

The Williamson Act: Siting Implications For California Projects

Legislation designed to protect agricultural land has prompted many regulators to pursue costly action regarding solar facilities.

■ David H. Blackwell & Michael Patrick Durkee

The Williamson Act, enacted to protect agricultural land from premature urban development through contracts between the local government and landowners, applies to half of all agricultural land and nearly one-third of all privately held land in California. Consequently, developers of solar farms, which are often sited in California's rural areas, are encountering these Williamson Act contracts. This article addresses whether solar farms could be considered a "compatible use" under the Williamson Act.

For years, regulators and energy providers have ignored Section 51238(a)(1) of the act, which provides that electric facilities are statutorily recognized compatible uses. As a result, energy providers have historically arranged for the "cancellation" of Williamson Act contracts, believing that this complicated and costly process was a prerequisite to building energy facilities throughout California.

We believe that this often-repeated approach of ignoring the express provisions in the Williamson Act is misguided, and that electric facility projects - whether traditional or renewable in nature - should be rec-

ognized as compatible uses, as the legislature intended.

Thus, when siting a solar project on Williamson Act lands, it is erroneous to automatically assume that contract cancellation is required or that a case-by-case review regarding an energy project's compatibility pursuant to Section 51238.1 is necessary.

When the Williamson Act was adopted in 1965, California's need for renewable sources of energy was not part of the legislative process. The world has obviously changed during the last 45 years, and recent federal and state mandates have pushed renewable energy to the forefront.

There now exists a tension between two laudable but competing goals: the preservation of agricultural land and setting aside land for the production of clean energy. If state and local agencies continue to apply the Williamson Act in a manner that frustrates the siting of renewable energy projects on agricultural lands, then legislative action may be necessary to reflect this new paradigm.

Establishing agricultural preserves

Before the Williamson Act, the California Constitution required that individual property-tax assessments be made according to the market value of the assessed property. As a re-

sult, the county assessor was required to consider the highest and best use to which the property was naturally adapted, and could not limit consideration only to the property's present use.

Therefore, agricultural lands adjoining urban areas could be subject to higher property assessments and taxes, thereby forcing agricultural landowners to discontinue farming and sell or convert their land to urban development.

The Williamson Act was adopted to address this problem. "The Williamson Act is a legislative effort to



David H.
Blackwell

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 - a factor which would force most landowners to prematurely develop," states *Honey Springs Homeowners Association v. Board of Supervisors* (1984) 157 Cal.App.3d 1122, 1130.

The act empowers local governments to establish agricultural preserves consisting of lands devoted to agricultural uses and other compatible uses. Preserves are "established for the purpose of defining the boundaries of those areas within which the city or county will be willing to enter into contracts pursuant to this act."

The act authorizes local governments to adopt rules and restrictions governing the administration of agricultural preserves and to ensure that the land within the preserve is maintained for agricultural, open space or

other compatible uses. Local rules regarding compatible uses must be consistent with the principles set forth in Section 51238.1, discussed in detail below.

Once an agricultural preserve is established, the local agency may offer to owners of agricultural land within the preserve the opportunity to enter into annually renewable Williamson Act contracts that restrict the land to agricultural uses and compatible uses for at least 10 years. The contract “may provide for restrictions, terms and conditions, including payments and fees, more restrictive than or in addition to those required by” the act.

Every contract must exclude uses that are not agricultural and that are not compatible with agricultural uses, and this exclusion must remain in effect for the duration of the contract.

History of compatible uses

As initially chaptered in 1965, the Williamson Act allowed the city or county to determine what was a compatible use, but it also provided that the following were recognized as compatible uses by statute: “the erection, construction, alteration or maintenance of gas, electric, water or communication utility facilities, unless the governing board makes a finding after notice and hearing that any or all such facilities are not a compatible use.”

At the same time, the legislature defined “agricultural preserve” to mean “an area devoted to agricultural and compatible uses as designated by a city or county.” In 1978, A.B.1625 removed “compatible uses” from the “agricultural preserve” definition, thereby requiring that agricultural preserves be established solely on the basis of the agricultural, open space or recreational use of the land in question, and not based upon a compatible use.



Michael Patrick Durkee

The apparent concern was that some jurisdictions were establishing agricultural preserves on properties where only a compatible use, as defined by the jurisdiction, was occurring. A.B.1625 provided that once a proper agricultural preserve was established, in addition to the legislatively defined compatible uses, the city or county could then enumerate the compatible uses that would be permitted within the preserve.

Thus, compatible uses were allowed to exist within a preserve but could not serve as the basis for the formation of the preserve.

Apparently, there was a concern that cities and counties were allowing compatible uses beyond those identified in the act that some believed were not consistent with the agricultural and open-space preservation goals of the act. In response, in 1994, the legislature adopted A.B.2663, which required that if a city or county allows compatible uses in an agricultural preserve beyond those expressly identified by the act, those uses normally must be consistent with the three principles of compatibility enumerated in Williamson Act Section 51238.1 (added by A.B.2663, and explained in more detail below).

In 1969, A.B.1178 modified the “compatible use” definition of Section 51201(e) and renumbered it to new Section 51238: “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.”

In 1991 and 1992, the California Department of Conservation introduced legislation that would have re-

placed Section 51238 with provisions that would require a local agency to submit any draft adopted or amended compatible-use ordinance to the department for review and comment regarding its compliance with new principles of compatibility set forth in new Section 51238.1.

Notwithstanding these limitations, proposed new Section 51238.2 essentially replicated the statutorily enumerated compatible uses from 1969’s A.B.1178, thereby underscoring the department’s recognition that the statutorily enumerated compatible uses, such as electric facilities, were not subject to any principles of compatibility.

Also noteworthy is that during the amendment process, there was an attempt to limit Section 51238 to facilities related to the transmission of gas, electric, water and communication services, but that attempt was withdrawn, and there remains no qualifier that the uses in Section 51238 be limited to transmission facilities. Both bills died on Nov. 30, 1992.

Current guidance

A.B.2663 went through six versions before it was signed into law in 1994, and it established the current relevant provisions of compatible-use law, including the three principles of compatibility in new Section 51238.1. Each version of the bill contained a provision maintaining the statutory compatible-use status of electrical facilities. The last amended version of A.B.2663 also introduced the separate compatibility standards for non-prime lands - a compromise that made the passage of the bill possible.

In addition, the final bill included uncodified intent language (Section 8) stating that “the goal of preserving the maximum amount of non-prime agricultural land can be met by allowing other compatible uses, in compliance with Section 51238.1(c)... that sustain the economic viability of these lands while maintaining their open-space quality.”

In 1999, A.B.1505 renumbered the subparagraphs of Section 51238 into (a)(1), (a)(2), and (b), reflecting its current structure.

Application of the act's Current Compatible Use Provisions to Electric Facilities Section 51201(e) expressly recognizes that a compatible use may be either established (1) by a city or county, so long as it meets the act's compatible-use parameters; or (2) by the act itself, including agricultural, open-space or recreational uses, and those uses identified in Section 51238(a)(1), which identifies electric facilities as statutory compatible uses.

As reflected in the legislative history, statutory compatible uses such as electric facilities are separate from, and are not subject to, the separate "principles of compatibility" set forth in Section 51238.1.

An interesting issue arises if the city council or county board of supervisors determines at a noticed public hearing that electric facilities are not "by law" compatible uses, as provided in Section 51238(a)(1). We are unaware of any local legislative body that has made such a determination. Therefore, there is no case study available regarding the character of such an action.

If the local body determined that all electric facilities were prohibited and, therefore, expressly not compatible uses, then one might assume that the local agency would then refuse to apply the principles of compatibility to an individual electric facility project. Even if that local agency applied the principles of compatibility, it is unlikely that the agency would determine that the project was compatible.

The legality of a local agency's categorical prohibition against electric facilities is dubious in light of the Williamson Act's express recognition of electric facilities as compatible uses since the inception of the act. The better practice, assuming that the local agency made the "contrary finding" to accepting electric facilities as

"by law" compatible uses, is to provide the agency with the ability to review new applications on a case-by-case basis while applying the principles of compatibility to that application.

This provides the local government with the necessary flexibility to consider and approve projects that the agency determines are compatible with the Williamson Act and beneficial to the community.

Conclusions

Under Section 51238.1, the typical analysis is to first determine if the use is consistent with the three principles of compatibility set forth in subsection (a) of Section 51238.1. If so, that ends the inquiry.

If the use does not satisfy subsection (a), the next level of analysis is to determine whether conditions could be imposed on the use in order to make it comply, as provided in subsection (b).

If the use cannot be considered a compatible use after applying subsections (a) and (b), and if the use is located on non-prime land, then the final step in the analysis is to determine whether or not the use complies with the requirements of subsection (c). Compatibility determinations pursuant to Section 51238.1 must be made on a case-by-case basis.

Electric facilities, including solar projects, should be recognized as statutory compatible uses. Despite the act's clear recognition of electric facilities as compatible uses, state and local agencies have historically ignored Section 51238 and have focused, if at all, on the separate compatibility requirements of Section 51238.1.

Concerned that the facility may displace existing agricultural activities, the agencies have usually determined that the use is not compatible with the act, and have required that the Williamson Act contract be canceled as to that area of the contracted property covered by the proposed development.

Knowing this, many energy de-

velopers have initiated cancellation proceedings without further inquiry. Cancellation is not a simple process, and it should only be used for extraordinary situations. It requires that specific findings be made by the board of supervisors following a noticed public hearing, and involves an increasingly complex process for determining the unrestricted value of the property at issue, upon which the contracting owner must pay 12.5% of that value to the state general fund.

Instead of continuing the unwarranted practice of avoiding Section 51238, state and local agencies should follow the letter of the law. If those agencies refuse to do so, a legislative remedy may be necessary, including amending the act to expressly define electric facilities (not defined in the act) to include solar power facilities, and to limit a local agency's ability to prohibit the construction of electric facilities on Williamson Act property.

Preservation of agricultural land still remains an important statewide goal, but the realities of the current environmental and economic climate require that the production of renewable energy facilities not play a subservient role.

Some counties are seeking ways to remove themselves from the act, as the budget crisis has severely reduced state subvention payments to local agencies for administering the act. These local agencies may see a brighter future through increased renewable energy development, and should take the steps necessary to make it a reality. ☞

David H. Blackwell is a partner in Allen Matkins' Walnut Creek, Calif., office, where he practices real estate law with an emphasis on land-use entitlements and litigation. He can be reached at dblackwell@allenmatkins.com. Michael Patrick Durkee is co-chair of Allen Matkins' California land-use practice, where he focuses on land use, elections and local government law. He can be reached at mdurkee@allenmatkins.com.
