

California's On Going Efforts to Balance the Need for Renewable Energy Projects with the Need to Preserve Agricultural Land

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California has assumed a leadership role in reducing greenhouse gas emissions and now requires all electrical utilities to procure 33% of their energy from renewable energy sources, which includes, for example, solar, geothermal, and wind energy. This requirement, combined with the financial incentives set forth in the American Reinvestment and Recovery Act ("ARRA"), has spawned a flurry of development applications to construct renewable energy facilities, such as "solar farms" on land encumbered by Land Conservation Act (more commonly known as the Williamson Act) contracts. The Williamson Act (the "Act") authorizes a city or county to enter into 10-year contracts with owners of land devoted to agricultural use, whereby the owners agree to continue using the property for that purpose and in return, the city or county agrees to value the land accordingly for purposes of property taxation.

In the 2011 Spring Edition of Coastal Grower magazine, I explored whether solar farms are compatible with the objectives of the Act and the various legal mechanisms set forth in the Act that could potentially allow a utility-scale solar PV facility on contracted land. I also discussed the San Benito County Board of Supervisor's ("San Benito County") decision to cancel the contracts on approximately 7,000 acres of "grazing" land for the development of the 399-Megawatt ("MW") Panoche Valley Solar Farm ("PVSF").

Since my last article, Governor Brown signed Senate Bill ("SB") 618, which provides another legal mechanism, solar use easements, to facilitate the development of solar facilities on contracted land. In addition, San Benito County was sued by a local community group and several environmental organizations for its decision to cancel contracts to allow construction of the PVSF over concerns about its environmental impacts, including its impact on agricultural resources. On September, 29, 2011, a Superior Court Judge entered judgment upholding the County's decision. This article will discuss the potential solar use easement option and the Judge's reasoning for upholding the Board's cancellation.

The Solar Use Easement Option

Prior to SB 618, an owner of contracted land that was interested in pursuing solar photovoltaic development was limited to either a land swap, cancellation of the contracts, or obtaining a determination from the city or county that the solar facility is compatible with the purposes of the Act. Under SB 618, upon the mutual agreement of the city or county and landowner, the parties can simultaneously rescind the Williamson Act and enter into a solar use easement provided that certain criteria are satisfied. Government Code (“GC”) §51255.1. For example, this option is only available if the Department of Conservation (“DOC”), in consultation with the Department of Food and Agricultural (“DFA”), determines that the land is comprised of soils with significantly reduced agricultural productivity for agricultural activities due to chemical or physical limitations, topography, drainage, flooding, adverse soil conditions, or other physical reasons. GC §51191(a)(1). Moreover, this option is generally limited to agricultural lands that are not designated as prime farmland, unique farmland, or farmland of statewide importance, as shown on the maps prepared pursuant to the Farmland Mapping and Monitoring Program of the California Natural Resources Agency. GC §51191(a)(2). The landowner must also pay a rescission fee in the amount of 6¼ % of the property’s fair market value at the time of the rescission or a higher 12½ % fee if the property is designated as a farmland security zone. GC §51255.1(c)(2).

To assist the DOC in evaluating the eligibility of the land for a solar use easement, the landowner is required to provide the DOC with information substantiating the inability to productively farm the land. This information includes: (1) a written narrative demonstrating that even under the best currently available management practices, continued agricultural practices would be substantially limited due to the soil's reduced agricultural productivity from chemical or physical limitations, (2) a soil test demonstrating that the characteristics of the soil significantly reduce its agricultural productivity, (3) an analysis of water availability demonstrating the insufficiency of water supplies for continued agricultural production, (4) an analysis of water quality demonstrating that continued agricultural production would, under the best currently available management practices, be significantly reduced, and (5) crop and yield information for the past six years. GC §51191(b). The landowner must also provide the DOC with a “proposed management plan” that describes how the soil will be managed during the life of the project, impacts on adjacent agricultural operations will be minimized, and how the site will be restored at the end of the facility’s useful life. GC §51191(c).

SB 618 also requires the certain provisions be included in a solar use easement and authorizes the city or county to include other specified provision in the easement. For example,

if the easement is limited in duration (“term easement”), the term of the easement must be 20 years unless a shorter term is requested by the landowner, but in no event less than 10 years. GC §51191.2. The city or county may require that the easement automatically renew every year thereby extending the life of the easement. The city or county may also impose restrictions, conditions, and covenants that it deems necessary or desirable to restrict the use of the land to photovoltaic solar facilities, including any necessary mitigation measures to protect the affected land or adjacent agricultural land. GC §51191.3. For term easements, the city or county must also require the landowner to post a performance bond or other financial security to fund the restoration of the land upon the dismantling of the facility. GC §51191.3(c).

SB 618 also establishes procedures for extinguishing solar use easements. GC §51192 et. seq. Like a typical Williamson Act contract, a solar-use easement can be extinguished by nonrenewal and termination. GC §51192. The solar use easement can also be extinguished by returning the land to its previous contract. Under the non-renewable or termination scenarios, the landowner must restore the property to the conditions that existed before the easement by the time the easement terminates. GC §51192.1. Under the termination scenario, the landowner would be required to pay a termination fee in the amount of 12 ½% of the property’s fair market value. GC §51192.2(c).

Superior Court’s Decision on the PVSF

Because the solar use easement option was unavailable when San Benito County was processing the PVSF, the landowners applied for and San Benito County approved the cancellation of the contracts. In their lawsuit, the project opponents argued that San Benito County violated the Act when it approved the cancellation because there was no evidence to support the required finding that the public interest in renewable energy outweighed the important purposes of the Act, which generally seeks to preserve and protect agricultural land. The opponents further argued that there was no evidence to support San Benito County’s finding that no other geographically “proximate” and available non-contracted land existed to accommodate the PVSF, which was the other required finding for this cancellation. Specifically, project opponents argued that there was a state designated “Clean Renewable Energy Zone” (“CREZ”) known as the Westlands CREZ straddling the border of Fresno and Kings Counties that was proximate and available for the PVSF. The court disagreed with both arguments.

Regarding the Board of Supervisors’ finding that the public interest in renewable energy outweighed the purposes of the Act, the trial court noted California’s high priority for the increased development of renewable energy to meet its greenhouse gas reduction goals and the public health, environmental, and economic benefits of renewable energy. The court also noted

the marginal value of the property as grazing land, physical constraints to farming the property (e.g. lower than average rainfall, extreme temperatures, poor quality of groundwater, etc.), the small percentage of land being cancelled relative to the amount of land under contract in San Benito County, and the court concluded that the Board of Supervisors' balancing of these competing interests was amply supported by evidence in the record.

The court also upheld the Board of Supervisors' finding regarding the lack of proximate and available non-contracted. The Board of Supervisors found that the Westlands CREZ was not geographically proximate due to its location 50 to 60 miles from the project site. Regarding the lack of availability and suitability of the site for the PVSF, the Board found that the majority of the Westlands CREZ was itself encumbered in Williamson Act contracts, the solar developer did not own any land within the Westlands CREZ, and that there was considerable uncertainty surrounding the developers ability acquire the site, let alone, secure all of the necessary permits to develop the PVSF at this location in a reasonable amount of time. The court found that the Board of Supervisors' findings were all supported by evidence in the record.

Based on the marginal productivity of the grazing land and other physical constraints preventing commercial farming, a viable option for San Benito County and landowners for purposes of developing the PVSF, could have been a solar use easement; however, this option was not available when the PVSF application was being processed and considered. Nonetheless, this option will likely be pursued by future solar developer and landowners, particularly in communities where a compatibility determination or contract cancellation is politically untenable, and when the contracted land consists of marginal or poor quality farmland.

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