

RESOLUTION NO. 5079

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SOLEDAD APPROVING AND AUTHORIZING THE CITY MANAGER TO EXECUTE A "DIRECT AGREEMENT" BETWEEN THE CITY, FOUNDATION WINDPOWER, LLC, FOUNDATION HA ENERGY GENERATION, LLC, FOUNDATION CA FUND VII MASTER TENANT, LLC, AND FOUNDATION CA FUND VII OWNER, LLC, FOR THE BENEFIT OF HAT CFII OP A, LLC.

WHEREAS, on April 2, 2014, the Soledad City Council adopted Resolutions 4964 and 4965, approving a "First Amended and Restated Wind Site Lease and Easement Agreement" and "First Amended and Restated Wind Power Purchase Agreement" with Foundation Windpower, LLC ("Foundation"); and

WHEREAS, by the terms of the Agreements, Foundation installed a wind turbine on leased City property at the Water Reclamation Facility ("WRF"), and commenced selling electricity generated by said turbine at a discounted rate back to the City for use for WRF operations; and

WHEREAS, Section 12.2 of the Lease Agreement commits the City to execute what is commonly known as a "Direct Agreement," a financing document that allows a Windpower Project related lender to protect its investment in the Project by enabling the same to step into the shoes of Foundation in the event of any default under the terms of the Lease; and

WHEREAS, on June 4, 2014, the City Council approved and authorized the City Manager to enter into a Direct Agreement with the construction lender for the Project via adoption of Resolution No. 4981- A Resolution of the City Council of the City of Soledad Approving and Authorizing the City Manager to Execute a Direct Agreement between the City, Foundation Windpower, LLC, Foundation CA Fund VII Master Tenant, LLC, and Foundation CA Fund VII Owner, LLC, for the Benefit of Seminole Financial Services LLC D/B/A/ SFS-Cal, LLC."; and

WHEREAS, while the construction loan with Seminole Financial Services has now been paid by Foundation, a new Direct Agreement with the Project's permanent lender, HAT CFII OP A, LLC, has been prepared and approved by City Staff, and Staff is now recommending that the City Council approve the Direct Agreement in order to facilitate Foundation's Project financing obligations.

NOW THEREFORE, BE IT HEREBY RESOLVED by the City Council of the City of Soledad that the Direct Agreement between the City, Foundation Windpower, LLC, Foundation HA Energy Generation, LLC, Foundation CA Fund VII Master Tenant, LLC, and Foundation CA Fund VII Owner, LLC, for the Benefit of HAT CFII OP A, LLC, a copy of which is attached hereto as Exhibit "A" and by this reference incorporated herein, is hereby approved and the City Manager is authorized and directed to execute the same on behalf of the City

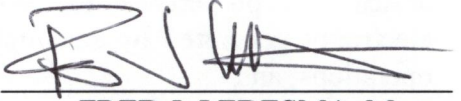
PASSED AND ADOPTED by the City Council of the City of Soledad at a regular meeting duly held on the 6th day of May, 2015, by the following vote:

AYES, and in favor thereof, Councilmembers: Christopher K. Bourke, Richard J. Perez, Patricia D. Stephens, Mayor Pro Tem Alejandro Chavez and Mayor Fred J. Ledesma


NOES, Councilmembers: None.

ABSTAIN, Councilmembers: None.

ABSENT, Councilmembers: None.


FRED J. LEDESMA, Mayor

ATTEST:


ADELA P GONZALEZ, City Clerk

DIRECT AGREEMENT

This **DIRECT AGREEMENT**, dated as of June 4, 2014 (this "Direct Agreement") is entered into by the City of Soledad, a public body, corporate and politic ("Contracting Party"), FOUNDATION WINDPOWER, LLC, a California limited liability company ("FWP"), FOUNDATION CA FUND VII MASTER TENANT, LLC, a California limited liability company ("Master Tenant") and FOUNDATION CA FUND VII OWNER, LLC, a California limited liability company ("Owner" and, together with FWP and Master Tenant, "Project Owner"), for the benefit of SEMINOLE FINANCIAL SERVICES, LLC D/B/A SFS-CAL, LLC, a Delaware limited liability company ("Lender").

RECITALS

WHEREAS, in connection with a wind-powered electric generating facility located in Soledad, California (the "Project") Contracting Party and FWP are party to (a) that certain First Amended and Restated Wind Power Purchase Agreement, dated as of April 2, 2014, (the "PPA"), and (b) that certain First Amended and Restated Wind Site Lease and Easement, dated as of April 2, 2014 (the "Lease Agreement"), whereby, *inter alia*, Contracting Party has leased to Tenant the leased premises ("Leased Premises") more fully described in the Lease Agreement and incorporated herein by this reference, which was evidenced by a Memorandum of Lease dated June 4, 2014 and recorded in the official records of Monterey County on June __, 2014 as [_____] ("Memorandum of Lease"), (the Lease Agreement and the Memorandum of Lease are hereinafter collectively referred to as the "Leasehold Documents"). The PPA and the Leasehold Documents are referred to herein collectively as the "Assigned Agreements";

WHEREAS, FWP and Owner (collectively "Borrower") and Lender entered into that certain Construction Loan Agreement, dated as of June __, 2014 (as amended, the "Loan Agreement"), pursuant to which the Lender will make loans and other extensions of credit to Borrower;

WHEREAS, FWP intends to assign the Project to Owner and Owner intends to lease the Project to Master Tenant pursuant to a Master Lease dated as of June __, 2014; and

WHEREAS, Borrower has entered into that certain Leasehold Deed of Trust, Assignment of Rents and Leases, Security Agreement and Fixture Filing (the "Deed of Trust") and a Security Agreement (together with the Deed of Trust collectively, the "Security Agreement") with the Lender, pursuant to which Borrower has assigned all of its right, title and interest in, to and under, and granted a first priority security interest in, the Assigned Agreements.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing, and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, and intending to be legally bound, the parties hereto hereby agree, notwithstanding anything to the contrary in the Assigned Agreements, as follows:

6/10/14
Waiting on
signed one

ARTICLE 1.
CONSENT TO ASSIGNMENT, ETC.

1.1 CONSENT TO ASSIGNMENT. Contracting Party (a) acknowledges that the Lender is entering into the Loan Agreement and related financing documents and making a loan to Borrower in reliance upon the execution and delivery by Contracting Party of this Direct Agreement, (b) consents to the collateral assignment under the Security Agreement of all of Borrower's right, title and interest in, to and under the Assigned Agreements, including all of Borrower's rights to receive payment under or with respect to the PPA and all payments due and to become due to Borrower under or with respect to the Assigned Agreements, whether as contractual obligations, damages, indemnity payments or otherwise (collectively, the "Assigned Interests"), (c) acknowledges the right of the Lender or its designee or assignee, in the exercise of the Lender's rights and remedies under the Security Agreement, to make all demands, give all notices, take all actions and exercise all rights of Borrower under the Assigned Agreements and (d) acknowledges and agrees that notwithstanding anything to the contrary contained in the Assigned Agreements, the Lender shall have the rights and benefits of a "Project Finance Party" and a "Mortgagee" each as defined in the Assigned Agreements.

1.2 SUBSEQUENT OWNER.

1.2.1 Contracting Party, Lender and Borrower agree that if the Lender notifies Contracting Party that an Event of Default has occurred and is continuing and that the Lender has elected to exercise the rights and remedies set forth in the Security Agreement, then (a) the Lender or a Permitted Transferee (Lender or such Permitted Transferee, the "Subsequent Owner") shall be substituted for Borrower under the Assigned Agreements and (b) Contracting Party will recognize the Subsequent Owner as its counterparty under the Assigned Agreements and will continue to perform its obligations under the Assigned Agreements in favor of the Subsequent Owner (including its obligations under any warranties) provided that such Subsequent Owner has assumed in writing all of Borrower's rights and obligations (including, without limitation, the obligation to cure any then existing payment and performance defaults, but excluding any then existing performance defaults which by their nature are incapable of being cured) under the Assigned Agreements; and (c) Contracting Party shall be relieved of any obligation to make payment to Borrower or otherwise perform obligations for Borrower under the Assigned Agreements so long as such payment or performance is made for Subsequent Owner. For purposes of this Direct Agreement, "Permitted Transferee" means Lender's designee or assignee or any other single purchaser or single transferee of all of the Assigned Interests in a judicial or nonjudicial foreclosure sale or by a conveyance made in lieu of foreclosure, which designee, assignee, purchaser, or transferee (i) has elected in writing to assume all of Borrower's or Lender's (as applicable) rights and obligations under all of the Assigned Agreements and (ii) is (either directly or indirectly through a third party operator or contractor with like kind successful experience) capable of assuming and performing all of Borrower's or Lender's (as applicable) obligations under all of the Assigned Agreements. Borrower agrees to indemnify, protect, defend and hold harmless Contracting Party from and against any liabilities, claims, damages (including injury or damage to person or property), losses, costs, expenses and fees (including reasonable attorneys' and experts' fees and costs) relating to payments made to or obligations performed for Subsequent Owner rather than Borrower by Contracting Party under the Assigned Agreements.

1.2.2 Contracting Party acknowledges and agrees that, notwithstanding anything to the contrary in the Assigned Agreements, none of (a) the assignment of the Assigned Agreements pursuant to the Security Agreement, (b) the foreclosure or any other enforcement action (any such action an "Enforcement Action") undertaken by the Lender in respect of its rights under the Security Agreement or any other related pledge agreement or mortgage, (c) the acquisition of the rights of Borrower under the Assigned Agreements as a consequence of any Enforcement Action by the Lender or any Permitted Transferee (or acceptance of an absolute assignment of the Assigned Agreements in lieu of an Enforcement Action) or (d) the assignment of the Assigned Agreements by the Lender to a Permitted Transferee following a purchase after an Enforcement Action or following an absolute assignment thereof in lieu of an Enforcement Action, shall constitute a default by Borrower under the Assigned Agreements or shall result in termination thereof.

1.3 RIGHT TO CURE. In the event of a default by Borrower in the performance of any of its obligations under an Assigned Agreements, or upon the occurrence or non-occurrence of any event or condition under an Assigned Agreement which would immediately or with the passage of any applicable grace period or the giving of notice, or both, enable Contracting Party to terminate or suspend its performance under an Assigned Agreement (each hereinafter a "Default"), notwithstanding any notice period provided in such Assigned Agreement, Contracting Party shall not terminate or suspend its performance under such Assigned Agreement until it first gives prompt written notice of such Default to the Lender or its designee or assignee and affords each such party a period of thirty (30) days, provided that it promptly commences in good faith to cure the Default within such cure period, and it diligently and continuously pursues such cure, (or if such Default is a non-monetary Default, such longer period as is required to cure such default so long as any such party has commenced and is diligently pursuing appropriate action to cure such Default, but in no event longer than forty-five (45) days) from receipt of such notice to cure such non-monetary Default; provided, however, that (a) if possession of the Project is necessary to cure such Default and the Lender or its designee or assignee has commenced foreclosure proceedings, the Lender or its designee or assignee will be allowed a reasonable time to complete such proceedings, provided Lender or its designee or assignee is diligently and actively pursuing possession of the Project, and (b) if the Lender or its designee or assignee is prohibited from curing any such non-monetary Default by any process, stay or injunction issued by any governmental authority or pursuant to any bankruptcy or insolvency proceeding or other similar proceeding involving Borrower, then the time periods specified herein for curing a Default shall be extended for the period of such prohibition, provided that Lender or its designee or assignee is diligently and actively pursuing the lifting of such process, stay or injunction.

1.4 REPLACEMENT AGREEMENT. In the event that an Assigned Agreement is terminated as a result of any bankruptcy, insolvency, reorganization or similar proceeding affecting Borrower, and if, within sixty (60) days after such cancellation or termination, the Lender so requests, Contracting Party will enter into a new agreement with the Lender or its Permitted Transferee (i) having the same terms and conditions of such Assigned Agreement, provided that any differing terms and conditions shall be subject to approval by Contracting Party's governing body in its sole and absolute discretion, and (ii) producing the same economic effect and the same level of performance to Contracting Party as continuing such Assigned Agreement.

1.5 NO LIABILITY. Contracting Party acknowledges and agrees that neither the Lender nor its Permitted Transferee shall have any liability or obligation under the Assigned Agreements as a result of this Direct Agreement, the Security Agreement or otherwise, nor shall the Lender or its Permitted Transferee be obligated or required to perform any of Borrower's obligations under the Assigned Agreements, except during any period in which the Lender (or its Permitted Transferee) is a Subsequent Owner pursuant to Section 1.2 or has exercised its rights and remedies under the Security Agreement, in which case (i) the obligations of such Subsequent Owner shall be no more than that of Borrower under the Assigned Agreements and (ii) such Subsequent Owner shall not be required to perform or be subject to any defenses or offsets by reason of any of Borrower's obligations under the Assigned Agreements that were unperformed at the time such Subsequent Owner became a Subsequent Owner (other than any defaults for failure to pay amounts owed under the Assigned Agreements or to the extent that a non-monetary default has not been cured and is capable of cure).

1.6 TRANSFER. Provided Lender or its Permitted Transferee, as applicable, is not in default under the Assigned Agreements, the Lender shall have the right to assign all of the Assigned Agreements or a new agreement entered into pursuant to Section 1.4 together to a person or entity to whom the Project is transferred, provided that such transferee is a Permitted Transferee. Upon such assignment, the Lender shall be released from any further liability under the Assigned Agreements or such new agreement to the extent of the interest assigned.

1.7 DELIVERY OF NOTICES. Contracting Party shall deliver to the Lender or, if notice from Lender is received designating a Permitted Transferee, then to Lender's Permitted Transferee, concurrently with the delivery thereof to Borrower, a copy of each notice regarding defaults, suspensions, terminations, actual or threatened litigation or arbitration between Contracting Party and Borrower, or material amendments given by Contracting Party to the Borrower pursuant to the Assigned Agreements. Any notice required or permitted to be given in writing under this Agreement shall be given or delivered by personal service, Federal Express or comparable overnight delivery service, or by deposit in the United States Post Office, postage prepaid, by registered or certified mail, addressed to the party receiving notice as specified below, which shall be updated by the parties as required. Changes in such address and/or contact persons named shall be made by notice similarly given. Notices given by personal service shall be deemed given the day so given. Notices mailed or sent by a delivery service or by registered or certified mail as provided herein shall be deemed given on the third business day following the date so mailed or on the date of actual receipt, whichever is earlier. All notices or tender required or permitted herein shall be in writing and shall be sent to the address set forth below (or such other address as a party may hereafter designate for itself by written notice to the other parties as required hereby) of the party for whom such notice or communication is intended:

If to Lender:

SFS-CAL, LLC
c/o Seminole Financial Services
455 North Indian Rocks Road, Suite B
Belleair Bluffs, FL 33770
Attention: Tim Fetter

If to Contracting Party:

City of Soledad
248 Main Street
Soledad, CA 93960
Phone: (831) 223-5000
Attn: City Manager and City Attorney

1.8 Entry on Leased Premises. Contracting Party agrees that upon and after any of (a) an Enforcement Action undertaken by the Lender in respect of its rights under the Security Agreement or any other related pledge agreement or mortgage, (b) the acquisition of the rights of Tenant under the Leasehold Documents as a consequence of any Enforcement Action by the Lender or any Permitted Transferee (or acceptance of an absolute assignment of the Leasehold Documents in lieu of an Enforcement Action) or (c) the assignment of the Leasehold Documents by the Lender to a Permitted Transferee following a purchase after an Enforcement Action or following an absolute assignment thereof in lieu of an Enforcement Action, Lender shall have the right to enter, possess and use the Leased Premises at such reasonable times and manner as are necessary or desirable to effectuate the remedies and enforce the rights of Lender under the Loan Agreement, Leasehold Deed of Trust and other security documents.

**ARTICLE 2.
PAYMENTS UNDER THE ASSIGNED AGREEMENT**

2.1 PAYMENTS. After receipt of notice from Lender that an Event of Default has occurred and is continuing and that the Lender has elected to exercise the rights and remedies set forth in the Security Agreement, Contracting Party will pay all amounts payable by it under the PPA or in connection therewith in the manner and as and when required by the PPA pursuant to the wiring instructions provided in Schedule A, or to such other person or account as may be specified from time to time by the Lender to Contracting Party in accordance with Section 1.7 above. All payments required to be made by Contracting Party under the PPA or in connection therewith shall be made without any offset, recoupment, abatement, withholding, reduction or defense whatsoever, other than that allowed by the terms of the PPA.

**ARTICLE 3.
REPRESENTATIONS AND WARRANTIES OF CONTRACTING PARTY**

Contracting Party makes the following representations and warranties in favor of the Lender as of the date hereof.

3.1 NO DEFAULT. To Contracting Party's knowledge, neither Contracting Party nor any other party to the Assigned Agreements is in default of any of its obligations thereunder, and as of the date hereof, to Contracting Party's knowledge, all payments that are required under the Assigned Agreements to have been made by any party thereto have been made. To Contracting Party's knowledge, each party to the Assigned Agreements has complied with all conditions precedent to the respective obligations of such party to perform under the Assigned Agreements, except to the extent any such conditions precedent have been waived by the party or parties to the Assigned Agreements not obligated by such conditions precedent. As used herein, "Contracting Party's knowledge" shall mean the actual knowledge, without duty of inquiry' of Contracting Party's Director of Public Works, Don Wilcox. Notwithstanding any provision of this Direct Agreement, in no event shall any liability accrue to Contracting Party by reason of any incorrect representation set forth herein, but Contracting Party shall be estopped to deny the truth of any such statement in the event of any dispute between Contracting Party and Lender, Project Owner, Tenant and/or Permitted Transferee.

ARTICLE 4. MISCELLANEOUS

4.1 GOVERNING LAW. THIS DIRECT AGREEMENT AND THE RIGHTS AND OBLIGATIONS OF THE PARTIES HEREUNDER SHALL BE CONSTRUED IN ACCORDANCE WITH AND BE GOVERNED BY THE LAWS OF THE STATE OF CALIFORNIA.

4.2 SUCCESSORS AND ASSIGNS. This Direct Agreement shall be binding upon and shall inure to the benefit of the parties and their permitted successors and assigns.

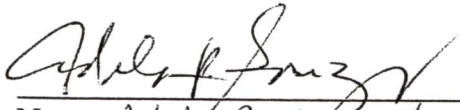
4.3 FURTHER ASSURANCES. Each of the parties hereby agrees to execute and deliver all such instruments and take all such action as may be necessary to effectuate fully the purposes of this Direct Agreement, subject to approval by Contracting Party's governing body in its sole and absolute discretion.

4.4 ENTIRE AGREEMENT. This Direct Agreement and any agreement, document or instrument attached hereto or referred to herein integrate all the terms and conditions mentioned herein or incidental hereto and supersede all oral negotiations and prior writings in respect to the subject matter hereof. In the event of any conflict between the terms, conditions and provisions of this Direct Agreement and any such agreement, document or instrument, the terms, conditions and provisions of this Direct Agreement shall prevail.

[Signature page follows.]

IN WITNESS WHEREOF, the parties to this Direct Agreement have caused it to be duly executed and delivered as of the date first written above.

CITY OF SOLEDAD,
a public body, corporate and politic,
as Contracting Party

By: 
Name: Adela P. Gonzalez
Title: City Manager

FOUNDATION WINDPOWER, LLC,
a California limited liability company,

By: _____
Matthew B. Wilson
Chief Executive Officer

**FOUNDATION CA FUND VII MASTER
TENANT, LLC,** a California limited liability
company ("Master Tenant")

By: **FOUNDATION CA FUND VII
MANAGER, LLC**
Its Managing Member

By: _____
Matthew B. Wilson
Chief Executive Officer

[Signatures continue on the following page.]

FOUNDATION CA FUND VII OWNER, LLC,
a California limited liability company,

By: **FOUNDATION CA FUND VII
MANAGER, LLC**
Its Managing Member

By: _____
Matthew B. Wilson
Chief Executive Officer

Accepted and Agreed:

SEMINOLE FINANCIAL SERVICES, LLC D/B/A SFS-CAL, LLC,
a Delaware limited liability company,
as the Lender

By: _____
Name:
Title:

Address for Notices:

SFS-CAL, LLC
c/o Seminole Financial Services
455 North Indian Rocks Road, Suite B
Belleair Bluffs, FL 33770
Attention: Tim Fetter

*Final executed
agreement?
ask Hilda*