

Robert Troy

From: Robert Troy
Sent: Tuesday, April 14, 2020 4:28 PM
To: Jack Yunits Jr.
Cc: Ronald Bergstrom; mpatflynn@gmail.com; Ron Beaty; Suzanne McAuliffe; Janice O'Connell ; Elizabeth Braccia; Don Reynolds; Owen Fletcher
Subject: Proposed Leases

Jack,

Pursuant to your request, I have analyzed the provisions of the Proposed Lease documents that Owen forwarded to me and highlighted and flagged the issues that should be of interest to the County Commissioners and the Members of the Assembly. Of course, this review is preliminary and there may be other issues that come to the forefront as the County reviews these proposals. As noted, I did not review the proposed Inter-Governmental Agreements. Thanks for the Commissioners and your considerable efforts during Covid 19. My summary follows.

Bob

This shall respond to the County Administrator's request that I review preliminary documents relating to a Proposed Leases of various properties owned by Barnstable County. I note that the Proposed Leases implicate properties including the Barnstable County Registry of Deeds, various parking lots at the County seat, including the expansive parking facilities adjacent to County buildings and County property at Rock Harbor Road in Orleans. There are also proposed Inter-Governmental Agreements between Barnstable County and the Cape & Vineyard Elective Cooperative, Inc. ("CVEC") that should also be reviewed related to the Proposed Leases. In order to assist the County Commissioners and the Assembly of Delegates (hereinafter referred to as the "County"), I respectfully submit preliminary comments that highlight the issues the County must consider in reviewing the contents of the Proposed Leases. For the purposes of this review, I will utilize the prototype Lease Agreement that was forwarded to me by the County for 3195 Main Street, Barnstable MA 02630.

- 1) The Lessor is Greenskies Clean Energy, a Limited Liability Company, organized in the State of Delaware whose business address is in Middletown Connecticut;
- 2) The Proposed Leases encumber 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 Greenskies LLC and it may include a battery energy storage system ("PV System");
- 4) The Lease is contingent upon an Agreement between Greenskies LLC 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 Greenskies LLC;
- 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 Greenskies LLC 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 Greenskies LLC "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 Greenskies LLC'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 or Section 8.12." It is clear that Barnstable County and CVEC had differing and potentially conflicting interests under the Proposed Leases. See Section 2.3 "Ownership of the PV System.";
- 14) The Term of the Proposed Leases 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 Greenskies LLC's obligation to pay taxes to "ad valorem 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;
- 19) Section 5.2 includes a list of ten (10) categories of "conditions precedent" that could permit either Barnstable County or Greenskies LLC, 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) Greenscapes LLC 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 Leases grant to Greenskies LLC 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 Leases; 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 Leases grant "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 Leases recite 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 Leases also recite 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 Leases 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 Leases 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 Leases include 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 Leases, Greenskies, LLC could seek Specific Performance and/or Monetary Damages against Barnstable County. See Section 8.5
- 38) The Proposed Leases provide 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 8.12). However, this right of Barnstable County is "subject to any prior right of CVEC to purchase the PV System." If the PV System is deemed abandoned pursuant to the Proposed Leases, Barnstable County may retain or remove the PV System

but only if CVEC does not exercise CVEC's right to acquire the PV System pursuant to Section 9.3 of the Net Energy Power Purchase Agreement. See Section 8.5 (d).

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 Leases recite that Barnstable County acknowledges CVEC's right to "...exercise its Purchase Option under this Lease and the PPA... [and that] this Agreement shall be amended to substitute CVEC for [Barnstable County] and shall continue in full force and effect." See Section 8.11 "Purchase Option" and Section 8.11 (I) "Acknowledgement of CVEC's Purchase Option."

41) The Developer may assign its rights in the Agreement in accordance with Section 11.1 of the Proposed Leases;

42) The Proposed Leases convey 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 Leases prohibit 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 Leases require 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 Leases include 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 Leases include 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."