

Considerations For Negotiating Wind Project Land Agreements

Developers that understand the laws applicable to their agreements – with an eye toward future lenders and project owners – can save themselves time and money down the road.

BY KATHLEEN DOLL KAPLA & KATHERINE A. ROEK

A utility, looking to add wind projects to its renewable energy portfolio, began negotiations with a wind developer to purchase the developer's wind leases and related assets in the Midwest. Negotiations were soon stalled when the utility's due-diligence investigation revealed that the developer had entered a lease with an individual who did not have title to the land under lease. Instead, the developer had been delegated the right to enter a lease on the landowners' land.

Further complicating matters, the developer's lease agreements contained perpetual operations periods, as with oil and gas leases, and their pre-operations period was greater than allowed under state law. The royalty rent structure did not define gross revenues, and the landowners were already asserting a right to project-wide royalties. Fearing there were too many obstacles to overcome, the utility walked away from the purchase.

With increased competition among developers for prime sites, tighter laws regulating development and growing anti-wind sentiment, developers may be tempted to get an agreement in front of a landowner as soon as possible. However, these pressures are the very reasons developers should pause and consider not just their goals in signing a land agreement, but also the

legal, title and community-relations factors at play.

The primary goal of any wind project lease or easement agreement is to ensure long-term, secure and exclusive rights to develop the property for wind energy purposes. While a developer's standard form agreement may satisfy this goal immediately, it could fall short in other areas. Periodically reexamining a form agreement can help identify potential problem areas, such as the following:

- Compliance with state or local rules for construction within a designated time frame, noise levels and setbacks;

- Inconsistent time frames for due diligence, construction and other activities; and

- Fee provisions that do not add up or are inapplicable to utility operators and owners.

It is common practice by developers to include in their site agreements provisions for turbine setbacks, extended due-diligence periods and allowable noise levels, but in some instances, these and other permitting-related matters are governed strictly by state or local rules and cannot be waived or circumvented by contract.

A law limiting the development period also may prohibit landowners from waiving this limited period. A lease that provides for a longer due-

diligence period than prescribed by law will probably not supersede the state rules. Similarly, if a local development ordinance requires a 1,200-foot setback from existing residences, a lease provision that allows for a 1,000-foot setback may be invalid if the local rule does not allow for a waiver by contract. Cautious developers will work with their counsel and consultants to check local and state laws for potential inconsistencies or issues with their standard site agreement.

It is also worthwhile to ensure the payment provisions of a site agreement can be satisfied by any owner of the project. Royalty rent structures are commonly used in wind leases. However, if a utility purchases the project, royalties (in the absence of a power purchase agreement) may be difficult or impossible to calculate. If a developer foresees the possibility of future utility ownership, including an alternative rent structure based on millage, installed capacity or another structure may be valuable.

Similarly, it is always good practice to check the math on royalty and other fee structures from time to time. Some rent calculations are made more complex than necessary and, as a result, may not result in an actual dollar figure when calculated. Be sure that the percentage of gross revenues can be determined by the formula pro-

vided in the lease by running a few hypothetical calculations.

While running hypotheticals against the structure of a lease, ensure that the total term of the agreement does not violate applicable laws and that a person reviewing the term can calculate how many years the project may be in place. Some developers may be tempted to structure their leases with perpetual renewal terms or use an easement form instead of a lease to circumvent state or local term limits on lease agreements. Again, a developer may be able to negotiate such terms with a landowner, but these provisions may cause concern for financing parties, title insurers and subsequent project owners if they foresee potential disputes or challenges to the validity of the site agreement.

Occasionally, wind leases and easements become like old software that has a mediocre foundation with patches to address weak points and bugs. It is worth taking the time to review all provisions of these agreements to ensure they meet the practical and legal requirements of the project and its location.

Other considerations

In addition to the aforementioned standards, agreements such as setback waivers, noise easements and “good neighbor” agreements may be necessary or useful to the development of a project. An abstract or memorandum of each such agreement should be recorded in the county in which the property is located to provide notice of the property burdened. Depending on applicable law, which again, should always be confirmed, the terms of these agreements may be in perpetuity or have a term that coincides with the duration of the wind energy project. Special consideration should also be paid to those state or local requirements applicable to wind energy projects, as they may impact the legitimacy, scope and duration of these types of agreements.

Setback waivers. Most zoning ordinances contain provisions requiring buildings or structures to be set back a certain distance from residences

or property boundary lines. State or county regulations that specifically address wind energy facilities will have such setback requirements, which can vary greatly by state and by county.

In a setback waiver, the landowner signing the waiver is acknowledging and consenting to the structure being placed in violation of the setback requirements, such as a neighboring property where a wind turbine is to be placed close to the landowner’s property line, generally in return for a one-time payment or fee. When a developer does not plan to site a wind turbine on the neighboring property owner’s property, the neighboring property owner may still be compensated through a setback waiver agreement. With any of these agreements, it is important to evaluate the local zoning ordinance to determine whether a given setback can be waived. It is also necessary to determine whether the landowner seeking to waive the setback has the appropriate authority to do so.

Noise easements. Most zoning ordinances also contain noise restrictions, which establish a threshold level (typically measured in decibels) over which a new structure may not increase the noise that is perceptible at a residence, for example. A noise easement may be contained within a wind lease or signed by a neighboring property owner and, in return for consideration, allows the wind energy project to generate and maintain audible noise levels in excess of the specified threshold over the easement property. Certain states or counties have caps on decibel levels over which noise increases may not be waived, so particular attention should be paid to state and local regulations that limit the level of waive-able noise.

In addition, look for statutory language that may limit how a noise easement may be granted. Some states may require that an easement be “appurtenant” to certain land rather than “in gross” to a particular developer or project. For example, a developer may seek an easement from a landowner for all noise from the “Big Turbine Wind Project,” while state statutes re-

quire that the easement be specifically tailored to noise from a particular piece of property. State statutes also may restrict assignments or “subeasements” of noise easements to prevent overburdening the granting landowner. Again, what a developer may be successful in negotiating could well be different or in contradiction to what is allowed under law. A careful reading of applicable statutes and ordinances by the developer and its counsel and consultants is critical.

Good neighbor agreements. Frequently, the key to a successful wind energy project is the community’s acceptance of the project. Not every landowner, however, will be asked to enter into a wind lease for the placement of a wind turbine or other facility on his or her land. This may create an environment of competition or a feeling of unfairness by those landowners who are located within or adjacent to the footprint of the project but do not get to enjoy the financial benefits that come with a turbine lease.

A developer may offer such a landowner the opportunity to enter into a so-called “good neighbor” agreement, wherein the developer pays the landowner consideration in return for the landowner’s agreement not to challenge or otherwise interfere with the successful operation of the project. However, smaller developers may find these agreements to be financially infeasible; developers of any size may find local support of their project contingent upon successful negotiation of these agreements. Again, careful consideration of the community’s receptivity to such agreements, potential conflicts of interest and the permissibility of such agreements is important before beginning the negotiation process.

Transmission and road access agreements. A developer may need access to a landowner’s property solely for the installation and the operation and maintenance (O&M) of transmission lines and roads to facilitate the wind energy project construction and operation. In a transmission line agreement, a developer seeks to ac-

quire the property rights necessary to construct an electrical distribution system, which may include electrical lines, substations, switching facilities and O&M structures.

The scope of the property burdened by a transmission or road access agreement will generally be narrowed to only that area needed for the transmission facilities or roads rather than the entire property. Before entering into a transmission and road access agreement, it is important to evaluate any other agreements that burden the land. For example, if the property is also subject to an exclusive easement for other purposes, a waiver or consent may need to be obtained from the easement holder before entering into the transmission and road access agreement.

Emerging issues

Several states, particularly those in the Midwest, are enacting statutes and regulations that are not particularly friendly to wind development, and thus need to be on the radar of developers as they approach any of the aforementioned agreements. For example, North Dakota's statute governing wind energy property rights provides that a wind option, easement or lease is void and terminates if certain activities have not occurred

within five years of commencement of the agreement, and specifies certain provisions that must be included in every agreement. South Dakota's statute governing wind energy property rights also provides that a wind energy land agreement is void "unless development of the potential to produce energy from wind power associated with the easement has occurred within five years after the effective date of the easement."

Then there is Wisconsin, whose Public Service Commission passed siting standards that would have established some of the strictest siting standards in the country. The standards specified requirements pertaining to setbacks (which vary based on whether the building is an occupied community building, participating residence, non-participating residence or public road right-of-way), noise criteria (including the ability for a landowner to waive this criteria, such as through a noise easement) and decommissioning of the wind energy project.

However, on March 1, the day the rules were set to take effect, Wisconsin's Joint Committee for Review of Administrative Rules voted 5-2 to suspend implementation of the rules. The fight over wind siting rules in Wisconsin will likely continue at the legislature. It is increasingly important

to look for how these emerging state and local laws may impact a developer's standard land agreements and its plans for developing and operating its project.

For better or worse, a contract between a landowner and a developer cannot address every possible contingency, legal requirement or emerging issue; however, with careful consideration and understanding of new legal requirements and practical issues, it is possible to negotiate wind project land agreements that satisfy state and local laws while benefiting both the landowner and the developer.

Developers that take the time to understand the laws applicable to their agreements and consider future lenders and project owners will save themselves time and money, and can improve landowner relations down the road. Working closely with legal counsel and expert consultants can help minimize negotiation mistakes and optimize project site agreements. **SNP**

Kathleen Doll Kapla is the principal of Kapla Law PLLC, based in Seattle. She can be reached at kathleen.kapla@kaplalaw.com. Katherine A. Roek is a partner in the Minneapolis-based law firm of Lindquist & Vennum PLLP. She can be reached at kroek@lindquist.com.