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California restricts
development of
millions of acres of
agricultural land under
the Williamson Act.
What are the options
for overcoming
this barrier?

SECURING **LAND** FOR LARGE-SCALE SOLAR PROJECTS



Passed in 1965, the Williamson Act seeks to stave off the loss of agricultural land to urban development.



California introduced a solar easement program last year under Senate Bill 618. SB 618 authorizes parties to a Williamson Act contract to agree to rescind the contract in order to simultaneously enter into a temporary solar-use easement. The term of the easement is typically no less than 20 years.

By **MATHEW J. SWAIN** and **ASHLEY E. BREAKFIELD**

In the current renewable energy boom, developers of utility-scale solar energy facilities share a common need: large tracts of relatively flat, undeveloped land in areas with high solar resource potential. California is an attractive location for solar developers, because it possesses an abundance of such land. Many developers have focused on the desert due to its obvious solar resource potential, but investor interest appears to be waning as the cost and uncertainty associated with completing these projects grows. This is due, in part, to public concern over impacts to desert ecosystems and limited transmission line capacity. California also possesses approximately 30 million acres of land in agricultural production on which utility-scale solar facilities could be located. However, development of about half of this land is restricted under the California Land Conservation Act, commonly known as the Williamson Act (the Act).

Passed in 1965, the Williamson Act seeks to stave off the loss of agricultural land to urban development. The Act is overseen by the state Department of Conservation and implemented by local governments, typically counties. It authorizes local governments to establish agricultural preserves in which they may offer contracts to landowners in the preserve, providing property tax reductions in exchange for long-term restriction on the use of their land to agricultural or compatible open-space uses. The property tax rate for land under Williamson Act is recalculated based on its value for agricultural purposes, rather than on its best and highest use; that can reduce taxes 20 to 75 percent annually. Until recently, these contracts had a 10-year initial term, and contracted land in Farmland Security Zones had 20-year initial terms. Under Assembly Bill 1265, passed in 2011, counties may reduce the contract term from 10 to nine years, and from 20 to 18 years, respectively.

As of 2009, there were approximately 15 million acres across 54 counties under Williamson Act contracts — about half of all farmland in California. Because utility-scale solar energy facilities require large tracts of contiguous land — typically hundreds, if not thousands, of acres — they frequently encounter parcels under Williamson Act contracts that are restricted to agricultural uses. Parties interested in utilizing contracted land for such projects have four options to move forward.

Option 1: Compatibility Finding

The first option is to obtain a finding from the local government that the renewable energy project is compatible with the Act. Generally, a use is compatible so long as it does not significantly compromise, displace or impair the current or future agricultural use and capability of the land, or result in significant removal of adjacent contracted land from agricultural or open-space use. In addition, the Act provides that “electrical facilities” are compatible uses as a matter of law, but the courts have not resolved whether this extends to utility-scale renewable energy projects or is limited to facilities that support existing agricultural uses.

Compatibility findings for solar energy facilities can prove difficult. These projects, whether based on photovoltaic (PV) or concentrated solar power (CSP) technologies, generally consist of dense installations of energy-generating equipment mounted close to the ground. Because of the shading caused by PV arrays and CSP mirrors, the land underneath this equipment cannot support intensive agriculture. In addition, because the equipment is mounted close to the ground, the use of agricultural equipment is impractical. Mitigating this conflict by reducing the density of equipment is cost-prohibitive, as it requires the developer to acquire rights to a larger footprint of land to generate the same amount of power.

Solar project developers in California frequently encounter parcels under Williamson Act contracts that are restricted to agricultural uses. In designing the 550-megawatt Topaz Solar Farm in San Luis Obispo County, First Solar reconfigured the project to avoid using any Williamson Act land.



As of 2009, there were approximately 15 million acres across 54 counties under Williamson Act contracts — about half of all farmland in California.

Therefore, in most cases, the intensive land use required for development of a utility-scale solar energy facility may be incompatible with the agricultural-use restriction imposed by Williamson Act contracts.

By comparison, the equipment and layout used in wind farms appears to be amenable to a compatibility finding. Although the size of the overall wind farm site may be several thousand acres, each wind turbine can be separated by hundreds of feet, depending on height and rotor diameter, and each tower's foundation occupies a relatively small footprint within the project boundary. Because the turbines are widely

spaced and the rotors are far above the ground, farmers can continue to carry out agricultural activities within the project area. In fact, some counties have made general findings that wind farms are compatible under the Act.

The Act provides a fallback option for projects that cannot obtain a compatibility finding. The local government may issue a conditional-use permit allowing the project to be built on contracted land if, among other things, the conditions will avoid or mitigate impacts to on- and/or off-site agriculture, the use is consistent with the purposes of the Act and the findings consider the productive capability of the land.

Option 2: Solar Easement Under SB 618

In recognition of its competing policy directives to preserve agricultural land and open space, on the one hand, and achieve a 33 percent renewable portfolio standard, on the other hand, and perhaps in recognition of the "compatibility barrier" noted above that solar developers face, California introduced a solar easement program last year under Senate Bill 618.

SB 618 authorizes parties to a Williamson Act contract, after approval by the state Depart-

ment of Conservation and in consultation with the Department of Food and Agriculture, to mutually agree to rescind the contract in order to simultaneously enter into a temporary solar-use easement. The term of the easement is typically no less than 20 years. In addition, the local government must charge the landowner a 6.25 percent fee based upon the fair market value of the property at the time of rescission.

This program is not applicable to all agricultural land, however. The subject land must not be designated as prime or unique farmland, or of national importance, unless the Department of Conservation determines otherwise. In addition, the land must consist of soils with significantly reduced agricultural productivity or have severely adverse soil conditions. Nor is the program necessarily less cumbersome than the other options discussed here. The written materials that must be submitted to the local government as part of a project application under SB 618 include soil and water analyses, crop and yield information for the subject land and a detailed management plan describing, in part, how the land will be restored to its previous general condition upon termination of the easement.

Other than non-renewal, each option for developing a renewable energy project on land currently under Williamson Act contract bears the risk that it could be undone by the courts.

Option 3: Cancellation

The third option is for the landowner to cancel the Williamson Act contract, which is not only difficult and expensive, but also disfavored by the courts.

A local government may approve cancellation of a contract under only two circumstances. The first is where cancellation is deemed consistent with the purposes of the Act. This determination requires the local board or council to make five mandatory findings, including that no non-contracted land nearby is suitable and available for the project, and that cancellation will not result in the removal of adjacent land from agricultural use or cause discontinuous patterns of urban development.

The second, more promising, option for renewable energy developers is where the city or county finds that cancellation is in the public interest. Specifically, the local government must find that other public concerns substantially outweigh the objectives of the Act and that no non-contracted land nearby is both available and suitable for the alternative use. Indeed, the Department of Conservation has noted that "because it is the policy of the State to require that a portion of its energy is generated using renewable sources, it is logical to expect that a local jurisdiction could find that the siting of a solar energy project makes the public interest findings required for cancellation of a Williamson Act contract."

Cancellation removes the agricultural-use restriction, but at significant expense. The landowner is assessed a fee equal to 12.5 percent of the fair market value of the property, which reduces this option's appeal. Additionally, because the decision by the county or city to cancel a contract is made at a noticed public hearing, where stakeholders interested in preservation of farmland and open space can be expected to strongly oppose cancellation, the decision can be politically difficult for the city, county and developer.

Option 4: Non-Renewal

Non-renewal is the last option for developing a solar energy project on land under Williamson Act contract. The process is straightforward: The landowner files a notice of non-renewal and waits out the remaining term of the contract, a minimum of eight years.

The use restrictions remain in effect until the contract expires, and the property taxes gradually increase to a fair market value assessment during the term of the cancellation. Although this option is relatively straightforward, it is the least viable from a project development standpoint. The expiration period is simply too long for project developers to invest capital, lock down financing or meet energy delivery deadlines under power purchase agreements.

However, non-renewal may be becoming less of an option for developers and more of a necessity for local governments. The Act provides that the state will reimburse local governments for the lost tax revenues resulting from the property tax reductions given to landowners with contracted land. Beginning in 2009, due to California's budget crisis and the weak economy, the state began restricting and/or reducing the allocation of tax reimbursements. As a result, cities and counties that were already struggling in this economy have lost significant funding for participating in the Act.

Rather than support the Act themselves and continue to lose revenue, some counties have considered non-renewal of existing contracts — an alternative that Imperial County recently decided to adopt — or a freeze on issuing new contracts altogether. There is no doubt that these actions could accelerate the process by which contracted land becomes available for solar energy development over the long term. However, with the passage of AB 1265, which provides for shorter contract terms and county recapture of property tax revenue under certain circumstances, some counties may continue to renew existing contracts and consider entering into new ones. Nevertheless, in the near term, securing financial backing for a project slated to be built on contracted land that has only recently commenced the lengthy non-renewal process is likely to be difficult at best.

Whatever Option, Mitigation Adds Cost

Securing the rights to develop agricultural land, whether under Williamson Act contract or not, usually entails mitigating the loss of agricultural land as a condition of project approval. Two common means of mitigation are paying an agricultural impact fee based on the value of

the land to be developed, and acquiring replacement land suitable for agriculture and placing it under a conservation easement. Impacts to high-quality "prime" farmland are typically mitigated at a 2:1 ratio, whereas non-prime farmland is generally mitigated at a 1:1 ratio. Thus, the actual amount of land that must be paid for can be two to three times the amount actually needed to construct the project. This mitigation cost, on top of any fees associated with Williamson Act cancellation or SB 618 solar easements, can significantly increase the cost of obtaining the rights to develop a particular project.

Uncertainty Ahead

Other than non-renewal, each option for developing a renewable energy project on land currently under Williamson Act contract bears the risk that it could be undone by the courts. The Act provides that compatibility findings may be challenged in court by any owner of land under Williamson Act contract in the county, as well as all landowners within 1 mile of the subject land. In addition, any person who has participated in the public process may challenge the issuance of a conditional-use permit or contract cancellation by petitioning the court. How smoothly the new SB 618 solar easement program functions and is interpreted by the courts also remains to be seen, as scoping workshops and plans continue to be implemented. Without a doubt, given the environmental and financial stakes, we can expect each option to be tested, challenged and, in many cases, successfully utilized in the years to come. **BT**



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