

Five key considerations of industrial solar leasing

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Industrial property owners are increasingly turning to rooftop solar facilities to add value to their portfolios and maximize the profitability of their assets, as well as to increase renewable energy sources for the greater good. While the general principles of commercial leasing apply to rooftop solar leases, there are a few issues that are unique to solar rooftop leasing. Here is a list of some common concerns that industrial property owners should be aware of:

1. How old is that roof? Can we get a new one?

Most solar tenants are looking for a site with a brand new roof at the inception of the solar lease, since the term of the solar lease will be 20-25 years, sometimes with options to extend for another five or 10 years. That said, however, the landlord will want to retain the option to replace the roof during the term of the solar lease in the case of emergency, and carve out opportunities to repair the roof during the term of the solar lease, if that becomes necessary.

If the roof is not new at the inception of the solar lease, but contains 10 or 15 more years of useful life, a building can still accommodate a solar facility, but landlords will need to negotiate with solar tenants in order to allocate the cost sharing of a mid-term roof replacement, as well as the

mechanical and operational logistics of having to remove the solar panels from the roof and then reinstall them once the new roof has been completed.

2. Who owns the roof, anyway?

Industrial property owners need to be mindful of whether they have granted rights in the building's rooftop to any of the building tenants.

In multi-tenant buildings, generally the landlord retains exclusive ownership and control of the roof, and in single-tenant buildings or ground leases, the roof may be under the tenant's control, including maintenance and repair rights.

If the building tenant is responsible for the roof's maintenance under the terms of the building lease, the landlord may need to amend the building lease to obtain control over the roof and take over the maintenance and repair responsibilities so that the landlord may legally lease the rooftop to the solar provider, if the economics work.

3. Solar leases need to be financeable.

Given that solar developers are making such a large scale, long term investment in the solar facilities to be installed, they generally obtain leasehold financing from traditional lenders and equity from tax credit investors. The federal investment tax credit is currently 26% of most of the costs of the solar facility, which credit is taken over the first five years of the solar facility's operation.

Solar lenders and tax equity investors require the solar lease to contain several lender-friendly provisions, including notice and cure rights, and other terms more likely to be seen in a ground lease than a building lease, including the right to obtain a subordination, non-disturbance and attornment agreement (SNDA) from any landlord lenders.

4. Don't blot out the sun!

Landlords should be mindful that solar tenants require a certain degree of insolation assurance, i.e., an understanding that sufficient sunlight will reach their solar facilities for maximum energy production. It is common for solar leases to contain protective language that landlords will not do anything to impair the sunlight or cast shadows over the solar facilities.

Landlords should work to carve out certain rights that would preserve their autonomy and flexibility for leasing out their primary asset (the building), including the right to carve out existing rooftop installations and landscaping. Landlords will also want the right to relocate and increase the size of rooftop HVAC units in the event that a new building tenant demands greater HVAC capacity, recognizing, however, that the landlord may need to compensate the solar tenant for decreased insolation.

5. Solar tenants own the solar facilities.

Solar leases generally contain an extremely specific delineation of who owns what. The solar facilities, though possibly considered “fixtures” under property law, are expressly and exclusively owned by the solar tenant. In addition, solar leases also specifically delineate who owns (usually the solar tenant) the various “Environmental Attributes” and “Incentives” that are allocated to or generated by a solar facility, including carbon trading credits, renewable credits, tax credits, accelerated depreciation, etc. Care should be taken to ascertain each party’s ownership of the various assets, and Environmental Attributes and Incentives.

As solar rooftop leasing gains popularity within industrial properties, property owners should ensure that they are mindful of the pertinent issues unique to solar leasing. Although industrial property owners can rely on their expertise in general leasing matters, the particular challenges of solar leasing require a more specialized approach. Before moving forward with rooftop and other solar leasing at their assets, property owners should seek advice from experienced lawyers and consultants in order to successfully navigate the intricacies of this eco-friendly trend.

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