

Here Comes the Sun – And It's Alright (As Long as You Have a Good Solar Lease)

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January 30, 2013



The North Carolina General Assembly is requiring North Carolina utilities to purchase energy from renewable sources. The hot sun beating on you and your land can be one of those sources.

Background

In August 2007, the North Carolina General Assembly established the Renewable Energy Efficiency Portfolio Standards ("Standards") which require that all investor-owned utilities ("IOUs") in the state obtain 12.5% of their retail electric sales from eligible renewable energy sources by the year 2021. The requirements are phased in over time. For example, in 2013, IOUs must obtain 3% of their power from renewable energy sources, a figure which increases to the 12.5% requirement in 2021. Municipal utilities and electric cooperatives are subject to similar requirements, culminating with a mandate of 10% renewables by 2018.

One of the ways a utility may meet these requirements is through using power generated by solar energy resources. The Standards require that 0.2% of the total electric power in kilowatt hours sold to retail customers in North Carolina be generated from solar energy resources by 2021. Because of these solar-specific requirements, a new phenomenon is being witnessed along the highways of North Carolina: instead of acres and acres of corn, tobacco, or soybeans, fields of solar panels are now dotting the landscape.

Chapel Hill-based Strata Solar now has 15 solar farms operating in North Carolina, 11 of which were completed in 2012. Many families who have farmed their land for generations have decided to forego replanting their fields, opting instead to lease them to solar energy developers for annual rent of up to \$600 per acre. For some new solar landlords, it may be a purely financial calculation (an acre that may rent for \$600 for solar panels may only fetch \$50 for farming), and for others it may be a desire to "go green" and get in on the front end of an emerging technology.

Regardless of the reasons you might have for entering into a lease with a solar energy provider, there are several areas of concerns you should consider prior to tying up your land with leases that often extend for 35 years or more.

Long Due Diligence Periods

A common provision in solar leases is a due diligence period of up to a year for the solar energy provider to inspect your property to determine if its use for a "solar farm" is feasible or desirable. These due diligence

periods are sometimes called "free-look periods" because they are just that – a period in which the provider, at no cost, has the unilateral right to perform certain inspections and studies in order to decide whether or not to lease your land.

This means two things to you: first, and most importantly, your prospective tenant will not be obligated to pay you rent for up to a year, if ever. If the solar energy provider decides, "in its sole discretion" or "sole judgment" (meaning, for any reason or no reason), that your property does not meet its needs, it can terminate its lease without having paid you a dime. The reason for passing on your property may have nothing to do with the property itself: the provider may not have reached an agreement with an end-user of the solar energy, or it may determine that the deal is just not economically feasible after all. Second, it also means that for an extended period, there will be agents of the solar energy provider milling around your property which raises, among other things, liability issues (what if one of them gets hurt on your property?) and damage issues (what if one of them damages your property?).

Term of Lease

How long will your property be tied up for use as a solar farm? Like all leases, the term of the lease is negotiable. In the case of a solar farm, the solar provider tenant will be making a substantial investment in the equipment it will install on your property, so it will expect a long-term commitment from you. Leases of 15 to 20 years, with two or more five- or ten-year renewal periods, are common.

Rent Adjustments

That \$600 per acre may seem like fair rent now, but how about 15 years from now? Parties to a proposed solar lease can agree on the front end to fixed rent escalations throughout the term of the lease (for example, a 2.5% increase every three years) or to increase the rent by using a formula whereby the rent increases with the cost of living or other financial indexes on certain dates.

Taxes

This is one that can hit your pocketbook hard and fast. Many landowners take advantage of the state and local land use valuation programs whereby a property is taxed according to its actual use as a farm versus its highest and best use (which might be an urban shopping center). The land use valuation programs often save landowners thousands of dollars in taxes a year. Not only should you take into consideration the possible change in the tax burden for each year of the lease in setting the rent you will charge, but, in addition, you also should recognize that three years of your prior tax savings, plus interest, will become due immediately if the use of your property as a farm is changed. Despite the commonly-used term "solar farm," a solar farm does not meet the statutory requirements for a farm use valuation, so a solar lease would trigger deferred taxes being assessed by the County on your "former" farmland. A well-drafted lease will address which party bears the burden of paying those immediately recaptured deferred taxes. The lease will also need to address which party is responsible for paying the taxes on a yearly basis.

Re-Zoning, Easements, and Other Landlord-Involved Lease Provisions

Your solar provider tenant may not be able to use your property for a solar farm if it is not zoned for such use. Your lease may provide that the tenant has the right to seek to have your property re-zoned and that you will cooperate in the process by executing whatever documents are required and taking whatever additional actions are needed, including attending zoning hearings. Be aware that unless your lease is carefully drafted, your property may be re-zoned during the due diligence period, prior to the tenant being obligated to pay rent. If the tenant decides not to go through with the lease, you may be left with property zoned for a solar farm which may limit your use of the property until you are able to have it re-zoned yet again, if you can!

Access to Adjacent Property

If you are not leasing all of your property, you may need access over the leased portion to the un-leased portion. Your lease should provide that you have the use of at least one road over the leased property for access and utility purposes. Make sure that any surveys obtained by the tenant clearly depict all access roads.

Removal of Facilities

Twenty-five years from now when your lease has expired, what will your property look like? Does it look like a farm again? If so, that's great. But how did it get that way? A good lease will address whose obligation it is to remove the solar facilities (here's a hint – it shouldn't be yours) and how much of the facilities will be removed (another hint – all of them, including any underground structures), with the land returned to the condition existing at the commencement of the lease.

Rooftop Leases

Of course, farmers and owners of vacant property are not the only property owners that can take advantage of a solar lease. Owners of improved property can also enter into leases whereby the tenant leases the rooftops of buildings to erect solar panels. In a subsequent article, we will address the special issues involved in rooftop solar leases including liability, electrical and electronic interference, and repair issues.

Conclusion

There is no doubt the green movement is here to stay, and government agencies, businesses, and individuals have responded. Look no further than the renewable energy industry in North Carolina. In 2007, when the Renewable Energy Efficiency Portfolio Standards were enacted, North Carolina residents and businesses claimed just over \$440,000 in tax credits for renewable energy investments. In 2011, that figure rose to more than \$11,000,000 (a 2500% increase in just five years!). With specific statutory requirements mandating the use of solar power, landowners will continue to be approached by solar energy providers looking for prime locations to erect their solar collectors. A well-drafted solar lease will help ensure your new relationship is as profitable for you as it is for the solar providers.

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