
MEMORANDUM

TO: TOWN MEETING MEMBERS
FROM: STEPHANIE MERCANDETTI, COMM. & ECON. DEV. DIRECTOR
SUBJECT: ARTICLE 18
DATE: OCTOBER 3, 2013
CC: MICHAEL BOYNTON, TOWN ADMINISTRATOR

Borrego Solar Systems, Inc. has requested the Town enter into an Agreement for Payment In Lieu of Taxes for Real Property and Personal Property otherwise known as a PILOT Agreement. Borrego Solar has plans to construct a 2.98mwh large-scale ground-mounted solar photovoltaic installation at 33 Industrial Road within the Route 1A Industrial Park. Borrego Solar received Site Plan Approval by the Planning Board on May 29, 2013.

Enclosed please find a draft of the PILOT agreement. We will be asking for the Board of Selectmen and Board of Assessors to approve the PILOT should this article gain favorable action by Town Meeting.

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**AGREEMENT FOR PAYMENT IN LIEU OF TAXES
FOR REAL PROPERTY AND PERSONAL PROPERTY**

between

WALPOLE SOLAR 2, LLC
and

THE TOWN OF WALPOLE, MASSACHUSETTS

and

NOVIIS, LLC

dated as of _____, 2013

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AGREEMENT FOR PAYMENT IN LIEU OF TAXES FOR REAL PROPERTY AND PERSONAL PROPERTY

THIS AGREEMENT FOR PAYMENT IN LIEU OF TAXES FOR REAL PROPERTY AND PERSONAL PROPERTY ("Agreement") is made and entered into as of _____, 2013 by and between Walpole Solar 2, LLC, a Delaware limited liability company ("Developer"), Noviis, LLC, a Massachusetts limited liability company ("Property Owner"), and the Town of Walpole, a municipal corporation duly established by law and located in Norfolk County, Massachusetts (the "Town"). Developer, Property Owner and the Town are collectively referred to in this Agreement as the "Parties," and individually referred to as a "Party."

WHEREAS, Developer is a "generation company" engaged in the business of producing, manufacturing or generating electricity or related services or products, including but not limited to, renewable energy generation attributes for retail sale to the public, or a "wholesale generation company" engaged in the business of producing, manufacturing or generating electricity for sale at wholesale only, as such terms are defined or used in the Massachusetts General Laws Chapter 59, §38H(b), and Chapter 164, §1;

WHEREAS, Developer has entered into a lease (the "Lease") with an initial term of ten years, with options to extend to up to a total term of 25 years, with the Property Owner, who is the owner of the approximately 19.77 acre +/- parcel of land located at 33 Industrial Road, Walpole, Massachusetts, as more particularly shown in Assessors Map 46 Parcel 47. and as generally shown in the Site Description attached hereto as Exhibit A (the "Property"), and plans to build and operate a photovoltaic power plant with an expected nameplate capacity (the "Capacity") of approximately 2.98 megawatts (MW) DC, and with an expected completion date of April 1, 2014 (the "Facility") on said Property;

WHEREAS, it is the intention of the Parties that Developer make annual payments to the Town for the full term of this Agreement in lieu of real and personal property taxes for the Property and Facility (collectively, the "Project"), in accordance with G.L. c.59, §38H(b) and other applicable laws and regulations, including the regulations of the Massachusetts Department of Revenue adopted in connection therewith;

WHEREAS, because Parties desire an accurate projection of their respective expenses and revenues with respect to the real and personal property that is taxable under law as a result of the Project, the Parties believe that it is in their mutual best interests to enter into this Agreement fixing the payments that will be made with respect to all taxable real and personal property for the Project for the term of the Agreement;

WHEREAS, the Parties intend that, during the term of the Agreement, except as otherwise provided herein, neither Developer nor Property Owner will be assessed for any statutory real and personal property taxes attributable to the Project to which it might otherwise be subjected under Massachusetts law for the Project, and that this Agreement will provide for the exclusive payments in lieu of such real and personal property taxes that Developer and Property Owner (or any successor owner of the Project) will be obligated to make to the Town with respect to the Project during the term hereof, provided, however, that this Agreement does not affect any other taxes and payments that may be charged to and owed by the Developer or Property Owner to the Town except for the real and personal property taxes attributable to the Project; nor does this Agreement affect any other payments that may be legally owed by Developer or Property Owner to the Town, including, but not limited to, taxes for personal

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property other than the taxes attributable to the Project, and payments for services provided by the Town to the Project, including, but not limited to, water and sewer services, betterment assessments, and other payment obligations;

WHEREAS, the Town is authorized to enter into this Agreement with the Developer and the Property Owner, on the basis that the payments in lieu of real and personal property taxes over the life of the Agreement are expected at inception to approximate the real and personal property tax payments that would otherwise be determined under G.L. c.59 based upon the full and fair cash valuation of the real and personal property attributable to the Project; and Developer, throughout the term hereof, qualifies as a "generation company" or "wholesale generation company";

WHEREAS, this Agreement is subject to approval by the Town's Board of Selectmen following authorization to execute same by Walpole Town Meeting; and

WHEREAS, the Parties have reached this Agreement after good faith negotiations.

NOW THEREFORE, in exchange for the mutual commitments and other good and valuable consideration, the receipt and sufficiency of which are acknowledged, the parties agree as follows:

1A. Payment in Lieu of Real and Personal Property Taxes. Developer agrees to make payments to the Town in lieu of the real and personal property taxes attributable to the Project for an initial period of ten consecutive years commencing on the Commercial Operation Date (meaning the date on which testing indicates that the Facility is capable of generating electric energy for four (4) continuous hours using such instruments and meters as have been installed for such purposes, and the interconnection to NSTAR's electrical grid and all required reviews and approvals have been provided by NSTAR and the Commonwealth of Massachusetts, as shall be certified in writing by Developer to the Town within 14 days after the Commercial Operation Date), in the annual amounts shown on Exhibit B attached hereto. Until the Commercial Operation Date has occurred, the Property Owner shall continue to be assessed and be responsible for payment of all real estate and personal property taxes for and in connection with the Property. In the event the Lease is extended, then the term of this Agreement shall also be extended for a period coterminous therewith up to and not to exceed an additional ten (10) years for a total term of up to and not to exceed twenty (20) years from the Commercial Operation Date. Each annual payment will be paid to the Town in four (4) equal quarterly installments (pro-rated for the first and last quarters of the term of this Agreement) on or before August 1, November 1, February 1 and May 1 of each fiscal tax year during the term of this Agreement (or, for the first payment, if the term of this Agreement commences after either such date, within ten (10) business days of the date of term commencement) and the annual payment amount and payment date will be noted on a quarterly bill issued by the Town to the Developer, provided that any failure of the Town to issue a bill shall not relieve Developer of its payment obligations hereunder. The Parties agree that the payments in lieu of taxes under this Agreement will not be reduced on account of a depreciation factor or reduction in the Town's tax rate, or increased on account of an appreciation factor or increase in the Town's tax rate, which factors have been anticipated and are reflected in Exhibit B.

1B. To the extent that the Capacity of the Project exceeds 2.98 MW (DC) on or at any time after the Commercial Operation Date for any reason, the remaining annual payments in lieu

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of taxes under this Agreement shall be increased by an amount equal to \$15.654 for each kW (DC) of such excess/increase, which amount shall be increased by two and one-half percent each consecutive 12-month period commencing on the Commercial Operation Date throughout the term of this Agreement; provided that, following any such increase, if the Project Capacity is decreased, such decrease shall result in an equivalent reduction to the payments in lieu of taxes under this Agreement, provided further that the payments in lieu of taxes under this Agreement shall not be reduced below the minimum amounts provided on Exhibit B irrespective of whether the Capacity is decreased to less than 2.98 MW (DC).

2. Inspection. The Town, its officers, employees, consultants and attorneys will have the right to periodically inspect the Project and meters used to measure the energy generated by the Project at reasonable times and on reasonable prior notice to Developer for the purpose of confirming and verifying the Capacity of the Project and compliance with this Agreement.

3. Payment Collection. All rights and remedies available to the Town for the collection of taxes shall apply to the payments in lieu of taxes hereunder, including but not limited to, all rights and remedies provided in G.L. c.59 and G.L. c.60, and all such rights and remedies are hereby reserved notwithstanding anything to the contrary herein. The provisions of the General Laws, including but not limited to G.L. c.59 and G.L. c.60, will govern the establishment of liens and the collection of any payments in lieu of taxes provided for in this Agreement as though said payments were real or personal property taxes due and payable to the Town.

4. Tax Status. The Town agrees that beginning after the Commercial Operation Date and during the term of this Agreement, the Town will not assess Developer or Property Owner for any real and personal property taxes attributable to the Project to which they might otherwise be subject under Massachusetts law in the absence of this Agreement, and the Town agrees that this Agreement will exclusively govern the payments of such taxes; provided, however, that this Agreement does not affect, and will under no circumstances preclude, the Town from assessing any other taxes, fees, charges, rates or assessments which Developer or Property Owner may be obligated to pay, including, but not limited to, real estate and personal property taxes excluding those attributable to the Project but including, without limitation, real estate taxes for buildings or other fixtures (other than the Facility) located on the Property, excise taxes on vehicles due pursuant to G.L. c.60A, betterments, fees, or charges for services provided by the Town to the Project or Property, including, but not limited to, water and sewer services.

5. Assignment. This Agreement may not be assigned by Developer or Property Owner without the prior written consent of the Town, which shall not be unreasonably withheld, conditioned, or delayed. For the avoidance of doubt, any consent of the Town required under this section may be granted by its Board of Selectmen. Notwithstanding the foregoing, the Town acknowledges this Agreement may be collaterally assigned by Developer to a party providing financing for the Project, provided that Developer shall provide the Town with written notice of any such collateral assignment within 30 days following the assignment. This Agreement will be binding on the successors and, if any, assigns of the Parties. Any proposed assignment by the Developer or Property Owner for which the Town's consent is required hereunder must be

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presented to the Board of Selectmen in writing not less than sixty (60) days in advance.

6. Statement of Good Faith. The Parties agree that the payment obligations established by this Agreement were negotiated in good faith in recognition of and with due consideration of the full and fair cash value of the Project, to the extent that such value is reasonably determinable as of the date of this Agreement in accordance with G.L. c.59, §38H. Each Party was represented by counsel in the negotiation and preparation of this Agreement and has entered into this Agreement after full and due consideration and with the advice of its counsel and its independent consultants. The Parties further acknowledge that this Agreement is fair and mutually beneficial to them because it reduces the likelihood of future disputes over real and personal property taxes attributable to the Project, establishes tax and economic stability at a time of continuing transition and economic uncertainty in the electric utility industry in Massachusetts and the region, and fixes and maintains mutually acceptable, reasonable and accurate payments in lieu of taxes for the Project that are appropriate and serve their respective interests. The Town acknowledges that this Agreement is beneficial to it because it will result in mutually acceptable, steady, predictable, accurate and reasonable payments in lieu of taxes to the Town. Developer acknowledges that this Agreement is beneficial to it because it ensures that there will be mutually acceptable, steady, predictable, accurate and reasonable payments in lieu of taxes for the Project.

7. Notices. All notices, consents, requests, or other communications provided for or permitted to be given hereunder by a Party must be in writing and will be deemed to have been properly given or served upon the personal delivery thereof, via courier delivery service or otherwise. Such notices shall be addressed or delivered to the Parties at their respective addresses shown below.

To: Developer:

Walpole Solar 2, LLC
c/o Soltage, LLC
66 York Street, 5th Floor
Jersey City, NJ 07302
Attn: Chief Executive Officer

With a copy to:

Mike Blasik
McCauley Lyman LLC
10 Speen Street
Framingham, MA 01701

To: Town:

Board of Selectmen
Town of Walpole

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135 School Street
Walpole, MA 02081

To: Property Owner:

Noviis, LLC
331 West Street
PO Box 230
Walpole, MA 02081
Attn: Antonio J. Lorusso, Jr., Manager

With a copy to:

Thomas E. Nannicelli, Esquire
470 Washington Street, Suite 30
PO Box 68
Norwood, MA 02062

Any such addresses for the giving of notices may be changed by giving written notice as provided above to the other Parties. Notice given by counsel to a Party shall be effective as notice from such Party.

8. Applicable Law. This Agreement will be made and interpreted in accordance with the laws and regulations of the Commonwealth of Massachusetts exclusive of conflict of laws provisions thereof. Developer, Property Owner and the Town each consent to the jurisdiction of the Massachusetts courts or other applicable agencies of the Commonwealth of Massachusetts regarding any and all matters, including interpretation or enforcement of this Agreement or any of its provisions. Developer and Property Owner agree that service of process may be effected on them by certified mail, return receipt requested at the addresses indicated in Section 7 of this Agreement (Notices) (or such other address either such Party may provide from time to time pursuant to Section 7).

9. Good Faith. The Town, Property Owner and Developer shall act in good faith to carry out and implement this Agreement and to resolve any disputes between them.

10. Force Majeure. The Developer, Property Owner and Town recognize that there is the possibility during the term of this Agreement that all or a portion of the Property or Project may be damaged or destroyed or otherwise rendered unusable due to unforeseeable events beyond the reasonable control of the Parties. These events are referred to as "Force Majeure." As used herein, Force Majeure includes, without limitation, the following events:

- A. Acts of God, including floods, winds, storms, earthquake, fire or other natural calamity;
- B. Acts of War or other civil insurrection or terrorism; or

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- C. Taking by eminent domain by any governmental entity of all or a portion of the Property or the Project.

The Party affected by an event of Force Majeure shall promptly notify the other Party in writing of the occurrence of such event. Such notice shall be accompanied by any information reasonably available regarding the nature and anticipated duration of such event of Force Majeure. The non-performing Party shall use commercially reasonable and diligent efforts to continue to perform its obligations hereunder and to overcome the effects of the event of Force Majeure. The suspension of performance shall be of no greater scope and of no longer duration than is reasonably required by the event of Force Majeure. Notwithstanding the foregoing, in no event shall Developer be relieved of payment obligations under this Agreement on account of any Force Majeure unless and until this Agreement is terminated, if at all, in accordance with this Section 10.

11. Legislation. Notwithstanding anything to the contrary in this Agreement, any future legislation providing for a statutory method for the calculation of taxes on solar developments, such as this Project, will not affect or alter the payments in lieu of taxes agreed upon herein and reflected in Exhibit B.

12. Covenants/Warranties.

A. During the term of the Agreement, Developer covenants and warrants that it will not voluntarily do any of the following:

1. seek to invalidate this Agreement, except as expressly provided herein;
2. fail to pay the Town all amounts due hereunder when due in accordance with the terms of this Agreement; or
3. seek, for any reason, an abatement or reduction of any of the amounts assessed in accordance with the terms of this Agreement, except as may be expressly provided herein.

B. Developer further represents and warrants:

1. It is a corporation or other business entity duly organized, validly existing and in good standing under the laws of the state in which it was formed, and if a foreign corporation or other business entity, is registered with the Massachusetts Secretary of the Commonwealth, and has full power and authority to carry on its business as it is now being conducted.
2. This Agreement constitutes a legal, valid and binding obligation of Developer enforceable in accordance with its terms, except to the extent that the enforceability may be limited by applicable bankruptcy, insolvency or other laws affecting other enforcement of creditors' rights

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generally or by general equitable principles.

3. It has taken all necessary action to authorize and approve the execution and delivery of this Agreement.

4. None of the documents or information furnished by or on behalf of Developer to the Town in connection with the negotiation and execution of this Agreement contains any untrue statement of a material fact or omits to state any material fact required to be stated therein, or necessary to ensure that the statements contained herein or therein, in the light of the circumstances in which they were made, are not misleading.

5. The person executing this Agreement on behalf of Developer has the full power and authority to bind it to each and every provision of this Agreement.

6. Developer is a “generation company” or “wholesale generation company” as those terms are used and defined in G.L. c.59, §38H(b) and G.L. c.164 § 1.

7. Developer is not a “manufacturing corporation” or “limited liability company engaged in manufacturing” exempt from taxation under G.L. c.59, §5(16)(3).

C. Property Owner represents and warrants:

1. It owns the Property in fee simple and has leased the Property or a portion thereof to Developer for the purpose stated herein.

2. If not an individual, it is a corporation or other business entity duly organized, validly existing and in good standing under the laws of the state in which it was formed, and if a foreign corporation, is registered with the Massachusetts Secretary of the Commonwealth.

3. This Agreement constitutes the legal, valid and binding obligation of Property Owner enforceable in accordance with its terms, except to the extent that the enforceability may be limited by applicable bankruptcy, insolvency or other laws affecting other enforcement of creditors’ rights generally or by general equitable principles.

4. It has taken all necessary action to authorize and approve the execution and delivery of this Agreement.

5. None of the documents or information furnished by or on behalf of Property Owner to the Town in connection with negotiation and execution

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of this Agreement contains any untrue statement of a material fact or omits to state any material fact required to be stated therein, or necessary to ensure that the statements contained herein or therein, in the light of the circumstances in which they were made, are not misleading.

6. The person executing this Agreement on behalf of Property Owner has the full power and authority to bind it to each and every provision of this Agreement.

D. Town represents and warrants that it has secured all approvals of appropriate officers, boards and bodies necessary to duly authorize the execution, delivery and performance of this Agreement and its obligations hereunder, including its Board of Selectmen and Town Meeting.

13. Invalidity: The Parties understand and agree that this Agreement shall be void and that no portion of this Agreement shall be enforceable, if (a) this Agreement, or any material portion of this Agreement, is determined or declared by a court of competent jurisdiction or the Massachusetts Department of Revenue to be illegal, void, or unenforceable; or (b) Developer is determined or declared by a court of competent jurisdiction or the Massachusetts Department of Public Utilities or Department of Revenue to not be a “generation company” or “wholesale generation company” as those terms are used and/or defined in G.L. c. 59 § 38H (b), and G.L. c. 164 § 1.

14. Early Termination: This Agreement may be terminated upon ten (10) business days written notice to the non-terminating Parties as follows:

- A. By either Developer or Town, if the Commercial Operation Date has not occurred by June 30, 2014, unless Developer elects to begin making payments hereunder notwithstanding the nonoccurrence of the Commercial Operation Date;
- B. By Developer, if there is an early termination of the Lease other than termination due to a default by the Developer under such agreement;
- C. By the Town, if the Project is abandoned, or the average amount of electricity generated by the Project in any two (2) consecutive calendar years is less than 400,000 kWh per year;
- D. By the Town if Developer fails to make any payment hereunder, unless any outstanding payment is made in full within the 10-business day termination notice period; or
- E. By the Town if Developer otherwise material breaches this Agreement, further provided that in such case the Developer shall have thirty (30) days to cure such breach and avoid a termination of this Agreement if and only if it delivers to the Town written notice within the 10-business day termination notice period certifying that it has commenced and will diligently pursue a cure.

15. Miscellaneous.

- A. Subject to applicable laws and regulations, each Party will, from time to time hereafter, execute and deliver, or cause to be executed and delivered, such reasonable additional documents as the other Party reasonably requests for the purpose of implementing or effectuating the provisions of this Agreement, including, without limitation, lender consent documents on customary terms and conditions requested by Developer and approved by the Town through its Board of Selectmen. The reasonable costs of executing and delivering such documents or instruments, including attorneys' fees, shall be borne by the requesting Party, provided that a Party shall not be required to obtain for the other an opinion of such Party's legal counsel. Notwithstanding the foregoing, the Town shall not be required to sign any document that will materially increase its risks or result in the waiver of any of its rights or defenses under this Agreement or at law or in equity, as reasonably determined by the Town.

- B. This Agreement may be executed in several counterparts, each of which shall be an original, and all of which shall constitute but one and the same instrument.

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Executed under seal by the undersigned as of the day and year first written above, each of whom represents that it is fully and duly authorized to act on behalf of and bind its principals.

<p>TOWN OF WALPOLE BY ITS BOARD OF SELECTMEN,</p> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>	<p>WALPOLE SOLAR 2, LLC</p> <p>BY:</p> <hr/> <p>[name of person signing]</p>
<p>NOVIIS, LLC</p> <p>BY:</p> <hr/>	

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EXHIBIT B PILOT Payments

Years	Amount
1	\$ 46,650.00
2	\$ 47,816.25
3	\$ 49,011.66
4	\$ 50,236.95
5	\$ 51,492.87
6	\$ 52,780.19
7	\$ 54,099.70
8	\$ 55,452.19
9	\$ 56,838.50
10	\$ 58,259.46
11	\$ 59,715.94
12	\$ 61,208.84
13	\$ 62,739.06
14	\$ 64,307.54
15	\$ 65,915.23
16	\$ 67,563.11
17	\$ 69,252.19
18	\$ 70,983.49
19	\$ 72,758.08
20	\$ 74,577.03

NOTE 1: Year commences on the Commercial Operation Date or anniversary thereof and ends on the day preceding the next anniversary of Commercial Operation Date, e.g. Year 1 commences on Commercial Operation Date and ends the day before the 1-year anniversary of Commercial Operation Date, Year 2 commences on the 1-year anniversary of Commercial Operation Date and ends the day before the 2-year anniversary of Commercial Operation Date, etc.

NOTE 2: Table includes all possible years with maximum extension of term of Agreement; actual term of Agreement is in accordance with Section 1 of Agreement.