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Solar Leases for Utility Scale Installations Legal Considerations for Developers

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I. Introduction

The need for a well-crafted solar lease cannot be overlooked as it lays the foundation for a successful solar project. Every renewable energy project presents a unique set of facts and circumstances that developers and their counsel must work through to get the project built. In addition to being financeable, a good solar lease must provide the developer with the flexibility it will need to address the variety of issues that will be encountered during the development process. This paper provides core considerations and provisions for a solar developer or legal practitioner who is drafting, negotiating, or reviewing a solar lease. It is not uncommon to encounter clients who wish to convert their form wind lease into a solar lease. In some ways a solar facility is more analogous to a natural gas power plant than a wind project. Consequently, a conversion of a wind lease into a solar lease should be done carefully keeping in mind the significant differences between the surface uses presented by the projects. Throughout this paper I will highlight wind lease clauses that are either not appropriate for inclusion in a solar lease or require adjustments. The focus of the paper will be on the central provisions of a solar lease and will not address each and every clause that may be included in a lease.

II. Term Provisions.

In many respects the provisions pertaining to the various terms under a solar lease are very similar in structure to a wind lease in that both may contain a development term, construction term and operations term. As discussed in more detail below, careful consideration should be given to how each term is triggered and the types of activities that will be undertaken during each period of time.

a. Option Agreement or Lease with a Development Term?

Much like a wind lease, a solar lease may be comprised of an initial development term that should last long enough for a developer to evaluate the site and to secure interconnection, offtake, financing and other key agreements. This initial term may last five years or longer depending on market conditions that influence the availability of capital to finance a solar project. Unlike a wind project, however, a solar project has a much smaller footprint with a lot less flexibility to move project infrastructure in the event undesirable conditions are discovered. A solar project owner will also eventually need full and exclusive control over the area where the project is located. Consequently, solar developers tend to be focused on the costs and risks associated with putting property under lease. Prior to addressing in full what a development term clause may include, it is important to consider an issue many developers face initially: should the project company enter into a lease agreement with a landowner or just obtain an option to enter into a lease? Both approaches have benefits and drawbacks; however, if properly drafted, a lease may capture the benefits of an option while avoiding some of the potential drawbacks of having just an option to lease.

An option contract involving the lease of real estate typically gives the optionee the right to enter into a lease upon certain stated terms within a specified period of time, but with no obligation to

do so.[1] No title passes at the time the option contract is formed.[2] In my experience developers will elect to enter into an option agreement rather than a full lease for two primary reasons 1) the developer believes an option will allow them to get the land in question tied up quickly and without the hassle of negotiating a full lease document and/or 2) the developer is concerned about environmental liability attaching to the project company if property is leased.

1. An option agreement may be faster, but not necessarily better.

With respect to the first consideration, an option agreement is faster than entering into a full lease agreement if the option does not attach a fully negotiated lease document as an exhibit. When a solar developer takes the option agreement route the option agreement typically contains the terms and conditions that apply to the option period and may either set forth key business terms to be included in the lease or it may simply state that the parties will enter into a solar lease containing reasonable and customary terms. Such an approach presents some potential risks. The biggest risk is that the developer will exercise its option to enter into the lease but the landowner will refuse to sign the lease because it finds some part of the lease objectionable or wants to renegotiate the business terms. I have also encountered situations where the landowner just changed their mind and no longer wanted to enter into a lease. Under Texas law, if a written option sets forth all of the terms on which the optionor offers to lease the property, or if an unexecuted lease form is attached to the option, the optionee's written exercise of the option may, without more, create a lease.[3] In order to avoid a potentially contentious lease negotiation and to have the clear right to specific performance, the developer would need to have attached a fully negotiated lease.[4] This approach extinguishes the desired speed factor. It could be argued that an option agreement that sets forth the key terms to be included in the lease is sufficient to obtain specific performance.[5] The problem with this argument is just that – it is just an argument the developer would presumably have to make before a judge or to the landowner's attorney.[6] Given the other documents a

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[1] *See* 17-252 Dorsaneo, Texas Litigation Guide § 252.01 (2016).

[2] *See McCaleb v. Wyatt*, 257 S.W.2d 880, 881–882 (Tex. Civ. App.—Fort Worth 1953, writ ref'd n.r.e.).

[3] *See Wilson v. Wagner*, 211 S.W.2d 241, 243 (Civ. App.—San Antonio 1948, ref. n.r.e.).

[4] A developer may go so far as to have the landowner sign the lease and have the lease held in escrow until the developer exercises its option.

[5] *See Wilson,* 211 S.W.2d at 243, Court of Appeals concluding that the option in question contained all of the essential provisions of an option for a ninety-nine year lease of real estate. Court stating, "[t]he parties are named, the property is fully and definitely described, the consideration for the option is $500; the lease when executed is to run for a term of 99 years; the rental is to be for certain specific sums per year; Wilson is to pay all taxes and assessments; the lease is to be assignable and is binding upon the heirs and assigns of the respective parties; all improvements located on the property at the end of the 99 year lease is to vest in Redmond, her heirs or assigns; Wilson has one year within which to exercise his option; when the lease is delivered to Wilson he is to pay the first year rental of $6,000; Redmond is to remove all existing structures from the property and deliver peaceable possession of the property to Wilson within sixty days after receipt of notice of Wilson's desire to exercise his option; the term of the first year of the lease is to commence upon the day possession of the property is delivered to Wilson." *Id*.

[6] The party seeking specific performance has the burden of showing that the contract is reasonably certain, unambiguous, and based on valuable consideration. *Paxton v. Spencer*, 503 S.W.2d 637, 643 (Tex. Civ. App.—Corpus Christi 1973, no writ). A contract that omits any essential terms is usually too uncertain to justify specific performance. *Botello v. Misener-Collins Co*., 469 S.W.2d 793, 795 (Tex. 1971); *Paxton*, 503 S.W.2d at 646. The terms of the contract must be expressed with enough certainty so that the court will be able to determine the duty of

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