

*Outline of MAFF's Notice regarding
Installation of Power Generating Facilities,
and Permission for Conversion of Agricultural Land Parcels*

On April 1, 2013, the Ministry of Agriculture, Forestry and Fisheries of Japan (the "MAFF") issued a notice entitled "Handling of permission system for conversion of photovoltaic facilities, etc. installed by fixation of poles on agricultural land parcels with ongoing crop production" dated March 31, 2013 (the "Notice"). The Notice clarifies that the fixation of poles for purposes of installing power generation facilities (such as photovoltaic facilities) above agricultural land parcels with ongoing crop production ("**Crop-Production Land Parcels**") requires temporary permission for conversion under the Agricultural Land Act. This newsletter sets out an outline of the Notice as well as some practical matters to be considered.

1. Background to the Notice

There have been recent new developments in technologies for the affixation of poles on Crop-Production Land Parcels for purposes of installing photovoltaic facilities on such land parcels (the "**Power Generating Facilities**"¹ and the poles affixed for purposes of installing Power Generating Facilities, "**Poles**"). Power Generating Facilities enables crop production on Crop-Production Land Parcels while simultaneously generating photovoltaic power on the same land parcels. These technologies are at the stage of being put into practical use.

A central issue is whether the installation of Power Generating Facilities on Crop-Production Land Parcels is subject to permission being obtained under the Agricultural Land Act for the conversion of the land parcels. While no concrete guidelines and notices etc have been provided by the MAFF in this respect, the MAFF seemed to have previously interpreted the Agricultural Land Act as requiring, where Poles are proposed to be affixed to Crop-Production Land Parcels for purposes of installing Power Generating Facilities, permission for the conversion ("**Conversion**") of (i) such areas of the land parcels where Poles are affixed (the "**Pole Affixation Areas**") and (ii) areas other than the Pole Affixation Areas. On the other hand, there had been cases in which persons authorized to grant such permission (such as the relevant Prefectural Governor (*Todofuken Chiji*)) (the "**Authorized Person**") did not require any permission for Conversion. Indeed, there had been instances where Power Generating Facilities had been installed on Crop-Production Land Parcels without any permission for Conversion having been obtained. This resulted in uncertainty as to whether permission for Conversion was required for the installation of Power Generating Facilities on Crop-Production Land Parcels. Accordingly, there was a need to address such uncertainty.

Under such circumstances, and the assumption that the continuation of agricultural production on the land area underlying Power Generating Facilities (the "**Underlying Agricultural Land Parcels**") is an overriding necessity, the Notice provides concrete clarification on the criteria for the handling of the permission system for Conversion.

¹ Such facilities are also called "solar sharing".

2. Outline of the Notice

The MAFF clarified in the Notice that permission for Conversion required under the Agricultural Land Act relates to Poles which are to be affixed when installing Power Generating Facilities on Crop-Production Land Parcels², and that the affixation of Poles will be subject to temporary permission for Conversion. Further details are set out as follows.

(1) Requirement, etc. of temporary permission for Conversion

An Authorized Person will require confirmation that the following requirements have been met before granting temporary permission for Conversion with regard to Poles:

- (i) the Conversion period under the application is not be more than three (3) years, and the purpose of Conversion is the affixation of Poles, based on the assumption that the appropriate continuation of crop production on Underlying Agricultural Land Parcels is an overriding necessity;
- (ii) affixed Poles are easily removable and simply structured, and land parcels under the application are within the minimum necessary size which are deemed appropriate;
- (iii) appropriate continuation of crop production on the Underlying Agricultural Land Parcels is ensured, the angles of panels and the intervals thereof, etc. of the Power Generating Facilities are designed to secure an appropriate amount of sunlight for crop cultivation, and the height of Poles and the intervals thereof etc. provides enough space for the effective utilization of machines, etc., necessary for the performance of agricultural work and crop cultivation; additionally, the area on which Power Generating Facilities are installed is not likely to adversely affect the effective utilization of the Crop-Production Land Parcels surrounding the Power Generating Facilities, and the functions, etc. of the agricultural drainage facilities.
- (iv) the applicant has sufficient financial resources and credits to remove the Power Generating Facilities (including Poles).

In addition, temporary permission for Conversion with regard to the affixation of Poles shall be subject to the applicant's performance of the following:

- (i) ensuring appropriate continuation of crop production on the Underlying Agricultural Land Parcels, and utilizing Poles to support the Power Generating Facilities which will be installed for such purposes;
- (ii) annual reporting of the status of crops produced on the Underlying Agricultural Land Parcels; additionally, confirmation has to be obtained regarding the content of such annual report from persons who have the necessary knowledge;

² Strictly speaking, the agricultural land parcels subject to the Notice are limited to (a) Agricultural Land Parcels within the Territories of Land for Agricultural Use, (b) Class A Agricultural Land Parcels, and (c) Class 1 Agricultural Land Parcels (each as defined in the notice issued by the MAFF entitled "Operation of Agricultural Land Act" dated December 11, 2009 (the "**December 11 Notice**")). Prime agricultural lands with areas of over a certain size generally fall within the scope of items (a) to (c) above. Class 2 and Class 3 Agricultural Land Parcels (as defined in the December 11 Notice) are not within the scope of the Notice. This may be because Class 2 and Class 3 Agricultural Land Parcels have been allowed to undergo Conversion for purposes of installing photovoltaic facilities thereupon when certain requirements are met.

- (iii) the taking of prompt measures for necessary improvements to Power Generating Facilities, such as ensuring that there is an appropriate amount of sunlight to facilitate the appropriate continuation of crop production on the Underlying Agricultural Land Parcels when the appropriate continuation of crop production on the Underlying Agricultural Land Parcels becomes or is expected to become difficult;
- (iv) the provision of prompt reports when (a) the appropriate continuation of crop production on Underlying Agricultural Land Parcels becomes or is expected to become difficult, (b) Power Generating Facilities are being rebuilt and (c) the power generating business conducted through the Power Generating Facilities is abolished.
- (v) prompt removal of Power Generating Facilities (including Poles) and return of the land parcels into such conditions as to be suitable for utilization as agricultural land parcels when there has been no crop production on Underlying Agricultural Land Parcels, or when the power generating business which is conducted through the Power Generating Facilities is to be abolished.

In addition, the "appropriate continuation of crop production" referred to above shall be deemed not to have been ensured in the event of any of the following:

- (i) when there has been no crop production;
- (ii) when the unit crop yields on Underlying Agricultural Land Parcels is reduced by approximately 20% or more compared to the average unit crop yields of the region in the same year;
- (iii) when it has been determined that there is material deterioration in the crops which are produced on Underlying Agricultural Land Parcels; and
- (iv) when it has been determined that it is difficult to effectively utilize machines, etc. necessary for the performance of agricultural work.

(2) Reporting after obtaining temporary permission for conversion

Under an annual reporting requirement, any person who has obtained permission for Conversion with regard to Poles (the "**Permitted Person**") is required to provide to the Authorized Person a report on the status of the crops (including information on yield amount, etc.) produced on Underlying Agricultural Land Parcels by the end of February following the year of the harvest.

Where, after temporary permission for Conversion has been obtained, it is determined that the appropriate continuation of crop production has not been ensured or is expected not to be ensured, the Authorized Person will instruct the Permitted Person to take such necessary measures to remedy the situation. In the event that the Permitted Person fails to take the necessary measures despite such instructions, resulting in the lack of crop production, or the abolition of the power generating business conducted through Power Generating Facilities, the Permitted Person will be instructed by the Authorized Person to remove the Power Generating Facilities.

(3) Newly obtaining temporary permission for conversion

A temporary permission for Conversion has a maximum term of three (3) years. Temporary permission for Conversion may be newly granted upon the expiration of a previous temporary permission after the applicant has given confirmation that the requirements of temporary

permission for Conversion continue to be met. The status of crop production on Underlying Agricultural Land Parcels during the previous term of Conversion will also be taken into account and carefully considered by an Authorized Person in his or her determination as to whether a new temporary permission for Conversion should be granted.

(4) Handling when Installer and Agricultural Producer are different

Where the person who installs the Power Generating Facilities (the "**Installer**") is not the same as the person who produces crop on the Underlying Agricultural Land Parcels (the "**Agricultural Producer**"), the permission set forth in Article 3 of the Agricultural Land Act for the establishment of superficies right (*chijouken*), as stipulated in the Article 269-2, Paragraph 1 of the Civil Code, or any other rights similar to such right are required to be obtained with regard to the Underlying Agricultural Land Parcels. Such permission is required in addition to the requirement for the obtainment of temporary permission for Conversion with regard to Poles.

Furthermore, when applying for permission for Conversion, a written document evidencing agreement regarding the burden of expenses for the removal of the Power Generating Facilities (including Poles) is required to be submitted. In principle, it is agreed that the Installer will bear such removal expenses.

3. Matters to be considered

The Notice has clarified the issue of whether or not permission for Conversion is required for the installation of Power Generating Facilities and details in relation thereto. However, the Notice contains many restrictions in relation to temporary permissions for Conversion (such as the requirement for Poles subject to temporary permissions for Conversion to be easily removable and simply structured, the limiting of the maximum term of permission to three (3) years, and other criteria in relation to crop production on the Underlying Agricultural Land Parcels). Accordingly, it is difficult to predict whether the issuance of the Notice will promote the installation of Power Generation Facilities on Crop-Production Land Parcels.

In particular, the three-(3)-year maximum term of permissions, and the requirement for new permissions to be obtained at the expiration of previous permission is likely to give rise to difficulties in massive or long term investments through loans or fund-raising exercises by third party capital subscriptions. Accordingly, the obstacles to long-term borrowings through project financing still remain.

- End -

* * * * *

*This law bulletin is published as a general service to clients and friends of Anderson Mori & Tomotsune and does not constitute legal advice.

Copyrights reserved by Anderson Mori & Tomotsune.

Contact Information:

Tomoaki Ikenaga
Partner, Chair of the Energy Practice Group
Email: tomoaki.ikenaga@amt-law.com
Telephone: +81-3-6888-1070

Eiji Kobayashi
Partner
Email: eiji.kobayashi@amt-law.com
Telephone: +81-3-6888-1096

Yoshitaka Kato
Associate
Email: yoshitaka.kato@amt-law.com
Telephone: +81-3-6888-4714