

GROWING ENERGY: AMENDING THE WILLIAMSON ACT TO PROTECT PRIME FARMLAND AND SUPPORT CALIFORNIA'S SOLAR ENERGY FUTURE

I. INTRODUCTION

As the sun rises over Farmer Singh's gleaming fields, he takes great pleasure in the knowledge that, unlike his neighbors to the north and south, he never worries about water or the quality of his soil. Farmer Singh is not using the sun to grow fruits or vegetables; he is producing an entirely different kind of resource – solar power to help meet California's renewable energy and environmental goals.

California's economy relies heavily on agriculture, and it is one of the primary producers of agriculture in the nation.¹ The state has vast areas of farmland, as much as forty-three million acres.² However, not all farmland is created equally. The California Conservation Board and the United States Department of Agriculture ("USDA") distinguishes farmland between prime and non-prime.³ Prime farmland is considered ideal for growing crops based on its moisture and salinity levels.⁴ Non-prime farmland, on the other hand, generally lacks moisture, and has salinity levels that are not favorable to agriculture.⁵

Throughout the past century, California's population has expanded rapidly, to the point that many agricultural areas have become threatened

¹ U.S. DEP'T OF AGRIC., WHAT'S AT STAKE FOR CALIFORNIA (Sept. 2009), <http://www.fas.usda.gov/info/factsheets/wto/states/ca.pdf>.

² EDWARD THOMPSON JR., CALIFORNIA AGRICULTURAL LAND LOSS & CONSERVATION: THE BASIC FACTS, AMERICAN FARMLAND TRUST (July 2009), http://www.farmland.org/documents/AFT-CA-Agricultural-Land_loss-Basic_facts_11-23-09.pdf.

³ See generally Cal. Dep't of Conservation, *FMMP Important Farmland Map Categories*, http://www.consrv.ca.gov/dlrp/fmmp/mccu/Pages/map_categories.aspx (last visited Nov. 14, 2011).

⁴ *Id.*

⁵ *Id.*

by suburban development.⁶ In the 1960's, this prompted the California legislature to enact laws intended to discourage landowners from converting productive agricultural lands to other uses.⁷ One of the primary statutes enacted was the Williamson Act of 1965, which modified property taxes on agricultural lands to provide incentives to prevent their premature development.⁸ Under the Williamson Act, an agricultural landowner receives a tax incentive by entering into a contract with the local municipality that requires the land to be used only for agricultural purposes.⁹ Rather than property tax being based on the value of the highest possible use of the land, the tax rate is based on the value of its agricultural use.¹⁰ The effect of this has been the preservation of millions of acres of valuable farmland against encroaching cities and suburbs.¹¹

In the decades since the passage of the Williamson Act, there has been a movement to increase the use of renewable energy in California's power portfolio.¹² As technology has improved, solar power has become one of the many renewable energy sources used to reach AB 32 goals.¹³ One of the issues with producing solar power is that a vast amount of open land is required in order for projects to be commercially feasible.¹⁴ In many areas of California, land that meets this requirement is by nature predominantly agricultural.¹⁵ This has resulted in a conflict between the state's traditional protection of farmland and the desire to expand renewable energy sources.¹⁶

At the center of this conflict lies the Williamson Act. As the statute is currently written, local municipalities have authority in determining whether solar production is a compatible use under Williamson Act contracts.¹⁷ Most counties have rejected this proposition, whereas as a small

⁶ THOMPSON, *supra* note 2.

⁷ *Id.* at 2.

⁸ *Id.* at 2.

⁹ David H. Blackwell & Michael Patrick Durkee, *The Williamson Act: Siting Implications For California Projects*, SOLAR INDUSTRY, June 2010.

¹⁰ *Id.*

¹¹ THOMPSON, *supra* note 2.

¹² Dirk R. Mueller & Takako Morita, *Making Room For Renewable Energy In Calif.*, LAW 360, Apr. 30, 2009, <http://www.law360.com/articles/98394/making-room-for-renewable-energy-in-calif->.

¹³ SANTA BARBARA COUNTY EXECUTIVE OFFICE, WILLIAMSON ACT COMPATIBLE USES – SOLAR ENERGY (2011).

¹⁴ Mueller & Morita, *supra* note 12, at 2.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

number of counties have allowed it.¹⁸ Where it has been allowed, three counties have approved development of solar energy projects on non-prime agricultural land.¹⁹ The majority of projects have required the cancellation of Williamson Act contracts.²⁰ These cancellations are often legally cumbersome and present significant barriers for solar farm developers.²¹ Moreover, where contracts are cancelled, the state loses any control it had over protecting prime farmland and requiring agricultural mitigation efforts by the developer.²² It would be a great benefit to all parties involved if the Williamson Act was amended such that solar farms could be developed on non-prime farmland without the need to cancel Williamson Act contracts. This would simplify the development process, while making it easier for the state to preserve prime farmland and require mitigation efforts where appropriate.

As California expands its renewable energy resources, it is important that those expansions do not infringe upon the state's agricultural industry. The Williamson Act was enacted with the purpose of protecting California's farmland.²³ As such, the Williamson Act is effectively a barrier to many solar projects. By amending the Act, the state could ensure that prime farmland continues to be protected in the face of solar energy interests, while providing those developers with some of the same tax incentives enjoyed by agriculture in a manner than encourages them to utilize non-prime farmland.

This Comment proposes that solar energy farms be specified in the Williamson Act as a compatible use on non-prime farmland and incompatible on prime farmland. Part II of this Comment discusses the importance of California's agricultural industry and distinguishes between prime and non-prime farmland. Part III provides a summary of the Williamson Act, its history, and its background. Part IV discusses California's renewable energy movement, the California Global Warming Solutions Act of 2006, and the role of solar energy in that context. Part V discusses the processes by which solar farms are established on land which is controlled by Williamson Act contracts. Part VI discusses how

¹⁸ Jenna Chandler, *Wind, solar farms OK on some Williams Act lands*, THE PORTERVILLE RECORDER, Sept. 01, 2010, at A2.

¹⁹ Mueller & Morita, *supra* note 12, at 3.

²⁰ See generally David H. Blackwell & Michael Patrick Durkee, *Are Solar Thermal Facilities Compatible with the Williamson Act?*, SOLAR THERMAL MAGAZINE, Feb. 21, 2011.

²¹ Kurtis Alexander, *Solar 'crops' for Fresno Co.?*, FRESNO BEE, Oct. 23, 2011, at A2.

²² DIV. OF LAND RES. PROT., CAL. DEP'T OF CONSERVATION, SOLAR POWER AND THE WILLIAMSON ACT (2011).

²³ *Id.*

land use planning for solar projects affects the various stakeholders in California. Finally, Part VII recommends an amendment to the Williamson Act and proposes specific solutions by which prime farmland will continue to be protected, while enabling expansion of the solar energy industry on non-prime farmland.

II. CALIFORNIA'S AGRICULTURAL INDUSTRY

A. *The Scope of Agricultural Land in California*

California's agricultural land is important not only to provide food but also to protect the economic benefits of agriculture in California. With over \$36.1 billion in farm receipts in 2008, California is the leader in production of agricultural output in the United States.²⁴ There are over four hundred types of crops grown in California and "the state produces about half of U.S. grown fruits, nuts, and vegetables."²⁵ Based on the 2002 Census, nine of the nation's top ten producing counties are located in California.²⁶ On a global scale, California ranks between fifth and ninth in the world based on agricultural output.²⁷ With this level of agricultural activity in California, it is clear that measures are needed to protect prime agricultural land from being prematurely developed into commercial or residential land.

B. *Prime Versus Non-Prime Farmland*

Prime agricultural land is defined as land that is irrigated and has the correct level of salinity, water moisture, soil temperature, and various other parameters to be productive.²⁸ According to the Farmland Mapping and Monitoring Program²⁹ for farm land to be considered prime it must

²⁴ WHAT'S AT STAKE FOR CALIFORNIA, *supra* note 1, at 1.

²⁵ CAL. DEP'T OF FOOD AND AGRIC., CALIFORNIA AGRICULTURAL RESOURCE DIRECTORY 2008-2009 17 (2010), *available at* http://www.cdffa.ca.gov/Statistics/PDFs/ResourceDirectory_2008-2009.pdf.

²⁶ *Id.* at 19.

²⁷ AGRICULTURAL ISSUES CENTER, UNIVERSITY OF CALIFORNIA, THE MEASURE OF CALIFORNIA AGRICULTURE I (2009).

²⁸ Cal. Dep't of Conservation, FMMP Prime Farmland Definition, *available at* http://www.consrv.ca.gov/dlrp/fmmp/overview/Pages/prime_farmland_fmmp.aspx (last visited Apr. 1, 2012).

²⁹ The Farmland Mapping and Monitoring Program (FMMP) produces maps and statistical data used for analyzing impacts on California's agricultural resources. Cal. Dep't of Conservation, FMMP Prime Farmland, *available at* <http://www.conservation.ca.gov/dlrp/fmmp/Pages/Index.aspx>.

meet the following two requirements.³⁰ First, the particular land must “have been utilized for irrigated agricultural production at some point during the four years prior to the Important Farmland Map date.”³¹ Second, “the soil must meet the physical and chemical criteria for Prime Farmland as determined by the USDA Natural Resources Conservation Service (“NRCS”).”³² The NRCS compiles lists of which soils in each survey meet the quality criteria based on the soil’s water moisture, temperature range, acid-alkali balance, water table, sodium content, flooding, erodibility, permeability rate, rock fragment content, and rooting depth.³³ All land that does not meet the requirements of prime land is labeled as non-prime land.³⁴

Currently, the proportion of prime to non-prime agricultural land under Williamson Act contracts in California is thirty-six percent and sixty-four percent respectively.³⁵ Only nine million acres of the forty-three million acres of agricultural land in California are considered to be prime land.³⁶ An average of forty thousand acres of agricultural land are being consumed by development each year of which approximately twenty-eight percent, or eleven thousand acres, is defined as prime agricultural land.³⁷ Sixty percent of the land developed in California’s most productive agricultural area, the San Joaquin Valley, has been determined to be prime agricultural land.³⁸ If development continues as it has in the past by 2050, 1.3 million acres of agricultural land in California, which includes 670,000 acres of prime agricultural land, will be developed.³⁹ The annualized agricultural loss on the prime land alone would be an estimated two billion dollars in production.⁴⁰

III. PURPOSE AND BACKGROUND OF THE WILLIAMSON ACT

Prior to 1965, individual property tax assessments were determined based on the property’s best and highest use, as required by the Califor-

³⁰ Cal. Dep’t of Conservation FMMP, *supra* note 28.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *See id.*

³⁵ Cal. Dep’t of Conservation, Williamson Act Program Basic Contract Provision, available at http://www.consrv.ca.gov/dlrp/lca/basic_contract_provisions/Pages/wa_overview.aspx (hereinafter “Basic Contract”).

³⁶ THOMPSON, *supra* note 2, at 1.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

nia Constitution.⁴¹ Thus, agricultural lands that were situated next to developed land could be subject to the adjacent developed land's level of taxation.⁴² This higher rate of tax on agricultural land, which has less economical return than developed land, would force agricultural landowners to sell their farmland or develop the land to meet the necessary tax burden.⁴³ After World War II, due to growth in the population, new businesses being developed, and an increase in property taxes, there was an increase in pressure to develop California's agricultural lands.⁴⁴ As property taxes and demand for developable land increased, an unprecedented amount of land was being converted for urban use so that landowners could profit from the farmland, and more importantly, afford the rising property taxes which increased because of concurrent development around the farmlands.⁴⁵ The Williamson Act was a legislative measure developed to counteract this overwhelming conversion and development of valuable agricultural land.⁴⁶ As stated in *Honey Springs Homeowners Association v. Board of Supervisors*, 157 Cal.App.3d 1122, 1130 (Cal. Ct. App. 1984) "[t]he Williamson Act is a legislative effort to preserve open space and agricultural land through discouraging premature urbanization and, at the same time, to prevent persons owning agricultural and/or open lands near urban areas from being forced to pay real property taxes based on the greater value of that land for commercial or urban residential use."⁴⁷

The Williamson Act, which is formally called The California Land Conservation Act of 1965, was enacted to preserve California agricultural land.⁴⁸ Under The Williamson Act counties are authorized to develop agricultural preserves that, in turn, allow the landowner to enter in to a ten year contract, renewed annually, with the municipality at a lower tax rate as long as the preserved land is utilized for only agricultural use.⁴⁹

When agricultural land is placed under a Williamson Act contract, landowners voluntarily relinquish their authority to develop their agricul-

⁴¹ Blackwell & Durkee, *supra* note 9, at 30.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Basic Contract, *supra* note 35.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Honey Springs Homeowners Association v. Board of Supervisors of San Diego County*, 158 Cal.App.3d 1122, 1130 (1984).

⁴⁸ Mueller & Morita, *supra* note 12.

⁴⁹ *Id.*

tural and open space lands.⁵⁰ In consideration for the right not to develop their land, municipalities must reevaluate the contracted land using constitutional authority and statutory formulas in determining the “use value”⁵¹ when assessing a lower tax liability.⁵² The legislative intent, as found in section 51220 of the California Government Code, is for the “preservation of a maximum amount of agricultural land by discouraging the premature and unnecessary conversion of agricultural land for urban purposes.”⁵³ Additionally, the Williamson Act strives to promote food production security, encourage agricultural support industries, curb urban sprawl, avoid costly public facilities and services, and promote environmental quality.⁵⁴

Two years after the passage of the Williamson Act, article XIII of the California Constitution (“Article XIII”) was enacted declaring the State’s interest “in preserving open-space land”, and allowing the valuation of that land to be based on actual use as opposed to the best or highest use valuation.⁵⁵ Article XIII allows preferential assessments for recreational, scenic, and natural resource areas, as well as areas devoted to production of food and fiber.⁵⁶ The average tax savings to the individuals with agricultural land under contract has amounted to as much as eighty-three percent, depending on the last time the property had been sold.⁵⁷

As of 2009, fifty-four of California’s fifty-eight counties have entered into Williamson Act contracts with their respective landowners.⁵⁸ Currently, this voluntary program has over sixteen million acres, close to one-third of California’s private land, under contract to be preserved.⁵⁹ These contracted lands currently represent over half of all agricultural land in California.⁶⁰ The amount of land voluntarily under contract is evidence in itself of the necessity of the tax incentive to help protect such an important resource.

⁵⁰ PETER DETWILER, *THE WILLIAMSON ACT: PAST, PRESENT, FUTURE?: HEARING BEFORE THE SENATE LOCAL GOV’T COMM.*, 2 (2010).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 3.

⁵⁴ *Id.* at 4.

⁵⁵ Basic Contract, *supra* note 35.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Mueller & Morita, *supra* note 12.

⁵⁹ DIV. OF LAND RES. PROT., CAL. DEP’T OF CONSERVATION, *supra* note 22.

⁶⁰ Blackwell & Durkee, *supra* note 9, at 30.

IV. CALIFORNIA'S RENEWABLE ENERGY MOVEMENT

More than four decades after passing the Williamson Act, California moved forward with another initiative aimed at preserving California's natural resources.⁶¹ The California Global Warming Solutions Act of 2006 ("the Warming Act"), was signed into law by Governor Arnold Schwarzenegger, and mandated that greenhouse gas emissions⁶² be reduced to 1990 levels by the year 2020.⁶³ The law was adopted to counter "the serious threat global warming poses to the economic well-being, public health, and environment of California."⁶⁴ To achieve the reduction in greenhouse gas emissions, as required by the law, California enacted a Renewable Portfolio Standard Program which has an initiative "to increase the amount of electricity generated from renewable sources to twenty percent of the total retail sales of electricity in California by December 31, 2010."⁶⁵ On April 12, 2011, Governor Brown signed Senate Bill (SB) 2X, which codified a further increase of the Renewable Portfolio Standards mandating that thirty-three percent of California's energy to be generated from renewable sources.⁶⁶

As of 2009, California utility companies' portfolio of renewable energy sources only amounted to about twelve percent of the annual usage, which falls far below the requirement of thirty-three percent.⁶⁷ To meet this mandated requirement, California utilities must substantially increase their renewable sources from "wind, solar, and geothermal energy" in a short span of time.⁶⁸ "Developing large scale wind and solar energy projects generally requires the use of hundreds, or even thousands, of acres of contiguous, undeveloped land."⁶⁹ Moreover, the large pieces of land that would meet the requirements for wind and solar farm projects are typically in rural areas and are usually constrained by the land use requirements of the Williamson Act.⁷⁰ The intent of the Williamson Act, to preserve prime agricultural land from premature devel-

⁶¹ Mueller & Morita, *supra* note 12.

⁶² Greenhouse gases include methane, chlorofluorocarbons and carbon dioxide. These gases act as a shield that traps heat in the earth's atmosphere. The resulting greenhouse gas effect is thought to contribute to global warming.

⁶³ Global Warming Solutions Act, Assemb. B. 32, 2006 Cal. Leg.

⁶⁴ Mueller & Morita, *supra* note 12.

⁶⁵ *Id.*

⁶⁶ AGRIC. RES. COMM., ASS'N OF ENVTL. PROFESSIONALS, GUIDANCE TO PUBLIC AGENCIES ON SELECTED AGRICULTURAL ISSUES IN CALIFORNIA 1 (2011).

⁶⁷ Mueller & Morita, *supra* note 12.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

opment, is in essence a road-block in achieving the Renewable Portfolio Standards of thirty-three percent.⁷¹

This road-block is evident from the legal battles that are being waged by the competing proponents of each law. One example of this legal fight is a lawsuit filed against Fresno County by the California State Farm Bureau for allowing a private company to build a solar facility on Williamson Act prime farmland.⁷² The Farm Bureau is not opposed to the development of solar to fulfill the requirements of the renewable energy mandates, but would prefer that non-prime farmland be utilized for such projects.⁷³ There are thousands of acres of non-prime or marginal farmland in Fresno County that could be utilized for solar facilities.⁷⁴ Using the non-prime land for solar would support the renewable energy movement while protecting prime Williamson Act contracted land.⁷⁵ Thus, even though the Williamson Act is a road-block for renewable energy mandates, proponents for protecting farmland are not averse to allowing solar facilities on Williamson contracted that is considered non-prime so that both protection of prime farmland and renewable energy projects can coexist.⁷⁶

V. ESTABLISHING SOLAR FARMS ON WILLIAMSON ACT LAND

A. Statutorily Defined Compatible Uses

Even though the Williamson Act's overall purpose is to protect land from any premature development, there is language within the law that permits compatible uses on the land that are not solely agricultural.⁷⁷ The law, as written in 1965, allowed municipalities to decide what would be deemed a "compatible use," but also clearly stated⁷⁸ that electric facilities and activities related to electricity production were statutorily compatible.⁷⁹ The original statute, section 51201(e), was reviewed in 1969 and the definition of "compatible use" was modified and renumbered as section 51238 to read as follows:

⁷¹ SANTA BARBARA COUNTY EXECUTIVE OFFICE, *supra* note 13.

⁷² Kurtis Alexander, *Farm bureau sues to block Fresno Co. solar project*, FRESNO BEE, Oct. 31, 2011, at A1.

⁷³ *See id.*

⁷⁴ *See id.*

⁷⁵ *See generally id.*

⁷⁶ *See id.*

⁷⁷ DIV. OF LAND RES. PROT., CAL. DEP'T OF CONSERVATION, *supra* note 22.

⁷⁸ CAL. GOV'T. CODE § 51201 (West 2011).

⁷⁹ Blackwell & Durkee, *supra* note 20.

Notwithstanding any determination of compatible uses by the county or city pursuant to this article, unless the board or council after notice and hearing makes a finding to the contrary, the erection, construction, alteration, or maintenance of gas, electric, water, or communication utility facilities are hereby determined to be compatible uses within any agricultural preserve. No land occupied by gas, electric, water, or communication utility facilities, shall be excluded from an agricultural preserve by reason of said use.⁸⁰

Based on the language stated in section 51238, many supporters of solar projects believe that production of electricity via solar farms is an enumerated compatible use as outlined in the statute.⁸¹ They feel that the clear language of the act of allowing electric facilities as a compatible use should naturally include any traditional or renewable source electricity production facility.⁸² Due to this clear exception, proponents believe that there is no need to further evaluate the compatibility of solar farms under the separate “principles of compatibility” as required when considering a non-enumerated compatible use.⁸³ Section 65850.5 of the California Government Code is also often cited to support solar facilities on contracted land.⁸⁴ The code states:

It is the intent of the legislature that local agencies not adopt ordinances that create unreasonable barriers to the installation of solar energy systems, including, but not limited to, design review for aesthetic purposes, and not unreasonably restrict the ability of homeowners and agricultural business concerns to install solar energy systems.⁸⁵

The opposition believes that the plain language of section 51238 was not intended for large scale power production facilities.⁸⁶ “A complete reading of these sections, including the legislative history, indicates the original intent of the language was most likely to allow electricity utility systems that serve the primary agricultural use of the land, which allow solar hot water systems for domestic use, and allow farmers to use solar power for onsite facilities rather than full on utility-scale electricity production facilities.”⁸⁷ Thus, even though there is an exception in the statute to protect electric facilities, the exception was not intended for large scale commercial solar energy facilities.⁸⁸

⁸⁰ CAL. GOV'T. CODE § 51238 (West 2011).

⁸¹ See Blackwell & Durkee, *supra* note 20.

⁸² See *id.*

⁸³ See *id.*

⁸⁴ AGRIC. RES. COMM., ASS'N OF ENVTL. PROFESSIONALS, *supra* note 66, at 4.

⁸⁵ CAL. GOV'T. CODE § 65850.5 (West 2010).

⁸⁶ See AGRIC. RES. COMM., ASS'N OF ENVTL. PROFESSIONALS, *supra* note 66, at 5.

⁸⁷ *Id.*

⁸⁸ *Id.*

Currently the majority of jurisdictions do not see solar energy farms as a compatible use with Williamson Act land.⁸⁹ However, three of California's fifty-four Williamson Act counties have allowed such a use based on the project meeting varying requirements by using a case-by-case analysis.⁹⁰ This current system of deciding compatibility is unclear as it does not specifically define whether solar facilities fit into the compatible "electric facilities" definition under the Williamson Act.⁹¹ Municipalities have been inconsistent in approving or denying solar farm projects on contracted land.⁹²

B. The Case-by-Case Compatibility Process

In the event that a use is not deemed compatible under the plain language exclusions of compatibility as stated in section 51238 it does not mean that the use is automatically excluded as non-compatible. When a local municipality determines that a use is not compatible per the written exclusions, it can then further analyze the use based on section 51238.1 by using a case-by-case analysis.⁹³ AB 2663 was signed into law in 1994 and outlines the current three principles of compatibility as stated in section 51238.1 of the Williamson Act.⁹⁴ The first step in this analysis is for the municipality to determine whether a particular use falls within the three principles of section 51238.1.⁹⁵ This first step aims to protect land from any use that would "significantly compromise the long-term productive agricultural capability of the subject parcel."⁹⁶

Once the municipality determines that a particular use qualifies under step one, the inquiry ends.⁹⁷ If the use is deemed incompatible then it is necessary to move on to the second principle.⁹⁸ The third principle authorizes a local municipal board or council to include in its own compatible use rules a list of uses that would otherwise not be in compliance with section 51238.1.⁹⁹ This second principle again is a case-by-case

⁸⁹ See generally Chandler, *supra* note 18.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See ETHAN N. ELKIND, HARVESTING CLEAN ENERGY 14 (2011).

⁹³ AGRIC. RES. COMM., ASS'N OF ENVTL. PROFESSIONALS, *supra* note 66, at 5, 17.

⁹⁴ See *id.* at 17.

⁹⁵ Blackwell & Durkee, *supra* note 9, at 33.

⁹⁶ CAL. GOV'T. CODE § 51238.1(a)(1) (West 2010).

⁹⁷ Blackwell & Durkee, *supra* note 9, at 33.

⁹⁸ *Id.* at 33.

⁹⁹ AGRIC. RES. COMM., ASS'N OF ENVTL. PROFESSIONALS, *supra* note 66, at 17.

analysis that each municipality can decide based on their view of what is deemed a compatible use.¹⁰⁰

Finally, if the use does not comport with the first two principles of the statute and the “use is located on non-prime land,” then the use can be analyzed using the third principle of section 51238.1.¹⁰¹ This principle allows for municipalities to approve a use based on a conditional use permit¹⁰² as long as steps to mitigate any impacts to agricultural operations have been made, the productive ability of the land has been assessed, the use is consistent with the Williamson Act in preserving agricultural land, and a residential subdivision is not included in the use.¹⁰³ If a use falls within these guidelines, then the municipality can use a case-by-case analysis to approve or deny the use on non-prime land.

C. Various Counties’ Application of the Compatible Use Process

The Williamson Act does not have language that directly addresses the compatibility of solar farms on contracted land, but simply allows local municipalities to apply the above stated analysis to determine if a use would qualify.¹⁰⁴ Furthermore, within the Act’s language, the term “electric facilities” is not clearly defined.¹⁰⁵ This has led some counties to use a narrow definition that defines electric facilities as only transmission lines and related improvements while other counties have more broadly defined electric facilities to include such things as electrical generation facilities.¹⁰⁶ The case-by-case analyses by each of the fifty-four counties that have contracted land has led to inconsistencies in approving or denying solar farms on contracted land. Some counties have deemed that solar farms are a compatible use while other counties have denied approval of such use on contracted land and have mandated that the land be taken out of the Williamson Act by cancelling the contract before the use would be allowed.¹⁰⁷

The counties that have allowed solar facilities to be developed have done so on non-prime land.¹⁰⁸ However, some counties, such as Kings

¹⁰⁰ See *id.* at 17.

¹⁰¹ Blackwell & Durkee, *supra* note 9, at 33.

¹⁰² See CAL. GOV’T. CODE § 51238.1(c)(1) (West 2010).

¹⁰³ DIV. OF LAND RES. PROT., CAL. DEP’T OF CONSERVATION, *supra* note 22, at 2-3.

¹⁰⁴ See *id.* at 2.

¹⁰⁵ See *id.*

¹⁰⁶ See generally *id.*

¹⁰⁷ Blackwell & Durkee, *supra* note 9, at 33.

¹⁰⁸ Mueller & Morita, *supra* note 12.

County, have gone the opposite direction.¹⁰⁹ Kings County has enacted a policy based on the second principle of section 51238.1 that allows solar farm projects to be recognized as a compatible use on contracted land.¹¹⁰ Alameda County has also recently approved a large scale solar farm on prime land based on the fact that ten acres of a 158-acre parcel being developed as a solar farm would not have a significant impact on the long-term agricultural production capability of the parcel.¹¹¹

Nevertheless three California counties have approved and allowed solar farm projects to be developed on non-prime Williamson Act agricultural land pursuant to a conditional use permit.¹¹² In September 2010, after months of debate, Tulare county officials voted to allow solar farms on protected agricultural land, as long as the projects meet some basic criteria.¹¹³ In approving these projects, the Tulare county supervisors decided in opposition to the views of both the Tulare County Agricultural Advisory Committee and the California Farm Bureau.¹¹⁴ In the same decision, Kathleen Bales-Lange, counsel for Tulare County, stated that three other counties facing similar decisions had determined that solar farms were not a compatible use with Williamson Act land.¹¹⁵

In another jurisdiction, the California Department of Conservation determined that the “Mariposa Energy Project in Alameda County appeared to be a compatible use because ten acres of the 158-acre panel parcel did not significantly compromise the long-term productive agricultural capability of the contracted parcel.”¹¹⁶ It is evident from the opposing decisions that have been reached by various counties that there is a need for clarification whether solar farms are a compatible use on Williamson Act contracted land.

¹⁰⁹ See *Rolling Out the Red Carpet For Chinese Solar*, SIERRA2THESEA.COM (May 19, 2010), http://www.sierra2thesea.com/sierra2thesea.com/Home?entries?2010?5?19_Rolling_Out_the_red_Carpet_For_Chinese_Solar...500mw_Solar_Farm_Announced_for_Kings_County.html.

¹¹⁰ See *id.*

¹¹¹ See *Is A Solar Farm Considered A Compatible Use Under California's Williamson Act?*, WATTPOLICY.COM (Apr. 13, 2010), <http://www.wattpolicy.com/2010/04/are-solar-farms-considered-combatible.html>.

¹¹² Chandler, *supra* note 18.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Is A Solar Farm Considered A Compatible Use Under California's Williamson Act?*, *supra* note 111.

D. Options for Terminating Williamson Act Contracts

If a solar facility is determined not to be compatible under the Williamson Act case-by-case analysis, it can be developed by cancelling the Williamson Act contract on that land.¹¹⁷ The landowner can give a notice of non-renewal, cancellation, or the land can be taken by eminent domain, which relieves the land from the Williamson Act restrictions.¹¹⁸ These are options that are part of the Williamson Act, but each has its own downfalls when pursuing the land for use as a solar facility.¹¹⁹ The land used for these types of projects “must be available at an economically affordable” cost to make the production of solar energy economically viable.¹²⁰ There are financial penalties associated with the cancellation of Williamson Act contracts that make renewable projects infeasible due to the added costs of canceling the contract.¹²¹ Non-renewal requires waiting ten years for the contract to expire and many renewable energy developers are not willing to wait that length of time to develop solar projects.¹²² Due to the fact that Williamson Act contracted land does not clearly allow solar projects, the difficulty and cost to work around the Williamson Act makes many projects on contracted land financially not viable.¹²³

E. The Wolk Bill

In light of the competing interests of the Williamson Act and Renewable Energy mandate, the legislature has begun to look at various options to resolve the discrepancy between counties.¹²⁴ On February 18, 2011, Senator Wolk introduced SB 618, which proposes a possible resolution to solar farms incompatibility on Williamson Act land.¹²⁵ The Wolk Bill would authorize Williamson Act parties to mutually rescind the previous contract and enter into a simultaneous solar-use agreement on the contracted land for a ten year term.¹²⁶ However, since this would be a state mandated easement and not conducted voluntarily by the counties, like

¹¹⁷ See Blackwell & Durkee, *supra* note 9, at 30.

¹¹⁸ DIV. OF LAND RES. PROT., CAL. DEP'T OF CONSERVATION, *supra* note 22, at 4.

¹¹⁹ See Blackwell & Durkee, *supra* note 9.

¹²⁰ *Id.*

¹²¹ ELKIND, *supra* note 92, at 12.

¹²² See *id.* at 13.

¹²³ *Id.* at 14.

¹²⁴ See Telephone Interview with John Gamper, Director of Taxation and Land Use, California Farm Bureau (Oct. 10, 2011).

¹²⁵ S.B. 618, 2011 Sess. (Cal.)

¹²⁶ *Id.*

Williamson contracts, the constitution requires the state to pay the counties for any lost revenue.¹²⁷ Considering the recent loss of subvention¹²⁸ funding for Williamson Act contracts, it is unlikely that the state will have the funds in the near future to compensate the counties for these mandatory solar-use easements.¹²⁹ In support of using non-prime land, the Wolk Bill does encourage utility scale solar facilities to be developed on non-prime agricultural land.¹³⁰ The Wolk Bill is not actually an amendment to the Williamson Act, but rather just another avenue to cancel a contract so that the land can be used for otherwise incompatible uses such as solar farms.¹³¹ Thus, the Wolk Bill, though allowing for solar farm development, will actually reduce the amount of overall agricultural land that is protected by the Williamson Act. Therefore, it is more prudent to address the Williamson Act language and clearly define solar farms as “electric facilities” that are compatible with contracted non-prime land because it would allow for the utilities to meet their renewable energy standards while still protecting agricultural land in the long term.

VI. PROPOSED AMENDMENTS TO THE WILLIAMSON ACT

The Williamson Act language needs to be amended to clearly state that solar farms are a compatible use only on non-prime Williamson Act Land.

The California Department of Conservation, a state agency, maintains the Land Evaluation and Site Assessment Model which defines which land is prime land.¹³² A majority of the agricultural production that the Williamson Act intends to protect is produced on prime land.¹³³ There is a vast supply of non-prime land that is under Williamson Act contract that has not been used for crop production over the past few years, and based on the lands salinity and production capacity, will not be used in the future.¹³⁴ These non-prime lands would be an ideal place for solar farms because they are tax protected by the Williamson Act and develop-

¹²⁷ *Id.*

¹²⁸ Blackwell & Durkee, *supra* note 9.

¹²⁹ *See id.*

¹³⁰ S.B. 618, 2011 Sess. (Cal.)

¹³¹ *Id.*

¹³² AGRIC. RES. COMM., ASS'N OF ENVTL. PROFESSIONALS, *supra* note 66.

¹³³ Telephone Interview with Ryan Jacobsen, CEO, Fresno Farm Bureau (Sept. 16, 2011).

¹³⁴ *See id.*

ing solar farms would not directly impact California's agricultural production capacity.¹³⁵

Since there is an abundance of non-prime land available in California that meets the basic requirements to develop a renewable energy solar farm the legislature should reevaluate the language of the Williamson Act to allow solar farms on non-prime Williamson Act land as a compatible use. There is also prior legislative intent that implies that the legislature is agreeable with allowing non-prime land to be compatible with solar farm developments.¹³⁶ Assembly Bill 2663, the legislation that defined section 51238.1 as discussed above, was revised six times before being enacted as a law in 1994.¹³⁷ This legislation created the current compatibility use laws, but before the bill was passed there was a compromise that was added to push the bill into law.¹³⁸ That compromise was the establishment in section 51238.1 of the separate compatibility standards for non-prime lands.¹³⁹ This was the first time since the inception of the Williamson Act that language was amended to provide avenues to utilize non-prime land in a more expansive manner without violating the Williamson Act provisions.¹⁴⁰

The Williamson Act language requires a change that would address compatibility issues created by the newer California Global Warming Solutions Act of 2006. There is a need to preserve agricultural land while also developing renewable energy alternatives. To achieve this goal it would be prudent for the California legislature to take control of determining that solar farms are compatible on non-prime Williamson Act agricultural land.

According to Dirk Mueller "in order to help California achieve its greenhouse gas reduction goals and thereby reduce the serious threat global warming poses to the economic well-being, public health and environment of California and help preserve the viability and productivity of California's agricultural land, we urge other California county governments to add wind energy projects as a compatible use on Williamson Act property, and to allow solar energy projects to be developed on non-prime agricultural land pursuant to a conditional use permit and subject to appropriate mitigation measures."¹⁴¹ Ryan Jacobson, CEO Fresno County Farm Bureau, agrees that there needs to be a change in how the

¹³⁵ See *id.*

¹³⁶ Blackwell & Durkee, *supra* note 9.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See *id.*

¹⁴⁰ *Id.*

¹⁴¹ Mueller & Morita, *supra* note 12.

various municipalities decide which projects are compatible.¹⁴² Mr. Jacobsen is willing to support a state-controlled change in Williamson Act language that would allow solar energy farms on non-prime Williamson Act agricultural land while clearly preserving prime agricultural land for agricultural uses.¹⁴³

By taking away the case-by-case analysis, currently conducted by municipalities, a state rule which clearly delineates solar farms as a compatible use with non-prime land would give municipalities a clear direction in pursuing fulfillment of the goal of both laws. A legislative remedy addressing solar power facilities placed on Williamson Act land may be required to resolve the current issues created between solar development and prime land preservation.¹⁴⁴

VII. THE NEED FOR EFFICIENT USE PLANNING FOR A SOLAR FUTURE

The requirements of the Williamson Act and California Global Warming Solutions Act of 2006 have an effect on multiple stakeholders.¹⁴⁵ The state and local governments, power producers, the agricultural industry, landowners, and the general public as consumers of energy and agricultural products will all be effected by how solar farms develop in the coming years.¹⁴⁶ It is important that each of these parties' interests are taken into account when approving and developing solar farms throughout the state.

The government's interest in developing an efficient plan for approving solar farms is to ensure that there is an economical way to approve proposed solar farm projects.¹⁴⁷ Currently, renewable energy projects are being approved by individual counties that are using a case-by-case analysis of each proposal.¹⁴⁸ This process of reviewing each project on an individual basis without a general plan for solar farms is a costly process that requires the Board of Supervisors or City Council to spend valuable time and money to review each proposal before making a decision to approve or deny the project.¹⁴⁹ If the municipalities had a state-based plan that clearly outlined the requirements for solar farms on Wil-

¹⁴² Interview with Ryan Jacobsen, *supra* note 134.

¹⁴³ *Id.*

¹⁴⁴ Blackwell & Durkee, *supra* note 9.

¹⁴⁵ See ELKIND, *supra* note 92, at 15.

¹⁴⁶ *Id.*

¹⁴⁷ *See id.*

¹⁴⁸ *Is A Solar Farm Considered A Compatible Use Under California's Williamson Act?*, *supra* note 111.

¹⁴⁹ See Phone Interview with Ryan Jacobsen, *supra* note 134.

Williamson Act land, it would save time and money in evaluating and deciding on the solar project proposals.¹⁵⁰ Thus, a state plan would provide for a more cost effective and efficient process for evaluating solar projects on Williamson Act land.

The power producing agencies and agricultural land owners can also benefit from a state level plan. Currently, the projects that have been approved by the various counties have not been planned in a unified manner amongst the approving counties.¹⁵¹ In fact, even projects within a county such as Fresno have been haphazardly approved on various land parcels throughout the region.¹⁵² The approved solar facilities are not in a particular zone or region but rather spread out over various regions of farm land.¹⁵³ In the long run, this lack of planning will pose prospective problems for both the power producers and the agricultural landowners.¹⁵⁴ Power producers will need to maintain the solar panels on each of the farms to ensure that the panels are clean and to deal with any transmission line issues.¹⁵⁵

The ability for solar power developers to avoid the high cost of canceling a Williamson Act contract is another incentive to utilize non-prime land for their facilities.¹⁵⁶ Currently, canceling a contract not only requires that the land pay a twelve percent penalty but also that the land from that point on will continue to be assessed at a higher property tax rate than contracted land.¹⁵⁷ A legislative change in the law that allows for the property tax protection and ability to develop solar facilities on contracted non-prime land is beneficial to the solar power developers.¹⁵⁸

With the current patchwork system of developing solar farms, power producers will need to access these various locations and travel from location to location in an inefficient manner to maintain each site.¹⁵⁹ Also, agricultural land owners will be affected in the long run due to contiguous parcels of farm land being split with the unplanned development of solar farms.¹⁶⁰ Thus, farming of the land will become more

¹⁵⁰ *See id.*

¹⁵¹ *See Is A Solar Farm Considered A Compatible Use Under California's Williamson Act?*, *supra* note 111.

¹⁵² Interview with Ryan Jacobsen, *supra* note 134.

¹⁵³ *See id.*

¹⁵⁴ *Id.*

¹⁵⁵ Telephone Interview with Mark Stout, Analyst, Cleantech America (Sept. 24, 2011).

¹⁵⁶ Telephone Interview with Kurtis Alexander, Fresno Bee Reporter (Nov. 29, 2011).

¹⁵⁷ *Id.*

¹⁵⁸ *See id.*

¹⁵⁹ Telephone Interview with Mark Stout, *supra* note 155.

¹⁶⁰ *See* Telephone Interview with Ryan Jacobsen, *supra* note 134.

costly and there is also a risk of nuisance issues that could develop with the placement of solar farms amongst farm land.¹⁶¹

A coordinated state plan could resolve the power producers' and agricultural landowners' interests. By developing a state planned region of approved non-prime Williamson Act land for the placement of solar facilities, the power producers would increase efficiency by being able to maintain the solar facilities without having to travel long distances between solar farms, and be able to build consolidated transmission facilities.¹⁶² Also, agricultural land owners would benefit by avoiding continuous farm land from being divided by solar farms and reducing the risk of future nuisance issues as the two industries attempt to coexist in close proximity.¹⁶³

A state plan that sets out a region or corridor for solar development across the various county lines would promote efficiency for both power producers and farmers.¹⁶⁴ These efficiencies would in turn benefit power consumers through lower energy costs.¹⁶⁵

VIII. CONCLUSION

The Williamson Act has played a vital role in protecting and preserving important agricultural land in California for over forty years.¹⁶⁶ However, with changes in population and environmental concerns coming to the forefront it is necessary to reevaluate the language of the Williamson Act of 1965. The agriculture industry has become more efficient, while the need for renewable energy has increased the requirement for vast amounts of rural land.¹⁶⁷ Protecting prime agricultural land from premature development is still an important mission, and the Williamson Act language should clearly define that solar farm activity is not compatible on prime land unless there is a compelling reason. The Legislature should clearly define that solar facilities are a compatible use only on non-prime Williamson Act contracted land.

There is never a simple solution to resolve competing interests, but there is need for compromise in this situation. It is imperative that the laws as implemented be reevaluated as the need arises so that they can work in union with one another without causing discrepancies among the

¹⁶¹ *Id.*

¹⁶² Telephone Interview with Mark Stout, *supra* note 155.

¹⁶³ Telephone Interview with Ryan Jacobsen, *supra* note 134.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Basic Contract, *supra* note 35.

¹⁶⁷ Blackwell & Durkee, *supra* note 9.

municipalities that are applying the laws. In this case both the Williamson Act and Renewable Energy Mandate are state managed programs and thus the state needs to step in and clearly define solar farms as a “compatible use” on non-prime Williamson Act contracted land.

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