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Solar easements and solar leases and what they mean for title insurance - by George Megaloudis

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George Megaloudis,
Roach, Ioannidis & Megaloudis

As more and more states and local governments encourage solar energy development and usage, governments, businesses, and consumers are increasingly running into questions about how to adapt current processes and regulations to accommodate this alternative source of energy.

Nate Baker, cofounder of Qualia Title & Closing Software, notes that “solar energy development raises several interesting and complex issues for securing land rights. If the proper title actions are not taken, a solar project can quickly be stalled or completely derailed.”

So how can title insurance professionals take solar energy development into account? Answering this question requires looking at the two most common cases for solar projects: easements and leases.

Easements

Solar easements are the less complex of the two topics. As a quick refresher, an easement is a property right granted from a landowner to a third party for their access, use, and/or enjoyment. In general, easements are granted in perpetuity, provided that the need for the easement continues to exist. There are three unique aspects of solar easements that title professionals need to know:

- Solar easements allow the third party to construct solar panels on a landowner’s property and prohibit the landowner from blocking the solar panels access to direct sunlight.
- Title insurance is a critical tool for establishing and enforcing solar easements. This type of transaction is on the rise as more governments capitalize on the benefits of solar energy.
- Surprisingly, only about 36 states in the United States have statutorily allowed the creation of solar easements. In the states that have not passed legislation permitting the creation of solar easements, title insurance protecting such easements is essentially meaningless.

Leases

Solar leases, on the other hand, present a whole different set of complications for title insurance. In a solar lease, a property owner leases solar equipment from a business and attaches the equipment to the property. For example, “a solar company might lease solar panels to a homeowner. But when the owner wishes to sell, refinance, or otherwise convey the property, two unique intricacies can surface,” Baker said.

The first is in regards to the leasing contract, which often states that property transfers are contingent on the buyer being eligible to continue with the leased solar equipment. If the buyer is not approved, then the owner is required to buy the panels from the leasing company. Since this is basic contract law, savvy property owners can avoid this issue by insisting that these provisions are left out of the leasing contract.

Financing Statements

The second issue arises around Uniform Commercial Code (UCC) financing statements, which solar companies attach to properties under solar leases. When an owner attempts to sell or refinance that property, the lender or bank will discover the UCC financing statement upon performing the title search. Many times, lenders and banks see the UCC financing as having a superior lien to the mortgage and deny the financing, effectively denying the property owner with a right to convey the property. A few solutions have recently been discovered for property owners to combat this challenge.

First, the owners can inform the solar company of their intention to convey or refinance the property. At which point the solar company can subordinate the UCC filing to the mortgage, or simply terminate the UCC filing and reinstate it after the new mortgage has been recorded. If the solar company will not follow through on either of these methods, then the lender may be able to overcome their concerns via a second option of obtaining title insurance to provide the lender comfort.

Title Insurance

However that begs a new question: how to underwrite your policy? Classifying solar panels as either personal property or a fixture can be problematic. If the solar panels are considered personal property, then there is no added value to the property for the solar panels. However, if the solar panels are considered a fixture, then they may affect the value of the property. This is a question that is best answered by the current market conditions and solar panel valuation. Regardless, the ultimate decision is determined by an agreement between the homeowner and the solar leasing company. It is then the job of the title agents to accurately interpret the agreement for the corresponding documentation and processes.

With the current developments in solar energy and title insurance’s role in protecting the interests of those who wish to capitalize on green energy markets, it will be interesting to keep watch how the means of protecting those interests will evolve.

George Megaloudis, Esq. is an active Qualia member, a partner at Roach, Ioannidis & Megaloudis

LLC, and cofounder of Simple Title Closing & Escrow PLLC, Boston, Mass.

New England Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540