

THE ZONING HEARING BOARD OF DOVER TOWNSHIP
YORK COUNTY, PENNSYLVANIA

IN RE: :
: :
APPLICATION OF : Application No. ZHB-23-1
: :
SOLAR RENEWABLE ENERGY, LLC :

DECISION

NATURE OF APPLICATION

This is an application by Solar Renewable Energy, LLC (hereinafter the “Applicant”) for a special exception to establish a Principal Solar Energy System on property at 5370 Harmony Grove Road in the Agricultural Zoning District. Two variances, which were requested with the initial application, were withdrawn prior to commencement of the hearing.

HEARING

A hearing was held by this Township Zoning Hearing Board (hereinafter referred to as “the Board”), with Chairwoman Ginter, Vice-Chairman Wright, and member Reynolds, and Alternate Member Myers present, on Wednesday, February 15, 2023, beginning at 7:00 p.m., in the Hearing Room of the Dover Township Community Building at 3700 Davidsburg Road.

The Zoning Officer, John McLucas, was present. The Zoning Board Solicitor, D. Michael Craley, was present. The Applicant, Solar Renewable Energy, LLC, was present, represented by Claudia Shank, Esquire of McNees, Wallace & Nurick. Also present were other adjoining property owners and interested persons as set forth in the record. At 9:45 p.m., the hearing was continued until March 15, 2023, with Chairwoman Ginter, and

members Pope, Reynolds, and Alternate Member Myers present. The Zoning Officer, John McLucas, was present. The Zoning Board Solicitor, D. Michael Craley, was present. The Applicant, Solar Renewable Energy, LLC, was present, represented by Claudia Shenk, Esquire of McNees, Wallace & Nurick. Also present were other adjoining property owners and interested persons as set forth in the record. At 8:57 p.m., testimony was concluded and the hearing was continued until April 19, 2023, with Chairwoman Ginter, and members Wright, Pope (via speakerphone), Reynolds, and Alternate Member Myers present. The Zoning Officer, John McLucas, was present. The Zoning Board Solicitor, D. Michael Craley, was present. The Applicant, Solar Renewable Energy, LLC, was present, represented by Claudia Shenk, Esquire of McNees, Wallace & Nurick. Also present were other adjoining property owners and interested persons as set forth in the record.

There was opposition to the application by individual citizens who testified against the proposal. All proceedings were recorded by Rinehart Reporting Service.

NOTICE

Notice of the hearing was provided in accordance with the Municipalities Planning Code and the Dover Township Zoning Ordinance requirements for each night of the hearing.

PLANNING COMMISSION RECOMMENDATIONS

The application was considered by the Township Planning Commission at their February 1, 2023 meeting. Recommendation was made to approve the requested special exception.

FINDINGS OF FACT

1. The property involved in this application is owned by Kenneth W. Krug, III, and located at 5370 Harmony Grove Road and contains approximately 27.20 acres.

2. Mr. Krug has entered into an Agreement of Sale to sell the property to Solar Renewable Energy, LLC, as shown in Exhibit A-4 of Applicant's application.

3. Solar Renewable Energy, LLC is a limited liability company, with offices at 4550 Lena Drive, Mechanicsburg, PA 17055.

4. The proposed project site is located in the Agricultural (A) District of Dover Township.

5. The Board granted party status to all of the individual parties who testified at the March 15, 2023 hearing.

6. Objection was made by Applicant's counsel to the grant of party status to any party not an immediately adjoining property owner.

7. The Applicant proposes to operate a Principal Solar Energy System (hereafter referred to as "PSES").

8. The Applicant provided testimony that no more than two (2) principal uses will be used on any of the parcels that encompass this project, one of which will be the PSES, and the other will be the continued use of the existing single-family detached dwelling on the property.

9. The Applicant testified that the parcel in question is currently in agricultural use.

10. The Applicant testified that the PSES will be located on approximately 27.20 acres of contiguous land. The property is bisected by Harmony Grove Road.

11. The proposed PSES would generate approximately 5.5 to 5.7 MegaWatts of electrical power.

12. The proposed PSES would include approximately 10,526 solar panels, arranged in arrays, underground electrical lines, inverters, battery storage, as well as appurtenances for the operation of the PSES. There will be two transformers located as shown in Exhibit. A-6 (Revised Site Plan).

13. The proposed PSES will generate enough electricity to power approximately 700 homes.

14. Applicant's expert Steven R. Crimmel, sales director, provided testimony that:

a. there are no fences as of the date of the hearings, however, all fences will be a minimum of twenty-five (25') feet from all property or public street/ road right of way lines.

b. all panels/equipment will be thirty-five (35') feet from any adjoining property and fifty (50') feet from public street/road right of way lines.

c. there will be a minimum distance of seventy-five (75') feet from adjoining non-participating residential structures and any component of the PSES including fences, buildings, panels, and other equipment.

15. All arrays are monitored remotely 24/7 every 15 minutes.

16. The property will be visited for inspection a minimum of one time per year.

17. The Applicant submitted proof of maximum area to be utilized for this project through Applicant's Exhibit A-6 (Revised Site Plan) which also shows the seventy-five (75') feet distance from property lines with adjacent non-participating residential structures.

18. Applicant, through its expert Benjamin Kirk, engineer for the project, testified that:

a. expectation of two to three months of construction to get the project underway.

b. the maximum height of the panels and racking system or any other portion of the PSES (other than transmission lines, infrastructure connecting the PSES to the electrical grid, or the substation) when installed will not exceed ten (10') feet.

c. there will be no substation.

d. the only areas that will be impervious coverage (in line with the zoning ordinance) will be the pads, the roads through the system, the foundations, and few other items as the panels and the area underneath are pervious per § 27-665(a)(2)(E)(1).

e. the Applicant will maintain the grassy and vegetative areas and proposes to plant “low grow-low mow” grass. In addition, the Applicant is not proposing to disturb any of the existing woodland.

f. as shown on Exhibit A-6, the impervious coverage will be approximately 0.281 acres, which is substantially less than twenty-five (25%) percent, and in compliance with the zoning ordinance including all items mentioned in § 27-665(a)(2)(E)(2).

g. the Applicant will comply with all screening requirements of the Township Zoning Ordinance and will set it forth in detail in the Land Development phase of the proceedings. Type 3 screening is proposed.

h. the screening will reach the required opacity from adjoining properties within five (5) years of planting.

i. the Applicant will maintain all natural screening that is currently present and what is added to meet all requirements.

j. all current existing wetlands will be maintained.

k. all access roads and driveways from Harmony Grove Road (which is state highway) to the fence of the site will be twenty-five (25') feet wide.

l. all maintenance roads will allow ten (10') feet between the fence and inside the project area as set forth in Exhibit A-6.

m. the maintenance roads will be kept as a grassy condition rather than gravel or paving.

n. the local fire companies will be able to access the site and the Applicant will work with the local volunteer fire companies to be prepared in case of emergency. The project will have electrical shut-off main switches for access by the fire company for any incidents.

o. an eight (8') foot fence will surround the site with gates that will be locked.

p. the fencing will be chain link.

q. appropriate signage with warnings, voltage, names, etc. will be displayed where necessary to comply with the requirements of the ordinance.

r. the Applicant will work with the Township, local fire companies and the York County Office of Emergency Management to comply with the ordinance requirement of an Emergency Management Plan.

s. the only noise generated on the site will be from inverters which are small boxes about four (4) foot square. Mr. Crimmel testified that it is estimated that about 10-15 inverters will be needed and no noise greater than sixty-five (65) decibels will be present at the property lines.

19. Mr. Benjamin Kirk also provided testimony that:

a. the Applicant will comply with all stormwater management requirements in accordance with the Dover Township Stormwater Management Ordinance.

b. the Applicant performed onsite wetland delineations and will continue to observe the area to avoid impact.

c. the Applicant will comply with all standards and the SALDO requirements through design and construction.

d. the Applicant does not at this the point of this application, have written acknowledgement from the Regional Transmission Operator (RTO) as this is a lengthy process.

e. the Applicant will obtain this RTO written acknowledgment as required by the Zoning Ordinance as it is a condition precedent to the issuance of a certificate of occupancy for the PSES.

f. all signage will be in compliance with the Zoning Ordinance for informational purposes and will not be utilized to display advertising.

g. the PSES storm water management plan has not yet been developed, however, it will be designed to comply with the Zoning Ordinance and will not be in any location that will alter or impede stormwater runoff.

h. e-mail contacts have been or will be given and a phone number for the public to contact with inquiries and complaints as to comply with the Zoning Ordinance.

i. the Applicant will comply with the decommissioning or removal of the project in compliance with the Zoning Ordinance.

j. the Zoning Ordinance requires financial security which the Applicant will comply with and maintain throughout the life of the PSES.

k. the Township and subsequent landowners can enforce decommissioning requirements as per the Zoning Ordinance.

20. In response to concerns about chemical contamination of the soil from leakage and other issues concerning solar panels, Mr. Crimmel testified to the following:

a. solar panels are not fragile, being made primarily from aluminum and shatter-resistant glass or polycarbonate, designed to withstand large (golf-ball sized) hail. While panels may crack, they do not shatter.

b. solar panels are made of solid state or crystalline materials.

c. solar panels do not contain liquids and cannot leak, nor do they leak chemicals under normal conditions or in the event of storms or fires.

d. the anticipated life expectancy of a solar panel is 30-40 years, and 80% is recyclable materials.

e. in Mr. Crimmel's experience, the only issues which have arisen concerning the panels has involved vandalism with damage from rock throwing. These panels are replaced with no environmental damage.

f. peer-reviewed studies done indicated that properly recycled solar panels passed EPA characteristic leaching procedures, meaning that the materials are non-hazardous.

g. the panels are coated with non-glare material so birds will not fly into them and they pose no risk to vehicles or aircraft.

h. very small amounts of lead soldering are present in the panels.

21. The project will not create any local employment opportunities.

22. All construction will be performed by contract employees.

CONCLUSIONS OF LAW

It is the responsibility of a zoning hearing board to resist intense pressure to which it may be subjected to from all sides and to decide the issues on their legal merits without regard for the identity or influence of the parties. Kennedy v. Upper Milford Township Zoning Hearing Board, 575 Pa. 105, 834 A.2d 1104, (Pa., 2003).

A Principal Solar Energy System (PSES) is a use permitted by special exception in the Agricultural Zoning District (Section 27-402.V) (See Ordinance No. 2021-03, enacted March 22, 2021 and effective March 27, 2021.)

Despite its name, a special exception is not an exception to a zoning ordinance, but a use which is expressly permitted, absent a showing of detrimental effect on the community. Greaton Properties v. Lower Merion Township, 796 A.2d 1038 (Pa. Cmwlth., 2002). See also Blancett-Maddock v. City of Pittsburgh Zoning Board of Adjustment, 640 A.2d 498, 501 (Pa. Cmwlth. 1994); Rapaport v. Zoning Hearing Board of the City of Allentown, 687 A.2d 29, 31 (Pa. Cmwlth. 1996) Courts have indicated, however, that special exception uses are made available in the zoning ordinance as a privilege, not as a right. Hogan, Lepore & Hogan v. Pequea Twp. Zoning Hearing Board, 638 A.2d 464 (Pa. Cmwlth., 1994). Accordingly, a special exception should be granted only in such situations as are expressly provided for and enunciated by the terms of the ordinance and the rules that determine the grant or refusal of the exception are enumerated in the ordinance itself. McGinty v. Zoning Board of Adjustment of the City of Pittsburgh, 717 A.2d 34 (Pa. Cmwlth., 1998).

The Applicant has both the persuasion burden and evidence presentation duty to show that a special exception proposal complies with all the specific and objective terms of

the ordinance. Bray v. Zoning Board of Adjustment, 410 A.2d 909 (Pa. Cmwlth., 1980); Appeal of Baird, 537 A.2d 976 (Pa. Cmwlth, 1988).

As Bray and its progeny make clear, once the initial burden of persuasion is met by the applicant by showing compliance with the specific conditions and requirements of the Ordinance, the objectors then have a duty of production to demonstrate that the proposed use would detrimentally affect the public health, safety and welfare. Mann v. Lower Makefield Twp., 634 A.2d 768, 771 (Pa. Cmwlth. 1993). Objector's duty of production cannot be met by showing that a proposed use will have effects that would normally result from the permitted use. Ruddy, 669 A.2d 1051, 1057. The Objectors must show, through substantial evidence, that the effects of this particular use will be greater or different than those results normally expected from the permitted use in order to meet their burden. *Id.*; Kern v. Zoning Hearing Board of Tredyffrin Township, 68 Pa. Cmwlth. 396, 449 A.2d 781 (1982). Further, as noted above, the burden cannot be met by speculating as to possible harm; rather, objectors must show to a high degree of probability that the proposed use will substantially affect the health and safety of the community in a way not normally expected from the type of use. Marquise Inv., Inc. v. City of Pittsburgh, 11 A.3d 607, 611 (Pa.Cmwlth. 2010); Bray, 410 A.2d 909, 914. If the objectors fail to meet this high standard, then the burden never shifts back to the Applicant to "come forward and to meet the objections so as to show that the intended use would not violate the health, safety and general welfare of the community with relation to such objections." *Id.* at 910. With this burden shifting paradigm in mind, an analysis of the General Standards for Special Exceptions reveals that, while the Applicant must persuade the Board that it complies with the General Standards, the objectors are tasked with producing substantial evidence that the Applicant cannot comply with these

General Standards. Here, the Applicant has established that it complies with all the specific criteria and general standards for Principal Solar Energy Systems (“PSES”).

Additionally, there is a presumption that the Applicant complies with the General Standards because the proposed use is included in the relevant zoning district as a use permitted by special exception; otherwise, the use would not be legislatively permitted. This presumption, in combination with the Applicant’s compliance with the specific criteria, satisfies the Applicant’s burden of proof as it relates to the General Standards and thus the burden of production should shift to the objectors.

Once the applicant has met his or her burden of proving that the proposed use meets the specific and objective requirements for a special exception under the zoning ordinance, a presumption arises that it is consistent with the health, safety and welfare of the community. *Manor Healthcare v. Lower Moreland Twp. Zoning Hearing Board*, 590 A.2d 65 (Pa. Cmwlth., 1991); *Bailey v. Upper Southampton Township*, 690 A.2d 1324 (Pa. Cmwlth., 1997). Where a particular use is permitted in an area, it is presumed that the local legislative body has already considered such use for the area in terms of general matters such as health, safety, and the general welfare, as well as the general intent of the zoning ordinance. *Shamah v. Hellam Township Zoning Hearing Board*, 648 A.2d 1299 (Pa. Cmwlth., 1994). See also *In re Cutler Group, Inc.*, 880 A. 2.d 39, 42 (Pa. Cmwlth. 2005); and *Borough of Perkasié v. Moulton Builders*, 850 A.2d 778, 781-82 (Pa. Cmwlth. 2004). In other words, there is a presumption from the legislative body that it has already decided that the use is not a detriment to the public health, safety and welfare of the community under normal circumstances. The governing body (Dover Township Board of Supervisors) has already determined that detrimental effects, such as effects on surrounding property values, are not so substantial as to prohibit the use under normal circumstances, and so the Applicant has carried the initial burden by a preponderance of the evidence in compliance with the

ordinance if the specific criteria are satisfied. The application must then be granted unless the objectors present specific, credible evidence of a substantial threat to the general health, safety and welfare of the community. *Bailey*, supra (emphasis added).

Where the local ordinance contains general requirements, the applicants do not have the threshold duty to present evidence or the burden of persuasion. *B.A.C v. Zoning Hearing Board of Millcreek Township*, 492 A.2d 477 (Pa. Cmwlth., 1985) (finding that the criterion that a proposed use will not fundamentally alter the character of a neighborhood is a general requirement); *Bray*, supra., (distinguishing between specific and general requirements); *Warren County Probation Assn. v. Warren County Zoning Hearing Board*, 414 A.2d 398 (Pa. Cmwlth., 1980) (finding that the criterion that a proposed use be appropriate to a particular lot and location is a general requirement). Thus, where the zoning ordinance sets out concerns of a general detrimental effect upon the community, as opposed to requiring compliance with specific provisions, it is the objectors who bear both the burden of production and persuasion. *Bray*, supra.

The burden placed on objectors to a special exception is a heavy one. The objectors cannot meet their burden by merely speculating as to possible harm, but instead must show "a high degree of probability that it will [substantially] affect the health and safety of the community". *Manor Healthcare*, supra. Objectors must show that the impact would be greater than what would ordinarily be expected from the type of use proposed. *Amerikohl Mining, Inc. v. Zoning Hearing Board of Wharton Township*, 597 A.2d 219 (Pa. Cmwlth., 1991).

It is the function of the zoning hearing board to weigh the evidence before it. *Taliaferro v. Darby Twp. Zoning Hearing Board*, 873 A.2d 807, (Pa. Cmwlth., 2005). In any zoning case, a zoning hearing board is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *Appeal of Lester M. Prange, Inc.*, 647 A.2d

279 (Pa. Cmwlth., 1994). The board, as factfinder and sole judge of credibility and conflict in testimony, has the power to reject even uncontradicted testimony if it finds the testimony lacking in credibility, including testimony offered by expert witnesses. *Taliaferro*, supra.; *In Re: Appeal of Realen Valley Forge Greens Associates*, 576 Pa. 115, 838 A.2d 718 (2003).

Applying the above legal principles to the facts of this case, the Board makes the following determinations.

Section 27-402 of the Zoning Ordinance permits a PSES in the Agricultural Zoning District by Special Exception.

The specific requirements which the applicant must meet for a PSES are set forth in Section 27-665a of the Dover Township Zoning Ordinance. (See Ordinance No. 2021-03, enacted March 22, 2021 and effective March 27, 2021.) Use Limitations for Special Exceptions in the Agricultural Zoning District are set forth in Section 27-402.7 of the Dover Township Zoning Ordinance. General Standards for Special Exceptions are set forth in Section 27-1004 of the Dover Township Zoning Ordinance.

Section 27-665a of the Zoning Ordinance sets forth the specific Supplementary Regulations for a Special Exception for a PSES. The Applicant provided exhibits and/or oral testimony of witnesses to show compliance with these requirements of Section 27-665a as follows:

- 27-665a(1) On any lot or portion thereof on which a PSES is located, two (2) principal uses may be permitted, one (1) principal use being the PSES and the other being a principal use reserved unto the owner of the lot. This Section 27-665a shall control over any inconsistent regulations in the Dover Township Zoning Ordinance.

Testimony by the applicant's witnesses and exhibits show compliance with this section.

27-665a(2) A PSES shall be a use permitted by Special Exception in the A-Agricultural District, C- Commercial District, I-Industrial District, R-1 Residential Zoning District, subject to the following:

- A. Eligible Parcel(s) in the R-1 Zoning District. In order to be eligible for a PSES in a R-1 Zoning District, a parcel or parcels must, at the time of application, be in active agricultural use and must have been in agricultural use, with the exception of a single family residence on the parcel, for a period of at least two (2) years prior to the filing of an application for special exception for a PSES.

Testimony by the applicant's witnesses and exhibits show compliance with this section.

- B. Minimum Lot Size. A PSES shall be located on lot or lots with no less than twenty-five (25) acres of contiguous land, provided that a PSES may be located on multiple contiguous parcels, provided that the minimum lot size for any individual parcel shall be five (5) acres.

Testimony by the applicant's witnesses and exhibits show compliance with this section.

- C. Setback Requirements. The following setback requirements shall apply for a PSES.

- 1. Perimeter Fencing – Twenty-five (25') feet from all property or public street/road right-of-way lines. No setbacks shall be required between contiguous parcels that are included within the PSES.

Testimony by the applicant's witnesses and exhibits show compliance with this section.

- 2. Panels/Equipment – Thirty-Five (35') from all property lines and Fifty (50') feet from all public street/road right-

of-way lines. No setbacks are required between contiguous parcels that are included with the PSES footprint.

Testimony by the applicant's witnesses and exhibits show compliance with this section.

3. In all cases there shall be a minimum distance of seventy-five (75') feet between adjacent non-participating residential structures and any component of the PSES including fences, buildings, panels and other equipment.

Testimony by the applicant's witnesses and exhibits show compliance with this section.

- D. **Height.** Except as otherwise provided in this Section, a PSES or any portion thereof, i.e. solar panels and racking systems shall not exceed twenty-five (25') feet in height; provided, however, that substations, transmission lines and infrastructure connecting the PSES to the electrical grid shall not be subject to a height limitation.

Testimony by the applicant's witnesses and exhibits show compliance with this section.

- E. **Maximum Impervious Coverage.** The total land area of a PSES may be covered by up to 25% of permanent impervious coverage. This requirement shall be calculated as a percentage of the total acreage within the PSES and not on an individual lot basis.

1. Any area under the solar panels or other areas that are maintained in a grassy or vegetative state shall be considered to be pervious surfaces. Grassy and vegetative areas shall be maintained in compliance with current Department of Environmental Protection Guidelines relating to solar farms.

Testimony by the applicant's witnesses and exhibits show future compliance with this section.

2. The following components of a PSES shall be considered impervious coverage and calculated as a part of the impervious coverage limitations:
 - i. Foundation systems, typically consisting of driven piles or monopoles or helical screws with or without small concrete collars.
 - ii. All mechanical equipment of PSES including any transformer, substation or structures for batteries or storage cells.
 - iii. Gravel or paved access roads and parking areas servicing the PSES.

Testimony by the applicant's witnesses and exhibits show compliance with this section.

- F. Screening. The PSES shall be screened from non-participating adjoining residences along the line of sight between any wall of the residence and any portion of the PSES, unless the affected landowner provides a written waiver of such screening. A PSES shall not be required to be screened from residences that are located on a participating parcel/lot of land or accessory buildings on adjoining properties. No buffering shall be required, except as provided herein.
 - i. To the extent possible, existing trees and vegetation shall be retained and incorporated to satisfy any screening requirements.
 - ii. Trees planted for such screening shall be of a species specified by the Township Subdivision and Land Development Ordinance or such other species of tree acceptable to the Township Engineer provided that such trees species shall achieve an opaque screen from required viewpoints within five (5) years of planting.
 - iii. Except as otherwise provided herein, all screening shall be designed and placed in accordance with the Township Subdivision and Land Development

Ordinance and shall be included in accordance with the required land development plan.

- iv. Where a PSES abuts a public road, Type 3 screening will be required.
- v. Screening that abuts a residential use shall be completed prior to any structures being built.

Testimony by the applicant's witnesses and exhibits show compliance with this section, and additional details will be provided in the Land Development Process.

G. Access. At a minimum, a twenty-five (25') foot wide access road or driveway must be provided from a state or township roadway into the site within twenty-five (25') feet of the street right-of-way line. Such access drive or driveway shall be designed and constructed in accordance with applicable Township Ordinances.

- 1. Maintenance access. Maintenance access shall be required. A ten (10') area between the fence and all solar panels shall be passable and maintained in an unobstructed condition so as to permit vehicular travel along the interior perimeter of the fence.

Testimony by the applicant's witnesses and exhibits show compliance with this section.

H. Stormwater Management. Stormwater management shall be designed, constructed and maintained in accordance with the Township Stormwater Management Ordinance.

Testimony by the applicant's witnesses and exhibits show compliance with this section, and additional details will be provided in the Land Development Process.

I. Design and Construction.

- i. The PSES owner shall comply with the Township subdivision and land development requirements. The

installation of PSES shall be in compliance with all applicable permit requirements, codes, and regulations.

- ii. Standards. The PSES layout, design and installation shall conform to applicable industry standards, such as those of the American National Standards Institute (ANSI), Underwriters Laboratories (UL), the American Society for Testing and Materials (ASTM), , Institute of Electrical and Electronics Engineers (IEEE), Solar Rating and Certification Corporation (SRCC), Electrical Testing Laboratory (ETL), Florida Solar Energy Center (FSEC) or other similar certifying organizations, and shall comply with the PA Uniform Construction Code as enforced by the Township and with all other applicable Township Ordinances. Glint and Glare - a PSES shall comply with applicable FAA requirements.

Testimony by the applicant's witnesses and exhibits show compliance with this section.

- iii. As a condition precedent to the issuance of a certificate of occupancy for the PSES, the owner of a PSES shall provide the Township with a written acknowledgement from the public utility company or the Regional Transmission Operator (RTO) to which the PSES will be connected that they have been informed of the customer's intent to install a grid connected PSES to their facilities.

Testimony by the applicant's witnesses show that the applicant will comply with this section.

- iv. No portion of the PSES shall contain or be used to display advertising. The manufacturer's name and equipment information or indication of ownership shall be allowed on any equipment of the PSES provided they comply with the prevailing sign regulations.

Testimony by the applicant's witnesses and exhibits show compliance with this section.

- v. Prohibited Locations. A PSES shall not be placed within any storm water conveyance system or facility, in any location that would alter or impede storm water runoff from collecting in a constructed storm water conveyance system, provided that collection lines may be placed over or under these features with acceptable vertical clearances or any land subject to an Agricultural Preservation Easement...

Testimony by the applicant's witnesses and exhibits show compliance with this section.

J. Fencing/Security/Emergency Management.

- i. All PSES shall be completely enclosed by a minimum eight (8') foot high fence and gates shall have locks. Fencing shall be of a typical chain link variety.
- ii. Clearly visible warning signs shall be placed at the base of all pad-mounted transformers and substations and on the fence on the surrounding the PSES informing individuals of potential voltage hazards/danger.
- iii. An Emergency Management Plan, consistent with standard operating practices of the industry shall be developed by the PSES owner/operator and furnished to the Township, the local fire company and the York County Office of Emergency Management prior to the issuance of a building permit.

Testimony by the applicant's witnesses and exhibits show compliance with this section.

K. Lighting. Lighting shall not be permitted except to the extent required for security or by applicable federal, state, or local authority.

Testimony by the applicant's witnesses and exhibits show compliance with this section.

- L. Complaints/Contact Information. The PSES owner and/or operator shall maintain a phone number for the public to contact with inquiries and complaints throughout the life of the project and provide this contact information to the Township. The PSES owner and/or operator may update this contact information from time to time by providing revised contact information to the Township Zoning Officer. The PSES owner and/or operator shall respond to the public's inquiries and complaints within 48 hours of notice of the same.

Testimony by the applicant's witnesses and exhibits show compliance with this section.

- M. Decommissioning/Removal.

- i. The PSES owner is required to notify the Township immediately upon cessation or abandonment of the operation of the PSES. After the initial commencement of commercial generation of electricity or power, the PSES shall be presumed to be discontinued or abandoned if no electricity or power is generated by such system for a period of six (6) continuous months. However, if the PSES owner notifies the Township of a written plan to bring the PSES back into operation, the Township may toll this six (6) month period and shall notify the PSES owner of its decision within forty-five (45) business days of receipt of the PSES owner's notice.
- ii. Prior to issuance of a certificate of occupancy for the PSES, the owner shall provide financial security, in the form and amount of a bond, irrevocable letter of credit, or other financial security acceptable to the Township, to secure the expense of decommissioning, dismantling and removing said PSES and restoration of the land to its original condition, in the amount of 110% of the estimated decommissioning cost minus the salvageable value of the solar-related equipment, fencing, buildings, etc. Every five (5) years, a new engineer's estimate of probable cost of decommissioning shall be submitted for approval in the same manner as the initial submission and the bond, letter of credit, or other financial security acceptable to the Township. This financial security shall be adjusted upward or downward as necessary. The owner of the PSES shall pay for all fees associated with

the review and approval of each such decommissioning cost estimated by the Township Engineer.

- iii. Removal of PSES facilities in decommissioning shall be completed in its entirety. Once the PSES is removed, any earth disturbance resulting from the removal shall be graded and seeded in order to re-establish a natural groundcover. The PSES owner shall have twelve (12) months from the cessation or abandonment of the operation of the PSES in which to dismantle and remove the PSES, including all solar-related equipment or appurtenances related thereto, including but not limited to buildings, aboveground cabling, electrical, components, roads (unless the landowner requests in writing that the access roads are to remain), foundations and other associated facilities from the property. If the owner fails to dismantle and/or remove the PSES within the established timeframes, the Township may complete the decommissioning at the owner's expense, subject to any recovery under the financial security provided in accordance with (b) above. The Township may authorize one twelve (12) month extension of such time for just cause shown by the PSES owner.

Testimony by the applicant's witnesses and exhibits show future compliance with this section throughout the life of the project.

In *Broussard v. Zoning Board of Adjustment of the Pittsburgh*, 589 Pa. 71, 907 A.2d 494 (2006), the Pennsylvania Supreme Court held that if the applicant for a special exception presents testimony and evidence that it will be able to fulfill zoning prerequisites at a later date, particularly through additional approvals by different governmental or regulatory bodies and agencies, the special exception may still be granted, subject to proof of satisfactory compliance by the appropriate governmental

official or body at the later date. Here, this Board finds Broussard to be controlling, and is satisfied, based on the credibility of the witnesses and the enforcement remedies available to the Township, that the items above such as screening and RTO approval, requiring additional governmental approvals or future approvals which cannot be granted until construction is commenced or completed will be met. Accordingly, compliance with the requirements of Section 27-665a has been met.

One of the neighboring residents, Mr. Eric Naylor, argued that the Applicant has failed to meet the prime soils exclusion requirement under the Use Limitation for Special Exceptions in an Agricultural Zone set forth in Section 27-402.7.

The municipal zoning hearing board is the entity charged with the interpretation and application of the zoning ordinance. Smith v. Zoning Hearing Board of the Borough of Huntingdon, 734 A.2d 55 (Pa. Cmwlth., 1999); Johnston v. Upper Macungie Township, 638 A.2d 408 (Pa. Cmwlth., 1994).

The rules of statutory construction apply to ordinances as well as statutes. Baladay Farms, LLC v. Paradise Township Zoning Hearing Board, 148 A.3d 496 (Pa. Cmwlth., 2016); Kohl v. New Sewickley Township Zoning Hearing Board, 108 A.3d 961,968 (Pa. Cmwlth., 2015). Conveniently, all are set forth together in Tobin v. Radnor Township Board of Commissioners, 597 A.2d 1258, 1264 (Pa. Cmwlth., 1991), as follows:

- a. The principles contained in the Statutory Construction Act, 1 Pa. C.S. s.1501-1991, are followed in construing a local ordinance.
- b. Words and Phrases of a local ordinance shall be construed according to the rules of grammar and according to their common and approved usage.

c. Zoning ordinances should be construed in a sensible manner.

d. In interpreting provisions of a zoning ordinance, undefined terms must be given their plain, ordinary meaning, and any doubt must be resolved in favor of the landowner and the least restrictive use of the land.

e. Of primary concern in interpreting a zoning ordinance is the legislative intent of the governing body which enacted the ordinance.

f. The letter of the ordinance is not to be disregarded in the pretext of pursuing its spirit.

g. A particular section of a zoning or subdivision code must be “read as an integral part of the whole and not as a separate portion with an independent meaning”.

h. Finally, it is presumed that the governing body did not intend a result that is absurd or unreasonable.

Where a word or phrase is defined, zoning hearing boards and courts are bound by the definition. *Hughes v. School District of Pittsburgh*, 108 A.2d 698 (Pa., 1954); *Slice of Life LLC, v. Hamilton Township Zoning Hearing Board*, 207 A.3d 886 (Pa., 2019).

Applying these principals, the Board concludes as follows:

Section 27-402.4 provides that all uses permitted as special exceptions in the Agricultural District shall be located either in buildings existing on the effective date of this part or on lands unsuitable for agricultural use. Section 27-402.7 provides “Use Limitations for Special Exceptions”. Sub-Section 27-402.7(B) states that special exception uses shall be permitted on lands considered unsuitable for agricultural purposes” and provides four criterion for “lands considered unsuitable for agricultural purposes.”

Conclusively, however, Section 27-665a.1. of Ordinance 2021-03 states:

On any lot or portion thereof on which a PSES is located, two (2) principal uses may be permitted, one (1) principal use being the PSES and the other being a principal use reserved unto the owner of the lot. **This Section 27-665a shall control over any inconsistent regulations in the Dover Township Zoning Ordinance** (emphasis added).

In addition, Section 27-665a.2(I)(5) of Ordinance 2021-03 also states, in part:

...Notwithstanding the requirements in Section 27-402 of the Zoning Ordinance, Solar Panels **shall be permitted to be located on prime soils. To the extent feasible**, Solar-Related Equipment and other accessory structures and buildings shall be placed on lands unsuitable for agricultural uses as defined in Section 27-402 (emphasis added)

This Board concludes that the intent of the Board of Supervisors is to completely supersede all the requirements of Section 27-402, except for the requirement that if it is “feasible” Solar-Related Equipment and other accessory structures and buildings shall be placed on lands unsuitable for agricultural uses. This is the clear and unambiguous intent of the Board of Supervisors, and consistent with all the principles of Statutory Construction set forth above. As noted therein, the primary objective of statutory interpretation is to determine the intent of the enacting legislation. 1 Pa.C.S. § 1921. “...a statute's plain language generally provides the best indication of legislative intent and, thus, statutory construction begins with examination of the text itself. *Malt Beverages Distribs. Assoc'n v. Liquor Control Bd.*, 918 A.2d 171, 176 (Pa. Cmwlth. 2007). Every statute shall be construed, if possible, to give effect to all its provisions. 1 Pa.C.S. § 1921(a). See also, *Balady Farms, LLC v. Paradise Twp. Zoning Hearing Bd.*,

148 A.3d 496, 502 (Pa. Cmwlth. Ct. 2016). This interpretation gives effect to both provisions and leads to a logical result.

Further, this provision only indicates a preference for location of PSES on lands that are unsuitable for agriculture. This preference is not a requirement; “to the extent feasible” is discretionary, whereas “shall be permitted” is mandatory. To find otherwise would be to ignore the purpose of the exemption from the requirements of Section 27-402 and violate the Canons of Statutory Construction by giving more weight to a subjective or discretionary criteria than a mandatory criteria. 1 Pa.C.S. § 1921(b); *Coretsky v. Bd. of Comm'rs*, 520 Pa. 513, 518, 555 A.2d 72, 74 (1989). Finally, to require an applicant to comply with the other factors under 27-402 7. B. would contradict the specific criteria for PSES, which further identifies the legislative body’s intent to make the entirety of Section 27-402 7. B inapplicable. Accordingly, the proposed PSES use is not prohibited by the specific requirements of Section 27-402.7B of the Dover Township Zoning Ordinance, as they are superseded by Sections 665a.1. and 665a.2.I(5) of Ordinance 2021-03.

This interpretation is also consistent with the “functional analysis” test for interpreting zoning ordinances set forth in *Appeal of Miller*, 515 A.2d 904 (Pa., 1986) and *Slice of Life LLC, v. Hamilton Township Zoning Hearing Board*, 207 A.3d 886 (Pa., 2019).

Objector Susan Hamberger, relying on a definition from the *Merriam-Webster On-Line Dictionary*, argued that because Harmony Grove Road bisected the property with approximately thirteen (13) acres on each side, there was not twenty-five (25) contiguous

acres for the PSES to be placed on. As noted above, where a word or phrase is defined in the Zoning Ordinance, zoning hearing boards and courts are bound by the definition provided therein. *Hughes*, supra., *Slice of Life LLC*, supra. Such specific definitions may differ from or be more broad or narrow than common usage. *Kissel v. Ferguson Township Zoning Hearing Board*, 729 A.2d 194 (Pa. Cmwlth., 1999).

Section 27-202 of the Dover Township Zoning Ordinance defines “Tract” as follows:

Tract- All contiguous land owned by the same land owner and all land owned by the same land owner which is contiguous except for the presence of public or private roads.

Accordingly, since this term is expressly defined in the Zoning Ordinance, the entire acreage of this tract is considered contiguous even though bisected by a road, and the minimum acreage requirement is met.

In conclusion, after review of the application, exhibits, testimony presented, and representations made, particularly concerning future compliance, all of which this Board holds to be binding representations by the Applicant and not mere statements of intent, this Board concludes as a matter of law that the Applicant has met all of the specific requirements and general standards of the Zoning Ordinance with respect to the grant of the special exception for a PSES.

As the Board has determined that the Applicant meets the specific requirements, it is now necessary to determine if the objectors have presented specific, credible evidence of a substantial threat to the general health, safety and welfare of the community. *Bailey*, supra (emphasis added).

Each objector and supporter who wished to provide testimony and evidence provided their name, address and proximity to the location of the proposed PSES. Counsel for the Applicant brusquely objected to the standing of any property owner who was not immediately adjoining the location of the PSES. The Board determined that due to the size and controversial nature of the proposed facility, as well as the high degree of public interest in the proposal, all persons living within ½ mile of the facility satisfied the requirement of having the potential of a “discernable adverse impact” and thus had standing as a party. This determination is within this Board’s discretion. See Friends of Lackawanna v. Dunmore Borough Zoning Hearing Board, 186 A.3d 525 (Pa. Cmwlth., 2019); Lorenzen v. West Cornwall Township Zoning Hearing Board, 222 A.3d 893 (Pa. Cmwlth., 2019).

As noted previously, the burden placed on objectors to a special exception is a heavy one. The objectors cannot meet their burden by merely speculating as to possible harm, but instead must show "a high degree of probability that it will [substantially] affect the health and safety of the community". Manor Healthcare, supra. Objectors must show that the impact would be greater than what would ordinarily be expected from the type of use proposed. Amerikohl Mining, Inc. v. Zoning Hearing Board of Wharton Township, 597 A.2d 219 (Pa. Cmwlth., 1991).

Objectors Mary Hamm and David Wolverton argued that the proposal will detract from the use and enjoyment of the properties and substantially change the harmony and character of the neighborhood, primarily due to devaluation of property values. Mr. Wolverton presented as an exhibit a copy of an on-line article dated October 1, 2020 from

The Providence Journal by Alex Kuffner titled “Study: Solar farms reduce home values” which indicated that some housing values near a PSES may initially drop between 1.7% and 5%.

It is well settled law that almost any new use, permitted or prohibited, will have some effect on the value of neighboring properties. However, evidence of negative effect on property values, to be persuasive, must show an especially large impact on property values, and requires testimony of an expert familiar with property values in the area effected. 2 Ryan, PA Zoning Law and Practice, s.5.3.6. No such expertise was provided by the objectors. Also, the proffered reduction in property values from the newspaper article, even if accepted as true, is insufficient as a matter of law to meet the objector’s burden requirement because proof that the proposed PSES has a greater than normal impact on the community is not satisfied even with proof that neighboring property values may decrease. Soble Construction Company v. Zoning Hearing Board of East Stroudsburg, 329 A.2d 912 (Pa. Cmwlth., 1974). See also Allegheny Tower Assoc., LLC v. City of Scranton Zoning Hearing Board, 152 A.3d 1118 (Pa. Cmwlth., 2017). Accordingly, the objector’s argument concerning impairment and devaluation of property fails to show any “large impact” required to meet objector’s burden, and this argument fails.

In conclusion, the objectors have not met their burdens and the application must therefore be granted.

When a special exception is granted, Section 912.1 of the Municipalities Planning Code (53 P.S. s. 10912.1) authorizes the zoning hearing board to attach such reasonable conditions and safeguards as it may deem necessary to implement the purposes of the zoning ordinance. Conditions so imposed must be supported by evidence in the record. Sabatine v. Zoning Hearing Board of Washington Township, 651 A.2d 649 (Pa. Cmwlth., 1994). Conditions imposed must also bear a reasonable relationship to the protection of the

public interest and be reasonable under the facts of the case. *In re: Appeal of Stolfus*, 79 Lancaster L.J. 1266, 1269 (2004). Given the testimony and concerns raised by adjoining residents the Board feels that one condition is warranted to mitigate the impact of approval of the use and so imposes it. The record also indicates that the Applicant does not object to the proposed condition.

DISPOSITION OF CASE

The requested special exception is hereby granted*, subject to the following condition:

The type of “slow-growth” or “low grow low mow” grass to be planted on the premises must be specified at the Land Development approval process and shall be non-invasive and of such a type that will not interfere with hay growth or any other agricultural commodity grown on nearby properties, or in any way be toxic to horses or farm animals.

Although non-binding, the Board also suggests that Dover Township consider requiring base-line soil testing and additional testing at certain intervals to assure no soil contamination.

DOVER TOWNSHIP ZONING
HEARING BOARD:

Jane Ginter,
Chairwoman

Robert Wright,
Vice Chairman

Richard Pope,
Member

Jonathan Reynolds,
Member

Date: April 27, 2023

NOTICE: Any party aggrieved by this decision may appeal to the Court of Common Pleas of York County within thirty (30) days from the date of issuance of this decision.

*The vote of the Board was 3-1 to grant the Special Exception, with Vice-Chairman Wright dissenting.