

CITY COUNCIL MEETING

AGENDA ITEM III



CITY OF FRANKLIN
COUNCIL AGENDA REPORT

City Council meeting December 2016

From: Elizabeth Dragon – City Manager

Subject: Solar Payment In Lieu of Taxes (PILOT) agreements

December 2016

Recommended Motion: “I move that the Franklin City Council set a public hearing on January 3, 2017 at 6:05pm regarding payment in Lieu of Tax agreements for solar projects proposed for city owned land”

2. Mayor asks a second, discussion, and calls the vote.

Discussion:

Last December the council approved Payment In Lieu Of Tax (PILOT) agreements for the seven proposed Solar sites in the city. In the motion which approved the agreement there was a contingency that all PILOT agreements were dependent upon the project being built and the necessary corresponding agreements for each project being executed.

Last year during the months of August and September the City Council approved four out of the five solar projects proposed on city property (lease, purchase power agreement, and payment in lieu of tax amounts). The fifth city solar project lease was finalized several months later (May 2016) after the transfer of ownership of the property from the Co-op to the City. There were two additional solar projects on private property. One was coordinated through the Franklin Business and Industrial Development Corp (FBIDC) in the Industrial park area and another was privately negotiated on Commerce Drive.

The PILOT amount approved for all seven proposed solar projects was to be \$3,500 annually. The length of the agreement was 20 yrs plus 1 transitional year.

Page 1 section 2 (term) of the PILOT states: “If the facility fails to achieve commercial operation by December 31, 2016, this agreement shall be deemed void and of no effect”. Commercial operation shall be deemed to have occurred once the solar power electric generating facility has been commissioned and accepted by CWS in accordance with applicable commissioning and inspection procedures b) the facility has been interconnected to the utility electric grid, and c)CWS has commenced the sale of energy from the facility on a commercial (rather than test) basis to one or more purchasers. None of the 7 proposed projects have met “commercial operation” standard and will not meet the standard by December 31, 2016-therefore the PILOT agreements will be deemed void at the end of the month.

The goal for the proposed city solar projects was to create renewable energy to power city buildings while also creating additional revenue to the city (a win-win situation). The

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negotiations involved a financial evaluation including originally five city owned sites. Revenues were evaluated for lease payments to the city for five sites and the Payment in Lieu of tax payments over the next 20 years. These revenues combined offset any potential risk assumed by entering into a 20yr power purchase agreement (where market rate energy costs are difficult to predict). Additionally, the end result of all five projects was expected to generate significant revenue to the city. We are now down to four city owned sites.

However, NH Solar Garden is requesting renewal of PILOT and plans to implement only one of the solar projects/agreements in the first year along with the power purchase agreement. This changes the revenue picture significantly. If four of the city solar projects are not built in conjunction with implementation of the power purchase agreement for city buildings- then it is not as clear that the end result will always be a benefit to the city.

Attached is a summary created by Director Milner to illustrate the difference in projected revenues & savings for different scenarios. If only one solar project is built on city property using the original 5.5% escalation of energy costs per year we remain in a positive position throughout the 20yr agreement. However, right now we are paying a lower rate than last year's estimate and if we used a more conservative (lower) escalation number of 2.5% in energy costs per year with only one solar project built we would be a negative position in year 8 of the 20 yr agreement.

I requested the city attorney draft language to add to the PILOT agreements which clearly ties the successful implementation of all four city owned projects to the execution of PILOT agreements at a rate of \$3,500 per year. Currently Solar Gardens plans to build one city project and implement the power purchase agreement. I have requested language be added that if the remaining 3 out 4 solar projects are not built within 3 years the city would then have the ability tax the solar projects at full value. This ensures that the end result for the city will be a positive revenue/cost savings scenario throughout the life of the 20 year agreement with a more conservative number for escalation of energy costs.

This change has not yet been agreed to by NH Solar Gardens.

If the council agrees with this proposed change I would recommend holding another public hearing in January under old business to comply with RSA 72:74 PILOT payments for renewable generation facilities. The council did hold a public hearing last December before approving the current agreements that are about to expire.

RSA 72:74 Payment in Lieu of Taxes. Requires the governing body of the municipality to hold a public hearing before entering into a voluntary agreement.

Agreements must be renewed every five years. The municipality in which the facility is located may agree to a term exceeding 5 years if such term is necessary for the financing of the project or is otherwise advantageous to both parties and both parties agree to such term.

RSA 72:74

I. The owner of a renewable generation facility and the governing body of the municipality in which the facility is located may, after a duly noticed public hearing, enter into a voluntary agreement to make a payment in lieu of taxes. A lessee of a renewable generation facility

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which is responsible for the payment of taxes on the facility may also enter into a voluntary agreement with the municipality in which the facility is located to make a payment in lieu of taxes, provided the lessee shall send by certified mail to the lessor written notice which shall state that the property of the lessor may be subject to RSA 80 should the lessee fail to make the payments required by the agreement. A copy of such notice shall be provided to the municipality in which the facility is located.

II. A renewable generation facility subject to a voluntary agreement to make a payment in lieu of taxes under this section shall be subject to the laws governing the utility property tax under RSA 83-F. Payments made pursuant to such agreement shall satisfy any tax liability relative to the renewable generation facility that otherwise exists under RSA 72. The payment in lieu of taxes shall be equalized under RSA 21-J:3, XIII in the same manner as other payments in lieu of taxes. In the absence of a payment in lieu of taxes agreement, the renewable generation facility shall be subject to taxation under RSA 72.

III. If a municipality that contains more than one school district receives a payment in lieu of taxes under this section, the proceeds shall be prorated to the districts in the same manner as local taxes are prorated to the districts, or in the case of a cooperative school district between the city or town and pre-existing school district.

IV. The collection procedures in RSA 80 shall be used to enforce a voluntary agreement to make a payment in lieu of taxes authorized by this section.

V. If a municipality enters into a voluntary payment in lieu of taxes agreement with an owner, or a lessee responsible for payment of taxes, of a renewable generation facility, the municipality, upon the request of the owner, or a lessee responsible for payment of taxes, of any other renewable generation facility located within the municipality, shall offer a comparable agreement to the owner or lessee of such facility.

VI. Except as provided in paragraph VII, no voluntary agreement entered into under this section shall be valid for more than 5 years; however, any such agreement may be renewed or amended and restated for any number of consecutive periods of 5 years or less.

VII. The owner of a renewable generation facility and the governing body of the municipality in which the facility is located may agree to a term exceeding 5 years if such term is necessary for the financing of the project or is otherwise advantageous to both parties and both parties agree to such term.

Alternatives: Do not approve the revised Pilot agreements and direct the City Manager to continue negotiations or simply allow the agreements to expire and assess the solar projects at full value if built.

Attachments/Exhibits: 1. PILOT agreement current language
2. Spreadsheet illustrating revenue & cost saving scenarios

[Pilot Language]

-Private Property-



PAYMENT IN LIEU OF TAXES AGREEMENT BETWEEN
THE CITY OF FRANKLIN AND COMMERCE WAY SOLAR, LLC

This Payment in Lieu of Taxes (PILOT) Agreement (hereafter "Agreement") is made this 13th day of November 2015, under New Hampshire Revised Statutes Annotated (NHRSA) § 72:74, between the City of Franklin, New Hampshire ("Town") and Commerce Way Solar, LLC ("CWS"), a New Hampshire limited liability company with a business address at 23 Rosemary Lane, Durham, NH 03824

Background

CWS seeks to develop a renewable solar power electric generating facility (the "Facility") to be located at Map 102, Lot 402 in Franklin NH expects the final installed Nameplate Capacity to be approximately 1.226 megawatts (MW). For the purposes of this Agreement, the term "Nameplate Capacity" shall mean the sum of all of the nameplate capacities for the total solar inverters installed and operating at the Facility. Once the project has reached commercial operation, defined below, the parties will sign a letter amendment to this Agreement specifying the actual Nameplate Capacity of the Facility (if applicable).

102-402-00

The Facility will be built on land leased by CWS, identified on Town tax maps as tax parcels (insert by town).

Under its lease agreements with landowners, CWS will be responsible for the payment of local ad valorem real estate taxes on Facility structures and other 2 improvements under NHRSA Chapter 72 (but not for taxes on the value of the underlying land, which will continue to be the landowners' responsibility).

The Facility will be a "renewable generation facility", as defined in NHRSA §72:73 and NHRSA 374-F:3, V(f)(3). Under NHRSA §72:74, the owner of a renewable generation facility and the governing body of the municipality in which the facility is located may, enter into a voluntary agreement to make payments in lieu of taxes.

CWS and the Town desire to enter into such a PILOT agreement under NHRSA §72:74.

NOW THEREFORE, the parties hereto agree as follows:

Terms and Conditions

1. Payments in Lieu of Taxes. CWS will make payments in lieu of taxes to the Town for each tax year (April 1 to March 31) during the term of this Agreement, in accordance with Sections 3 and 4 below. These PILOT payments will be in lieu of any and all ad valorem real estate taxes otherwise payable under NHRSA Chapter 72, including all town, county, and local school district taxes.

2. Term. Mindful of RSA 72:74, VI and VII, the parties have determined that a long-term agreement providing predictability of tax revenues and expenses would be advantageous to both the Town and CWS. Accordingly, the term of this Agreement shall be 21 (twenty-one) years, beginning with a "transition tax year" described in Section 4 below and continuing thereafter for 20 additional years (the "Operating Term") as described in Section 5 below. If the Facility fails to achieve commercial operation by December 31, 2016, this Agreement shall be deemed void and of no effect. For the purposes of this Agreement, the term "commercial operation" shall be deemed to have 3 occurred once (a) the solar power electric generating facility has been commissioned and accepted by CWS in accordance with applicable commissioning and inspection procedures (b) the Facility has been interconnected to the utility electric grid, and (c) CWS has commenced the sale of energy from the Facility on a commercial (rather than test) basis to one or more purchasers. The date on which CWS commences energy



sales on a commercial basis shall be deemed the "Commercial Operation Date." CWS shall give the Town written notice of said Commercial Operation Date within seven (7) days after it occurs, together with a proposed letter amendment confirming the Facility's actual Nameplate Capacity.

3. Transition Tax Year Payment. The tax year in which the Facility achieves commercial operation, the Transition Tax Year, shall be the first tax year covered by this Agreement. Recognizing that construction of the Facility may not have commenced (or that if construction has commenced that the Facility is likely to be only partially constructed) as of April 1 of said Transition Tax Year, and that CWS's revenues for said tax year may be non-existent or minimal, the PILOT payment for said Transition Tax Year will be based on the following formula, calculated as of the Commercial Operation Date:

$$(\text{Nameplate Capacity}) \times (\text{days left in Transition Tax Year}/365) \times (\text{first year PILOT rate}) \times 0.5$$

For example, if Nameplate Capacity is 1.2 MW and commercial operation is reached on September 1, the Transition Tax Year payment would be calculated as:

$$(1.2 \times (211/365) \times \$3,500) \times .5 = \$1,213.87$$

The Transition Tax Year Payment will be made within ninety (90) days of the Commercial Operation Date.

4. PILOT Payments for 20-Year Operating Term. Subject to possible adjustments up or down under Section 5 below, annual PILOT payments to the Town for the 20-year Operating Term shall begin at the rate of \$3,500 per megawatt of Nameplate Capacity, in the tax year that begins on April 1 following the commercial operation date.

If the Facility's actual Commercial Operation Date occurs after March 31, 2016, then the schedule of annual PILOT payments during the Operating Term covered by this Section 4 will be amended to reflect that the first year of the Operating Term will be the tax year following the tax year in which commercial operation begins.

5. Potential Adjustment of PILOT Payments.

(a) Increase in Capacity. In the event that some or all of the Facility's increased in the nameplate capacity during the term of the Agreement in such a way as to increase the Facility's total capacity, then PILOT payments beginning in the next tax year will be adjusted upwards.

(b) Reduction in Capacity: If the Facility's installed and operating capacity as of April 1 in any tax year is materially reduced (due to causes beyond CWS's control) from the previous tax year due to: (i) damage caused by natural forces, (ii) operational restrictions caused by a change in law, regulation, ordinance, or industry management standards, (iii) decommissioning and removal of inverters, or (iv) the permanent cessation of the Facility's operations, then the PILOT payment will be adjusted downward based on the total actual installed and operating Nameplate Capacity after the reduction in capacity, or in the case of clause (iv) above, this Agreement will terminate.

6. Payment of Amounts Due. Other than the Construction Period payments and the Transition Tax Year Payment, which shall be made as set forth in Section 3 above, CWS shall make the PILOT payments due hereunder for any given tax year in the Operating Term to the Town in two equal installments, at the Town Tax Collector's office, on July 1st and December 1st .



7. Non-Payment. Non-payment of any payment due the Town shall constitute a default. Notice of non-payment or any other default shall be provided to CWS (and to CWS's Lender, as further specified in Section 8 below), in the manner and at the address provided for Notices in Section 12 of this Agreement. CWS shall have 30 days to cure the default after receiving such notice. In the event the condition causing the default is not cured within 30 days, the Town may commence an action to collect any non-payment under RSA 80:50, seek specific performance of a non-monetary default or proceed against the real estate under RSA 80:58-80. It shall not be a defense to such a proceeding that CWS is obligated under this Agreement to make payments in lieu of taxes rather than taxes.

8. Lender's Right to Cure. The Town shall send a copy of any notice of default sent to CWS to CWS's Lender by certified mail at the same time such notice is sent to CWS, and no such notice of default to CWS shall be effective unless and until a copy of such notice has been delivered to CWS's Lender. CWS's Lender shall have the same time and rights to cure any default as CWS, and the Town shall accept a cure by CWS's Lender as if such cure had been made by CWS. CWS shall provide written notice to the Town as to the name and address of CWS's Lender for such notices to be sent.

10. Other Taxes Not Covered. This Agreement covers only ad valorem real estate taxes payable under NHRSA Chapter 72. It does not include or cover other local, state, or federal taxes which may be payable on account of Facility revenues or activities, including the Land Use Change Tax, Timber Tax, State Utility Property Tax, Business Enterprise Tax, or Federal Income Tax.

11. Notices. Any notice to be provided under this Agreement shall be in writing and shall be deemed to have been given when delivered personally or by certified mail at the following addresses:

For the Town: City of Franklin, 316 Central St, Franklin, NH 03235

For Commerce Way Solar, LLC, 23 Rosemary Lane, Durham, NH 03824

For Commerce Way Solar's Lender: (to be provided by CWS)

with a copy to: Orr and Reno, P.A. One Eagle Square Concord, NH 03302

In the event of a change in the address of any party listed above, the responsible signatory (CWS in the case of itself, its Lender and/or its counsel) shall give the other party prompt written notice of such change of address, which shall be effective upon receipt.

12. Miscellaneous.

(a) This Agreement shall be construed and interpreted in accordance with the laws of the State of New Hampshire. In the event any term of this Agreement or the application of any such term shall be held invalid by any court having jurisdiction, the other terms of this Agreement and their application shall not be affected thereby and shall remain in full force and effect, provided that the remaining terms continue to preserve the essential economic terms of this Agreement.

(b) The terms and provisions contained in this Agreement constitute the final Agreement between the parties with respect to this Agreement and supersede all previous communications, representations or agreements, either verbal or written. No modification or amendment to this Agreement shall be valid unless it is in writing and signed by both parties hereto.



(c) CWS shall have the right, in its sole discretion, to assign this Agreement to any bona fide purchaser, transferee, or assignee, provided that said purchaser, transferee or assignee has the financial, managerial, and technical capacity to construct and operate the Facility as contemplated by the parties hereto. All covenants, agreements, terms and conditions contained in this Agreement shall apply to and be binding upon the parties, their assigns and successors. CWS shall provide written notice to the Town of any sale, transfer, or assignment not less than 30 days prior to such sale, transfer or assignment taking effect.

(d) Section titles or subject headings in this Agreement are provided for the purpose of reference and convenience only and are not intended to affect the meaning of the contents or scope of this Agreement.

(e) This Agreement may be executed in multiple counterparts, each of which shall be deemed an original instrument, but all of such counterparts together will constitute but one Agreement.

City of Franklin, NH

By: Elizabeth Dragon

Name: Elizabeth Dragon

Title: City Manager

NhSolarGarden.com, LLC

By: Andrew Kellar

Andrew Kellar

Manager