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Memo

TO: BARNSTABLE COUNTY COMMISSIONERS, COUNTY ADMINISTRATOR, ASSEMBLY OF DELEGATES SPEAKER, ASSEMBLY OF DELEGATES CLERK

FROM: ROBERT S. TROY, COUNTY COUNSEL RST

DATE: MAY 29, 2020

RE: PROPOSED ORDINANCE 20-09
SOLECT ENERGY DEVELOPMENT, LLC

This shall respond to the request of the County Administrator and the Assembly of Delegates for a review of the Proposed Lease for the Rooftop of the Barnstable County Lab in Barnstable Village, Barnstable MA. My review establishes that there are serious issues that must be addressed by Barnstable County. Due Diligence is required to protect the County's interests. In order to insure that the Leases are properly vetted, I respectfully request the Assembly of Delegates to vote to take the following action:

> Request the County Administrator to undertake a comprehensive review of all of the Proposed Leases by requesting CVEC, as the County's Administrator for the Photovoltaic Projects, in accordance with the County Commissioners' Vote on May 20, 2020, to review the provisions of the Proposed Leases and certify to Barnstable County that the Terms and Provisions of the Proposed Leases are consistent with the best practices of governmental organizations in leasing real estate for Photovoltaic Projects and comport with all applicable laws of the Commonwealth of Massachusetts, including Procurement, and to

the extent that amendments to the Proposed Leases are deemed necessary by CVEC to protect the interests of Barnstable County, CVEC shall negotiate such amendments. If any amendments are substantive in nature and require the approval of the Assembly of Delegates, the amendments to the Proposed Leases shall be transmitted to the County Administrator for further action consistent with the Barnstable County Charter.

I have undertaken a review of each of the Proposed Leases and conclude that the following issues need to be analyzed and addressed by the County. Please find herewith my summary of the salient issues for the Proposed Lease of the Barnstable County Lab rooftop and Battery Storage System:

1) The Lessor is Solect Energy Development, LLC, hereinafter "the Developer";
2) The Proposed Lease encumbers various parcels of developed and undeveloped property owned by the County. Careful analysis should be accorded what implications are inherent in leasing each of these parcels as to how a lease would affect future availability for these sites to be used for other purposes as well as what consequences the encumbrances could affect surrounding parcels owned by the County. The financial benefits that could accrue from the lease payments must be weighed against a potential loss of flexibility in prospective utilization of County land for future County services;
3) The Lease is intended to authorize the operation and maintenance of a solar photovoltaic system owned by the Developer and it may include a battery energy storage system ("PV System");
4) The Lease is contingent upon an Agreement between the Developer and CVEC, a separate governmental entity that includes constituents distinct from Barnstable County;
5) The Lease is also contingent upon a distinct Agreement between Barnstable County and CVEC;
6) CVEC proposes to sell to Barnstable County "an allocated share of the Net Energy purchased by CVEC" from the Developer;
7) "Definitions" that need to be closely scrutinized include "Additional Exceptions," "Bankrupt," "Commercially Reasonable," "Effective Date," "Event of Default," "Event of Termination," "Financier," "Parties,"

"Permitted Use," and "Termination Date." Notwithstanding the foregoing, the Definition of "Force Majeure" needs to be particularly scrutinized inasmuch as it includes circumstances such as Covid 19;

8) "Leased Premises" defined in Section 2.1 of the Proposed Lease includes "possession, use, enjoyment and control of the Premises described in Exhibits A and A-1 (identified County property) subject to the County's right to Quiet Enjoyment in Article X";

9) "Leased Premises" also includes the right of the Developer to have "reasonable pedestrian and vehicular access to and egress from the Premises plus the right and sufficient space for the installation, operation and maintenance....[of the proposed PV System] and to interconnect the PV System to local electric distribution systems";

10) Section 2.1 (c) provides that Barnstable County grants to the Developer "the exclusive right to receive sunlight at the Premises during every hour of each day that sunlight reasonably could be received by the PV System,..." Barnstable County also agrees that it will not "create or install vegetation or structures that will obstruct the passage of sunlight to the Premises occupied by the PV System. This clause impacts Barnstable County's right to modify or landscape property it owns outside of the "Leased Premises" if development or landscape would "...obstruct the passage of sunlight to the Premises occupied by the PV System";

11) Barnstable County is empowered to utilize its discretion in providing "...necessary space on the Property at locations and for such time as specified... [for temporary storage and staging of tools, materials and equipment, construction laydown, parking for construction crew vehicles, and vehicular and pedestrian access for rigging, material handling and other temporary facilities necessary to construct, erect, install and remove the System.] See Section 2.1 (d);

12) The "As-is Condition" of Barnstable County's real estate (Section 2.2) is modified by the provisions of Section 5.2 that includes the Developer's right to request that the County upgrade and make improvements on the Premises and "existing infrastructure," or request the County to "agree to share the costs to such upgrades." See Section 5.2(d). This is a "Condition Precedent to Commencement of Construction." See Section 5.2;

13) Barnstable County has no "ownership interest" in the PV System unless it exercises its Purchase Option in Section 8.12 or unless "...by virtue of being a CVEC Member in the event that CVEC exercises its

purchase option under the PPA or in accordance with Section 8.11." It is clear that Barnstable County and CVEC had differing and potentially conflicting interests under the Proposed Lease. See Section 2.3 "Ownership of the PV System.";

14) The Term of the Proposed Lease is twenty (20) years between the "Effective Date" and the "Termination Date." A five (5) year Extension is provided for a total potential term of twenty five (25) years. See Section 3.1;

15) In addition to the term of twenty five (25) years, the Lease includes provision of a "Holdover" if "any party claiming by or under Developer "retains possession of the Premises..." at which time Barnstable County may convert the Lease to a month to month tenancy or tenancy at will. See Section 3.2 "Holdover." In these circumstances, "Developer shall also pay to Landlord all damages sustained ..resulting from retention of such possession by Developer..." See Section 3.2;

16) Rent is established as "an annual rental payment in the amount of $1.00..." See Section 4.1;

17) The Proposed Lease limits the Developer obligation to pay taxes to "ad valorum real and personal taxes." See Section 4.2 "Taxes." This provision should be scrutinized particularly in anticipation that federal, state and local taxing authorities may prospectively impose additional categories of taxation;

18) Barnstable County is required to pay "Monthly Minimum Reliability Contributions" assessed by the "Distribution Company." See Section 4.3. This provision contradicts language in other Leases imposing this obligation on the Developer;

19) Section 5.2 includes a list of ten (10) categories of "conditions precedent" that could permit either Barnstable County or the Developer, to terminate the Agreement. Each of these expansive "outs" should be carefully scrutinized. If either party invokes any of these provisions and the other party does not waive them, the final sentence of the Section governs: "In the event either party terminates this Agreement the Parties shall have no further obligations except those which survive expiration or termination of this Agreement." See Section 5.2 "Conditions Precedent to Commencement of Construction";

20) If a Governmental Authority requires "changes in plans and/or specifications for the Project...", Barnstable County may not "unreasonably" withhold approval of any changes. See Section 5.3;

21) "Material changes in plans and/or specifications to the PV System" required by the "applicable electric distribution company" must be approved both by Barnstable County and CVEC and approval by either Barnstable County or CVEC shall not be "unreasonably withheld." See Section 5.5;

22) The Developer shall have access to the Leased Premises during construction and operation of the PV System, including "all pre-construction activities." See Section 5.6 "Access to and Use of the Premises";

23) Approval of Plans must be given by both Barnstable County and CVEC, as distinct governmental entities, and such "approval shall not be unreasonably withheld." See Section 5.7 "Plans and Specifications."

24) The Proposed Lease grants to the Developer the right - before and after completion of the PV System – to "make additions, alterations and changes, structural or otherwise in or to the PV System…" subject to specified limited conditions. This provision substantially obviates the details of the Project that dominate the language in the Proposed Lease; See Section 5.11 "Alterations";

25) Damage to Barnstable County property "or other property not belonging to Developer during installation or during operations" is limited to Damage "directly caused by the Developer." See Section 5.14 "Damage";

26) The Proposed Lease grants the Developer the right to "undertake maintenance, repair, upgrade, replacement or security activities with respect to electrical transmission or distribution lines owned by Barnstable County," subject to approval of Barnstable County and CVEC, as distinct governmental entities, which approval "shall not be unreasonably withheld". Here, CVEC is empowered to exercise the right of "approval" or "disapproval" of the Developer's right to maintain, repair or security of Barnstable County's electrical transmission or distribution lines." This provision needs to be analyzed in the context of the Barnstable County Charter; See Section 5.17 "Utilities";

27) In the event of "Late Completion" of "Commercial Operation," the Developer is ostensibly required to "pay Delay Liquidated Damages." However, any "Delayed Liquidated Damages" owed Barnstable County must be "addressed" between CVEC and Barnstable County "pursuant to the Inter-Governmental Agreement." Late Completion, includes "events of Force Majeure." It is unclear why CVEC would have a role in

determining the amount of Liquidated Damages that Barnstable County would be due from the Developer; See Section 5.20 "Late Completion";
28) The Proposed Lease recites that Barnstable County represents and warrants that it "has read and fully understands the form of PPA…including all rights granted to CVEC thereunder." See Section 7.1 (e);
29) The Proposed Lease also recites that Barnstable County covenants that the County "…shall not interfere or allow a third party to interfere with the sun affecting the PV System." See Section 7.2;
30) Termination is "Subject to Section 8.4 (Force Majeure). See Section 8.1 "Termination." This Section limits Barnstable County's right to Terminate the Agreement under this Section;
31) Barnstable County's right to Terminate the Proposed Lease is also voided if CVEC exercises its Purchase Option and Terminates the PPA. See Section 8.1 (f);
32) Barnstable County's right to Terminate the Proposed Lease is also nullified if the PPA is terminated "due to a default by CVEC." See Section 8.1 (f);
33) Events of Default by Barnstable County include failure of Barnstable County to insure that "…Developer shall quietly have and enjoy the Premises throughout the Term and extensions thereof, including [dedicating] the Leased Premises to Developer's use and "defending against a third party claim that would materially interfere with Developer's rights…." See Sections 8.2 and 10.1;
34) Section 8.4 titled "Force Majeure" provides that "if by reason of Force Majeure either party is unable to carry out, either in whole or in part, its obligations herein contained, such Party shall not be deemed to be in default during the continuation of such inability";
35) Section 8.4 also provides: If an event of Force Majeure continues for a period of one hundred eighty (180) days or longer, either Party may treat such an event as an Event of Termination and may immediately terminate this Agreement…";
36) The Proposed Lease includes this Definition of "Force Majeure:" …any cause not within the reasonable control of the affected Party which precludes that Party from carrying out, in whole or in part, obligations under this Agreement, including, but not limited to, ….*epidemics.* (Emphasis added);

37) Under the Proposed Lease, the Developer could seek Specific Performance and/or Monetary Damages against Barnstable County. See Section 8.5;
38) The Proposed Lease provides that in the event of a Default by Developer, Barnstable County may elect to purchase the PV System pursuant to the Purchase Option of the Agreement (See Section 8.11).
39) If the PV System is abandoned by the Developer, Barnstable County may retain the PV System as its property or dispose of the PV System. If Barnstable County elects to retain the PV System as its property, this shall "relieve Developer from any liability for its failure to remove such PV system; and provided further, however, that the foregoing shall not apply to any of the PV System that is not timely removed if the failure to remove is caused by an event of Force Majeure..." See Section 8.9;
40) The Proposed Lease provides that CVEC may execute its Purchase Option under the Lease and that CVEC may be substituted for Barnstable County as the Host and continue the Lease Contract. See Section 8.11(l);
41) The Developer may assign its rights in the Agreement in accordance with Section 11.1 of the Proposed Lease;
42) The Proposed Lease conveys certain rights to a "Financier." See Sections 11.2 through 11.4;
43) Barnstable County foregoes its right to assert its legal rights in Massachusetts and Federal Courts by agreeing to Arbitration of Disputes at the American Arbitration Association. See Section 12.1 "Dispute Resolution";
44) In the event that there is a lawsuit between CVEC and the Developer during the term of the PPA, the Proposed Lease prohibits Barnstable County from exercising any termination rights and require Barnstable County to continue to fully perform its obligations under the Agreement. See Section 12.2 (b);
45) In the event that the Department of Public Utilities, Department of Energy Resources or "other Governmental Authority" implement "any Applicable Legal Requirement" that may affect any provision of this Agreement or the economic benefits anticipated by either Party, in particular any rule or regulation regarding Net Metering," the Proposed Lease requires that Barnstable County is obligated to amend the Agreement, "including allocation of economic benefits to most closely approximate the benefits anticipated by both Parties." See Section 13.1;

46) The Proposed Lease includes a provision in which Barnstable County conveys to CVEC legal status as a Third Party Beneficiary to the Lease Contracts. See Section 13.14 "CVEC as Third Party Beneficiary";
47) The Proposed Lease includes a provision in which Barnstable County represents that "...it understands and agrees that this Agreement is CVEC's standard form lease agreement for project development and that modifications to the main body of this Agreement are not permitted." See Section 13.15 "Special Terms and Conditions";
48) Exhibit A includes a "Sketch Plan" that "...may be amended or revised from time to time." The Proposed Lease must include a specific and definite interest in real estate in order to comply with legal and recording requirements;
49) Exhibit A-1 is blank. This Exhibit affords the County to itemize it's "Reserved Uses of the Premises" that include the right to maintain and repair the roof of the structure as required by the Leases entered into between Barnstable County and the Massachusetts Trial Court;
50) Exhibit F, titled Power Purchase Agreement between Developer and CVEC is blank;
51) Exhibit G, titled Intergovernmental Power Sales Agreement between CVEC and Host is blank.

RST:geo