



MEMORANDUM

VIA EMAIL

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TO: Janice M. O'Connell, Clerk
Barnstable County Assembly of Delegates ("Assembly")

FROM: Nicholas J. Scobbo, Jr. *NJS*
Sherry L. Vaughn *SLV*

DATE: May 28, 2020

RE: Solar Lease Agreements

As requested by Barnstable County, through the Assembly, we reviewed the lease agreements for photovoltaic ("PV") energy facilities¹ which you forwarded to us on May 7, 2020 (the "Leases"). Our review is a legal review from the energy industry perspective. Our review is designed to assist the Assembly in its understanding of the Leases and to make recommendations for modifications to the Leases so as to enhance their value to, or limit the liability of, Barnstable County. We did not review

¹ We reviewed the following:

1. Lease Agreement for Rooftop Mounted Solar PV Energy Facility with Alliance CVEC V LLC (Registry of Deeds Building),
2. Lease Agreement for Canopy Solar PV Energy Facility with Solect Energy, LLC (County Lab Building)
3. Lease Agreement for Canopy Solar PV Energy Facility with Greenskies Clean Energy LLC (Main Campus)
4. Lease Agreement for Rooftop PV Energy Facility Solect Energy, LLC (1st District Building)
5. Lease Agreement for Roof-Mounted Solar PV Energy Facility with Rock Harbor Road RF Solar Project 2020, LLC (2nd District Building); and
6. Lease Agreement for Ground Mounted Dual Use Solar PV Energy Facility with Main Street Solar Project 2020, LLC (Barnstable County Farm)

We were not provided with a copy of the 2nd District Canopy lease agreement (between Barnstable County and Rock Harbor Road CY Solar Project 2020, LLC for Solar Canopy Photovoltaic Energy Facility on an area of ground space which is a part of the Property located at 237 Rock Harbor Road, Orleans, MA) until May 28, 2020. Therefore, it was not included in our review.

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the Leases for purposes of negotiations with the counterparties or with respect to any concerns raised by County Counsel and Special Counsel.

Due to the overlap of several of the provisions of the Leases, the following outline was the clearest way to convey our analysis.

A. Overview of Relevant Lease Provisions from a Legal/Energy Industry Perspective

1. Pursuant to the Leases, Barnstable County (as the “Host”) is leasing space (some rooftop, some ground) to various limited liability companies (each a “Developer”) so that the Developer may construct, install, operate and maintain a PV System (*i.e.* the solar electric generating facility, which may or may not also include a battery energy storage system). In the industry, as a general matter, the electrical output of the PV System (consisting of capacity and energy and environmental attributes) is sold by the Developer to an aggregator who resells it or to an end use customer, all pursuant to laws and regulations in place in the Commonwealth.
2. For the Rooftop Lease with Alliance CVEC V LLC (Registry of Deeds Building), the Canopy Solar Lease with Solect Energy, LLC (County Lab Building), and the Canopy Solar Lease with Greenskies Clean Energy LLC (Main Campus):
 - a. The Developer sells “Net Energy” to the Cape & Vineyard Electric Cooperative, Inc (“CVEC”) pursuant to a Power Purchase Agreement between the Developer and CVEC. CVEC is an Aggregator. “Net Energy” is defined as “the actual and verifiable amount of Energy generated by the PV System and delivered to CVEC at the Point of Delivery pursuant to the [power purchase agreement between Developer and CVEC] in excess of any Energy consumed by the PV System as metered in kWh at the Metering Device(s), and in conformance with Applicable Legal Requirements and the Tariffs.” _____
 - b. CVEC sells an allocated share of the “Net Energy” to the Host pursuant to an Intergovernmental Sales Agreement. The difference between the cost of the Net Energy and the retail price of energy the Host would otherwise purchase is the value provided by the Lease terms to the Host. Hence, the lease costs are very low.
 - c. The rent under these Leases is a nominal annual amount (\$1.00)
3. The Rooftop Lease with Solect Energy, LLC (1st District Building), the Roof-Mounted Solar Lease with Rock Harbor Road RF Solar Project 2020, LLC (2nd District Building), and the Ground Mounted Dual Use Solar Lease with Main Street Solar Project 2020, LLC (Barnstable County Farm) do not reference the sale of “Net Energy” to or from CVEC. Thus, the lease cost will be higher.
 - a. The rent is an annual lump sum payment (subject to reduction based upon the incremental SMART Blocks above Block 5).
4. Each Lease references the SMART Program and the Developer’s enrollment therein.

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- a. The Solar Massachusetts Renewable Target (SMART) Program is an incentive program established by the Massachusetts Department of Energy Resources (“DOER”) to encourage solar power in Massachusetts.
 - b. The incentive would be paid directly by the local electric distribution company to the Developer, once the Developer’s enrollment in the SMART Program has been approved by DOER.
 - c. The PV System must be interconnected by Eversource (the local electric distribution company).
 - d. The SMART Program is a 3200 MW declining block incentive program. Applications – the higher the Block, the lower the incentive.
 - i Each Block has a limited amount of capacity, measured in megawatts.
 - ii The base compensation rates vary by Block number and by electric distribution company.
 - iii The lower numbered Blocks have a higher base compensation rates than the higher numbered Blocks. In other words, Block 1 would pay more than Block 5; Block 5 would pay more than Block 8.
 - iv The base compensation rate for each Block is set forth in the attached spreadsheet.
 - e. The regulatory framework for the SMART Program is found at 225 CMR 20 (which is referenced in the Leases).
5. Except for Roof-Mounted Solar Lease with Rock Harbor Road RF Solar Project 2020, LLC (2nd District Building), each Lease includes a provision regarding responsibility for the “Monthly Minimum Reliability Contribution” (“MMRC”)
- a. The MMRC is required pursuant to G.L. c. 164, §139(j) and 220 CMR 18.10.
 - b. The purpose of the MMRC is to ensure that all electric company customers contribute to the reliability, safety and maintenance of the electric distribution system.
 - c. The MMRC may appear as a monthly fee on an electric customer’s utility bill.
6. The Leases also provide that the PV System qualify as a “Solar Net Metering Facility”
- a. A “Solar Net Metering Facility” is defined in 220 CMR 18.02 as “A facility for the production of electrical energy that uses sunlight to generate electricity and is interconnected to a Distribution Company.”
 - b. A Solar Net Metering Facility may qualify for Solar Net Metering Credits.
 - c. “Net Metering” is “the process of measuring the difference between electricity delivered by [an electric distribution company] and electricity generated by a [Net Metering Facility] ...and then fed back to the [electric distribution company].”

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In conclusion, the Leases at within the electric industry norms for these type of transactions. However, there are some potential changes we think would help the County.

B. Suggested Additional Provisions to Leases

1. For those Leases with nominal rent (*i.e.* the Rooftop Lease with Alliance CVEC V LLC (Registry of Deeds Building), the Canopy Solar Lease with Solect Energy, LLC (County Lab Building), and the Canopy Solar Lease with Greenskies Clean Energy LLC (Main Campus), a provision requiring an energy production guarantee or payment in lieu of energy production (this might be addressed in the Power Purchase Agreement between CVEC and the County) would be appropriate.
 - a. An energy production guarantee or a provision for payment in lieu of energy production guarantees that the PV System will produce a certain amount of energy (typically the amount of energy is determined by the energy needs of the Host) during a specified time frame. If the guaranteed amount is not met, then the installer of the PV System (Developer) pays the Host a certain amount of money as compensation.
 - b. The energy production guarantee is different from a performance guarantee. A performance guarantee generally is provided by the manufacturer (as opposed to the installer) of the PV System. The performance guarantee is meant to protect against degradation of solar panels at a rate higher than as designed. Essentially the manufacturer probably gave a performance guarantee to the Developer.
 - c. For those Leases (*i.e.* Rooftop Lease with Solect Energy, LLC (1st District Building), the Roof-Mounted Solar Lease with Rock Harbor Road RF Solar Project 2020, LLC (2nd District Building), and the Ground Mounted Dual Use Solar Lease with Main Street Solar Project 2020, LLC (Barnstable County Farm), where compensation is based on rent (without reference to the sale of "Net Energy" to or from CVEC), consider a guarantee from a "parent" or other guarantor of the Developer.
 - i. A guarantee provides security in the event the Developer defaults under the Lease. This is relevant because the Developers are all recently established look like single-asset entities. This means that the Developer has just this one asset and if something goes wrong, the liability of the Developer is limited to the LLC and the only asset it owns. The LLC can declare bankruptcy and the ability of creditors, such as the Host, to be compensated is limited to just the asset of the LLC. Hence, some form of third party guarantee protects the Host from a rent payment default by the Developer.
 - ii. A guarantee may also provide protection if a default by the Developer under an agreement to which the Host is not a party (such as loans) causes a cross-default of the Lease. Many Developers finance their developments by combining all of the assets being financed as security for one loan. More often than not, the lender will have "cross-default" provisions in the loan. This means that if the Developer defaults on a portion of the loan, the security the Developer gave to the lender includes the assets which did not default and the lender can seize those assets as security for the default.
 - d. To the extent the Developers might be entitled to an abatement from taxes on the PV System pursuant to the exemption set forth in G.L. c. 59, §5, cl. 45, consider a

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requirement that Developer waive this exemption. As you will see from the below information, the County or town could miss out on property taxes.

- i. Chapter 59 governs the assessment of taxes on real and personal property located in the Commonwealth.
 - ii. G.L. c. 59, §5, cl. 45 provides a 20-year exemption from taxation for “Any solar or wind powered system or device which is being utilized as a primary or auxiliary power system for the purpose of heating or otherwise supplying the energy needs of property taxable under [chapter 59].”
- e. Add qualifications as to who may be a “Financier”
- i. Because the Financier has “step-in rights”, notice rights and may take possession of the PV System in certain circumstances, there should be some criteria in place regarding who may be a Financier – e.g. only certain banks or financial institutions, with certain credit ratings and perhaps local banks.
- f. To the extent the PV Systems will be installed in a space where ice and snow may accumulate and for which the Host does not regularly maintain snow removal services, consider adding a provision such as:

Snow Removal. Host does not provide snow removal service for the Premises. Snow removal on the Premises, if needed, shall be the responsibility of the Developer as necessitated by Developer’s PV System. Any snow removal activities will be performed by competent personnel, in a workmanlike manner, and to minimize any damage to the existing surface of the Premises. Developer shall promptly repair any damage caused by its snow removal activities.

C. Suggested Revisions/Questions -Various Lease Provisions

- 1. Rent –
 - a. We have assumed that the nominal rent in the Rooftop Lease with Alliance CVEC V LLC (Registry of Deeds Building), Canopy Solar Lease with Solect Energy, LLC (County Lab Building) and the Canopy Solar Lease with Greenskies Clean Energy LLC (Main Campus) is premised on the arrangement to obtain power through CVEC.

The May 20, 2020 Power Point presentation that you forwarded to us supports this assumption. Please advise if our assumption is incorrect.
 - b. We have assumed that the rent to be paid under the Rooftop Lease with Solect Energy, LLC (1st District Building), Roof-Mounted Solar Lease with Rock Harbor Road RF Solar Project 2020, LLC (2nd District Building), and Ground Mounted Dual Use Solar Lease with Main Street Solar Project 2020, LLC (Barnstable County Farm) is based upon the amount of power the PV System is expected to generate.

The May 20, 2020 Power Point presentation that you forwarded to us supports this assumption. Please advise if our assumption is incorrect.

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- c. The rent under the Roof-Mounted Solar Lease with Rock Harbor Road RF Solar Project 2020, LLC (2nd District Building) is payable to the “Town”, but “Town” is not defined.

2. Permitted Use

a. As to all Leases:

- i. Include “repair” and “decommissioning” in definition of Permitted Use
- ii. Qualify “expand” to be limited to the extent expansion may be safely achieved on the Premises.
 - Also may need to limit expansion based on KW/MW to be generated

b. Section 2.1(c) in each Lease should be modified as follows:

Host also grants Developer the exclusive right to receive **capture and convert** sunlight at the Premises during every hour of each day that sunlight reasonably could be **captured** received by the PV System, and Host shall not create or install vegetation or structures that will obstruct the passage of sunlight to the Premises occupied by the PV System

- c. Section 2.1(b) of the Leases differ in that some grant a non-exclusive easement and others grant a non-exclusive license for access and egress.

- i. Generally, a license is for a specific purpose, is revocable at will, and does not create an interest in the property.
- ii. Generally, an easement is a non-possessory interest in the property which is binding upon subsequent owners.
 - If there is a reason for granting an easement rather than a license, consider modifying the relevant Section 2.1(b) to specify that the grant is of a non-exclusive easement “**in gross**”

3. Subordination

a. Rooftop Lease with Alliance CVEC V LLC, Rooftop Lease with Solect Energy, LLC (1st District Building), Ground Mounted Dual Use Solar Lease with Main Street Solar Project 2020, LLC (Barnstable County Farm), Canopy Solar Lease with Greenskies Clean Energy LLC (Main Campus): no comment

b. Canopy Solar Lease with Solect Energy, LLC (County Lab Building) and Roof-Mounted Solar Lease with Rock Harbor Road RF Solar Project 2020, LLC (2nd District Building): The second sentence of Section 2.6 should be modified as follows:

Developer acknowledges and understands that the Host reserves the right to grant additional leases, easements, **licenses** or rights of way, whether recorded or unrecorded, as may be necessary, which do not **materially** interfere with Developer’s use of the Premises or the exercise of Developer’s other rights hereunder and the operation of the PV System, and provided that

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each third party to which such grant is made **subsequent to the date of this Agreement** acknowledges in writing Developer's rights under this Agreement.

4. Monthly Minimum Reliability Contribution ("MMRC")

a. Rooftop Lease with Alliance CVEC V LLC and Rooftop Lease with Solect Energy, LLC (1st District Building):

- i Developer is responsible for MMRC "charged or assessed to Host by Distribution Company"
- ii Because the Power Point presentation indicates that the State pays the electric bill for the 1st District Building, the MMRC provision (Section 4.3) should be revised as follows:

Developer shall be responsible to pay any Monthly Minimum Reliability Contribution charged or assessed to Host **or against the Property** by the Distribution Company.

b. Canopy Solar Lease with Solect Energy, LLC (County Lab Building) and Canopy Solar Lease with Greenskies Clean Energy LLC (Main Campus): Host is responsible for payment of any MMRC.

- i Who receives the benefit of the Net Metering Credits? The party who receives the benefit of the Net Metering Credits should be responsible (or partially responsible) for the MMRC.

c. Roof-Mounted Solar Lease with Rock Harbor Road RF Solar Project 2020, LLC (2nd District Building):

- i There is no reference to the MMRC.
- ii Because the Power Point presentation indicates that the State pays the electric bill for the 2nd District Building, the MMRC provision (Section 4.3) should be revised as follows:

Developer shall be responsible to pay any Monthly Minimum Reliability Contribution charged or assessed to Host **or against the Property** by the Distribution Company.

d. Ground Mounted Dual Use Solar Lease with Main Street Solar Project 2020, LLC (Barnstable County Farm):

- i MMRC is assumed as part of the purchase option (Section 8.11(l)), but MMRC is not defined or otherwise referenced in the Lease
- ii The following provision regarding the MMRC should be added:

Developer shall be responsible to pay any Monthly Minimum Reliability Contribution charged or assessed to Host or against the Property by the Distribution Company.

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5. Manufacturer and Installer Warranties
 - a. Rooftop Lease with Alliance CVEC V LLC, Rooftop Lease with Solect Energy, LLC (1st District Building), Canopy Solar Lease with Greenskies Clean Energy LLC (Main Campus): no comment
 - b. Canopy Solar Lease with Solect Energy, LLC (County Lab Building), Roof-Mounted Solar Lease with Rock Harbor Road RF Solar Project 2020, LLC (2nd District Building), Ground Mounted Dual Use Solar Lease with Main Street Solar Project 2020, LLC (Barnstable County Farm): The manufacturer and installer warranties run to the benefit of the Developer, but they also should be assignable to the Host so that in the event of default by Developer or exercise of the purchase option by Host, the warranties will not be nullified/voided.
6. Hazardous Materials
 - a. Rooftop Lease with Alliance CVEC V LLC (Registry of Deeds) and Canopy Solar Lease with Greenskies Clean Energy LLC (Main Campus): The second sentence of Section 5.25 should be modified as follows:

The Developer shall fully indemnify the Host for any release of hazardous materials at the Property caused by the Developer (or its affiliates, contractors or subcontractors) including all court costs, attorney's fees, damages and liabilities as a result thereof.
 - b. Canopy Solar Lease with Solect Energy, LLC (County Lab Building), Roof-Mounted Solar Lease with Rock Harbor Road RF Solar Project 2020, LLC (2nd District Building), Ground Mounted Dual Use Solar Lease with Main Street Solar Project 2020, LLC (Barnstable County Farm): The second sentence of Section 5.25 should be modified as follows:

Developer shall have no liability concerning the release of hazardous materials on or from the Premises other than liability arising from or related to any hazardous materials brought to the Premises at the direction of Developer or released onto the Premises by or in connection with the PV System.
 - c. Rooftop Lease with Solect Energy, LLC (1st District Building): no comment
7. Insurance
 - a. As to all Leases:
 - i. In addition to CGL, the Developer should maintain workers compensation at statutory levels and commercial auto of not less than \$1MM combined single limit
 - ii. Host may not be able to obtain waiver of subrogation rights against Developer for property insurance. Host should not agree to obtaining a waiver unless it has obtained approval from the property insurance carrier (to the extent Host is not self-insured)
8. Taxes:
 - a. As to all Leases: The provision concerning payment of taxes (Section 4.2) should be broadened as follows:

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Developer shall be responsible for and pay all ad valorem real and personal property taxes, **payments in lieu of taxes**, if any, or **any fees, charges assessments or levies of any kind, which are levied, charged imposed or assessed by any the local Governmental Authority, with respect to the leasehold or the PV System or which are attributable to Developer's use of the Premises**, as may be further set forth in Exhibit D (Special Terms and Conditions) ("Taxes"). **If Host receives notice of any such Taxes, the Developer shall assume full responsibility for such Taxes and shall fully indemnify and hold harmless Host from all claims, suits judgments, costs and expenses (including reasonable attorneys' fees) associated with such Taxes.**

b. In addition as to the Rooftop Lease with Solect Energy, LLC (1st District Building): There is a requirement that Host reimburse Developer for taxes paid. What is the reason for this reimbursement?

c. Section 5.2 provides in part:

Host, in its regulatory capacity as a Governmental Authority, and Developer shall have reached agreement on the liability of Developer for ad valorem property taxes, if any are to be assessed, and have entered into a structured tax agreement with respect thereto.

- i. Is Host the proper party to enter into a "structured tax agreement" with the Developer?
- ii. Wouldn't the city/town be the proper party for such an agreement?

9. Maintenance

a. As to all Leases:

- i. Section 5.22(e) (or 5.23 (e) for the Ground Mounted Dual Use Solar Lease with Main Street Solar Project 2020, LLC (Barnstable County Farm)) should be modified as follows:

Host may not request more than one relocation per Contract Year **except in Emergency**

- ii. The second sentence of Section 5.25 (or 5.26 for the Ground Mounted Dual Use Solar Lease with Main Street Solar Project 2020, LLC (Barnstable County Farm)): should be modified as follows:

The Developer shall fully indemnify the Host for any release of hazardous materials at the Property caused by the Developer **or its contractors or subcontractors** including all court costs, attorney's fees, damages and liabilities as a result thereof.

10. Term: As to all Leases - The Term is 20 years, which may be extended for additional 5 years by mutual agreement. **Note:** The typical useful life of a PV system is 15-20 years (this may change as technology improves).

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11. Termination & Purchase Option:

a. As to all Leases:

i There is reference to a “Buyer” in Articles 5 and 8 and Section 13.8, but the term “Buyer” is not defined.

ii Add the following as an event of default under Section 8.3:

Insolvency, receivership, reorganization, bankruptcy, or similar proceedings or debarment shall have been filed by or commenced against Developer and such proceedings remain undismissed or unstayed for a period of ninety (90) days

iii Section 8.11(d) states in part: “The purchase price shall be the higher of the Buyer Purchase Payment in Exhibit C, or the Appraised Value of the PV System, as determined by the Independent Appraiser (“Purchase Price”).” However, Exhibit C sets forth the insurance requirements (perhaps the reference is to Exhibit C of the PPA?).

b. The Canopy Solar Lease with Solect Energy, LLC (County Lab Building), Roof-Mounted Solar Lease with Rock Harbor Road RF Solar Project 2020, LLC (2nd District Building), Ground Mounted Dual Use Solar Lease with Main Street Solar Project 2020, LLC (Barnstable County Farm) do not include the right of Host to elect the purchase option in the event of a default by the Developer.

i Please consider including the Host’s right to elect to exercise the purchase option in the event of a default by the Developer.

ii The “Financier” has “step-in” rights, but Host has no approval rights as to who the Financier may be.

c. Based on our experience in representing public entities, it is important to note whether the purchase option may render the Lease to be construed as a finance lease (and therefore a loan) as opposed to a lease for which appropriations are made (and therefore not a loan). This is something you may wish to address with County Counsel (if you have not done so already).

12. Sun Covenants – please be aware that Host cannot engage in activities that are inconsistent with the below covenants.

a. As to all Leases, the Host covenants:

Host shall not interfere or allow a third party to interfere with the sun affecting the PV System.

b. In the Rooftop Lease with Solect Energy, LLC (1st District Building), in addition to the covenant referenced in 11(a), Host covenants:

Host shall not construct or permit to be constructed any structure on the Property that could adversely affect insolation levels at the Premises, permit the growth of foliage that could adversely affect insolation levels at the Premises, or directly emit or permit the emission

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of suspended particulate matter, smoke, fog or steam or other air-borne impediments to insulation on the Premise.

13. Quiet Enjoyment –

a. Host covenants that the Developers will quietly have and enjoy the premises throughout the Term and that neither the Host nor a third party will not materially interfere with the Developers' quiet enjoyment of their rights under the Leases.

b. In addition, under the Canopy Solar Lease with Solect Energy, LLC (County Lab Building), the Roof-Mounted Solar Lease with Rock Harbor Road RF Solar Project 2020, LLC (2nd District Building), and the Ground Mounted Dual Use Solar Lease with Main Street Solar Project 2020, LLC (Barnstable County Farm): Under Section 10.1(d), Host's right to enter the Premises is at its own risk, limited to maintenance purposes and may not materially interfere or affect the operation of the PV System. If Host will need to enter the Premises for other purposes, then Section 10.1(d) should be modified to provide for same.

c. Host may except particular conduct from the covenant of quiet enjoyment by including it as an Additional Exception in Exhibit A-1. If there is any activity or conduct that Host wishes to reserve which may impact the Developer's use of the Premises, Host should expressly include such activity in Exhibit A-1.

Please let us know if you have any questions with respect to the above. Thank you.

Attachment

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