

Solar Development on Williamson Act Lands

Coastal Grower

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In February 2009, Congress passed the American Reinvestment and Recovery Act (“ARRA”), which included a series of tax cuts and incentives to jump start the sagging economy. Among other incentives, the ARRA included a program that provided commercial solar projects with a lump-sum cash grant in lieu of a tax credit if the project broke ground by December 31, 2010 (the deadline was recently extended one year or until December 31, 2011). In addition to these federal tax incentives, the State of California has mandated, through a combination of legislation and regulatory orders, that public utilities procure up to 33% of their energy from renewable energy sources by 2020. Accordingly, the ARRA and California’s renewable energy mandate have spawned a surge in applications to develop renewable energy facilities in California.

However, as the County of San Benito (“County”) recently experienced when it approved the approximately 2,000-acre Panoche Valley Solar Farm (“PVSF”), the need to develop renewable energy facilities in California can sometimes collide with State and local interests in preserving agricultural land. While the Panoche Valley has an abundance of sunshine that makes it an optimal location for solar, most of the land, including the site of the PVSF, is encumbered in unexpired Williamson Act (Government Code §51200, et. seq.) contracts (“Contracted Land”).

Options for Developing Solar on Contracted Land

The Williamson Act generally limits the type of land uses on Contracted Land to agricultural, recreational, and open space. If a landowner wants to construct an alternative type of use on Contracted Lands, such as a solar power facility, the landowner has five options. First, the landowner may provide a notice of non-renewal of the contract, and eventually, after many years, remove the development restrictions. Second, depending on the magnitude of the solar project and proximity of the Contracted Land to non-Contracted Land, the landowner could

potentially remove some of the Contracted Land by swapping the Contracted Land with abutting non-Contracted Land. Third, the landowner can pursue a compatible use determination. Fourth, the landowner can pursue contract cancellation. Finally, the city or county could acquire the Contracted Land through eminent domain, thereby nullifying the contract and any related development restrictions.

In the case of a solar power facility, two of the above options are generally not available. Nonrenewal of contracts typically is not an option because the aggressive ARRA deadlines for securing financial assistance for these projects and the regulatory mandates facing public utilities require immediate action. Generally, a developer cannot afford to wait until expiration of the 10 to 20 year contract term to proceed with the solar power facility. The fifth option is also not an option unless the landowner can convince the city or county to exercise its power of eminent domain to acquire the property and remove the restrictions, which may prove difficult since the ARRA tax grant is not available to municipal-owned energy facilities.

Accordingly, the landowner is faced with one of the three remaining options, a land swap, a compatibility determination, or contract cancellation. Under the land swap option, up to 10 percent of Contracted Land can be swapped with abutting non-Contracted Land pursuant to a subdivision or lot line adjustment. A landowner could conceivably remove a portion of Contracted Land from the Williamson Act to accommodate a solar facility in exchange for encumbering the same amount of adjacent non-Contracted Land.

Alternatively, the landowner could pursue a compatible use determination from the city or county. For a use to be compatible with Williamson Act enrollment, it must not disrupt the purpose of the Williamson Act contract, which is primarily to preserve agricultural lands. The California Department of Conservation (“DOC”) has opined that a compatible use cannot significantly compromise the long-term productive agricultural capability of the land, displace an agricultural use, impair continuing agricultural uses on the site or adjacent contracted sites, nor lead to the loss of agricultural uses on adjacent lands.

If a land swap is infeasible and a compatibility determination unlikely, the landowner could pursue cancellation of the contracts. The Williamson Act allows cancellation only if the city or county decision-making body finds that: (1) cancellation is consistent with the purposes

of the Williamson Act or (2) cancellation is in the “public interest.” For cancellation to be consistent with the purposes of the Williamson Act, the decision-making body must find that: 1) the contract(s) to be cancelled have been nonrenewed; 2) cancellation is not likely to result in removal of adjacent lands from agricultural uses; 3) the proposed use is consistent with the general plan; 4) cancellation will not result in discontinuous patterns of development; and 5) there is no proximate non-Contracted Land which is available and suitable for the use proposed on the Contracted Land, or, development of the Contracted Land would provide more contiguous patterns of urban development than development of proximate noncontracted land. Cancellation is in the “public interest” if (1) other public concerns substantially outweigh the objectives of the Williamson Act; and (2) there is no proximate non-Contracted Land which is available and suitable for the use proposed on the Contracted Land, or, development of the Contracted Land would provide more contiguous patterns of urban development than development of proximate non-Contracted Land.

Pursuing any of these options can be costly because they require discretionary decisions from the city or county, which means application fees and California Environmental Quality Act (“CEQA”) compliance. Moreover, if the administering agency or county approves a cancellation request, the landowner is also required to pay a mandatory fee of 12.5 percent of the unrestricted value of the property (most of which goes to the State), which could be substantial depending on the size and location of property. Nonetheless, as the state’s demand for renewable energy, including solar, continues to increase and financial incentives make renewable energy more economically viable, solar developers are willing to incur these costs.

The PVSF Experience

In the case of the PVSF, a solar photovoltaic power facility, the developer initially pursued a compatibility determination. However, in the wake of a recommendation of denial by the County’s Land Conservation Act Committee, the County Board of Supervisors determined that the PVSF was not compatible with the existing agricultural uses. The DOC also submitted a letter opining that it appeared “highly unlikely” that PVSF would be compatible because it would “displace or impair the current grazing” of the land and suggesting that a compatible use must be “related directly to grazing.” Nonetheless, the DOC opined that the PVSF “could meet the requirements of a cancellation” and noted the strong public interest in renewable energy.

After the Board's denial of the compatibility determination, the PVSF developer applied for the cancellation of approximately 7,000 acres of Williamson Act contracts. The County also prepared an Environmental Impact Report ("EIR") pursuant to CEQA, which analyzed the impacts of cancellation and ultimate build-out of the PVSF.

In October 2010, after approximately six hours of public testimony and notwithstanding the Land Conservation Act Committee's recommendation of denial of the cancellation, the Board certified the EIR and approved the tentative cancellation of the contracts. The Board, in its resolution approving the cancellation, made extensive findings to support cancellation. In addition and consistent with its prior position, the DOC again submitted comments to the County opining that the Board could make the requisite "public interest" finding to approve the cancellation of the contract based on several factors, including:

- The importance of renewable energy sources to achieve important greenhouse gas reduction goals;
- The inability to farm the land due to irrigation inefficiencies, poor water quality, and minimal rainfall;
- The developer's proposal to continue cattle and sheep grazing uses on the land not occupied by solar energy facilities; and
- The unavailability of other large contiguous pieces of non-Contracted Land near the project site that could accommodate the PVSF.

The tentative cancellation of PVSF contracts will become final once the developer provides proof of the completion of the conditions of approval, the most substantial of which is the payment of the cancellation fee, which totaled approximately \$2 million.

Conclusion

There is no "one size fits all" approach to pursuing solar development on Williamson Act land. Whether an agricultural landowner or developer should pursue a lot line adjustment, a compatibility determination, or seek cancellation, will depend entirely on the unique characteristics of the project and the quality of the Contracted Land. In addition, the landowner or developer must have sufficient financial means based on the significant costs in pursuing any of these options, including the application fees, CEQA compliance costs, and significant

cancellations penalties if cancellation is required. Finally, the city or county could have unique regulations or requirements relevant to compatibility determinations or contract cancellations that should be consulted before embarking on any quest to develop solar on Williamson Act. Accordingly, a landowner or developer, who may be contemplating solar development on Contracted Lands should consider consulting legal counsel familiar with the regulatory framework to help evaluate the pros and cons of proceeding down a particular path.

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