IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

PAUL J. KRAMER, et al.,	:	
Appellant,	:	CV2023-01192
v.	:	(consolidated into 2023-01189)
	:	CV2023-01348
ZONING HEARING BOARD OF MUNCY TOWNSHIP,	:	(consolidated into 2023-01189)
Appellee,	:	
AND	:	
	:	
SOLAR RENEWABLE ENERGY, LLC,	:	
Appellant,	:	
v.	:	
	:	
ZONING HEARING BOARD OF MUNCY TOWNSHIP,	:	
Appellee.	:	

OPINION AND ORDER

I. Background:

Solar Renewable Energy LLC (hereinafter "Solar") applied for a special exception under the terms of the Zoning Ordinance of Muncy Township, seeking approval for the construction of a Principle Solar Energy System (hereinafter the "System") on vacant land situate along Quaker Church Road in Muncy, Lycoming County, Pennsylvania bearing Lycoming County tax parcel number 41-353-141 (hereinafter the "Parcel"). A hearing on that application was held on July 17, 2023, before the Zoning Hearing Board of Muncy Township (hereinafter the "Zoning Hearing Board"). The evidentiary record was closed at the conclusion of the July 17, 2023, hearing. The Zoning Hearing Board conducted a deliberation session on August 21, 2023, and rendered its written decision dated September 25, 2023. The Zoning Hearing Board decision of September 25, 2023 (hereinafter the "Written Decision") granted the application for a special exception, subject to twelve (12) conditions.

Paul J. Kramer and Melissa Kramer and numerous other landowners (hereinafter collectively the "Appellant Landowners") filed a Notice of Appeal of the Zoning

Hearing Board decision on October 24, 2023, to docket number 2023-01189. That Notice of Appeal does not contain allegations regarding the issue of whether the Appellant Landowners have standing to appeal as parties who opposed the application at the July 17, 2023, hearing. Solar filed a Notice of Intervention to the appeal at docket 2023-01189. Solar also filed a Notice of Appeal to the Zoning Hearing Board decision on October 25, 2023, to docket number 2023-01192. Appellant Landowners filed a second appeal on December 5, 2023, to docket number 2023-01348. The three (3) appeals all arise out a since transaction and present similar issues of fact and law. Thus, the appeals filed to 2023-01189 and 2023-01192 were consolidated by Order of this Court dated November 3, 2023, on motion of counsel for the Zoning Hearing Board. By Order dated November 16, 2023, filed to docket 2023-01,192, the Court indicated that the second Appellant Landowners appeal (now docketed to 2023-01348) would be consolidated with the appeals filed to dockets 2023-01189 and 2023-0119.

II. Issue Presented:

Before reaching the merits of the Notice of Appeal filed by Solar or the two (2) Notices of Appeal filed the Appellant Landowners, a threshold issue is whether the appeals are from the Written Decision of the Zoning Hearing Board, or from a deemed approval pursuant to 53 P.S. §10908(9).

Solar contends that it is entitled to a "deemed" approval, because the Zoning Hearing Board failed to comply with the terms of 53 P.S. §10908(9), which provides that:

> The board or the hearing officer, as the case may be, shall render a written decision or, when no decision is called for, make written findings on the application within 45 days after the last hearing before the board or hearing officer. Where the application is contested or denied, each decision shall be accompanied by findings of fact and conclusions based thereon together with the 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. If the hearing is conducted by a hearing officer and there has been no stipulation that his decision or findings are final, the board shall

> make his report and recommendations available to the parties within 45 days and the parties shall be entitled to make written representations thereon to the board prior to final decision or entry of findings, and the board's decision shall be entered no later than 30 days after the report of the hearing officer. Except for challenges filed under section 916.11 where the board 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 subsection (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 board to meet or render a decision as hereinabove provided, the board shall give public notice of said decision within ten days from the last day it could have met to render a decision in the same manner as provided in subsection (1) of this section. If the board shall fail to provide such notice, the applicant may do so. Nothing in this subsection shall prejudice the right of any party opposing the application to appeal the decision to a court of competent jurisdiction.

53 P.S. §10908(9).

A "hearing" for purposes of 53 P.S. §10908(9), is not limited to testimonial proceedings on the record. Rather, a deadline date set for the submission of written evidence or a date set for oral argument of counsel may constitute a "hearing" under that Section. *See Heisler's Egg Farm, Inc. v. Walker Township Zoning Hearing Board*, 232 A.3d 1024, 1034 (Pa. Commw. Ct. 2020); *Gaster v. Township of Nether Providence*, 124 Pa. Commw. 595, 600-602, 556 A.2d 947, 949-950 (Pa. Commw. Ct. 2007). Conversely, a date set for submission of briefs or for a session scheduled for "deliberation and discussion among the Board members" will not constitute a hearing for purposes of 53 P.S. §10908(9). *Wistuk v. Lower Mt. Bethel Township Zoning Hearing Board*, 592 Pa. 419, 428-429, 925 A.2d 768, 773-774 (Pa. 2007), citing *Quality Food Markets, Inc. v. Zoning Hearing Board of South Lebanon Township*, 50 Pa. Commw. 569, 571, 413 A.2d 1168, 1169 (1980).

It is undisputed that the evidentiary record was closed at the conclusion of the hearing conducted on July 17, 2023. The Zoning Hearing Board solicitor stated on the

record "So we'll close the record, and what we need to do is deliberate. I guess due to the hour we might better schedule another time for deliberation." Notes of testimony at page 143. Thereafter, the Zoning Hearing Board scheduled a session for its deliberation on August 21, 2023. That session was not an evidentiary proceeding, no substantive exhibits were introduced, and no oral argument was received. At the commencement of the August 21, 2023, session, the Zoning Hearing Board solicitor stated "We closed the record as far as evidence, testimony, etc., argument, no argument either, last time, at the last hearing. So tonight's hearing is just going to be for the purpose of reviewing the criteria in the ordinance and the purpose of that is to make findings of fact so that if this conditional use is approved appropriate conditions can be attached." Notes of testimony at pages 2-3.

Although it is certainly not dispositive of the issue, the Court notes that Appellant Landowners concur in the position of Solar regarding its claim of a deemed approval.

III. Deemed Approval:

The Court finds that the deliberation session conducted on August 21, 2023, was not a hearing for purpose of 53 P.S. §10908(9). Since Solar never agreed to keep the record open after the July 17, 2023 hearing, the forty-five (45) day period for a decision under that Section commended on July 17, 2023, and expired on August 31, 2023. The Zoning Hearing Board written decision was rendered far later, and thus Solar is entitled to the benefit of a "deemed approval" under 53 P.S. §10908(9).

The deemed approval is not subject to appeal by the Zoning Hearing Board, since an appeal may only be filed by a party in interest who opposed the application. *Board of Supervisors of East Rockhill Township v. Mager*, 855 A.2d 917, 920 (Pa. Commw. Ct. 2004). The deemed approval does not, however, effect the appeal rights of any other party in interest, who opposed the application. *Gryshuk v. Kolb*, 685 A.2d 629, 631 (Pa. Commw. Ct. 1996). Although the Findings of the Zoning Hearing Board clearly reflect that some Appellant Landowners have standing, the Court has not yet determined whether all Appellant Landowners have standing.

IV. Standard Applicable to Appeals:

Having determined that the three (3) pending appeals must be considered as appeals from a deemed approval, the Court must determine how the appeals will be resolved. In the matter of *Gryshuk v. Kolb*, 685 A.2d 629, 631 (Pa. Commw. Ct. 1996), the trial court found that Owners were entitled to a deemed approval. The trial court then conducted a "substantial evidence review" of the findings of the zoning hearing board, rather than making its own findings. The Commonwealth Court reversed, observing that

> Owners argue that, since the Board's decision was untimely and a deemed approval therefore existed, the Board's decision and its late-filed findings constituted a nullity. Thus, Owners submit, the trial court should have made its own factual findings instead of "adopting" the Board's findings as supported by substantial evidence. *Faulkner v. Moosic Borough Board of Adjustment,* 154 Pa.Cmwlth. 616, 624 A.2d 677 (1993); *Southland.* The Township contends that the trial court, despite some of the language in its opinion, in fact made its own findings, in compliance with *Faulkner*. According to the Township, the court independently reviewed the record, and on close reading its own findings and opinions are replete in its decision. The Township alternatively suggests that, even if the trial court did not conduct the proper review, this error was harmless, because the court would obviously reach the same decision were we to remand the case for the court to make its own findings. We are compelled to agree with Owners on this issue for the following reasons….
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> The conclusion we reach in light of these considerations is that the holding in *Faulkner* is applicable under the circumstances presented, i.e., the proper course in reviewing a deemed approval is for the trial court to make its own findings even if there are zoning board findings in the record. Thus, it was incumbent upon the trial court here to render its own findings and conclusions. The pertinent question now to be addressed is whether the court complied with this standard.
>
> This question is readily answered. We cannot properly say that the trial court made its own findings, as opposed to reviewing the Board's findings and conclusions for substantial evidence. The court cited those findings and conclusions extensively in its opinion and purported to review them for substantial evidence. An examination of the language in the opinion shows the

> Township's contention that the court acted as fact-finder to be simply untenable given the court's unambiguous statements to the contrary. Indeed, as alluded to above, the court specifically rejected the claim that it was to find its own facts. Thus, we are bound to conclude that the court erred here.
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> It may very well be that the trial court completely agreed with the Board's late-filed findings and, employing the correct scope of review, would still decide the substantive merits of this case exactly as it already has. However, we simply cannot declare this an absolute certainty. The court erred in acting as fact-reviewer instead of fact-finder and we are therefore constrained to remand this case to the court for its own specific findings and conclusions on the record made before the Board.

685 A.2d at 633-634.

In the matter of *DeSantis v. Zoning Hearing Board of City of Aliquippa*, 53 A.3d 959 (Pa. Commw. Ct. 2012), the trial Court remanded a deemed approval to the Board for the purpose of making findings on the record. The Commonwealth Court reversed, and held that "the trial court was obligated to make its own findings of fact and conclusions of law. It was error to remand the matter to the Board for that undertaking, and the findings by the Board now contained in the record are a nullity." 53 A.3d at 962, citing *Gryshuk v. Kolb*, 685 A.2d at 634.

Given the reality that these appeals are to be considered as appeals from a deemed approval, and that the Written Decision, and the conditions imposed by the Zoning Hearing Board have been rendered a nullity, this Court must conduct these appeals *de novo*. The Court will enter an appropriate Scheduling Order.

AND NOW, this 5th day of March, 2024, the Court having concluded that these appeals must be considered *de novo* from the grant of a special exception by the Zoning Hearing Board of Muncy Township, it is Ordered and directed as follows:

1. The appeals filed to 2023-01189 and 2023-01192 were consolidated by Order of this Court dated November 3, 2023, on motion of counsel for the Zoning Hearing Board. By Order dated December 11, 2023, filed to docket 2023-01192, the Court indicated that the second Appellant Landowners appeal (now docketed to 2023-01348) would be consolidated with the appeals filed to dockets 2023-01189 and 2023-01192. Therefore, the three (3) appeals captioned above are hereby consolidated.
2. In the event that any party challenges the standing of any appellant of record, or in the event that any party seeks to present additional evidence, that party is directed to file either a motion challenging standing or a motion pursuant to 53 P.S. § 11005-A, or a signed written stipulation, on or before Friday, March 22, 2024. Any Motion should allege whether it is filed with concurrence. In the event of a timely contested motion, the Court will schedule briefing and oral argument. Fully executed stipulations will likely be approved without hearing.
3. In the event that no timely Motion or signed written stipulation is filed on or before Friday, March 22, 2024, the Court will issue a Scheduling Order for briefing and oral argument on the merits, limited to the existing record.

By the Court,

Hon. William P. Carlucci, Judge

WPC/aml
CC: Court Administrator

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