

# Money from the Sky? Property Owners and Lenders Ponder On Site Solar Energy Systems

by Bob Marsico on March 8, 2012

Even with recent highly publicized bankruptcies of solar technology companies, such as Solyndra (despite a \$535 million federal loan guarantee), significant technological advances have occurred in recent years in the cost effective generation of solar sourced power. In fact, with various governmental incentives, tax credits, and other programs, increasing consideration is being given by owners of commercial and industrial real estate properties to the installation of solar energy generating systems, in order to partially satisfy power needs inexpensively and thereby add to cash flow. In addition, eco-friendly power generation also tends to have an intangible, positive marketing effect with prospective tenants in a challenging rental environment.

Typically, commercial property owners who utilize the expertise of companies specializing in solar energy generation do so through fairly detailed agreements. Often such agreements provide for the installation by the solar energy company of an on site system (usually roofmounted) and for the terms of purchase by the property owner of the solar energy output of the installed system at favorable rates. Agreements may also address a myriad of other business issues crucial to both parties, including, but not limited to the following:

- a) the contract term;
- b) ownership of the system during the term;
- c) obligations for maintenance, repair, and replacement of the system;
- d) insurance;
- e) defaults and possible early termination;
- f) responsibilities for obtaining required governmental approvals;
- g) ownership of tax credits and governmental incentives;
- h) site access;
- i) environmental concerns; and
- j) responsibility for payment of taxes.

Lenders holding mortgages on properties where installation of solar energy systems is contemplated are, with increasing frequency, being drawn into the discussions between their borrower/property owners and the solar energy companies, who seek lender consent for the renovations required for such systems — generally where the loan documentation requires lender approval. Furthermore, solar energy providers typically want assurances that their solar energy agreements are not impacted in the event a property owner defaults on its mortgage and a foreclosure ensues.

On the other hand, mortgage lenders are generally unwilling to allow such agreements to gain priority over the lien of their mortgages on the affected property. To address such conflicting goals, the parties may consider entering into subordination, non-disturbance, and attornment agreements, pursuant to which the parties confirm various terms, such as the following:

- (a) any agreement between the property owner and the solar company relating to the provision of on site solar power is subordinate to the lien of the mortgage;
- (b) provided such solar power agreement is in good standing, the mortgage holder will continue to recognize it even after a default by the borrower under the mortgage and the foreclosure of the property by the lender; and
- (c) upon a foreclosure by the lender, the solar company will accept the subsequent property owner as the substituted contracting party under the solar agreement.

Given the positive benefits, both monetary and non-monetary, accruing to the property under properly crafted solar energy agreements, institutional lenders are generally willing to cooperate in such arrangements.

Needless to say, the drafting and analysis of solar energy agreements and subordination, non-disturbance, and attornment agreements relating thereto, require the thoughtful and careful legal skills of an experienced business attorney to protect and balance the goals and concerns of property owners, solar energy providers, and mortgage lenders.

If you have any questions as to such agreements or need assistance in such endeavors, an experienced business attorney can be of assistance.