

Commercial Real Estate Law

March 2011

Tapping Into the Power of the Sun

The *Ontario Green Energy Act (GEA)*, enacted in May 2009, is currently offering financial incentives for the generation of renewable energy sources, such as wind, solar, hydro, biomass and biogas.

Some property owners are taking advantage of this new income opportunity by either installing and operating solar panel facilities on their commercial or industrial buildings or leasing their rooftops to a solar provider who will do the same.

The GEA created the Feed-in Tariff (“FIT”) Program. The FIT Program is supposed to guarantee access to the provincially-regulated power grid when specific regulatory requirements are met (there are some issues, however, with accessibility to local distribution companies). The FIT Program is also supposed to guarantee specific rates for energy generated from renewable sources (rates have already been reduced once and are due for review in the next few months).

The Ontario Power Authority operates the FIT Program and enters into 20-year contracts at the guaranteed rate applicable to the particular type of project. As a result, even with the possibility that the guaranteed rates will be decreased for new applications, owners of commercial and industrial buildings are actively being approached by solar power companies or providers seeking to lease rooftop space to install and operate solar panel facilities. Before agreeing to lease your rooftop, it is important to determine if such facilities are appropriate for your property.

Due Diligence is Key

A. Appropriate physical due diligence by qualified professionals

Many roofs were not constructed with load bearing capacity for PV panels. There are different PV technologies and different techniques available to address various concerns such as weight limitations, snow drifting, wind velocities, placement of existing roof top mechanicals and the orientation of the building on the property.

B. Appropriate research and due diligence on the solar provider

With this new investment opportunity, many new solar

providers have popped up. Look for experience and completed projects, services and products offered, membership in the Canadian Solar Industry Association, the depth of their due diligence process and their ability to finance.

C. Appropriate legal due diligence

Do not sign a lease without first obtaining legal advice and beware of letters of intent that are actually binding. Here are some factors for property owners to consider when determining whether a solar rooftop lease is appropriate for their property:

Review Existing Property Leases

A detailed review of existing leases should include analyzing provisions governing the use, maintenance and control of the rooftop, the allocation of costs between the landlord and the tenant(s) with respect to the roof, and how a rooftop tenant would affect the management and operation of the building generally.

It is likely that leases will need revision to allow for installation and maintenance or to address tenant concerns in relation to the rooftop solar panel system’s impact on the tenant’s business and expenses.

Check Zoning Issues

Property owners will also need to consider how solar panels might impact height restrictions on the buildings on the property. Many municipalities now have specific provisions in their zoning by-laws dealing with rooftop solar panel systems.

Consider Property Tax Implications

The Municipal Property Assessment Corporation (MPAC) has not yet set a formal policy on how to classify and assess rooftop solar facilities. However, MPAC has indicated they will likely assign an industrial classification to their use. As such, a solar panel installation may impact the tax

classification and/or assessed value of your property, increasing your property taxes.

You will want to know any property tax implications (or make provision for an increase), particularly where the installation results in a mix of industrial and commercial uses, where the lower rate single use formerly applied.

Leasing Issues Specific to Rooftop Solar Panels

Any lease should address not only where the panels will be located, but also their long-term impact on the roof and the allocation of responsibility for maintaining, repairing, upgrading, replacing, and insuring the panels and the roof.

The landlord should also consider indemnities for damage to the roof by the solar tenant, nuisance and insurance issues, as well as relocation and interruption clauses that

limit landlord liability in the event that the roof needs to be replaced or other circumstances that may require the relocation and interruption of the solar panel system.

While solar rooftop leases can lead to big benefits for solar tenants, property owners and the environment, these are only some of the legal and practical issues to consider in deciding whether to set up a solar panel facility. In some cases, leasing rooftop space may be incompatible with the current commercial uses of the property. In circumstances where solar rooftop leasing makes business sense, property owners should consult legal counsel, knowledgeable in this area, before agreeing to the terms of a lease or other binding agreement. Pallett Valo LLP's Commercial Real Estate Practice is already at the forefront of this area, having drafted, negotiated and conducted seminars on solar rooftop panel leasing. We will continue to monitor new developments in this area.

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Pallett Valo LLP Commercial Real Estate Practice

We have experience in all areas of Real Estate Law, from the most complex joint ventures and land development projects to routine commercial purchase, sale and mortgage transactions. We assist our clients as they structure and negotiate their projects, and we strive to creatively and effectively overcome any obstacles which arise during the course of a transaction. Our "outside the legal box" thinking and practical, business approach allows us to best serve and protect our clients.

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