



# Travis County Commissioners Court Agenda Request

**Meeting Date:** 12/27/2011, 9:00 AM, Voting Session

**Prepared By/Phone Number:** Katie Petersen Gipson, Planning and Budget Office, 854-9346

**Elected/Appointed Official/Dept. Head:** Leroy Nellis, Acting County Executive  
Planning and Budget

*[Handwritten signature: Leroy Nellis]*  
*[Handwritten note: for Leroy Nellis]*

**Commissioners Court Sponsor:** Judge Biscoe

**AGENDA LANGUAGE:**

Approve collateral assignment agreement between Travis County, Fotowatio Renewable Venture, LLC (Solar Farm) and Wells Fargo bank

**BACKGROUND/SUMMARY OF REQUEST AND ATTACHMENTS:**

See attached memo

**STAFF RECOMMENDATIONS:**

PBO recommends approval.

**ISSUES AND OPPORTUNITIES:**

N/A

**FISCAL IMPACT AND SOURCE OF FUNDING:**

There is no impact to the requirements and obligations of the existing agreement.

**REQUIRED AUTHORIZATIONS:**

Planning and Budget Office  
County Judge's Office

Leroy Nellis  
Cheryl Aker

## MEMO

**TO:           Members of the Commissioners Court**

**FROM:       Mary Etta Gerhardt**  
**Assistant County Attorney**

**DATE:       December 21, 2011**

**RE:         FRV – Collateral Assignment Agreement**

The Court is being asked to approve a collateral assignment by FRV to Wells Fargo. This approval was requested under the following provision of the original tax incentive agreement with FRV:

**12.2    Collateral Assignment by Company.** Company may assign this Agreement without the consent of County to its financing parties for the purposes of providing collateral security in connection with any financing, and County consents to the assumption of this Agreement by the financing parties or their designee in the event of a foreclosure. If the Company collaterally assigns this Agreement, then Company or its financing parties shall give County written notice of such assignment prior to such assignment (with such notice including the name and contact information of any assignees), and County shall negotiate in good faith with Company and Company's lenders to agree upon a consent to such collateral assignment, which shall be in form and substance agreed to by County, Company and Company's lenders, and shall include inter alia the following provisions: (a) the Parties shall not amend or modify this Agreement without the prior written consent of the Company's lenders (which approval shall not be unreasonably withheld, delayed or conditioned); (b) prior to exercising its right to terminate this Agreement as a result of default by Company in accordance with Section 8.1.3, County shall give notice of such default by Company to any of Company's lenders of which County has been provided written notice; (c) Company's lenders shall have the right, but not the obligation, to cure a default of the Company on behalf of Company in accordance with the provisions of this Agreement by providing written notice to the County of their intent to so cure and, upon delivery of such notice, the lenders will have ninety days (or a time period mutually agreed to in writing by the Parties) from the date of the notice from the County set forth in Section 12.3(b) to cure such default prior to the termination by the County of this Agreement in accordance with section 8.1.3; and (d) County shall make any and all payments due and owing by County under this Agreement to an account designated by Company's lenders, which payments Company agrees will fully satisfy County's payment obligations under this Agreement to the extent of such payments. For the avoidance of doubt, no consent to collateral assignment described above shall increase the financial obligations of County hereunder or decrease or change the requirements or obligations of Company or the assignee under the terms of this Agreement unless or until an amendment has been executed by all Parties. All obligations and requirements of this Agreement, including the required reporting, shall remain in full force and effect regardless of any assignment under this Section 12.2.

The agreement has been reviewed by this office and by PBO and basically sets out the arrangements should the Bank take over FRV in the event of foreclosure. The County's obligations are in no way altered, and the obligations under the agreement remain in force. The agreement is a part of the necessary paperwork for FRV to continue the securing of necessary financial assistance.

**CONSENT TO COLLATERAL AGREEMENT BETWEEN  
TRAVIS COUNTY, FRV AE SOLAR, LLC AND WELLS FARGO, NA**

This Consent to Collateral Agreement ("Collateral Agreement") is entered into between Travis County, a political subdivision of the State of Texas ("County"), FRV Solar, LLC ("FRV") and Wells Fargo, NA ("Bank"), referred to in this Agreement as the Party and/or Parties.

**RECITALS**

WHEREAS, the Parties acknowledge that County and FRV entered into a Economic Development Agreement for Property Tax Rebates dated April 19, 2011, as amended by Amendment of Agreement and Approval of Change in Ownership dated as of December \_\_, 2011 ("Agreement"); and

WHEREAS, FRV and Bank entered into the Security Agreement dated as of December \_\_, 2011 ("Security Agreement"), with Bank as Collateral Agent for the benefit of various financial institutions providing financing to FRV (collectively, the "Secured Parties").

WHEREAS, County agreed in the Agreement to consent to certain financial agreement(s), specifically assignment to financing parties for the purpose of providing collateral security in connection with financing, of FRV pursuant to the terms of the Agreement.

NOW, THEREFORE, the Parties hereby agree as follows:

**1.0 Assignment.**

1.1 County and FRV agree that, pursuant to the Agreement, FRV may assign the Agreement without County's consent to its financing parties for the purposes of providing collateral security in connection with any financing.

1.2 Pursuant to the terms of the Agreement, County consents to the assumption of the Agreement by the Bank or their designee in the event of foreclosure. In such event, the Bank or such designee will assume all responsibilities and obligations under the Agreement as if Bank or such designee were the original contracting party. In the event that Bank names a designee, Bank will notify County within fifteen (15) days providing County with the name and contact information for such designee.

1.3 Unless specifically stated in this Collateral Agreement, this acknowledgement and consent by County in no way changes the obligations of FRV to County under the Agreement, a copy of which is attached to this Collateral Agreement as Exhibit 1; and any agreements between Bank and FRV as to the subject matter of the Agreement remain subject to the terms of the Agreement. The Agreement attached to this Collateral Agreement is the full and complete Agreement between County and FRV as of the date of execution of this Collateral Agreement.

1.4 The Parties agree that, as to the performance of the day-to-day obligations under the Agreement, including construction and operations and reporting, FRV will be the responsible Party; and County will continue to look to FRV for all performance obligations unless and until notified in writing of any change. Unless and until written notice is provided as to the change in status for day-to-day obligations, FRV will be responsible for providing copies of communication under the Agreement except for any notice requirements set fort specifically in this Collateral Agreement.

1.5 County agrees that, to the best of its knowledge, FRV is currently in compliance with all terms of the Agreement.

## **2.0 County Agreement.**

2.1 Prior to exercising its right to terminate the Agreement as a result of default by FRV pursuant to the Agreement, County will give notice of such default by FRV to Bank and to any other lenders ("Lenders") as to which County has been given written notice (such notice including the name of the lender, address and contact person).

2.2 County agrees to give Bank and Lenders the right to cure any default of FRV on behalf of FRV in accordance with the provisions of the Agreement by providing written notice to County of their intent to so cure; and, upon delivery of such notice, the Bank and/or Lenders will have ninety (90) days (or a time period agreed to in writing by County, Banks and/or Lenders) from the date of the notice from County to cure, or cause to be cured, such default prior to the termination by County of the Agreement. This right to cure is a right of Banks/Lenders, and not an obligation.

2.3 Upon receipt by County of all necessary information and paperwork as required by the Travis County Auditor and agreed to by FRV and Bank, County agrees to make any and all payments due and owing to FRV by County under the Agreement to an account designated by Bank/Lenders, which payments FRV, Bank and Lenders agree will fully satisfy County's payment obligations under the Agreement to the extent of such payments. Such payments will be made to Wells Fargo, NA, as Depository Agent, to Account No. \_\_\_\_\_, ABA No. \_\_\_\_\_, or as otherwise may be designated in writing by Bank to County from time to time, and FRV hereby irrevocably consents to any and all such payments being made in such manner. All Parties agree that each payment by County to Bank of amounts due under the Agreement shall satisfy the County's corresponding payment obligation under the Agreement.

2.4 The Parties agree that the consent to assignment under this Collateral Agreement does not increase the financial obligations under the Agreement or decrease or change the requirements or other obligations under the terms of the Agreement unless or until an amendment has been executed by all interested Parties. All obligations of the Agreement, including reporting, shall remain in full force and effect regardless of this Collateral Agreement or any assignment.

2.5 County agrees that County has not assigned or pledged the Agreement to any other party and has not received any notice of any assignment relative to the right, title and interest of FRV in, to and under the Agreement other than the one addressed in this Collateral Agreement.

## **3.0 Termination.**

3.1 Notice. At any time that termination of the Agreement becomes a possibility, County will copy Bank on all relevant communication and correspondence.

3.2 Option to Cure. Bank will retain the option to respond to any such event if Bank desires to take the opportunity to cure any defect or default causing the consideration of termination.

3.3 Procedure. Bank will provide such notice and proceed under the terms as to termination as set forth in the Agreement. Any termination procedures will be as set forth in the Agreement.

3.4 **Communication.** The final obligation for communication between FRV and Bank will be that of FRV and Bank; County will make every reasonable effort to communicate all termination-related communication to both FRV and Bank throughout the process.

3.5 **Additional Agreement(s).** At any time that FRV and/or Bank cannot fulfill the obligations of the Agreement, the Parties will have the option to re-negotiate the Agreement at the sole discretion of County.

**4.0 Miscellaneous**

4.1 At any time that the obligations of FRV to Bank are completed and the lien of the Security Agreement has been released in full, FRV and Bank will deliver notice of such event to County with written confirmation of such completion and determination of status of the Agreement.

4.2 **Notice.** Notice between the Parties shall be provided pursuant to the Agreement. For the purpose of this Collateral Agreement, the contact information for the Parties shall be:

4.2.1 Bank:

4.2.2 FRV:

FRV AE Solar, LLC

Attn:

with copies to:

Attn: ]

Attn: ]

With a copy to:

4.2.3 County:

Honorable David Escamilla (or his successor in office)

Travis County Attorney

P.O. Box 1748

Austin, Texas 78767

ATTENTION: Civil Transactions

and

Cyd Grimes, Purchasing Agent (or her successor)

Travis County Purchasing

P. O. Box 1748

Austin, Texas 78767

Rodney Rhoades

County Executive, Travis County Planning and Budget

P. O. Box 1748

Austin, Texas 78767

4.3 **Counterparts.** This Collateral Agreement may be executed in one or more counterparts with the same effect as if the signatures thereto and hereto were upon the same instrument.

4.4 **Law and Venue.** This Agreement is governed by the laws of the State of Texas and all obligations under this Agreement shall be performable in the City of Austin, Texas or in Travis County, Texas. It is expressly understood that any lawsuit, litigation, or dispute arising out of or relating to this Agreement will take place in State Court in Travis County and the City of Austin. The Parties

acknowledge and agree that each Party shall be responsible for any attorneys' fees incurred by that Party relating to this Agreement.

4.5 Immunity or Defense. The Parties expressly understands and agrees that, neither the execution of this Agreement nor the conduct of any representative of County shall be considered to be a waiver of, nor shall it be deemed to have waived, any immunity or defense that would otherwise be available to it against claims arising in the exercise of its governmental powers and functions, nor shall it be considered a waiver of sovereign immunity to suit. The Parties shall have all remedies and defenses allowed by law.

IN WITNESS WHEREOF, the Parties hereto have caused their duly authorized officers to execute and deliver this Collateral Agreement as of the date indicated below:

TRAVIS COUNTY

BY: \_\_\_\_\_  
Samuel T. Biscoe, Travis County Judge  
Date: \_\_\_\_\_

WELLS FARGO, NA

BY: \_\_\_\_\_ BY: \_\_\_\_\_  
Printed Printed  
Name: \_\_\_\_\_ Name: \_\_\_\_\_  
Title: \_\_\_\_\_ Date: \_\_\_\_\_  
Date: \_\_\_\_\_

FRV AE SOLAR, LLC

BY: \_\_\_\_\_  
Printed  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_