing setback requirements, lot coverage, and minimum size are each explicitly and

unambiguously applicable to individual lots. Read in this context, it is evident that the buffering requirement is also applicable to individual lots, and not to a "campus" of lots. A contrary interpretation would lead to an impermissibly incoherent result. *Mann,* 634 A.2d 771–72. For these reasons, the lower court erred in finding that Lebanon Solar provided sufficient information regarding the buffering requirement of the Zoning Ordinance.

E. The lower court erred in its holding that North Annville Township was estopped or otherwise prevented from considering all 12 of the lots included within the Appellant's application to the Supervisors for conditional use as being separate lots and not treated as one lot.

The trial court disagreed with the Township's acceptance of one application for all twelve (12) lots. This was error.

"[A] municipality has a legal obligation to proceed in good faith in reviewing and processing development plans." *Kassouf v. Township of Scott*, 883 A.2d 463 (Pa. 2005)

citing *Raum v. Board of Supervisors of Tredyffrin Township,* 370 A.2d 777 (Pa. Cmwlth. 1977). "[A]fter application acceptance, 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 587 (Pa. Cmwlth. 2008). The "acceptance of a conditional use application does not constitute a determination that it complies with the technical requirements of the ordinance." *Brookview Solar*, 305 A.3d at 1237.

"Where the governing body, in the zoning ordinances, has stated conditional uses to be granted or denied by the governing body pursuant to express standards and criteria, the governing body shall hold hearings on and decide requests for such conditional uses in accordance with such standards and criteria." 53 P.S. 10913.2(a).

In the within matter, the Township received the application from Lebanon Solar and followed the applicable procedures to ensure the matter received the proper

hearings. The matter at issue – whether Lebanon Solar complied with the application requirements and satisfied the requirements of a conditional use – was properly decided by the Township. It would have been error to reject the application without full review.

VII. CONCLUSION

For the foregoing reasons, North Annville Township requests that the rulings of the lower court be affirmed in the appeal of Lebanon Solar but overturned in the appeal of North Annville Township.

Respectfully Submitted,

By: /s/Paul Bametzreider

Date: 9/24/24

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CERTIFICATE OF COMPLIANCE WITH RULE 2135

I certify that this filing complies with the Pa.R.A.P. 2135(a)(2). This brief contains less than 16,500 words.

/s/Paul Bametzreider

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CERTIFICATE OF COMPLIANCE

It is certified this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that requires filing confidential information and documents differently than non-confidential information and documents.

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