

HERE COMES THE SUN

THE RISE OF COMMERCIAL SOLAR DEVELOPMENT IN MICHIGAN

By Stephen R. Estey and Lauren A. Evers

A combination of government initiatives, commitments by utilities, and demand by corporations for cleaner energy has fueled the growth of renewable energy sources. According to recent reports, DTE Energy aims to reduce carbon emissions by 80 percent by 2040.¹ Likewise, it appears that by 2040, Consumers Energy aims to reduce carbon emissions by 90 percent and generate 56 percent of its energy from renewable energy sources.² Large companies and institutions in Michigan are also prioritizing the switch to cleaner energy.³

New sites for wind development are becoming increasingly hard to come by. The price of solar panels has continued to drop and a new state policy has recently opened 3.4 million acres of farmland to possible solar development, making solar an attractive option to increase the pool of renewable energy in Michigan. With the passage of the Clean and Renewable Energy and Energy Waste Reduction Act, 2008 PA 295, Michigan made a significant push toward cleaner electric energy generation sources with renewable energy and efficiency targets. 2016 PA 342 increased the target amount of electric energy to be produced from renewable sources to 15 percent by 2021 and set a goal of meeting not less than 35 percent of the state's electric needs through a combination of energy waste reduction and renewable energy by 2025.⁴

At a Glance

As the demand for cleaner energy in the state continues to grow, commercial solar development is poised for significant expansion.

The decrease in the price of solar panels and a recent policy change has opened up a third of the state's farmland to solar development.

While solar developers evaluate opportunities in the state, municipalities should review their ordinances to ensure they are ready when developers start inquiring.

Wind development in the state

Since the passage of 2008 PA 295, wind has been the primary source of renewable energy in Michigan.⁵ In 2018, there were 1,925 megawatts (MW) of utility-scale wind farms operating in the state; four more wind developments are expected to begin operating over the next few years and are projected to add 555 MW of capacity.⁶ As the number of sites with the best wind conditions remaining undeveloped continues to decrease, other sources of renewable energy will become more competitive.

Opportunity for solar

As the demand for renewable energy sources continues to grow, there is a significant opportunity for solar development, especially given the continuing drop in the price of installing commercial solar panels.⁷ A review of DTE's website indicates it has invested more than \$170 million in solar energy sources in Michigan.⁸ According to information published by DTE, its Lapeer Solar Park is the largest of its kind operating in the state, covering 250 acres with 200,000 panels that generate 48 MW.⁹ In the second quarter of 2019, 2.1 gigawatts (GW) of solar capacity was installed in the U.S., bringing the nation's total installed capacity to 69.1 GW.¹⁰ U.S. solar capacity is projected to more than double in the next five years.¹¹

Michigan opens a pathway for 3.4 million acres of land to enable solar development

The Michigan Department of Agriculture and Rural Development (MDARD) recently made a policy change to allow for

commercial solar energy development on land enrolled in the Farmland and Open Space Preservation Program, commonly referred to as PA 116 land.¹² A third of the state's farmland is PA 116 land.¹³ This farmland was previously unavailable under the Farmland and Open Space Preservation Act, 1974 PA 116 (recodified as Part 361 of the National Resources and Environmental Protection Act, 1994 PA 451, MCL 324.36101 *et seq.*),¹⁴ whereby landowners and the state agree to jointly hold the right to undertake development of the land for a term of years, which results in certain tax credits for the farmer. The farmland subject to these development agreements is prevented from having a structure built on it that is not consistent with farm operations.¹⁵

Before a recent MDARD policy change, commercial solar panel operations were not permitted on land enrolled in a PA 116 agreement.¹⁶ MDARD's May 2017 guidance, "Commercial Solar Facilities on PA 116 Land," stated that "[t]he land use is not considered agricultural, and therefore, the land would need to be removed from the program prior to the construction of such a facility."¹⁷ Under this previous policy, PA 116 agreements frequently presented an obstacle to solar developers searching for large areas of land for projects, especially given the lengthy terms of many of these agreements; it was often difficult, if not infeasible, to obtain a removal of the land from the PA 116 program.¹⁸ An area that was otherwise optimal for solar development could be restricted because a portion of the land was subject to a PA 116 agreement. A developer looking to build a commercial solar project on land subject to a PA 116 agreement had to seek a release, which was only available in extremely limited circumstances.¹⁹ The release process frequently involves extensive, costly legal work and is highly contingent on the discretion of local authorities.²⁰ If a release is obtained, the landowner must repay the tax credits taken on the parcel being removed during the last seven years, plus interest.²¹

At the same time that solar panels were prohibited on farmland subject to PA 116 agreements, wind turbines were permitted.²² In its July 2017 guidance titled "Wind Turbines on PA 116 Land," MDARD stated, "[w]ind turbines may be placed on land currently enrolled in the PA 116 Program, provided specific conditions are met."²³ For a wind turbine placed on land by persons other than the landowner (i.e., not wind turbines built for personal use by the farmer) the conditions included the following:

- a. The wind turbine must be placed by a public utility or the turbine owner must maintain a valid interconnect agreement with a public utility to connect to the public utility system; and
- b. The Michigan Department of Agriculture and Rural Development determines the location of the facility and ground changing features associated with the wind generator do not substantially hinder the farming operation; and

- c. The facility and placement of the wind turbine must be approved by the unit of government having zoning authority; and
- d. The landowner/PA 116 agreement holder must agree with the placement of the facility.²⁴

MDARD's July 2017 guidance is still in effect as of the time this article was written. Presumably, MDARD viewed wind turbines as compatible with farming operations, as farming activities could still be employed on farmland that surrounded the turbine footprint.

After taking office, Governor Gretchen Whitmer convened a workgroup chaired by MDARD Director Gary McDowell to review solar panel compatibility with farmland preservation.²⁵ On June 3, 2019, Gov. Whitmer and MDARD announced the decision to allow commercial solar energy development on PA 116 land—in essence reversing the department's prior policy.²⁶ MDARD explained the details of its new policy through two documents intended to guide the use of commercial solar facilities on PA 116 lands.²⁷ As authority for its new policy, MDARD relied on the provisions allowing for structures to be built on PA 116 land if the structures are consistent with farm operations in the act and paragraph 2 of PA 116 agreements.²⁸ Further, it declared that “the placement of structures for commercial solar energy generation on property enrolled in the Farmland Development Rights Program is consistent with farming operation and is consistent with the purposes of the statute (MCL 324.36101; 324.36104 and 324.36104(a))” *if certain conditions are met, including*, but not limited to, the following:

- The existing PA 116 agreement is extended by deferring its continuation until after the solar energy use ends. There will be no net change in the length of the PA 116 agreement.²⁹
- The landowner cannot claim tax credits during the time the property is used to generate solar power.
- The Solar Project Company must design and plant the site to achieve at least a 76 on the Michigan Pollinator Habitat Planning Scorecard for Solar Sites.
- Any portion of the site not included in pollinator plantings must maintain U.S. Department of Agriculture–Natural Resource Conservation Service Cover Standard 327.
- The Solar Project Company must obtain and maintain financial surety sufficient enough to decommission the solar array and return the property to agricultural purposes.
- Establishment and maintenance of the site must be such that the land can be returned to agricultural uses at the end of the solar agreement.³⁰

Further, MDARD has asserted that the following circumstances must also be present:

- The PA 116 land must be part of a larger, in-scale solar facility.
- The local government with zoning authority over the PA 116 land must have approved the placement of the solar panels.
- MDARD must have approved the placement of the solar panels.³¹

Thus, to take advantage of the new policy, the landowner must split the original PA 116 agreement under MCL 324.36110(4).³² The land that is not subject to a commercial solar agreement will continue to operate under the original PA 116 agreement.³³ The landowner must enter into an amended farmland development rights agreement for the land subject to a commercial solar agreement.³⁴ In signing these agreements with the Solar Project Company, the landowner agrees to certain conditions, including those set forth above.³⁵

While there is a clear difference between the amount of remaining land that can be traditionally farmed in a wind development versus a solar development, it should be noted that there are many emerging agricultural practices relating to solar developments, such as animal grazing or use of pollinator-friendly ground cover to assist beekeepers and increase declining honeybee populations. Moreover, the ability to allow a certain percentage of farmland to remain fallow over time can prove useful in the future when the land is eventually returned to traditional farming operations.

MDARD's new policy represents a shift in its view of solar energy generation and its compatibility with farmland preservation. A release and the related immediate repayment of tax credits are no longer required to put a commercial solar facility on PA 116 land—removing a huge obstacle to solar development in the state. With 3.4 million acres of PA 116 farmland, this policy shift presents a significant opportunity for new solar energy development in Michigan.³⁶

How to prepare

The commitments to renewable energy sources made in the state and the greater opportunity for solar development as a result of reduced solar panel prices and the favorable MDARD policy shift means increased solar development is in Michigan's future. Consumers Energy alone made the development of more than 6,000 MW of solar energy an essential element of its 2019 Clean Energy Plan.³⁷

Along with adding clean energy to Michigan's grid, solar development can provide hosting municipalities with a sizable increase in their tax base, more jobs, and needed income sources for residents during construction. Some municipalities, like those where new solar farms are operating, have developed ordinances to regulate solar development. Many still

have no framework to address this use of land for solar development. Just as municipalities were forced to develop comprehensive planning documents and ordinances to address wind development, many municipalities will need to review their ordinances to prepare for large-scale commercial solar development, particularly in rural communities. Municipalities should take a proactive approach and develop solar ordinances to ensure they are ready when developers start inquiring. These ordinances can ensure solar farms are developed in zoning districts where they will be harmonious with neighboring land uses and provide other protections for the municipalities, such as bonds sufficient for decommissioning. Having clear ordinances will also provide developers with information necessary to develop an accurate project framework and timeline to work within so they can spend less on legal fees. ■



Stephen R. Estey is a member in Dykema's Real Estate Department. He handles matters for various energy industry clients, including electric transmission, wind, solar, and petroleum pipeline companies, to secure necessary property interests required for capital projects. In this capacity, he assists his clients with regard to legal and strategic considerations in the planning and siting of new infrastructure and represents their interest in zoning, easement acquisition, and contract negotiations.



Lauren A. Evers is an associate in the Business Litigation practice in Dykema's Bloomfield Hills office. Evers's practice involves all aspects of real estate disputes, including general real estate litigation, easement acquisition, subordinations, and condemnation of agricultural, residential, and commercial property. She also works with and advises municipalities, landowners, and businesses that are considering expanding or acquiring new locations in zoning and land-use matters.

ENDNOTES

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17. *Id.*
18. *Gov Whitmer, MDARD*.
19. MCL 324.36110, MCL 324.36111, and MCL 324.36111a.
20. See, for example, release under MCL 324.36111a(1)(b)(iii).
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25. *Gov Whitmer, MDARD*.
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28. *Policy for Allowing Commercial Solar Panel Development*.
29. The deferment period added to the remaining period of the original PA 116 agreement cannot exceed 90 years. *Id.*
30. *Id.*
31. *Commercial Solar Facilities*.
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33. *Id.*
34. *Id.*
35. *Id.*
36. MDARD's new solar policy has not been integrated into the act, and therefore, is subject to change at any point.
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