IN THE COURT OF COMMON PLEAS OF ADAMS COUNTY, PENNSYLVANIA
CIVIL

**BROOKVIEW SOLAR I, LLC,**
**Appellant**

**v.**

**MOUNT JOY TOWNSHIP BOARD OF SUPERVISORS,**
**Appellee**

**2021-SU-578**

**TESSA AMOSS, DWIGHT AMOSS, TRAVIS BERWAGER, MICHAEL BOCCABELLO, ALAN BUSBEY, TINA BUSBEY, LARRY COMBS, BARBARA COMBS, ANN DeGEORGE, NICHOLAS DEMAS, CHRISTINE DEMAS, THOMAS DUNCHACK, SR., THOMAS DUNCHACK, II, GLENDA GERRICK, LARRY HARTLAUB, CURTIS HAWKINS, SHERRY HAWKINS, KATHLEEN HEGAN, JOSEPH HOFMANN, PHILIP HUNT, AMANDA MARTIN, JUSTIN MARTIN, TODD McCAUSLIN, ANGELA McCAUSLIN, ANGELIQUE MERKSON, STEPHEN MERKSON, TOM NEWHART, CAROL NEWHART, THEA PHIPPS, JENNIFER RICKETTS, STEVEN RICKETTS, DEBORAH SANDERS, SCOTT SANDERS, SUZANNE SCHUST, EMILY SHOEY, BARBARA STEELE, MARILYN TRUSS, LARRY WOLTZ, PEGGY WOLTZ, DAVID YANCOSKY, RICHARD OGG, PATRICIA OGG, LAWRENCE R. McLAREN, MARY ANN HARTLAUB, CLAYTON S. WOOD, CORBIN WOOD, STEVEN E. WOOD, CHRISTINE L. WOOD, DAVID R. UPDYKE and KENNETH A. HILBERT,**
**Intervenors**

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ADAMS COUNTY, PA
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**ORDER OF COURT**

AND NOW, this 2nd day of September, 2022, for the reasons set forth in the attached Findings of Fact and Opinion, it is hereby Ordered that the denial of Brookview's application for a conditional use zoning permit is affirmed. Brookview's application for a conditional use zoning permit is denied.

PURSUANT TO RULE 236
You are hereby notified that this order has been entered in this case.

9-6 20 22 This being a true and attested copy taken from and compared with the original.

Attest:

Deputy Prothonotary

COURT OF COMMON PLEAS ★ ADAMS COUNTY, PA ★

BY THE COURT:

**MICHAEL A. GEORGE**
**President Judge**

Jeremy D. Frey, Esquire; Robert L. McQuaide, Esquire;
Paul W. Minnich, Esquire; and Christopher A. Naylor, Esquire (Brookview)
Susan J. Smith, Esquire (Mount Joy)
Nathan C. Wolf, Esquire (Intervenors)
Lawrence R. McLaren, *pro se* Intervenor
Mary Ann Hartlaub, *pro se* Intervenor
Walter A. Tilley, III, Esquire (Intervenors)
jvs

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**Intervenors**

This is an appeal by Brookview Solar I, LLC ("Brookview") challenging the Mount Joy Township Board of Supervisors' ("Board") denial of Brookview's application seeking the grant of conditional use approval for construction of a solar energy project ("Project") in Mount Joy Township.[1] In addition to Brookview and the

[1] Although the Board is a five-member board, one supervisor recused himself on the basis of being an owner of a parcel of land utilized in the Project who would financially benefit from the Project's approval. The recused supervisor did not participate in any of the proceedings resulting in the application being considered by the remaining four members. All references to "Board" in this Opinion

Board, the parties in this litigation include 44 individuals ("Opposing Intervenors") who were granted intervenor status by an Order of Court dated September 8, 2021.[2] By Order dated February 24, 2022, six additional individuals who support Brookview's appeal were granted intervenor status ("Supporting Intervenors").

The Board held a total of 21 public hearings on the application from January 2020 through March 2021. Following the extensive presentation of evidence, closing arguments by the parties, and private deliberation conducted by the Board, the application was denied by operation of law as a result of a tie vote by the Board.[3] The Board subsequently issued Brookview with written notice of the application's denial. The notice included as attachments two unsigned versions of a document titled "Decision of the Mount Joy Board of Supervisors," both of which contained findings of fact purportedly made by the differing factions of the Board. The findings of fact were consistent in some respects but different in others, however, neither of the versions garnered a majority vote by the Board. In light of the unique procedural stance of this litigation, by Order dated January 12, 2022, this Court determined its scope of review to be *de novo*.[4] In response to Court inquiry, all parties indicated they did not wish to introduce additional evidence. Thereafter, a briefing schedule

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will apply to the four remaining members. Incidentally, the township supervisor who recused from Board consideration of the application currently joins this litigation as a Supporting Intervenor.

[2] The Opposing Intervenors had also been granted party status at the Board's hearing on the application. 42 of the Opposing Intervenors are represented by counsel. Two of the Opposing Intervenors are proceeding *pro se*. For purposes of this Opinion, they will be referred to collectively.

[3] Two of the remaining Board members voted in favor of the application for conditional use while two others opposed grant of the conditional use. Appellate authority is clear that a tie vote by an evenly divided tribunal such as a zoning hearing board is the equivalent of "leaving in effect [a] negative administrative response..." ***Danwell Corp. v. Zoning Hearing Bd.***, 529 A.2d 1215, 1217 (Pa. Commw. 1987).

[4] Where a court of common pleas considers an appeal under *de novo* review, the court reviews the record as factfinder. ***Faulkner v. Bd. of Adjustment***, 624 A.2d 677, 679 (Pa. Commw. 1993).

was established with which all parties have complied. This matter is now ripe for disposition.[5]

Brookview urges the Court to reverse the decision of the Board as the requirements of the Ordinance have been met or will be met in further Township proceedings. Opposing Intervenors object to the admission of a glare analysis report on the basis of hearsay. Thereafter, they argue that absent admission of the glare analysis, Brookview has not met Ordinance requirements. Opposing Intervenors also challenge alleged shortcomings in Brookview's application related to stormwater management and internal trafficways.

For the reasons set forth below, the decision of the Mount Joy Township Board of Supervisors denying Brookview's application for a conditional use approval will be affirmed.

## FINDINGS OF FACT

1. On November 2, 2017, the Board of Supervisors of Mount Joy Township ("Board") adopted Ordinance No. 2017-03 ("Zoning Ordinance") governing zoning within the Township's jurisdictional boundaries.
2. The Baltimore Pike Corridor District ("BPCD") is a zoning district within the Township composed of approximately five square miles

[5] The Court identified the issues on appeal to be: (1) the evidentiary admissibility of a glare study submitted by Brookview with its application; (2) whether the admissible evidence establishes a *prima facie* case that the proposed use complies with the specific requirements of the zoning ordinance as

(approximately 3,300 acres) running perpendicular on the north and south sides of State Road 97 ("Baltimore Pike").

3. Section 301 of the Zoning Ordinance identifies "solar energy systems[s]" as a conditional use in the BPCD.

4. Zoning Ordinance Section 1201 sets forth the criteria governing the filing and consideration of conditional use applications.

5. Zoning Ordinance Section 402.II identifies specific requirements applicable to the development of a "solar energy system."

6. On November 13, 2019, Brookview submitted an application for conditional use approval for the Project.

7. Brookview qualifies as a proper party as it meets the definition of "Applicant" pursuant to Section 107 of the Municipalities Planning Code ("MPC"), 53 P.S. 10107.

8. The application involves only the portion of the Project which is located in the BPCD as the Project also involves properties in the Township's Agricultural Conservation District wherein solar energy systems are permitted by right. Approximately 391 acres of the Project lie within the BPCD.

9. Brookview intends to construct a 75-megawatt photovoltaic solar energy generating facility over an approximate 1,000 acre site plan. 530 acres of the 1,000 acre site are planned to be utilized for structural improvements.

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they relate to a conditional use; and (3) whether substantial evidence proves that the proposed use

10. The Project is a solar energy system as defined by the Zoning Ordinance.

11. The initial plan submitted by Brookview identified 29 separate parcels of land to be utilized in the Project.

12. Subsequent to the application, Brookview filed an amended plan in which 21 separate parcels of land are involved in the Project with 10 of the parcels being located in the BPCD. Applicant's Exhibit 16.

13. The Project will include approximately 300,000 solar panels, each having a maximum height of 12 feet. January 15, 2020 Tr., pgs. 63, 73.

14. The exact dimensions or number of solar panels to be utilized in the Project is unknown at this time as the specific panels have not yet been selected by the applicant. August 27, 2020 Tr., pg. 51.

15. In addition to the solar panel arrays, the Project will include electric invertors, collection lines, and a collection substation. Some of the facilities will be located underground. January 15, 2020 Tr., pgs. 56-57.

16. Brookview's application for a conditional use permit includes a site plan.

17. The site plan identifies all lot lines, adjacent lots, the respective owners of the lots, and the existing improvements. The plan also describes the general location of the proposed improvements and structures, however, does not specifically identify the proposed improvements or precise location of access roads as the actual plan layout cannot be

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will adversely affect the public welfare in a way not normally expected from the type of use.

determined until the panel to be used in the Project is selected. August 27, 2020 Tr., pg. 26.

18. The site plan reveals the boundaries of the Project are irregular and involve non-contiguous lots intermixed among parcels of land which are not participating in the Project.

19. The Project is proximate to an existing substation located in a neighboring township.

20. The site plan accompanying the application does not include a stormwater management plan demonstrating compliance with the Code of Mount Joy Township, Chapter 81 (relating to stormwater management). June 24, 2020 Tr., pg. 81.

21. Brookview's application includes as an attachment a glare analysis prepared by Capitol Airspace Group.

22. Although the glare study indicates "[t]here is no predicted glare for residences . . . [or] along the routes for cars," Brookview did not present the author of the report or any other expert testimony on the subject.

23. Manufacturer specifications for the key components of the solar energy system were not provided at the time of application; however, Brookview has indicated they will be submitted at the time of application for a building or electric permit or 30 days prior to the start of site development, whichever shall first occur.

24. Confirmation of approval of interconnection from the public utility to which the solar energy system will be interconnected was not available

at the time of Brookview's submission of the application; however, Brookview has indicated that the information will be submitted at the time of application for building or electric permit or at least 30 days prior to the start of site development.

25. Ordinance Section 402.II(2)(5) (requiring written confirmation that a certified installer, as identified by the Pennsylvania Department of Environmental Protection, will install the solar system) imposes a moot and invalid requirement as the Pennsylvania Department of Environmental Protection does not maintain a list of certified installers.

26. Ordinance Section 402.II(2)(6) requires the application to include any written solar easements existing or intended to be entered prior to the issuance of a zoning permit. The Zoning Ordinance, however, does not define "solar easements." Brookview has submitted use easements for all lots utilized as part of the Project but does not intend to obtain further easements as part of the Project.

27. All properties utilized by the Project meet the minimum lot size requirement of the Zoning Ordinance as all proposed parcels are larger than two acres. Applicant's Exhibit 17.

28. Improvements related to the Project will be no closer than 50 feet from the lot line of an adjacent lot improved with a dwelling or an unimproved lot in a residential zoning district provided the lots are otherwise not contiguous lots participating in the Project. Applicant's Exhibit 16.

29. All parcels utilized in the Project will be enclosed with a minimum 8-foot-high fence with a self-locking gate. February 19, 2020 Tr., pg. 47.

30. The amended site plan submitted by Brookview identifies points of access to the several lots but does not identify the dimensions or precise location of the interior travel aisles. Engineered details of the access drives necessary to determine compliance with Chapter 86 of the Township Code (relating to subdivision and land development) have not been provided. Applicant's Exhibit 16; June 24, 2020 Tr., pg. 110.

31. The Project will include sufficient safety lighting as required by Ordinance Section 402.II(7).

32. The Project plan depicts a 25-foot-wide buffer as required under Ordinance Section 402.II(8) (relating to landscaping).

33. The Project will include a perimeter fence which will be placed on the interior of the buffer as required by Ordinance Section 402.II(9).

34. Brookview's application includes a landscape report indicating the Project's compliance with Ordinance Section 402.II(10)(a–e).

35. Ordinance Section 402.II(10)(g–j)[6] relates to future performance standards that cannot possibly be met at the time of submission of an application for conditional use.[7]

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[6] The Township's Zoning Ordinance inconsistently designates the numeric and alphabetic identification of sections and subsections in Section 402. Compare Section 402.II(2)(1) with Section 402.II(10)(a).

[7] For instance, included in these sections is the requirement that the developer maintain the solar energy system in good working order and repair and notify the Township upon cessation or abandonment of the system.

36. Ordinance Section 402.II(10)(k) requires a proposed amount of performance security sufficient to decommission the solar energy project be submitted with the application. The actual amount and form of performance security approved by the Township need not be submitted to the Township until an amount has been approved and no later than submission of the application for a building or electric permit or 30 calendar days prior to the start of development of the lot for the solar energy system use, whichever shall first occur.

37. A proposed amount and form of performance security was submitted by Brookview with the application. The proposed amount has not been approved by the Township.

38. The Project complies with the Zoning Ordinance's dimensional requirements related to minimum lot width, minimum front setback, minimum rear setback, minimum side setback, and maximum height specific to the use, applicable to conditional uses generally, and applicable to uses within the BPCD. Applicant's Exhibit 16.

39. There is no evidence of record that the Project complies with the dimensional requirements for the BPCD related to open space (20 percent) as required in Ordinance Section 302(a).

40. The record lacks credible evidence concerning maximum lot coverage (50 percent) as required by Ordinance Section 302(a).

41. Brookview has failed to offer credible evidence related to the internal circulation of access roads.

42. Adequate public facilities are available to serve the proposed use, and the proposed use will not have an adverse effect on the logical and economic extension of such public services and facilities.

43. Brookview has established by credible evidence that the proposed use shall be in and of itself properly designed with regard to off-street parking, off-street loading, landscaping, screening, and buffering. Brookview has not established the Project's compliance with all other elements of proper design as required by the Zoning Ordinance.

44. Except as otherwise set forth herein, Brookview's Project complies with Ordinance requirements related generally to all uses within the BPCD and the Zoning Ordinance generally.

45. Brookview's application complies with the filing requirements set forth in Section 1201A(1) of the Zoning Ordinance except as otherwise set forth hereinabove.

46. Brookview has paid all applicable fees associated with the filing of a conditional use application.

47. Brookview's application contains a written statement identifying the natural, scenic, historic, and esthetic values of the environment as required by Section 1201A(2)(c) of the Zoning Ordinance.

48. The purpose of the BPCD "is to take advantage of the corridor's historic function as a major thoroughfare and to continue the established mixed use and intensive development pattern along the corridor, subject to appropriate siting and design controls that foster the continued

efficiency of [the Baltimore Pike] as a major corridor, enhance the appearance of land use along [the Baltimore Pike], protect and preserve the historic features along [the Baltimore Pike], and minimize adverse impacts of non-residential uses on residential uses." Ordinance Section 205.

49. Brookview has failed to demonstrate by credible evidence that the proposed use is consistent with the purposes and intent of the Ordinance's description of the BPCD. The proposed Project will monopolize approximately 10 percent of the acreage in the district for a single use.

50. Brookview has failed to prove by credible evidence that the proposed use will not detract from the use and enjoyment of adjacent or nearby lots, substantially change the character of the neighborhood, or adversely affect property values.

## DISCUSSION

### ORDINANCE INTERPRETATION

Before discussing whether the factual findings support the grant of a conditional use, it is necessary to interpret the extent of the requirements for the grant of a conditional use pursuant to the Ordinance. More specifically, it is necessary to define the duty of an applicant as it pertains to the production of a glare

analysis with the conditional use application. This consideration is important because the Opposing Intervenors have challenged the admissibility and subsequent consideration of the "glare analysis" attached to Brookview's application on the basis the author of the report was not presented as a witness. Opposing Intervenors argue they were denied their right to meaningful cross-examination as required by Section 908 of the MPC, 53 P.S. § 10908, due to Brookview's failure to present the author as a witness. Opposing Intervenors cite ***Appeal of Little Britain Township***, 651 A.2d 606 (Pa. Commw. 1994) for the proposition that a party's right to cross-examine adverse witnesses in zoning hearings before municipal boards is mandatory as a matter of due process.

Brookview counters by suggesting that the glare analysis is a procedural requirement of the application process rather than a substantive consideration in determining whether sufficient factual evidence was presented in support of the application for conditional use. When viewed in this manner, Brookview claims the glare analysis is admissible as evidence for the purpose of establishing the completeness of the application. In essence, Brookview suggests testimony in support of the analysis is not necessary as the substantive conclusion contained in the analysis is of little import provided an analysis is attached to the application.

In resolving the competing arguments urged by the parties, it is important to understand that any discussion of this issue must start with the Ordinance's actual language. ***City of Clairton v. Zoning Hearing Bd.***, 246 A.3d 890, 903 (Pa. Commw. 2021), *appeal denied*, No. 138 WAL 2021, 2022 WL 1817588 (Pa. June 3, 2022). Section 402.II(2) provides in relevant part:

II. **Solar Energy System**

...

2. Application for zoning permit for the solar energy system shall include:

...

2. Glare analysis demonstrating, through siting or mitigation measures, that any glare produced by the solar energy system will not have an adverse impact.

...

Zoning Ordinance Section 402.II(2)(2). Unlike the inclusion of the glare analysis as a subparagraph to application requirements, the Ordinance sets forth other specific requirements in separate paragraphs. Apparently, the genesis for the current issue arises from the Ordinance's inartful placement of the glare analysis requirement as a subparagraph of items to be included in the application.

Although the Rules of Statutory Construction are not controlling in resolution of this issue, the principles underlying those rules are germane to this discussion. ***Reeves Fam. Real Est., L.P. v. Bd. of Supervisors***, 273 A.3d 1277, 1290 (Pa. Commw. 2022). Among those principles is the concept that statutory law "should receive a sensible construction and should be construed[,] if possible[,] . . . [to avoid] absurdity." ***Summit Sch., Inc. v. Commonwealth, Dep't of Educ.***, 108 A.3d 192, 197 (Pa. Commw. 2015) (quoting ***Cap. Acad. Charter Sch. v. Harrisburg Sch. Dist.***, 934 A.2d 189, 193 (Pa. Commw. 2007)). Additionally, "no provision of a statute sh[ould] be reduced to mere surplusage" as courts must attempt to give meaning to every word in the statute. ***Watts Twp. Bd. of Auditors v. Raudensky***, 200 A.3d 129, 134 (Pa. Commw. 2018) (internal quotation marks omitted) (quoting

***Walker v. Eleby***, 842 A.2d 389, 400 (Pa. 2004)). Brookview's current argument ignores both of these principles.

Unquestionably, the language at issue places a duty upon an applicant for conditional use to include with the application a glare analysis **demonstrating** the lack of an adverse glare impact by the Project. The definition of "demonstrating," according to Webster's New Collegiate Dictionary, is "to prove or make clear by reasoning or evidence." It appears, therefore, that the drafters of the Ordinance intended not only that a perfunctory conclusion be included in the analysis but also that the conclusion be credibly supported by evidence. Contrary to the instruction of our appellate courts, Brookview's proposed interpretation of the subject language essentially relegates the words which define the purpose of the glare analysis to mere surplusage. As similar language is abundant throughout the Zoning Ordinance,[8] acceptance of Brookview's argument essentially vitiates any substantive meaning to significant portions of the Zoning Ordinance.

The more troubling aspect of Brookview's position is that it unequivocally leads to an absurd result. In effect, as noted by the Opposing Intervenors, Brookview's interpretation would allow the crayon artwork of a first grader, accompanied by the words "the glare produced by the Project would not have an adverse impact" as being sufficient to satisfy the unambiguous and important requirement for conditional use approval. The obvious absurdity of such an interpretation makes further discussion on this subject unnecessary.

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[8] The language of the section in question is consistent with language throughout the Township's Zoning Ordinance. For instance, an application for conditional use for an "adult use" development requires that a site plan "demonstrating compliance" with other Ordinance requirements must be included with the application. Ordinance Section 401(a)(2)(3).

## ADMISSIBILITY OF GLARE ANALYSIS

Having concluded that the Ordinance mandates an applicant for conditional use for a solar energy system to provide a glare analysis which credibly establishes a lack of negative impact, it becomes necessary to consider Opposing Intervenors' objection to the glare analysis's admissibility. In ruling upon the objection, it is incumbent to understand the procedural posture in which the glare analysis was admitted into the record as well as related hearing testimony.

Brookview's application, including the attached glare analysis, was initially identified as Board Exhibit 1 at the initial board hearing on January 15, 2020. January 15, 2020 Tr., pg. 13. However, it was not admitted as an exhibit at that time. Discussion of the glare analysis next occurs at the February 12, 2020 hearing, during which a senior project manager for Brookview confirmed that the application contained a glare analysis. February 12, 2020 Tr., pgs. 81–82. During this testimony, the project manager added that "the glare analysis found no impact." *Id.* at 82. Although cross-examination of the project manager was permitted, it was not vigorously pursued by any party.[9] There is no further discussion of the glare analysis in the thousands of pages of transcripts developed over 21 public hearings with the exception of when Brookview rested their presentation of evidence on August 27,

[9] At various points throughout her testimony, the project manager was unable to answer specifics concerning the Project and deferred to others. February 19, 2020 Tr., pgs. 17-19; also *see generally* January 15, 2020 Tr., pgs. 97-117. The project manager acknowledged she is not an engineer so she "know[s] a lot about a lot of subjects but I don't know everything." January 15, 2020 Tr., pg. 128. She conceded that she is not an expert, February 19, 2020 Tr., pg. 25, but rather the project manager who depends on subject matter experts to provide more specific details. February 19, 2020 Tr., pg. 28.

2020. At that time, counsel for Brookview moved to introduce "Applicant's Exhibits" 1–17.[10] Although the glare analysis was not included within Applicant's Exhibits 1-17, counsel for Opposing Intervenors voiced his objection to any consideration of the glare analysis on the basis that testimony concerning the conclusions reached by the analysis was not presented. Opposing Objectors protested their denial of an opportunity to cross-examine the author of the glare analysis as to either the methodology or the conclusions provided. August 27, 2020 Tr., pg. 148.[11] The Board did not rule on the objection but the Board's solicitor expressed her opinion that the objection should not be sustained on the basis that "the Application [was] submitted to the Township, and all of its parts were properly identified as an exhibit." *Id.* at 149. There is no other witness discussion of the glare analysis or any indication that it was authentic[12] or formally admitted as evidence.

The Board argues that the glare analysis is admissible as evidence on the basis that it was identified as a Board exhibit. This argument is unpersuasive for several reasons. Initially, there is a significant difference between "identifying" an exhibit for purposes of maintaining a clear record and "admitting" an exhibit for evidentiary consideration.[13] Unquestionably, under Pennsylvania law, the factfinder

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[10] Applicant's Exhibits 1–17 include neither Brookview's original application, which contained the glare analysis as an attachment, nor the glare analysis as an independent exhibit. Rather, the application and attached glare analysis were marked as "Board" Exhibit 1 at the initial hearing from January 15, 2020. *See* January 15, 2020 Tr., pg. 13.

[11] After diligent search, this writer has been unable to find any instance or any authority permitting consideration of the evidence on the basis an objection was lodged against its admission even though it was not moved into evidence.

[12] Prior to a document's admission, the Rules of Evidence require some proof of authentication. Pa.R.E. 901. Other than its attachment to the application, the record is devoid of any discussion of the document's authenticity. This void in proof heightens the concerns meant to be alleviated through the opportunity for meaningful cross-examination.

[13] Black's Law Dictionary, Fifth Edition, defines "identify" as "*evidence*; sameness; the fact that a subject, person or thing before a court is *the same* as it is represented, claimed or charged to be"

may only consider evidence which was properly admitted during the course of the proceeding. ***Commonwealth v. McFadden***, 156 A.3d 299, 309 (Pa. Super. 2017) (quoting ***Commonwealth v. Smith***, 97 A.3d 782, 788 (Pa. Super. 2014)) ("[A] trial court acting as the fact-finder 'is presumed to . . . disregard inadmissible evidence.'").

The status of the application as a matter of record does not equate to a finding that the application is substantive evidence. It is hornbook law that pleadings in any litigation do not constitute evidence. ***Atlas Bolt & Screw Co. v. Komins***, 10 A.2d 871, 872 (Pa. Super. 1940) ("[F]acts averred in the statement of claim and not denied are not evidence unless placed in evidence by the trial judge or counsel."). With the exception of allegations in a pleading that are admitted by an opposing party, *see* ***id.***; ***Grubbs v. Dembec***, 359 A.2d 418, 422 (Pa. Super. 1976), the mere pleading of a factual allegation does not relieve a party from its burden of proof. Therefore, while the Board correctly notes that a pleading is part of the official record, it is not a substitute for proof of a material fact at hearing. Attaching a critical report to the application without any evidence of authenticity or other indicators of reliability does not satisfy even the most lenient standard of proper evidence. In undertaking a *de novo* review, only proper evidence may be considered. *See* ***McFadden***, 156 A.3d at 309; ***Rebert v. Rebert***, 757 A.2d 981, 984 (Pa. Super. 2000) ("'De novo' review entails, as the term suggests, full consideration of the case anew. The reviewing body is in effect substituted for the prior decision maker and redecides the case.").

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(italics in original). That same resource identifies the "admission of evidence" as a "[r]uling by trial judge the trier of fact, judge or jury, may consider testimony or document or other thing...in determining ultimate question."

Accordingly, the glare analysis, having not been admitted as evidence, is not proper evidence in weighing whether a grant of conditional use is appropriate.

Even should this Court overlook the lack of formal admission of the glare study as a de minimis procedural oversight, evidentiary consideration of the report is still precluded as the objection to its admission is well placed. In weighing the admissibility of the glare analysis, it is important to note that formal Rules of Evidence do not apply to zoning hearings conducted by a municipal body. 53 P.S. § 10908(6); ***Zitelli v. Zoning Hearing Bd.***, 850 A.2d 769, 771 n.2 (Pa. Commw. 2004). Nevertheless, all parties to a zoning hearing before a municipal board have a right to be represented by counsel and must be afforded the opportunity to present evidence and cross-examine adverse witnesses on all relevant issues. 53 P.S. § 10908(5); ***Appeal of Little Britain Twp.***, 651 A.2d 606, 614–15 (Pa. Commw. 1994). This right is "mandatory . . . in all hearings before . . . zoning hearing board[s] . . . as a matter of due process." ***Little Britain Twp.***, 651 A.2d at 615.

At the conditional use hearing before the Board, Brookview did not present testimony from the preparer of the glare analysis. The inherent unfairness of consideration of the glare analysis without the opportunity for cross-examination is readily apparent from a review of the record. For instance, one can only wonder how a glare analysis can be credibly undertaken when the specifications of the solar panels to be utilized in the Project is unknown. Yet at the time of the analysis, neither the panels' size nor the specifications of their materials were known. Although this Court concedes a lack of specialized knowledge relative to solar panels, even an uninformed observer may question how a glare study could be completed when the

material from which the sun is reflecting is unknown. Although a rational explanation might exist, this certainly presents a fertile area of inquiry which Opposing Intervenors were denied by Brookview's failure to present a witness on this subject.

An additional concern arises from a reading of the analysis itself. The analysis relied upon the Solar Glare Hazard Analysis Tool ("SGHAT") to measure ocular impact of the solar panels at designated locations. Importantly, the FAA policy allegedly followed in conducting the analysis requires that ocular impact be studied "**over the entire calendar year** in one (1) minute intervals from when the sun rises . . . until the sun sets . . . ." Brookview Glare Analysis, pg. 2 (emphasis added). However, the glare analysis does not make any reference to the length of the study or the intervals at each of the designated locations from which data was collected. In fact, there is a paucity of any supporting data for the conclusion reached in the report. These concerns are not unreasonable as the glare analysis is dated October 25, 2019; a date which is much less than a calendar year from, and only two weeks subsequent to, preparation of the Project's site plan, which is dated October 11, 2019. Even more alarming is the incontrovertible fact that the site plan ultimately submitted for approval, Applicant's Exhibit 16, was not prepared until February 10, 2020; over three months **after** the glare study was completed.

Perhaps most interesting, the glare analysis is based on the assumption that the panels' height above ground is seven feet. The plans submitted with the Project, however, indicate that the solar panels will be 12 feet above ground level. While there may very well be an explanation for this discrepancy, that explanation is lacking on the face of the report and calls into question the entire validity of the analysis.

These concerns, among others, certainly present significant skepticism as to the conclusions reached by the glare analysis. However, Opposing Intervenors were not permitted an opportunity to cross-examine on these important material issues as Brookview failed to present any witnesses in support of the conclusions reached in the report.

Supporting Intervenors suggest that any objection to admission of the glare analysis was waived when Brookview's project manager's testimony referenced the glare analysis without objection from any party. Supporting Intervenors claim that the testimony of Brookview's project manager sufficiently corroborated the glare analysis as competent evidence thereby presenting Opposing Intervenors an opportunity to conduct cross-examination on the substance of the report. In aid of their argument, Supporting Intervenors cite ***Uptown Partners v. City of Pittsburgh Zoning Board of Adjustment***, 182 A.3d 1125 (Pa. Commw. 2017).[14]

The point of law which Supporting Intervenors rely upon was actually first enunciated in ***Walker v. Unemployment Compensation Board of Review***, 367 A.2d 366 (Pa. Commw. 1976). In ***Walker***, the Commonwealth Court defined the evidentiary **weight** to be afforded hearsay evidence by a zoning hearing board as follows:

> (1) hearsay evidence, *properly objected to*, is not competent evidence to support a finding of the Board . . . ; (2) hearsay evidence, *admitted without objection*, will be given its natural probative effect and may support a finding of the Board, *if it is corroborated by any competent evidence in the record*, but a finding of fact based *solely* on hearsay will not stand.

[14] ***Uptown Partners*** is an unpublished opinion that may be cited for persuasive value but is nonprecedential. 210 Pa. Code § 69.414(b).

***Walker***, 367 A.2d at 370 (emphasis in original) (citations omitted). Relying on this authority, Supporting Intervenors suggest that the failure to object to the project manager's testimony constitutes waiver of any objection to the report's admissibility.[15] I find this argument misplaced.

Unquestionably, ***Walker*** and its progeny established guidelines to be used in determining the **weight** of hearsay evidence by a factfinder in a zoning hearing. Critically, however, ***Walker***, and by extension ***Uptown Partners***, adds little to the current discussion as the issue before the Court is one of **admissibility** rather than **weight**. Admissibility and weight are separate and distinct considerations. *See* ***Commonwealth v. Safka***, 141 A.3d 1239, 1250 (Pa. 2016). Accordingly, neither ***Walker*** nor ***Uptown Partners*** is controlling.

Opposing Intervenors' objection to the admissibility of the glare analysis is on the basis of hearsay. Hearsay evidence is an out-of-court statement offered into evidence at a judicial proceeding to prove the truth of the matter asserted in the statement. Pa.R.E. 801. It is hornbook law that hearsay is not admissible unless permitted under an authorized exception. Pa.R.E. 802. While, as previously mentioned, the Rules of Evidence generally do not apply to zoning proceedings, the ***Little Britain*** decision instructs otherwise in regard to the consideration of hearsay on a material issue. Supporting Intervenors do not otherwise cite to an exception to the rules of hearsay. Rather, as discussed above, they argue waiver is applicable. Instantly, the record is unequivocal that objection was made to the glare analysis's

[15] As discussed earlier, despite the project manager's fleeting reference to the glare analysis, it was never authenticated or formally introduced as an exhibit through the project manager or any other witness.

admission as evidence even though it was not formally offered as evidence. Since the report is clearly hearsay and objection was made to its admission, waiver is not applicable.

Unquestionably, the project manager's testimony concerning the glare analysis constitutes hearsay. The failure to object to the project manager's reference to the glare analysis certainly impacts the admissibility of the project manager's testimony but not, by extension, the admissibility of the glare analysis. Opposing Intervenors have not cited, nor has this Court found, any authority for the creative proposition that an earlier failure to object to hearsay testimony precludes subsequent objection to different but related hearsay testimony. Indeed, appellate authority teaches otherwise. *See* ***Jones v. Constantino***, 631 A.2d 1289, 1297–98 (Pa. Super. 1993) (expert witnesses may rely on treatises informing opinion, but nevertheless the treatise remains hearsay and cannot be admitted for the truth of the matter asserted).[16]

In sum, while the project manager's hearsay statement concerning glare analysis is admissible as objection to the same was never made, the project manager's passing reference to the glare analysis does not constitute waiver in weighing a subsequent hearsay objection to the admissibility of actual glare analysis. Absent authority to the contrary, this Court will rely on the instruction of ***Little Britain*** and general concepts of hearsay in precluding admissibility of the glare analysis. Accordingly, Opposing Intervenors' objection to its admission as substantive

[16] Although this writer recognizes ***Jones*** speaks in the context of expert testimony and that lay witnesses such as the current project manager are generally not permitted to express opinions as to scientific matters, Pa.R.E. 701, this distinction adds, rather than detracts, to the persuasiveness of ***Jones*** to the current issue.

evidence is sustained. The glare analysis was never properly entered as an exhibit and, even if so considered, is inadmissible pursuant to the precedential instruction of ***Little Britain***.

**BURDEN OF PROOF AND PERSUASION**

Having defined the parameters of admissible evidence, it becomes necessary to assess the overall merits of Brookview's application. Any discussion in this regard must begin with an understanding of the respective burdens of proof concerning Ordinance requirements. Appellate authority instructs that unless a zoning ordinance provides otherwise, a municipal body evaluating a conditional use application must do so under a two-part, burden-shifting framework:

> First, the applicant must persuade the local governing body its proposed use is a type permitted by conditional use and the proposed use complies with the requirements in the ordinance for such a conditional use. Once it does so, a *presumption* arises the proposed use is consistent with the general welfare. The burden then shifts to objectors to rebut the *presumption* by proving, to a *high degree of probability*, the proposed use will adversely affect the public welfare in a way *not normally expected* from the type of use.

*See* ***Aldridge v. Jackson Twp.***, 983 A.2d 247, 253 (Pa. Commw. 2009) (emphasis added) (internal citations omitted); ***Bailey v. Upper Southampton Twp.***, 690 A.2d 1324, 1326 (Pa. Commw. 1997). With respect to the first part of the conditional use analysis, the applicant need only make a *prima facie* case that "the plan submitted complies with all zoning requirements." *See* ***In re Richboro CD Partners, L.P.***, 89 A.3d 742, 749 (Pa. Commw. 2014); ***Bailey***, 690 A.2d at 1326. This burden requires an applicant to demonstrate "compliance with the specific criteria of the ordinance."

***In re Thompson***, 896 A.2d 659, 670 (Pa. Commw. 2006). With respect to the second part of the conditional use analysis, the burden shifts to objectors to prove that the threat posed by the conditional use is "substantial" before the municipal body may deny an application as "[t]he fact that a use is permitted as a conditional use evidences a legislative decision that the particular type of use is consistent with the zoning plan and presumptively consistent with the health, safety and welfare of the community." *See* ***Bailey***, 690 A.2d at 1326; ***In re Cutler Grp., Inc.***, 880 A.2d 39, 42 (Pa. Commw. 2005).

Although Pennsylvania law generally shifts the burden of proving negative public welfare impact resulting from a land development to objectors, appellate courts have recognized that there are circumstances in which the burden of persuasion as to the health, safety, and general welfare of the community is placed upon an applicant. In ***Derr Flooring Co. v. Whitemarsh Township Zoning Board of Adjustment***, 285 A.2d 538 (Pa. Commw. 1971), the Commonwealth Court instructed that when a zoning ordinance specifically places the burden upon an applicant to establish that approval of the application will not be detrimental to the health, safety, and general welfare of the community, the burden of persuasion on that issue does not shift to objectors but rather remains with the applicant. ***Id.*** at 542.

Instantly, a reading of the Mount Joy Township Zoning Ordinance indicates the Ordinance specifically retains the burden of persuasion on health, safety, and general welfare considerations with the applicant. Article 12 of the Zoning Ordinance specifically provides: "[t]he applicant for a conditional use shall demonstrate, by credible evidence, compliance with [the following] criteria . . . ." :

1. The proposed use shall be consistent with the purpose and intent of the Ordinance as expressed in the district descriptions and such use is specifically authorized as a use by conditional use within the district wherein the applicant seeks approval.

2. The proposed use shall not detract from the use and enjoyment of adjacent or nearby lots.

3. The proposed use will not substantially change the character of the subject lot's neighborhood nor adversely affect the character of the general neighborhood, the conservation of property values, the health and safety of residents or workers on adjacent lots and in the neighborhood, nor the reasonable use of neighboring lots. The use of adjacent lots shall be adequately safeguarded.

...

Zoning Ordinance Section 1201B. This language unequivocally delegates the burden of proof on the specifically identified public welfare considerations to Brookview. As such, in determining whether conditional use approval for the Project is appropriate, the burden of proof and persuasion on both the specific requirements of the Ordinance and the public welfare considerations identified in the Ordinance rests with Brookview.

**SPECIFIC ORDINANCE REQUIREMENTS**

Analyzing this Court's factual findings through the lens of Ordinance requirements reveals Brookview has not carried its burden of proving compliance with the specific standards related to the grant of conditional use for a solar energy system. In the interest of brevity, this Opinion will limit its discussion to deficiencies in Brookview's evidence.

Examination of Brookview's proof, or lack thereof, will begin with the previously discussed glare analysis. Section 401.II(2)(2) requires a glare analysis demonstrating "that any glare produced by the solar energy system will not have an adverse impact." In light of the objection to the admissibility of the actual glare analysis report having been sustained, the only evidence in the record related to this requirement is the project manager's general statement concerning the results of the report. In order to evaluate the weight of this testimony, it is necessary to briefly summarize the content of the testimony.

A thorough reading of the totality of the project manager's testimony reveals, by her own admission, that she is not qualified to speak to manufacturing specifications, engineering, landscaping, electrical specifications, or other detailed scientific information related to the solar system. In essence, her testimony is a "check-the-box" exercise of reciting Ordinance requirements while claiming Brookview's satisfaction of the same. When challenged on specifics of any particular subject, she appropriately deferred to subject matter experts. Her reference to the glare analysis was fleeting and essentially consisted of her parroting the report's conclusions. Although this Court does not question her truthfulness as a witness, her echoing of the glare analysis's conclusion, without any indication of her understanding of the substance of the same, is unpersuasive in weighing the ultimate issue. More specifically, this factfinder, in exercising discretion concerning the credibility of witnesses and the weight of their testimony, finds the project manager's testimony insufficient to reach any conclusion related to the glare analysis. *See* ***Pennsy Supply, Inc. v. Zoning Hearing Bd.***, 987 A.2d 1243, 1250–51 (Pa.

Commw. 2009) (the factfinder has discretion to determine whether a party has met its burden of proof and determinations as to the credibility of witnesses and the weight to be given to the evidence). As this testimony is the only evidence related to the glare analysis in light of the actual report's inadmissibility, Brookview has failed to present credible evidence of its satisfaction of the Ordinance requirement that the solar energy system not have an adverse glare impact on surrounding properties.

Although objection to evidentiary admission of the glare analysis was sustained as more specifically discussed above, its admission would not change the current result. The report, standing alone, is not persuasive. This finding is made on the basis that, in general, the opinion of an expert, or in this case a scientific report, has value only when the facts upon which it is based are accepted. *See* ***Kelly v. St. Mary Hosp.***, 778 A.2d 1224, 1227 (Pa. Super. 2001) ("An expert cannot base an opinion on facts which are not warranted by the record.").

As discussed above, there is no means to assess the facts upon which the glare analysis is based as, to a large extent, they are simply unknown. By all accounts, the specifications, materials, size, and layout of the solar panels to be utilized in the Project have not been determined.[17] The effect of the lack of this critical information in weighing the credibility of the glare analysis is obvious. The obvious is further magnified by inherent inconsistencies in the analysis. For instance,

[17] Brookview insinuates that the Ordinance does not require identification of manufacture specifications of the key components of the solar energy system until either the time of application of the building or electric permits or 30 calendar days prior to the start of site development excuses their obligation to comply with other ordinance requirements. Although Brookview correctly cites Ordinance Section 402.II(2)(3), they have failed to identify any authority for the proposition that permissive language in one section of the Ordinance excuses compliance with a specific requirement in a different section of the Ordinance. Unquestionably, the unambiguous language of the Ordinance

the height of the solar panels examined in the analysis differs from the actual height of the solar panels which Brookview intends to install.[18] Of equal concern is the fact that the plan, including panel array layout, for which Brookview seeks approval was not the plan purportedly considered in the glare analysis.[19] This Court's earlier discussion expressing concern as to the inability to cross-examine the preparer of the report on critical matters applies equally to the weighing report's credibility as the report is not believable absent additional important information. Thus, even if this Court had admitted the glare analysis as substantive evidence, the result remains unchanged as the glare analysis lacks sufficient credibility to support a finding Brookview has met its burden of proof and persuasion regarding the glare analysis Ordinance requirement.

A second deficiency in Brookview's proof involves Brookview's failure to demonstrate compliance with the Township's Chapter 81 Stormwater Management requirements. Ordinance Section 401.II(2)(1)(iii) demands an application for conditional use include a site plan "demonstrating compliance with Chapter 81 Stormwater Management of the Code of the Township of Mount Joy." Rather than providing such a plan, Brookview claims it is only required to demonstrate "a substantial likelihood" that the requirement will be satisfied in future proceedings before the Township and state agencies related to the Project's permitting and

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directs certain requirements relating to solar energy systems be met at the time a request for the grant of a conditional use is made.

[18] As previously mentioned, the glare study relates to solar panels with a maximum height of 7 feet. Brookview intends on utilizing solar panels which have a maximum height of 12 feet.

[19] While Brookview may argue that the modified plan is a reduction in the amount of solar panel arrays contained in the original plan implying the glare would be even less than the plan which was the subject of the glare analysis, their argument misses the point. It is the vagueness of their plan and the lack of any identification of the precise location of the panels which precludes such a comparison

approval process. More succinctly, Brookview essentially claims that a showing of stormwater management compliance is not required in a zoning application for conditional use approval.[20]

In support of its position, Brookview relies upon ***Schatz v. New Britain Township Zoning Hearing Board of Adjustment***, 596 A.2d 294 (Pa. Commw. 1991). In ***Schatz***, the municipality opposed the grant of a special exception for property to be used as an inpatient drug and alcohol treatment facility. ***Id.*** at 295. The township argued that the application jeopardized public welfare because the proposed facility did not appear to have adequate sewage capacity and the applicant did not address issues related to stormwater management, water supply requirements, and the township's building code. ***Id.*** at 298. In affirming the grant of a special exception to the applicant, the Commonwealth Court was careful to note that the issues under challenge related to public welfare rather than specific requirements set forth in the ordinance. Based upon this finding, the Court applied the case law discussed earlier hereinabove which unequivocally instructs that absent ordinance direction to the contrary, the burden of proving negative impact to public welfare considerations in zoning litigation shifts to the objecting party once the

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between plans and, more importantly, undercuts every attempt to meaningfully weigh the plan's compliance with Ordinance requirements.

[20] In concurring with Brookview's argument, the Board, in their brief, suggests "[t]here is no evidence in the record that the proposed use will generate stormwater management impacts that would not be addressed through the administration of the Stormwater Management Ordinance and NPDES regulations and permitting, including the attachment of any conditions to such approval and permit." Board Brief, pg. 16. It is interesting that the Board takes this position in its brief as two of the four supervisors voting on the application found that Brookview had not met this requirement. *See* Board Draft Decision, ¶ 24. Nevertheless, the Board's circular reasoning is nonsensical. A party cannot provide evidence of stormwater impacts when the applicant fails to provide sufficient information for one to analyze the potential impact. This is precisely the conundrum that the plain language of the Zoning Ordinance addresses by requiring the stormwater management plan at the time the application is considered.

specific ordinance standards have been met by the applicant. Although the ***Schatz*** Court observed "[z]oning only regulates the *use* of land and not the particulars of development and construction," ***Id.*** at 298 (emphasis in original), the Court did so in the context of evaluating general considerations of public welfare not specifically required by the Ordinance. For this reason, ***Schatz*** is inapplicable to the current discussion as the obligation of an applicant to provide a site plan demonstrating compliance with the Township's stormwater management regulations **is** a specific requirement expressly set forth in the Mount Joy Ordinance.

Rejection of the argument currently being advanced by Brookview finds support in a very recent opinion by a panel of the Commonwealth Court. In ***Heisler's Egg Farm Inc. v. Walker Township Zoning Hearing Board***, 232 A.3d 1024 (Pa. Commw. 2020, *appeal denied*, 241 A.3d 647 (Pa. 2020), the Commonwealth Court held as follows:

> We recognize that this Court has stated that zoning regulates the use of land, not the particulars of development and construction, and that, therefore, typically an application for a special exception need not address the issues of adequate sewage capacity, stormwater management or water supply requirements. ***Schatz v. New Britain Tp. Zoning Hearing Bd. of Adjustment***, 141 Pa.Cmwlth. 525, 596 A.2d 294 (1991). However, where a zoning ordinance provision requires that the adequacy of such items be addressed, a special exception can be denied if the applicant fails to establish that it can meet the requirements. . . .

***Id.*** at 1040. Although the ***Heisler's*** decision involved the grant of a special exception, the reasoning is equally applicable to consideration of a conditional use application. Because it is a specific requirement of the Ordinance, the burden of proof on this element clearly rests with the applicant. *See* ***Aldridge v. Jackson***

***Twp.***, 983 A.2d 247 (Pa. Commw. 2009). Therefore, absent applicable precedent or other authority to the contrary, this Court rejects Brookview's invitation to ignore the plain language and requirements of the Zoning Ordinance.

Brookview counters by arguing that even should the Ordinance require a stormwater management plan at the time of submission of the application, the zoning officers' acceptance of the application precludes excuses of Brookview's noncompliance. Brookview cites to ***Nextel Partners, Inc. v. Clarks Summit Borough***, 958 A.2d 587 (Pa. Commw. 2008), in support of the suggestion that acceptance of the application by the zoning officer precludes inquiry into the completeness of the application or its compliance with Ordinance requirements. Brookview expands upon this reasoning to suggest that the Township's acceptance of the current application, which did not include a stormwater management plan, precludes denial of the application on the basis that the plan is absent.

In ***Nextel***, the Commonwealth Court addressed the municipal body's failure to act upon an application for zoning relief within the statutory time periods established by the MPC. In holding a municipality's failure to act on the application within the prescribed time period to be the equivalent of a deemed approval of the application, the ***Nextel*** Court concluded that once an application is accepted, regardless of deficiencies in the application, the time period for municipal action is commenced. ***Id.*** at 591-92. The ***Nextel*** Court, however, further held that consideration of the technical requirements and interpretations of the application should be reserved until the hearing process during which ordinance compliance could be assessed. ***Id.*** at 593-94.

***Nextel*** is inapplicable to the current circumstance as timeliness of the Board's action is not at issue. The current issue before the Court is not whether the application was administratively incomplete thereby tolling commencement of hearing deadlines but rather whether Brookview has proven, at hearing, its compliance with the Zoning Ordinance's stormwater management requirement. Contrary to Brookview's argument, the current evaluation of the substantive merits of Brookview's application is being conducted in compliance with the intent of the ***Nextel*** Court. Brookview's compliance with technical requirements in the Ordinance is properly being considered after an evidentiary presentation.

In a related vein, Brookview claims that the lack of evidence related to a stormwater management plan is excused due to its reliance on the opinion of the township zoning officer that a stormwater management plan was not necessary until later in the Project's approval process. Brookview correctly cites to a January 14, 2020 letter from the Township zoning officer to the Board that indicates:

> Section 402.II(2)(a)(3) demonstrating compliance with Chapter 81 Stormwater Management or the Code of the Township of Mount Joy. *Not included in the conditional use, stormwater management permit required under Chapter 81.*

Board Exhibit 7 (italics in original). Brookview further references the zoning officer's testimony at hearing wherein she indicated the stormwater management plan is not required as part of a conditional use application. February 12, 2020 Tr., pg. 17.[21]

[21] Counsel for the Opposing Intervenors cross-examined the zoning officer as to the basis of her conclusion. Without identifying the source of her information, the zoning officer indicated it was her understanding that the stormwater management plan was not required as part of the zoning application but rather was required prior to permitting. February 12, 2020 Tr., pg. 31. Similarly, in its brief, the Board, without explaining the source of its understanding, inexplicably takes the position that "the zoning officer, Township engineer and the Board understand that stormwater management is addressed through the administration of the Township's Stormwater Management Ordinance . . . ."

The cornerstone of Brookview's argument is that Brookview "had a right to rely upon" the advice and interpretation of the Zoning Ordinance by the zoning officer. Unfortunately for Brookview, this proposition is contrary to statutory law. 53 P.S. § 10614 provides:

> The zoning officer shall administer the zoning ordinance in accordance with its literal terms, and shall not have the power to permit any construction or any use or change of use which does not conform to the zoning ordinance.

***Id.*** This provision recognizes that it is the responsibility of a municipal board, acting in a quasi-judicial role, to consider zoning applications before it by determining facts and weighing those findings based upon their interpretation and application of the zoning ordinance. The statutory scheme set forth in the MPC incorporates fundamental principles of due process in providing all potentially interested parties with notice, the right to appear and present evidence, and the right to cross-examine evidence presented during the course of the hearing. The suggestion that an individual zoning officer can individually usurp all of these procedural safeguards is nonsensical and offensive to concepts of due process. On the other hand, this conclusion is not prejudicial to an applicant before the board as the applicant is equally capable of reading the plain language in the Ordinance. Rather, acceptance of Brookview's argument would lead to obviously absurd results, and potential abuses of due process, as sole authority of zoning ordinance application would rest in the unchallengeable decisions of a single zoning officer. For these reasons, the suggestion is rejected.

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Board's Brief, pgs. 15–16. The Board's stance on this issue is interesting as the record reflects that the Board, through its solicitor, issued competing decisions following the hearing. Those decisions

Interestingly, the requirement in a zoning ordinance that an application for the construction of a solar energy system include a site plan demonstrating compliance with stormwater management regulations has a practical purpose. *See generally* the testimony of Lawrence Lahr. October 21, 2020 Tr., pgs. 17-106.[22] *See also* Applicant's Exhibit 24. Indeed, numerous witnesses expressed concern over the Project's stormwater runoff and the impact it would have on their enjoyment and use of their properties adjoining the Project site. Similarly, several neighboring property owners expressed concern over the negative impact that stormwater runoff would have on their property value.

Brookview's failure to include such a plan highlights the importance of this particular Ordinance requirement. One cannot seriously question that the specifics of the solar panel placement and size affects the impervious coverage on a parcel of land. Similarly, one cannot seriously question that the amount and location of impervious coverage has a direct relationship to the quantity and intensity of stormwater runoff which directly correlates to the value and utilization of the affected neighboring property. Yet, Brookview asks this Court to ignore the lack of evidence on the critical details influencing stormwater considerations at the precise time in the Project's approval process when considerations of health and welfare, including the impact on land value, must be made. Whether it be the applicant or the objectors who carry the burden of persuasion on issues related to the health and welfare of neighboring properties, either is significantly handicapped should they not have

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reveal that the Board was equally split as to whether the applicant demonstrated compliance with the stormwater management requirements of the Ordinance. Board Draft Opinions, ¶ 24 of each.

[22] Mr. Lahr was recognized as an expert in land planning and municipal zoning.

sufficient factual information concerning the particulars which frame such considerations. More succinctly put, a party cannot fairly address a matter upon which they have a burden of proof if the factual information critical to such a determination is unknown. Indeed, the drafters of the Zoning Ordinance recognized this concern when they intentionally included the requirement that the site plan include a stormwater management plan with the application for conditional use.[23]

Brookview counters that compliance with the stormwater ordinance at this stage of the permitting process is not practical. In support of this claim, Brookview references the testimony of their engineer that it would be fairly impossible to show compliance with all aspects of the stormwater management Ordinance due to the preliminary nature of the presented plan. Brookview's argument is summarily rejected.

Although it is true that Brookview's engineer expressed concern over the difficulty of proving Ordinance compliance at this stage of the Project approval process, he conceded the difficulty to be self-imposed due to the current lack of detail in the plans. Indeed, his testimony did not claim compliance to be impossible[24] but rather acknowledged that the lack of detail in the current plans is related to

[23] The provision of the Zoning Ordinance requiring a stormwater management plan as part of the application process for the construction of a solar facility is unique in the Ordinance as it relates to specific requirements for identified conditional uses. Indeed, of the 40 identified uses in the Ordinance which contain specific requirements, only solar energy systems require a site plan which requires the inclusion of a stormwater management plan. The drafters of the Ordinance apparently recognized the importance of a stormwater management plan in relation to solar energy systems as compared to other conditional uses. It is evident that the drafters placed such importance on a stormwater management plan in the development of solar energy systems that they intentionally included the requirement at the time of evaluation of whether the grant of a conditional use was appropriate.

[24] During cross-examination, the engineer confirmed it was possible to do a preliminary stormwater plan if the size of the solar panels was known. August 27, 2020 Tr., pg. 43. He acknowledged an actual specification of the panel, including size, cannot be known until a particular panel is selected by Brookview. August 27, 2020 Tr., pg. 27.

Brookview's resource and time conservation. August 27, 2020 Tr., pg. 26. Brookview's argument is dismissed as this writer is unaware of any legal principle that permits statutory law or municipal ordinances to be discarded at one's whim on the basis of time or expense.[25] The rationale behind Brookview's argument defines its entire application as it attempts to rewrite the Ordinance by suggesting entitlement to a conditional use without providing the details which permit the Board, or the parties, the opportunity to evaluate either specific objective requirements of the Ordinance or the Project's impact on public welfare. The nature of Brookview's application reminds one of trying to capture a cloud; the application's constant shifting of critical details makes definitiveness for meaningful evaluation impossible. Unfortunately for Brookview, the Ordinance requires more.

Brookview further argues that consideration of details such as stormwater management at the conditional use hearing is an inefficient waste of Township time as the same would result in lengthy and duplicative hearings throughout the approval process. This argument is inaccurate and simply misrepresents the controlling provisions in the Ordinance. Ordinance Section 1201D directs that any site plan presented in support of a conditional use "will...bind the use in accordance with the submitted site plan." The section further explains that "...any subsequent change on the subject lot not reflected on the original approved site plan shall require the approval of another conditional use." Ordinance Section 1201D. That same section

[25] Certainly, where an ordinance requires an act which is incapable of performance, the law excuses lack of compliance. *See* ***Dalzell v. Kane***, 183 A. 782, 784 (Pa. 1936) ("When strict compliance with the terms of the written law is impossible, compliance as near as can be, under judicial sanction, is allowed."). That is not the circumstance currently as there is no question that a stormwater management plan can be developed for the subject property. Brookview suggests nothing more than

further provides that alterations, additions, or relocation of stormwater management facilities are not minor changes that might otherwise avoid the requirement to submit a new application for a conditional use. Ordinance Section 1201D(2)(h). This language in the Ordinance unequivocally mandates that any changes to the stormwater management plan after conditional use approval requires the plans to be resubmitted to the Board for a new conditional use approval.

Contrary to Brookview's argument, it is the lack of a definitive stormwater management plan at the time conditional use approval is being considered which most definitely will result in duplicative proceedings. According to the testimony of Brookview's own engineer, the size of the solar panels is currently unknown, August 27, 2020 Tr., pg. 65; the spacing between the panels is similarly unknown, August 28, 2020 Tr., pg. 57; actual lot coverage has not yet been determined, August 27, 2020 Tr., pg. 22; and it is likely that the ultimate lot coverage ratio for the Project will change with future renditions of the plans, August 27, 2020 Tr., pg. 64. Unquestionably, future repetitive zoning hearings are unavoidable under the current circumstances as the application's lack of any stormwater management plan must result, under Ordinance requirements, in a repeat of the zoning hearing once a stormwater management plan is developed.[26] For this reason, this Court is unwilling to accept Brookview's invitation to delay the presentation of critical information

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mere inconvenience and expense. There is no explanation in the record as to any inability on the part of Brookview to be able to identify the specifications of the panels intended to be used.

[26] Any other reading would render the provisions of Section 1201D meaningless which is contrary to established Pennsylvania law which teaches that the provisions of an ordinance are to be interpreted with an eye towards giving all provisions of the ordinance meaning. *See* ***Phoebe Servs, Inc. v. City of Allentown***, 262 A.3d 660, 665-66 (Pa. Commw. 2021), *appeal denied*, 273 A.3d 509 (Pa. 2022) ("When interpreting an ordinance, we construe words and phrases according to their plain meaning... If possible, we are to give effect to all the ordinance's provisions.").

concerning stormwater management until later proceedings. Rather, the unequivocal language of the Ordinance will be applied. Such an application clearly results in a finding that Brookview has not met this specific requirement in the Ordinance.

A similar conclusion is reached in regard to Brookview's lack of compliance with the specific requirement that the application identify an access drive and interior travel aisles in compliance with the Township's subdivision land development code. Zoning Ordinance Section 402(ii)(6). Once again, Brookview, apparently with the zoning officer's blessing, chose to delay production of critical information related to plan for access roads which this Ordinance specifically requires be produced at the time the request for conditional use is under consideration. Although Brookview's plan includes general information in regard to access roads as they are vaguely depicted on a number of exhibits, Brookview's engineer acknowledged that their identification on the plan was speculative as "[t]he access roads are a function of the layouts. The layout cannot really be determined until the actual panel is selected." August 27, 2020 Tr., pg. 26. As the reasoning for this conclusion is similar to that set forth above in regard to the glare analysis and the stormwater management plan, it will not be repeated herein. The result, however, is the same: Brookview has not carried its burden of proof on this specific criteria in the Ordinance.

Brookview has also failed to offer sufficient evidence to prove compliance with the dimensional requirements of the Ordinance. Zoning Ordinance Section 302(a) sets forth the minimum open space percentage and maximum lot coverage

percentage for parcels in the BPCD at 20 percent and 50 percent respectively.[27] Inexplicably, after a painstaking review of the record, it appears there is a complete absence of any discussion related to open space on the parcels subject to development. This discrepancy, standing alone, mandates denial of the application.

Similarly, although Brookview offered testimony concerning the maximum lot coverage on each parcel, the evidence is simply not credible. Calculation for maximum lot coverage is based upon hypothetical solar panel size rather than the actual size as the same has not yet been determined. While there likely will be space between the panels, the actual amount of space uncovered by structures is unknown. August 27, 2020 Tr., pg. 57. Critically, Brookview's evidence presented on this issue appears inherently contradictory. For instance, their exhibit calculating lot coverage[28] identifies a unit count of approximately 12,000 panels placed on the approximate 391 acres of Project properties within the BPCD. This relatively small number of solar panel units on the proposed Project's total acreage in the BPCD contrasts significantly with the testimony of Brookview's civil engineer which indicated that the average number of panels per 100 acres is approximately 80,000. February 19, 2020 Tr., pg. 73. While it is true that the plan under consideration at the time of the civil engineer's testimony is different than the plan currently under consideration, the minor adjustments in the modified plan do not explain the significant discrepancy in

[27] Definitions in the Ordinance distinguish "open space" from "lot coverage." Open space is defined as "[a]ny area of land or water, or any combination of land or water, within a development site that is free of improvement." Zoning Ordinance Section III. Importantly, the term "improvement" includes "any physical change to the surface of the land." *Id.* On the other hand, lot coverage is defined in the Ordinance as the "percentage of the lot area covered with structures, including any portion of a structure elevated above grade but except ground swimming pools and playground equipment, and impervious area as defined in this Ordinance." Zoning Ordinance Section 111. As such, minimum open space and maximum lot coverage calculations are distinct calculations.

this evidence. Indeed, a visual inspection of panel placement as depicted on the site plan makes reconciliation of Brookview's lot coverage calculation with the proposed site plan[29] difficult if not impossible as the plan appears more consistent with the 80,000 solar panels per acre calculation expressed by Brookview's civil engineer.

Most importantly, Brookview concedes the unreliability of the lot coverage calculation for purposes of considering compliance with conditional use requirements. Brookview's own senior project engineer acknowledged the strong possibility that the ultimate lot coverage ratio of the Project will change with future renditions of the plans. August 27, 2020 Tr., pg. 64.[30] The uncertainty on this topic is likely due to the reality that lot coverage cannot be meaningfully determined until solar panel size, access routes, and stormwater management facilities are defined. Since Brookview unquestionably has the burden of proof on this clearly specific dimensional requirement, the lack of credible evidence establishing lot coverage compliance condemns Brookview's application for conditional use to failure.

**GENERAL WELFARE STANDARDS**

Brookview has failed to credibly establish satisfaction of the criteria applicable to all conditional uses under Section 1201(B). Initially, as identified in finding of fact

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[28] Applicant's Exhibit 17
[29] Applicant's Exhibit 16
[30] Although the senior project manager indicated in his opinion that it is unlikely that any change of plans would cause the Ordinance's maximum lot coverage to be exceeded, Brookview is once again asking for conditional use approval of a plan based upon speculation as to what the final plan may look like. In essence, Brookview is asking the Township to accept their promise of good-faith future compliance in exchange for the Township's disregard of its own clear Ordinance requirements. There is no support in the law for this position.

48, the Project consumes approximately 10 percent of the land in the BPCD. This reality contrasts directly with the intent of the Ordinance to continue the established mixed use currently in place in the BPCD. While some may differ as to this conclusion, the Ordinance requires Brookview to present credible evidence of compliance with the Ordinance's intent. Brookview has not done so. Consequently, the Project fails to comply with the specific Ordinance requirement which states the proposed use must be consistent with the purpose and intent of the Ordinance. Zoning Ordinance Section 1201B.

Additionally, as exhaustively outlined hereinabove, due to Brookview's failure to identify the specifics of the solar panels, critical information concerning site development is unknown. It logically follows, therefore, that any opinions proffered by Brookview's witnesses related to the use and enjoyment of adjacent or nearby lots are equally speculative. Under the current record, it is simply impossible to determine whether the use of adjacent lots is being adequately safeguarded or if the health and safety of neighboring residents is being placed at risk. Although the use being proposed is specifically authorized as a use by conditional use within the BPCD, the record lacks necessary critical information to make any further determination.

Examples of real impacts on neighboring properties which currently can't be measured are evident throughout the record.[31] Perhaps the lot greatest at risk of negative impact by the Project is Lot 82 as identified on Brookview's plan. The lot is

[31] *See* Brookview Objectors' Exhibit 6; *see also* testimony of numerous Objectors.

completely surrounded by proposed solar panels.[32] November 9, 2020 Tr., pg. 101. One of the fields adjacent to Lot 82 which is proposed to contain solar panels has approximately 11 acres sloping down towards Lot 82. November 9, 2020 Tr., pgs. 102-103. Although the risk of significant stormwater flowing onto Lot 82 from the proposed Project site is obviously concerning,[33] Brookview failed to present a final stormwater management plan permitting any meaningful examination of the risk. This lack of critical detail is fatal for the Brookview plan as the Ordinance expressly places the burden of proof on an applicant for a conditional use will not adversely affect the reasonable use of neighboring lots or negatively impact property values. Zoning Ordinance Sections 1201(B)(2) and (3).

## SUMMARY

In sum, the current application lacks a number of critical details specifically required by the Ordinance. Although there is some truth to Brookview's position that details might ultimately be flushed out as the Project advances through the approval process, their interpretation is entirely contrary to the plain language of the Ordinance. Brookview's suggestion that conditional use approval should be granted simply upon their promise of future compliance essentially vitiates the entire purpose of the Ordinance. One simply can't assess the extent that a use of a property may impact a neighboring property unless sufficient information is present to analyze the

[32] This writer will leave to the reader any conclusions as to the impact to Lot 82 of once being surrounded by farmland only to be surrounded on all four sides by solar panels if the Project is approved.

potential impact. Yet, this is exactly what the current Brookview application attempts. It is also the exact concern addressed by the Ordinance which requires critical details concerning issues like stormwater management, glare impact, and dimensional details at the time the application is considered for approval. To be clear, this Opinion is not a condemnation of the efficacy of a solar energy project; rather, it is a denial of Brookview's application for failure to meet specific Ordinance requirements.

For the foregoing reasons, the attached Order is entered.

BY THE COURT:

**MICHAEL A. GEORGE**
**President Judge**

Dated: September 2, 2022

[33] One inch of rain on one acre of land translates to approximately 27,000 gallons of water. November 9, 2020 Tr., pg. 123.