

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

NATHAN BOLLINGER and :
BOLLINGER SOLAR LLC, :
Appellant, : CV 23-01204
v. :
BOARD OF SUPERVISORS OF :
WOLF TOWNSHIP, :
Appellee. : LAND USE/ZONING APPEAL

OPINION AND ORDER

I. Introduction:

This matter came before this Court for oral argument on the land use appeal filed October 26, 2023. The written record has been filed, the parties have timely submitted briefs, and counsel for all parties in interest attended oral argument on February 13, 2024.

Nathan Bollinger and Bollinger Solar, LLC (hereinafter collectively “Bollinger”) filed an application for a conditional use in Wolf Township for the construction of a solar farm on real property bearing Lycoming County tax parcel number 59-354-194-A. That application came for an evidentiary hearing before the Wolf Township supervisors on June 12, 2023. The filed transcript of that hearing is included in the record. The hearing concluded as follows:

MR. SMITH: So, supervisors, what I am going to recommend, because I heard Mr. McGinley say that he had further information to present to the board and others may have further information, what I’d like to suggest with the supervisors’ approval, is that we keep the record of this proceeding open. I don’t know that we need another hearing but allow people to submit information to the board either for or against the application, and I would like the applicant’s agreement that the record can stay open for 30 days and that the 45 day period for the township to make its written decision would run from that 30 day period. Is that acceptable to you?

MR. VASSALLO: Yeah. We’re not going to proceed with land development until we know -- there’s not a lot to land development anyhow but there’s the NPDES modification to the permit.

MR. SMITH: So you’re okay with keeping the record open for 30 days –

MR. VASSALLO: For 30 days I wouldn’t have a problem.

MR. SMITH: -- without triggering – and that the 45 day decision window will start from the end of that 30 days? Yes?

MR. VASSALLO: Thirty days I'm in agreement with. Hopefully the 45 is not taken to make the decision.

MR. SMITH: All I want to do is say that the clock starts on the 45 days at the 30th day.

MR. VASSALLO: Okay.

MR. SMITH: All right?

MR. VASSALLO: Yep.

MR. SMITH: Yes? And that's -- I want to hear a yes from you too, Mr. Bollinger.

MR. BOLLINGER: Yes, that's acceptable.

MR. SMITH: And is that okay with the board?

MR. BARTO: Yeah.

MR. CLAYTON: Yeah.

MR. SMITH: Then I think it's appropriate to adjourn the hearing at this point in time.

MR. BARTO: Yeah, I think so. First I'd like to thank everyone for coming out and expressing their opinion and comments and stuff. I think it was a good conversation on the reasons why you're opposed to it and why you're for it obviously and stuff. So with that said, I'll accept the motion to adjourn the meeting,

MR. CLAYTON: I'll second it.

MR. BARTO: Okay. It's been moved and seconded, adjourn the meeting all in favor signify by saying aye.

MR. CLAYTON: Aye.

MR. THOMAS: Aye.

MR. BARTO: Opposed? Motion carried.

(Whereupon, the hearing was concluded at 7:36 p.m.)

The record includes the minutes of the regular meeting of the Wolf Township supervisors, conducted on July 10, 2023. Those minutes reflect that the record of the June 12, 2023, hearing was supplemented by the submission of written documents. Thereafter, Supervisor David Thomas made a motion, seconded by Supervisor Gregg Clayton "to Close the Conditional Use Hearing Record for Nathan Bollinger/Bollinger Solar on July 12, 2023. Motion Carried."

The record includes the minutes of the regular meeting of the Wolf Township supervisors, conducted on August 14, 2023. Those minutes reflect that representatives of Bollinger attended, and answered approximately nine (9) questions from meeting visitors. Thereafter, Supervisor Gregg Clayton made a motion, seconded by Supervisor Dean

Barto “to Deny the Conditional Use for Bollinger Solar. It does not meet ordinance requirements and is not compatible with surrounding uses. Motion Carried.” On September 26, 2023, the Wolf Township supervisors entered their written findings and their Opinion and Order (hereinafter the “Opinion and Order of September 26, 2023”).

Bollinger filed a timely appeal. Bollinger contend that they are entitled to a “deemed approval” of their conditional use application pursuant to 53 P.S. § 10913.2(b)(2), because the Opinion and Order of September 26, 2023, was rendered more than forty-five (45) days after the last hearing on the application. It is undisputed that, at the conclusion of the hearing conducted on June 12, 2023, all parties agreed that the evidentiary record would remain open for an additional period of thirty (30) days. The minutes of the July 10, 2023, regular meeting of the supervisors reflect that additional documents were accepted to supplement the record of the June 12, 2023, hearing, and that the supervisors voted to close the record.

Appellee contends that the August 14, 2023, regular meeting of the Wolf Township Supervisors was the final hearing on the Bollinger conditional use application. For that reason, the Court requested an opportunity to review the recording of that meeting. The Court has been advised that Wolf Township did not retain the recording. Thus, the Court is limited to consideration of the meeting minutes. The minutes do not suggest that any evidence or oral argument was accepted at that meeting. Rather, it appears that Bollinger answered a few questions from meeting visitors, and that the supervisors voted to deny the Bollinger application.

On September 26, 2023, seventy-six (76) days after the record was closed, the Wolf Township Board of Supervisors issued the Opinion and Order of September 26, 2023.

II. Questions Involved

Whether Bollinger is entitled to a “deemed approval” of their conditional use application, pursuant to 53 P.S. § 10913.2(b)(2).

III. Answer to Question Involved

Bollinger is entitled to a “deemed approval.”

IV. Discussion

Bollinger contends that the forty-five (45) day period for a decision under 53 P.S. § 10913.2(b)(1), commenced on July 12, 2023 (the conclusion of the agreed thirty (30) day extension after the June 12, 2023 hearing and the date identified in the Motion passed at the meeting of July 10, 2023) and expired on August 26, 2023. Since that day was a Saturday, Bollinger' argument would be that the deadline for the written decision required by 53 P.S. § 10913.2(b)(1), would have been Monday, August 28, 2023.

Appellee contends that the question and answer exchange which took place at the August 14, 2023, meeting constituted a "hearing" for purpose of 53 P.S. § 10913.2(b)(1), that the forty-five (45) day period for a written decision commenced on that date, and that the Opinion and Order of September 26, 2023, was timely.

53 P.S. § 10913.2(b)(1) and (2) provide as follows:

- (1)** The governing body shall render a written decision or, when no decision is called for, make written findings on the conditional use application within 45 days after the last hearing before the governing body. Where the application is contested or denied, each decision shall be accompanied by findings of fact or conclusions based thereon, together with any reasons therefor. Conclusions based on any provisions of this act or of any ordinance, rule or regulation shall contain a reference to the provision relied on and the reasons why the conclusion is deemed appropriate in the light of the facts found.
- (2)** Where the governing body fails to render the decision within the period required by this subsection or fails to commence, conduct or complete the required hearing as provided in section 908(1.2), the decision shall be deemed to have been rendered in favor of the applicant unless the applicant has agreed in writing or on the record to an extension of time. When a decision has been rendered in favor of the applicant because of the failure of the governing body to meet or render a decision as hereinabove provided, the governing body shall give public notice of the decision within ten days from the last day it could have met to render a decision in the same manner as required by the public notice requirements of this act. If the governing body shall fail to provide such notice, the applicant may do so.

It is the settled law of this Commonwealth that a “hearing” for purposes of 53 P.S. § 10913.2(b)(1) is not limited to a testimonial proceeding on the record. Rather, a deadline date for the submission of written documents in evidence, or a scheduled oral argument of counsel, may be considered a “hearing” for purposes of that Section. *See Gaster v. Township of Nether Providence*, 124 Pa.Cmwlth. 595, 600-602, 556 A.2d 947, 949-950 (Pa. Commw. Ct. 2007); *Heisler’s Egg Farm, Inc. v. Walker Township Zoning Hearing Board*, 232 A.3d 1024, 1034 (Pa. Commw. Ct. 2020).

Conversely, a deadline for the mere filing of briefs in support of the position of each party will not constitute a hearing for purposes of 53 P.S. § 10913.2(b)(1). *Wistuk v. Lower Mt. Bethel Township Zoning Hearing Board*, 592 Pa. 419, 428-429, 925 A.2d 768, 773-774 (Pa. 2007).

Here, the record simply does not support the position asserted by the Wolf Township supervisors. The transcript of the June 12, 2023, hearing reveals that the parties agreed to keep the record open for a defined period of thirty (30) days. The Township solicitor went to great lengths to make the effect of the thirty (30) extension clear, on the record: “MR. SMITH: -- without triggering – and that the 45 day decision window will start from the end of that 30 days? Yes?” and, shortly thereafter, he repeated “All I want to do is say that the clock starts on the 45 days at the 30th day.” All parties agreed. ***In fact, Bollinger and Barto and Clayton each agreed with their solicitor, on the record. It is difficult to imagine how the solicitor could have been more clear.***

At the meeting on July 10, 2023, the supervisors did exactly what they agreed to do at the conclusion of the June 12, 2023, hearing. They accepted additional documents into the record. That alone, would support the conclusion that the record was closed. **Nevertheless, the supervisors took the additional step of affirmatively voting that the record was closed, effective July 12, 2023. Any reasonable review of the record yields the conclusion that the record was closed effective July 12, 2023, and that the written Opinion and Order of September 26, 2023, was untimely.**

ORDER

AND NOW, this 27th day of March, 2024, it is hereby ORDERED and DIRECTED as follows:

1. The Court finds that the final hearing on the application of Nathan Bollinger and Bollinger Solar, LLC, for a conditional use was conducted on July 10, 2023.
2. The Court finds that the Wolf Township Supervisors closed the record on the Bollinger conditional use application, effective July 12, 2023.
3. The Court finds that, pursuant to 53 P.S. § 10913.2(b)(1), the Wolf Township supervisors were required to submit their written decision within forty-five (45) days after July 12, 2023.
4. The Court finds that the written decision dated September 26, 2023, was untimely.
5. The Court concludes that, based upon that fact that the written decision of September 26, 2023, was untimely, Nathan Bollinger and Bollinger Solar, LLC, are entitled to a deemed approval of their conditional use application, pursuant to 53 P.S. § 10913.2(b)(2). For that reason, their appeal is sustained.
6. The parties shall proceed consistent with this Order.

By the Court,

Hon. William P. Carlucci, Judge

WPC/aml

CC:

Court Administrator

Jonathan DeWald, Esquire

J. Michael Wiley, Esquire

Matthew M. Hennessy, Esquire

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