Zoning Coverage for Renewable Energy Projects

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Disclaimer

This underwriting guideline represents my opinion as a professional and is based on my understanding of the coverage, developed over 25 years of serving the renewable energy industry. You should always confirm my understanding by communication with your underwriter.

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Zoning Coverage in the Title Insurance Context

- The right of the appropriate governmental entity to control land uses within its jurisdiction
- The right to operate the property for its existing use in the present zone designation
- The right to construct the proposed facility in the present zone designation
- The right to REconstruct the same facility in the event of a catastrophe

Who Wants the Coverage?

- Owners, lenders and investors
- Typically greater value to lenders and investors because the developer obtains the rights

Why are Energy Deals Different?

- The existing zone doesn't typically permit the energy use!
- The diminished value of the existing zone & Zoning Letters
- The right to construct the energy facility by CUP, SUP, Resolution, etc.
- Insuring "subject to its terms"

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The ALTA 3 Zoning Series

- ALTA 3 – unimproved land
- ALTA 3.1 – completed structure
- ALTA 3.2 – land under development
- ALTA 3.3 – non-conforming use
- ALTA 3.4 – no zoning

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The ALTA 3.2 Zoning Endorsement for Land Under Improvement – Part 1

1. "Improvement" means a building, structure, road, walkway, driveway, curb, subsurface utility or water well existing at Date of Policy ***or*** to be built or constructed according to the Plans that is or will be located on the Land, but excluding crops, landscaping, lawns, shrubbery, or trees.
b. "Plans" means those site and elevation plans made by [*name of architect or engineer*] dated ____, last revised ________, designated as [*name of project*] consisting of ___sheets.
2. The Company insures against loss or damage sustained by the Insured in the event that, at Date of Policy

a. according to applicable zoning ordinances and amendments, the Land is not classified Zone _______________;
b. b. the following use or uses are not allowed under that classification:

Sample 3.2 Zoning Endorsement

1. “Improvement” means a building, structure, road, walkway, driveway, curb, subsurface utility or water well existing at Date of Policy ***or*** to be built or constructed according to the Plans that is or will be located on the Land, but excluding crops, landscaping, lawns, shrubbery, or trees.
b. “Plans” means those site and elevation plans made by STG Engineering dated June 26, 2023, last revised July 26, 2023, designated as Giant Energy Project consisting of 8 sheets.
2. The Company insures against loss or damage sustained by the Insured in the event that, at Date of Policy

a. according to applicable zoning ordinances and amendments, the Land is not classified Zone Agricultural *;

b. b. the following use or uses are not allowed under that classification:

Photovoltaic solar facility with ancillary battery installation, * by rights contained in the Conditional Use Permit no. 23-101 issued by Podunk Co., AL, on June 16, 2023, subject to its terms.

* This clause can be added in either location.

The ALTA 3.2 Zoning Endorsement for Land Under Improvement – Part 2

3. The Company further insures against loss or damage sustained by the Insured by reason of a final decree of a court of competent jurisdiction either prohibiting the use of the Land, with any existing Improvement, as specified in paragraph 2.b. or requiring the removal or alteration of the Improvement, because of a violation of the zoning ordinances and amendments in effect at Date of Policy with respect to any of the following matters:

a. Area, width, or depth of the Land as a building site for the Improvement OK

b. Floor space area of the Improvement Not applicable

c. Setback of the Improvement from the property lines of the Land if shown on the Plans

d. Height of the Improvement generally no appropriate except wind projects, or

e. Number of parking spaces not applicable except O&M buildings.

What Does Zoning Coverage Cost … and Why?

- It isn't associated with land title risk discoverable in the Public Record
- It tends to be expensive where rates are not negotiable
- It might be appropriate to transfer the risk to the developer under their contractual warranties

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Special Considerations

- The 3.2 works for existing or new improvements unless substantial modifications have been made to the coverage, which is negated.
- If there are no substantial changes from one Date of Policy to the next, there may not be a need to update the coverage because, on an energy transaction, the Insured isn't changing.
- The coverage is always subject to the terms of the agreement. We're not insuring compliance with the permitting conditions.