Solar Lease Provisions in Pennsylvania and Further Landowner Considerations

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Our previous alert titled "Solar Leases: Legal Considerations for Landowners," discussed several fundamental provisions of solar leases, including decommissioning requirements and security, determination of lease areas, and minimum acreage requirements. However, those topics barely scratch the surface of the legal considerations contained in a solar lease. This alert addresses a few additional provisions prevalent in most solar leases that are important to landowners.

One of the most inconsistent provisions found in many solar leases includes the timing and clarity of the various "stages" of the lease term and the payment obligations of the company which are tied to those stages. Oftentimes, in addition to or in lieu of an "option period" (the period during which the company has an option or right to lease the property), a lease will provide for a "development period" and/or a "construction period" which precede the "operations period." These early periods will sometimes appear to last for only a few years, but upon careful inspection, begin and end upon the occurrence of future events which are out of the landowner's control and may never occur, resulting in an indiscernible lease term. More importantly, the company's payment obligations are often determined by the current period of the lease term.

During the development or construction period, the company's payment obligations are only a few thousand dollars per year. Once construction begins and the construction period is underway, the property is no longer available for farming and, once again, most leases provide no meaningful payment to the landowner. The obligation to make rent payments based on the property acreage does not begin until the future operations period, which may or may not occur. Under these terms, a landowner could find oneself many years into a lease with restrictions on the use and ownership of the property, but without meaningful compensation or right to terminate the lease. If construction has begun, the landowner may endure a loss of income for years with no reasonable expectation of compensation from the company. The periods comprising the lease term must be properly negotiated to set maximum time limits in order to protect the landowner's financial interests and to encourage the company to diligently endeavor for the purpose of constructing and operating a solar facility.

Related to the lease term "periods" are the rights of and permitted uses by the company during those periods. Most solar leases and options grant significant rights to the company during the option and development periods without reciprocal protections for the landowner. For example, most leases and options allow the company to apply for government approvals and permits or to rezone or reclassify the property during the early periods, which may result in the landowner's rights, with respect to the use of the property, being materially changed. These rights are exercisable by the company prior to ever even committing to construct a solar facility on the property.

Another lease provision that needs to be carefully negotiated is the parties' obligations with respect to property taxes. A typical lease will impose the obligation to pay property taxes on the landowner, including taxes attributable to the value of the solar facility. A properly negotiated lease should require the company to pay all property taxes attributable to its improvements, the underlying ground it occupies, and any other increases above the current assessment of the property. Likewise, the lease should impose the burden on the company to pay roll-back or recapture taxes that result from the inevitable disqualification of the property from Clean and Green or any other preferential tax assessment program. Although distinct from property tax, the lease should also require the company to pay all realty transfer taxes assessed as a result of the execution of the lease.

If you have any questions pertaining to solar lease negotiations or any alternative energy leases, please contact Jacob Kiessling or any member of the Barley Snyder Real Estate Practice Group.

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