

**New Jersey
N2K Hour:**

**Insuring Solar
Energy Deals**

**Webex Presentation:
April 11, 2023**

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What is Solar Energy?

- Solar energy systems are used for the collection and connection of the sun's rays into energy, and for heating and cooling purposes that require clear access to direct sunlight.
- Without any access to direct sunlight, over a sufficiently large "access pattern" and for a sufficient length of time (approximately during daylight hours), no solar energy system can function effectively.
- The "access pattern" for sunlight to the collector or solar pane located on the property is three-dimensional.

What is Solar Energy? (cont.)

- A solar energy project allows the 3rd party to construct the solar panels and array on the property and prohibit the landowner from blocking the solar panels access to direct sunlight.
- The footprint often consumes the entire parcel owned by the landowner.
- The unique aspect of a solar energy project is that the agreements are typically a combination of both a lease (for a term of years) and easement (non-exclusive grant of possession for a long period of time).

What is a Solar Easement?

- Solar easements are negative easements as to air space.
- These easements are created by developers or by private agreements between adjoining owners for the benefit of property upon which there has been or is being constructed a solar collector of heat energy from the sun.
- Solar easements require, in addition to legal knowledge, a considerable amount of technical expertise (engineering, architecture, surveying, etc.) when they are drafted.
- The usual underwriting principles and caveats that are applicable to the insurance of appurtenant easements must be followed and in addition, local statutory requirements, if any.

What is a Solar Easement? (cont.)

- The insurance of a solar access easement, as an appurtenant easement to the land on which the solar energy is located is an extra-hazardous underwriting risk, so prior approval must be obtained from the underwriter before attempting to insure a solar access easement.
- Solar access can be established through one of these methods:
 - Zoning and subdivision regulations.
 - Building code requirements.
 - Subdivision covenants established by the developer.
 - Solar easement legislation.
 - Appurtenant solar easement.

Structure of the Project

- The development of a solar energy project can range anywhere between a few months to 4 years.
- The structure of the transaction will involve the following:
 - The Lease Agreement
 - Solar Easement
 - Fee Ownership of the Land (examples: Operation and Maintenance parcel, Laydown Yard, Solar-fee purchase then leaseback to another entity)
 - A combination of the fee parcel and leasehold interest may be involved, and the solar project can also be in the form of a large-scale project, single-site projector or a portfolio that contains several separate sites in one or more counties.

Understanding the Parties to a Transaction

- Who is the developer on the project?
- Which client are we serving directly on our transaction? (e.g. fee owner, lessee, the lender)
- Are each of the parties familiar with solar energy deals, and have we worked with them previously on other transactions?
- Who is the owner of the fee parcel?
- Is there an existing lease agreement between the parties, and have all approvals been obtained for the solar project from the municipality?
- Have the improvements been completed yet, or is the construction still ongoing on the site?

Title Clearance and Requirements

- Solar project may last a few months or a few years.
- Reasonable expectations should be considered by the parties involved on the transaction during due diligence period.
- Approval for the project from the municipality in the form of a resolution or ordinance must be obtained, so the project can move forward.
- Underwriting must be done primarily by the office coordinating the deal.
- Always consult your underwriter with any requests for affirmative coverage by the buyer or lender on the transaction.

Title Clearance and Requirements (cont.)

- Consistency in the resolution is important, and duplicate inquiries are likely required on larger projects involving multiple sites.
- A longer search period than the standard 60 year search may be required, especially if we are providing mineral coverage to the parties.
- Please check to see if there are any deed restrictions or covenants in your chain of title which would prevent the construction or the placement of the solar panels on the property.
- Affirmative coverage will be negotiated at the onset of the transaction.

Energy Projects – ALTA 36 Endorsements

- ALTA has developed the ALTA 36 series of endorsements for use when insuring solar energy projects.
- These endorsements are designed specifically for energy projects, such as wind farms, solar farms, traditional electricity generating facilities, etc.
- Such projects may involve leasehold interests.
- The specific endorsements applicable to leasehold estates are 36.2-06 for an owner's policy and 36.3-06 for a loan policy.
- Coverage is afforded for loss in the event of an eviction or ejection.

Energy Projects – ALTA 36 Endorsements (cont.)

- The endorsement provides that the loss calculation shall include diminution in value of insured's interest in any existing or future “severable improvements.”
- If the project is over more than one parcel, the endorsement contains a definition of “constituent parcel” that becomes applicable.
- The computation of loss due to the eviction or ejection caused by a covered matter affecting any constituent parcel shall include loss or damage to the integrated project.
- Please consult your underwriter before issuing the ALTA 36 series.

ALTA 36 Endorsement Forms

- ALTA 36-06 and ALTA 36.1-06 are designed for policies that insure an easement or an easement and a lease.
- ALTA 36-06 is designed for an Owner's Policy; ALTA 36.1-06 is designed for a Loan Policy.
- ALTA 36.2-06 and ALTA 36.3-06- are designed for policies that insure a lease, but not an easement.
- ALTA 36.2-06 is designed for an Owner's Policy; ALTA 36.3-06 is designed for a Loan Policy.
- ALTA 36.7-06 and ALTA 36.8-06 are designed for policies that insure a fee estate.
- ALTA 36.7-06 is designed for an Owner's Policy; ALTA 36.8-06 is designed for a Loan Policy.

Definition of Terms in the ALTA 36 Series

- This endorsement contains an expansive definition of “Electricity Facility” that includes an existing electricity generating facility and an electricity generating facility under construction or to be built on the land in locations according to defined “Plans” depicting the project.
- This endorsement also contains a definition of existing and future “Severable Improvement” linked to the definitions of Electricity Facility and the Plans.
- The endorsement provides that, in the event of an eviction or ejection, as applicable, the calculation of loss shall include the diminution in value of the Insured’s interest in any existing or future Severable Improvement.

Definition of Terms in ALTA 36 Series (cont.)

- This endorsement contains a definition of “Constituent Parcel.”
- The endorsement provides that, in the event of an eviction or ejection, as applicable, caused by a covered matter affecting any Constituent Parcel, the computation of loss or damage resulting from the eviction shall include loss or damage to the integrated project.
- This endorsement provides that the Insured Claimant shall have the right to have the Electricity Facility and the insured estate valued either as a whole or separately.

Definition of Terms in ALTA 36 Series (cont.)

- This endorsement also tailors the provisions of the “Additional items of loss covered by this endorsement” section to energy projects. For example, it includes the reasonable cost of disassembling, removing, relocating and reassembling any Severable Improvement.
- This endorsement contains an exclusion clarifying that it excludes costs of remediation resulting from environmental damage or contamination.

Requirements for ALTA 36 Series

- Issuance of the ALTA 36 series requires Senior Committee Underwriter Approval, regardless of the liability amount for your transaction.
- A solar energy project is considered an extra-hazardous risk transaction, so you must consult your underwriter first before issuing any endorsements on a solar energy deal to the buyer or lender.
- The project must involve an electricity generating facility (e.g., wind farms, solar farms, traditional electricity generating facilities, etc.).
- Copies of all leases and easements for the transaction are required.

Requirements for ALTA 36 Series (cont.)

- An ALTA Survey showing the proposed improvements for all sites is required for issuance of the ALTA 36 series endorsements as well as survey endorsement and Utility Facility Endorsement.
- Copy of Owner's and Loan Proformas with all requested endorsements.
- Please note that NJ is a race notice jurisdiction and does not offer mechanics lien coverage.
- A lender may inquire about mechanics lien coverage since it is a problematic issue in other states.

Additional Requirements

- This endorsement is designed primarily for a policy insuring an energy project under construction or to be built. However, it can be used for an existing, completed energy project with appropriate modification to the definitions of Electricity Facility and Severable Improvement, and deletion of the references to the Plans.
- If the project is to be built or under construction, obtain and retain a set of the plans for the project (survey, site and elevation plans or other depictions or drawings prepared by an architect or engineer), and such plans must be referenced in the endorsement.

Additional Requirements (cont.)

- If the project is completed or existing, and no construction is contemplated, you may waive the requirement of the plans, and modify the endorsement to delete the reference to the Plans.
- If the energy project contains a combination of fee, leasehold and/or easement interests insured on the same policy, the policy may contain several different versions of the energy endorsement.
- If this endorsement is issued, it should not be necessary to also issue an ALTA 13-06 (Leasehold – Owner's) or 13.1-06 (Leasehold – Loan) Endorsement or ALTA 31-06 (Severable Improvements).

Can we offer Zoning Coverage on a Solar Energy Deal?

- We can issue zoning coverage, but it requires additional scrutiny on the transaction.
- What has been approved by the township or municipality in terms of the project?
- Urban development for solar projects is very different than rural development.
- Special districts or categories are often established by municipalities for the use of the property.
- There may be restrictions and covenants that may prohibit the intended use.
- However, these restrictions and covenants can be set aside by a court order.

Reviewing Surveys for ALTA 36 Coverage

- The survey must show the proposed improvements in order to provide the ALTA 35 and 36 series endorsements during development.
- The legal description of the insured leasehold interest and/or easement area must be included on the survey.
- Post-construction, as built surveys are used for date down coverage on the project. (ALTA 33-06 in NJ for Construction loan disbursements)
- Must keep track of the various revisions of the survey and how each modifies the coverage under the policy.
- If property is under construction, the easement area or improvements on the property are subject to change.

Other Endorsements that Require Additional Scrutiny

- ALTA 8.2 (Commercial Environmental Protection Lien)
- ALTA 17 or 17.1 (Access or Indirect Access)
- ALTA 17.2 (Utility Access) – Electric Only
- ALTA 18 or 18.1 (Tax Parcel)
- ALTA 19, 19.1 and 19.2 (Contiguity Series)
- ALTA 25 (Survey)
- ALTA 26 (Subdivision) – If available / applicable
- ALTA 35.3 (Minerals and Other Subsurface
- Substances - Land Under Development)

Restricted Endorsements

- The following endorsements cannot be issued for solar energy deals when issuing the ALTA 36 series.
- ALTA 9, 9.1, 9.2, 9.3, 9.7 and 9.10
- ALTA 13 and 13.1 (Leasehold)
- ALTA 28, 28.1, 28.2 and 28.3
- ALTA 31 (Severable Improvements)
- The ALTA Energy Project Endorsements (ALTA Endorsement 36, 36.1, 36.2, 36.3, 36.4, 36.5, 36.6, 36.7 and ALTA Endorsement 36.8) contain similar provisions to some of these common endorsements you may regularly issue in commercial transactions.

Solar Energy in NJ

- States in the Midwest or Western region of the United States may generally come to mind when you hear about solar energy, but solar energy is becoming more popular in NJ in recent years.
- The Solar Act of 2012 amended certain aspects of the statute that governs the generation, interconnection, and financing of renewable energy and mandated that 4.1% of electricity sales must come from solar by 2028.
- Governor Murphy also signed into the law the Clean Energy Act of 2018, which updated and accelerated the solar requirement to 5.1%.
- The state of NJ attained this requirement in April 2020.

Solar Energy in NJ (cont.)

- On July 9, 2021, Governor Murphy signed the Solar Act of 2021, directing the Board of Public Utilities to double the growth of the existing solar program, incentivizing up to 3,750 megawatts ('MW') of solar generation by 2026 (750 MW annually).
- The NJ Department of Environmental Protection offers a list of guidelines and programs for solar energy projects on its website.
- You can also visit the NJ Board of Public Utilities solar reporting website for solar activity reports of solar energy installations in the State of NJ.

Solar Energy Transactions

- There are a number of old landfills throughout the State of NJ which are now being utilized for solar energy projects.
- One example is a landfill located in Mount Olive, NJ.
- The Mount Olive property once served as a municipal sanitary landfill from 1966 to 1981.
- When the owner of the property went bankrupt in the early 1980s, the property was abandoned and the landfill was not properly closed.
- In 1982, the landfill was placed on the EPA's National Priorities List of Superfund sites.

Solar Energy Transactions (cont.)

- The site became an ongoing issue for the municipality due to water contamination and air pollution, lost tax revenue and lost profits stemming from the inability to develop the land for commercial purposes.
- A private solar energy company, called CEP Renewables, entered into a public-private partnership with the municipality to redevelop the property into a 25.6 MW solar energy facility.
- CEP foreclosed on the previously municipal-owned tax sale certificates and acquired title to the property, a structure that was feasible because of the company's ability to craft a liability-sharing structure with the NJDEP and EPA.

Solar Energy Transactions (cont.)

- Lastly, CEP obtained all local, county and state land use permits and state and regional interconnection approvals for the project and secured easements for interconnection.
- The Mount Olive property is just one example of an old and unusable landfill which has been converted into a solar energy redevelopment site for the use of more affordable clean energy to the local community.
- Stewart has insured other sites which are similar to the Mount Olive property both in NJ and across the country.
- These transactions will become more commonplace in the future, as several NJ municipalities will look to expand solar energy redevelopment to improve their communities.

Wrap Up and Review

- A solar energy project allows the 3rd party to construct the solar panels and array on the property and prohibit the landowner from blocking the solar panels access to direct sunlight.
- ALTA has developed the ALTA 36 series of endorsements for use when insuring solar energy projects.
- Solar energy deals are considered an extra-hazardous risk and require Senior Committee underwriter approval from Stewart.
- As solar energy transactions become more common in NJ, please always consult your underwriter regarding questions on ALTA 36 coverage and any additional requirements that must be raised on your transaction.

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Keyword Search

Example : Absentee

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☐ All of these words ☒ This exact phrase ☐ Any of these words

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Please mark your calendars for the next

May N2K HOUR:

Tuesday, May 9th, 2023

11:00AM

Judgments