

Rooftop Solar Panels – Good Business Sense or Not?

January 1, 2009

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A number of landlords, owners and tenants have recently received inquiries from rooftop solar panel installers, desirous of installing solar panels on their roofs. In principle, the idea sounds like a good one, encouraging green initiatives. But in circumstances in which the owner is not the end user of the building (it has a tenant) or is thinking of selling the building, further consideration may be required before entering into licences for solar panels.

The first consideration has to be whether or not the landlord, owner or tenant in fact controls the roof at all. In ground leases, the landlord leases the entire property and building to the tenant and, as such, it is the tenant and not the landlord that has control of the roof. In a single tenant building, it may be that the landlord has offloaded the responsibility for the roof to the tenant. Alternatively, the lease may allocate obligations in respect of the roof between the landlord and the tenant. It may be that the tenant has the day-to-day repair and maintenance obligations in respect of the roof, and that the landlord's obligations are limited to capital costs associated with the roof. It may be that the landlord keeps all of the roof obligations, but offloads certain of the costs it incurs to the tenant. The lease may create a distinction depending on whether or not it is the structural or non-structural portions of the roof being considered. Suffice to say, the first step in any discussion of whether or not to license the roof for the use of solar panels is to take a look at the leases affecting the building to determine how the costs are allocated between the landlord and the tenants with respect to the roof, and whether or not any licence fees earned by the landlord or the tenant in respect of the solar panels need to be attributed against other operating costs or are for the landlord's or tenant's account alone.

It is also critical to examine any reciprocal operating agreements or agreements with "shadow anchors", which might limit rooftop use or require certain equipment to be screened from view (which could hamper the operation of the panels), and which might prescribe maximum building heights (which heights are perhaps affected by rooftop installations).

The next step is to take a good, long look at the licence itself. A landlord or owner wants to consider not only where the panels will be located, but also their weight and impact on the roof, the allocation of responsibility for maintaining, repairing, upgrading (as the technology evolves), replacing, and insuring the panels, relocation rights, and relocation costs. An owner/landlord needs to think about who is responsible for the removal of ice and snow beneath the panels, where the wires affecting the panels are going to go, whether or not the installation of the panels will affect any existing warranties or guarantees, or any signage, dedicated HVAC, telecommunication or satellite rights granted to others. One should consider whether or not the installation of the panels will affect other utilities in other premises, and who will be entitled to the benefit of the carbon credits that might be associated with the panels. It should be ascertained whether any hazardous substances are involved. Both parties will want to consider whether or not the licence, which is usually for a long period of time, is one that can be terminated, or one that must be assumed by a transferee. It is also important for an owner to be satisfied with respect to the financial wherewithal of the licensee and whether or not the licensee is a newly incorporated shell, or an entity that can live up to its obligations under the licence for the long term and whether or not the licensee is entitled to transfer those obligations to another party with or without discussion with the landlord.

Finally, consideration needs to be given to the property tax implications. The panels and the foundations on which they rest would be

exempt in proportion to that used for producing power for sale to the general public. While not exempt if the electricity is not used for sale, but for property use, an income property should not face any additional taxes if powered by in situ generators. An industrial building, generally valued on cost, has its building HVAC/electric systems costed so, to the extent that the cost of a solar electricity system varies significantly from traditional systems, there may be some additional value.

Provincial assessors (“MPAC”) currently treat the land on which panels and their foundations sit as being in the industrial tax class, which usually attracts a higher tax rate than the commercial class. However, that assumes the only use of the property is a solar electricity production facility. Land (which includes buildings and structures) that is used to produce electricity is classed as industrial. It is not clear if MPAC would apportion, as industrial, any of the assessed value of, for example, a grocery store, the roof of which had solar panels.

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