

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.

**DESIGNATED APPELLANT'S RESPONSE TO CROSS-APPEAL AND
REPLY BRIEF IN SUPPORT OF APPEAL**

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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I. SUMMARY OF RESPONSE ARGUMENT

Lebanon Solar I, LLC (“Lebanon Solar”) files this Response to Cross-Appeal and Reply Brief in Support of its Appeal in accordance with Pennsylvania Rules of Civil Procedure 2112, 2113, and 2136 to address critical misstatements raised by both the Briefs of Designated Appellee North Annville Township Board of Supervisors (the “Township”) and Grady Summers (the “Intervenor”).

Preliminarily, both the Township and Intervenor raise arguments and issues in their respective principal briefs that the parties failed to raise in either their respective Notices of Appeal and/or Statement of Errors filed submitted during the pendency of this appeal. Thus, at the outset, any argument set forth in either of Designated Appellees’ principal briefs that are not set forth in their preliminary appeal documents shall be disregarded by this Court.

Second, as litigated at length before the Lebanon County Court of Common Pleas (the “Lower Court”), and as supported by both statutory and case law, Lebanon Solar timely filed both its May 5, 2022, Notice of Appeal and June 17, 2022, Amended Notice of Land Use Appeal. Designated Appellees’ repeated (and failed) attempts to disqualify Lebanon Solar from the judicial process are fruitlessly arduous and any arguments relative to the timeliness of 2022 filings should be summarily dismissed at this juncture.

Finally, the Lower Court aptly analyzed at length why and how the Township erred in its determination that each of the individual tax parcels comprising Lebanon Solar’s solar energy generation project (“Project”) were required to individually meet each of the requirements of Section 522 of Township Zoning Ordinance (“Ordinance”). Given the well-developed case law as to this issue, and the Lower Court’s careful review of the same, this Court should uphold the Lower Court’s ruling to the extent that it sets forth that nothing in the Ordinance, or any other law, required that each of the 12 tax parcels which comprised the Project individually meet all ordinance criteria and that the Project, when properly viewed as a cohesive single use met the setback, buffering, and lot coverage requirements of the Ordinance.

II. RESPONSE ARGUMENT AS TO DESIGNATED APPELLEES

a. North Annville Township is Prohibited from Raising Any Issue Relative to the Lebanon County Court of Common Pleas February 13, 2023, Order Denying its Motion to Quash as It Did Not Reference the February 13, 2023, Order in its Notice of Appeal.

An appellant’s failure to appeal from a particular order renders any attack of that order waived when a Notice of Appeal only references a particular order. *Jordan v. Pennsylvania State University*, 276 A.3d 751 (Pa. Super. 2022) (Appellant’s failure to appeal from trial court’s order denying a petition for relief from judgment of non pros rendered any attack of that order waived when appellant’s notice of appeal made no mention of judgments of non pros or the trial court’s order

denying petition for reconsideration even when the Appellant’s brief contended he was seeking “reversal of all the lower court’s opinions and orders and judgments.”). Moreover, the practice of filing one appeal from multiple orders is strongly disapproved and the Commonwealth Court will quash single appeals from multiple orders unless otherwise dictated by compelling circumstances. *M.R. Mikkilineni v. Amwest Surety Ins. Co.*, 919 A.2d 306 (Cmwlth. 2007).

In its Notice of Cross -Appeal, the Township specifically notes that it is appealing from the “Order entered in this matter date January 26, 2024.” *See*, Township Notice of Cross-Appeal, at 1. The one-paragraph Notice of Cross-Appeal submitted by the Township makes no reference to any other order of court. Thus, in accordance with the applicable case law, the Township has waived any argument relative to the February 13, 2023, Order denying the Township’s Motion to Quash. Accordingly, the Township’s preliminary argument in its principal brief should be disregarded in its entirety by this Court.

- b. Grady Summers is Prohibited from Raising Any Issue Relative to the Lebanon County Court of Common Pleas’ January 26, 2024, Order Because He Did Not Raise that Issue in Either His Notice of Appeal or His Concise Statement of Matters Complained of on Appeal.**

Similarly, Intervenor not only did not reference the Lower Court’s January 26, 2024, Order in his Notice of Appeal, but he also failed to make any mention of the same in his Statement of Errors submitted before the Lower Court in this case.

See, Intervenor’s Notice of Appeal at 1; Intervenor’s Concise Statement of Errors. Like with the failure to cite to a particular Order of Court in a Notice of Appeal, the failure to raise an issue in a Statement of Errors deems that issue waived. *U.S. Bank, N.A. for Certificateholders of LXS 2007-7n Trust Fund v. Hua*, 193 A.3d 994 (Pa. Super. 2018); *see also*, *Kull v. Guisse*, 81 A.3d 148 (Cmwlth. 2013) (Issues not included in an appellant’s Statement of Errors are waived and will not be addressed on appeal.); *Eiser v. Brown & Williamson Tobacco Corp.*, 938 A.2d 417 *Pa. Super. 2007) (In order to preserve claims for appellate review, parties must comply whenever the trial court orders them to file a statement of matters complained of on appeal pursuant to rule of appellate procedure; waiver for non-compliance with rule is automatic).

Because Intervenor made no reference to the Lower Court’s January 26, 2024, Order in either his Notice of Appeal or his Concise Statement of Errors, any argument set forth in his principal brief regarding the Lower Court’s ultimate findings are waived. Indeed, the only issue appropriately considered relative to Intervenor is whether the Lower Court erred when it denied the Township’s Motion to Quash in February 2023 (Lebanon Solar contends did not).

- c. **The Lebanon County Court of Common Pleas Ruled Appropriately When it Denied the September 20, 2022, Motion to Quash Filed By North Annville Township.**

Section 1002-A of the Pennsylvania Municipalities Planning Code (the “MPC”), which governs the jurisdiction of the Lower Court to hear appeals of land use decisions states:

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 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) of this act. It is the express intent of the General Assembly that, **except in cases which an unconstitutional deprivation of due process would result from its application**, the 30-day limitation of this section should be applied in all appeals from decisions.

53 P.S. §101002-A(a) (emphasis added). Much ado has been made by courts over the years as to what “entry of the decision” means for purposes of land use appeal. This Court has stated that the state of the law regarding the time within which to appeal a land use decision is “uncertain.” *Peterson v. Amity Twp. Bd. of Supervisors*, 804 A.2d 723, 729 (Pa. Cmwlth. 2002). However, it is clear here that the Township made a decision on Lebanon Solar’s application on April 5, 2022, and that the May 5, 2022, Notice of Appeal was therefore timely. As the Township states in its brief, filed in this matter on September 25, 2024.

“[a]fter 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...”

Brief of North Annville Township, at 10 (emphasis added).

Decisions contemplating whether land use appeals were filed too late are plentiful, however, very few consider whether an appeal could be quashed as premature, and those that do exist are confusing and contradictory. In *Snyder v. Zoning Hearing Board*, 782 A.2d 1088 (Pa. Cmwlth. 2001), this Court found that an appeal filed by objectors to a land use approval, which was filed within 30 days of the vote of the board was premature under Section 1002-A and must be quashed. 782 A.2d at 1089. Then, just a year later, in *Peterson v. Amity Twp. Bd. of Supervisors*, 804 A.2d 723 (Pa. Cmwlth. 2002), this Court held that under Section 1002-A, “the formal vote of the municipality to approve a subdivision plan begins the thirty-day period [under Section 1002-A] within which an aggrieved objector must appeal, at least to the extent the objector has actual or constructive notice of the decision.” 804 A.2d at 727.¹ Another several years later, this Court again considered the issue of prematurity of an appeal in *EDF Renewable Energy v. Foster Township Zoning Hearing Board*, 150 A.3d 538 (Pa. Cmwlth. 2016). In *EDF Renewable Energy*, this Court found that the lower court properly denied a motion to quash where the initial notice was filed prior to receipt of the written findings, but said notice reserved the right to supplement the appeal upon receipt of the findings,

¹ While the holding in *Peterson* has been questioned by the Supreme Court in *Narberth Borough v. Lower Merion Twp.*, 915 A.2d 626 (Pa. 2007), that decision did not directly overrule *Peterson* and did not involve the issue of a premature appeal. In fact, the Court in *Narberth Borough* noted the confusion and potential defects in the MPC, praised the Commonwealth Court for its attempts to reconcile the unclear law with the facts at hand.

and ultimately a second notice of appeal was filed. 150 A.3d at 545. This Court went on to note that the second notice of appeal filed in that case “cured any jurisdictional defect.” *Id.*

Finally, even in cases where notices of appeal are untimely filed (which is directly refuted by Lebanon Solar in this case), the MPC clearly carves out an exception “in cases in which an unconstitutional deprivation of due process would result from its application.” 53 P.S. §101002-A(a). As articulated by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), “[t]he fundamental requirements of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” 424 U.S. at 333.

With regard to the case at bar, the Motion to Quash filed before the Lower Court required the Court to consider three inter-related questions, each of which had to be addressed separately: (1) was the initial Notice of Appeal filed within thirty days of the public vote in which the Township decided to deny the Application premature or cured by the filing of the Amended Notice of Land Use Appeal; (2) if so, was the Amended Notice of Appeal required to be filed within thirty days of the Findings and Conclusions; and (3) if it was, would there be a deprivation of due process if the strict reading of Section 1002-A was applied in the case.

Based upon the record as it existed at the time the Motion to Quash was filed, logic, and the plain meaning of the MPC establish that because the Township had

finalized a decision with significant clarity at the time of its April 5, 2022, public vote, an appeal within 30 days thereof was proper. Moreover, even if there were some jurisdictional defects relative to the timing of the Motion to Quash being filed, any such defect was cured by the subsequent filing of the Amended Notice of Land Use Appeal. Indeed, there is no applicable time limit placed upon the filing of an amended appeal which would render a filing 35 days after distribution of the Township's Findings of Fact and Conclusions of Law improper.

Finally, even if the Amended Notice of Land Use Appeal had to have been filed within 30 days of the issuance of the Findings of Fact and Conclusions of Law, the Court was within its authority to allow the appeal to continue if disallowing the same would result in a deprivation of due process. *See*, 53 P.S. §101002-A(a). Since the outset of this case, Lebanon Solar has fought to obtain an opportunity to be heard at a meaningful time and in a meaningful manner relative to its proposed solar project. The record before the Lower Court demonstrated that the Township repeatedly and routinely ignored its obligations as a quasi-judicial body and the Lower Court, in its denial of the Township's Motion to Quash, held:

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

See, February 13, 2023, Order. The Lower Court went on to hold that “nothing in the MPC equates a final decision with a written one” and that “the decisional precedent cited by the parties is murky enough that we cannot justify throwing out a party’s substantive rights based upon it.” *Id.*

Based on the foregoing, it is clear that the issue of timeliness of Lebanon Solar’s appeal of the Township’s decision has been litigated *ad nauseum*. The Lower Court thoroughly examined the facts and the law and ultimately agreed with Lebanon Solar’s position that it timely filed an appeal. Thus, it is appropriate now that this Court uphold that decision and focus its energies on deciding the underlying merits of these consolidated appeals. Further, in answering the Motion to Quash, Lebanon Solar concurrently filed a Petition to Appeal *Nunc Pro Tunc*, before the Lower Court to be considered in the alternative should the Lower Court have found any merit in the Motion. The Court found no need to address the Petition, and should this Court find any merit in Appellees’ arguments related to the Motion, it must, at a minimum, remand to the Lower Court for consideration of Lebanon Solar’s Petition to Appeal *Nunc Pro Tunc*.

d. The Township Erred by Requiring Every One of The 12 Parcels That Comprise Lebanon Solar I, LLC’s Project to Individually Comply with Section 522 of the Zoning Ordinance.

In their principal briefs, although only proper for Designated Appellee Township to do so, both Designated Appellees argue that the Lower Court erred in

numerous ways when it considered whether anything in the Zoning Ordinance permitted the Township require each of the 12 tax parcels to individually meet every subsection of Section 522 of the Township Zoning Ordinance. First, this issue is one of ordinance interpretation, a question of law for which this Court's standard of review of review is de novo and its scope of review is plenary. *Weiler v. Stroud Township Zoning Hearing Board*, 300 A.3d 1121, 1126 (Pa. Cmwlth. 2023). All arguments raised by Designated Appellees are untenable and ask this Court to misconstrue the plain terms of the Zoning Ordinance, misapply irrelevant case law, and disregard the reality of the Township's own actions.

First, the Township intentionally misrepresents the interpretation issue before the Court. The Township argues that Lebanon Solar alleged that the definition of "lot" under the Zoning Ordinance was sufficiently ambiguous to allow multiple tax parcels to be considered a single "lot" under the Ordinance. This is not the issue raised by Lebanon Solar before the Township, the Lower Court, or this Court. The issue raised by Lebanon Solar is whether or not anything in the Ordinance prohibited the use of more than one tax parcel for a single "solar farm" and whether anything in the Ordinance required that each of those tax parcels individually meet all criteria contained in Section 522 of the Zoning Ordinance. *See e.g.* Lower Court Brief of Lebanon Solar, at 15-25. While the definition of "lot" is relevant to this analysis, it is not the end of the analysis.

An ordinance must be “construed, if possible, to give effect to all its provisions” so that no provision is mere surplusage. 1 Pa. C.S. § 1921(a); accord *Commonwealth v. Ostrosky*, 909 A.2d 1224, 1232 (Pa. 2006). “When 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 Pa. C.S. § 1921(b). As the Lower Court properly concluded, while the Township may wish the Ordinance as written at the time of the Application required each parcel to comply individually with all provisions of Section 522, it simply does not.

Neither the Lower Court, nor counsel for Lebanon Solar, was able to find any case law or statutory law that prohibits an applicant to aggregate parcels or submit an application for a project proposed to span multiple parcels with one application. Further, none of the case law identified by the Township is relevant to this issue.

The Township cites to a series of cases regarding the “Merger Doctrine.” The Township’s reliance on those cases, however, is misguided as the Merger Doctrine is irrelevant to this issue and was never raised by Lebanon Solar. The Township points to a variety of cases related to the doctrine of merger where a nonconforming lot may be merged with another lot in common ownership automatically. *See e.g., Tinicum Township v. Jones*, 723 A.2d 1068 (Pa. Cmwlth. 1998); *Daley v. Zoning Hearing Board*, 770 A.2d 815 (Pa. Cmwlth. 2001); *Springfield Township v. Halderman*, 840 A.2d 528 (Pa. Cmwlth. 2004). This doctrine is completely

irrelevant to this case and the Township’s reliance on the same is misguided at best. Township also points to this Court’s recent decision in *Riccio v. Newtown Township Zoning Hearing Board*, 308 A.3d 928 (Pa. Cmwlth. 2024), which is in no way analogous, to support its arguments. In *Riccio*, the relevant issue was whether or not the zoning hearing board erred in concluding a parcel was a distinct and separate lot and had not been merged due to common ownership. *See id.* at 940-41. At no time has Lebanon Solar argued that any of the tax parcels were merged into a single zoning lot (they are not held in common ownership) – it is simply arguing that the Ordinance does not require that a Solar Farm be on one lot, and that Section 522 requires that those conditions be met for the entire Solar Farm, not for each individual tax parcel that makes up the same.

The Board alleges that the “Zoning Ordinance’s definition of ‘lot’ unambiguously expresses that the criteria of Section 522 must apply to each of the twelve participating lots of the Application individually and explicitly precludes the concept of a collective ‘campus of lots.’” *See* Township Brief at 49-54. It points to the definition of “lot,” (undisputedly a “legally defined tract, parcel or plot of land, whether occupied or capable of being occupied by buildings”) but does not point to any portion of the ordinance that insinuates, let alone “unambiguously expresses” that “the criteria of Section 522 must apply to each of the twelve participating lots of the Application individually” or that it “explicitly precludes” the “concept of a

collective ‘campus of lots.’” *See id.* To the contrary, Section 522 applies to a “Solar Farm,” not “each lot in a Solar Farm” and the Board has pointed to nothing that indicates that a “Solar Farm” cannot be situated on more than one zoning lot or tax parcel. In fact, by Ordinance No. 1-2021, the Board amended its Zoning Ordinance to contain the requirements it alleges were already expressly contained in the Zoning Ordinance in effect for this Application. For example, Section 522(2) of the Zoning Ordinance is now Section 522(b) and reads “The minimum lot size for the establishment of any Solar Farm shall be fifty (50) acres and all fifty acres must be located on one lot and the lot must be entirely in the township Agricultural zoning district.” (emphasis added).²

Furthermore, the absurdity of the Township’s proposed interpretation of the Zoning Ordinance is belied by its own actions. The Township accepted a single application for a single “Solar Farm” which spanned multiple tax parcels, and at no time prior to the public hearings indicated that each parcel must be judged separately. Further, if it were the case that each parcel was required to meet each of the criteria in Section 522 individually, then should the Township not have issued twelve (12) decisions addressing each parcel individually? The Township admits, for example, that ten (10) of the twelve (12) parcels are over fifty (50) acres and therefore would

² Even where not technically made part of the record, 42 Pa.C.S. §6107(a) requires that ordinances “*shall* be judicially noticed.”

meet Section 522(2) if judged individually. If each parcel is to be judged individually, is the Township not in error for denying the Application for failure to comply with Section 522 (2) for those ten (10) parcels?

Accordingly, the interpretation of the Ordinance set forth by the Township is unsupported by the plain text of the same as well as by the record, and rules of ordinance construction necessitate that this Court interpret the same in favor of Lebanon Solar as the applicant.

III. SUMMARY OF REPLY ARGUMENT

In each of their respective principal briefs, both Designated Appellees attempt to characterize the argument of Lebanon Solar as to the Lower Court's application of the *Brookview Solar* case in such a way that suggests Lebanon Solar does not believe the Lower Court to have the authority to consider precedent in issuing decisions before it. Such a characterization is not only misguided, but an affront to the undersigned. Lebanon Solar of course recognizes the authority of the Lower Court to research and rely upon case law not specifically relied upon by parties before it on a case. Rather, as it is apparent that Designated Appellees did not comprehend the argument, Lebanon Solar is of the position that reliance on *Brookview Solar* is improper in this case because the underlying facts are readily distinguishable, and the Court raised an issue sua sponte, that Lebanon Solar was not given the opportunity to argue.

IV. REPLY ARGUMENT AS TO DESIGNATED APPELLEES

The facts in *Brookview Solar* are wholly distinguishable from the facts of this case. In *Brookview Solar*, the municipality in question was responsible for administration of its own stormwater ordinance, and its solar ordinance required the submission of a site plan that demonstrated compliance with its stormwater ordinance. See generally, *Brookview Solar I. LLC v. Mount Joy Township Board of Supervisors*, 305 A.3d 1222 (Pa. Cmwlth. 2023). Said facts differ from the facts here significantly.

First, the Township does not administer its own stormwater management, but rather Lebanon County does so. Second, the municipality in the *Brookview Solar* case simply required a plan demonstrating compliance with stormwater management, it did not require plan approval. The distinguishable realities between *Brookview Solar* and the case at bar render *Brookview Solar* utterly inapplicable. Thus, the application of *Brookview Solar* gave rise to a distinct issue in this case (i.e., the applicability of the case itself), and Lebanon Solar was entitled (as were Designated Appellees) to argue that issue prior to the Lower Court's reliance thereon. Thus, the Lower Court committed reversible error when it, *sua sponte*, relied on *Brookview Solar*, which does not support affirmation of the Township's decision.

V. CONCLUSION

Both of the Designated Appellees included arguments in their respective briefs that are waived as a matter of law – Intervenor’s argument as to the merits of the Lower Court’s decision, and the Township’s argument as to timeliness of Lebanon Solar’s 2022 appeal of the Township’s decision. Said arguments should be summarily dismissed without consideration. Moreover, the extent any arguments are properly raised and/or were not waived, both the timeliness of Lebanon Solar’s appeal of the Township decision and the definition of what constitutes a lot have already been thoroughly litigated and properly decided by the Lower Court. There exists no basis for the reversal of such holdings now. Finally, the Lower Court’s reliance on *Brookview Solar* was not only improper because the case is distinguishable from the case at bar, but because the Lower Court, vis-à-vis its reliance on that case, raised a distinct issue that the parties were not given an opportunity to argue prior to the issuance of the January 26, 2024, Order and Opinion.

For those reasons, and for all the reasons set forth in both Lebanon Solar’s principal brief and herein, this Court should reverse the decision of the Township.

Respectfully submitted,

Date: October 25, 2024

By: /s/ Elizabeth A. Dupuis, Esq.

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CERTIFICATE OF COMPLIANCE

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

Elizabeth A. Dupuis

PROOF OF SERVICE

I hereby certify that, on this 25th day of October, 2024, I am causing to be serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

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