

DUST IN THE WIND

LANDOWNER ISSUES TO WATCH FOR IN WIND FARM LEASES

ISBA SOLO-SMALL FIRM CONFERENCE JULY 2009

BY

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I. TYPES OF WIND ENERGY AGREEMENTS

a. Lease

- i. Usually long-term.
- ii. Must specifically reserve landowner's right to use land; otherwise lease is seen as an exclusive right (e.g., farming, hunting, mineral rights, etc.)

b. Easement

- i. Can be long-term or perpetual
- ii. Affirmative Easement – grants right to do something on the property (erect turbine, build roads, install power lines)
- iii. Negative Easement – prohibits certain actions (landowner cannot interfere with wind flow) or agree in advance not to sue over noise or light or other nuisances

- c. **MET – Meteorological Tower Agreement** – allows the Developer to erect a tower on the land to hold the anemometer (monitors and measures wind speed)

II. EFFECTS ON AGREEMENTS WITH OTHERS

a. Secured Creditors

- i. If there's a mortgage on the property, does the mortgage document prohibit this type of agreement?
 1. Mortgage may require acceleration of debt
 2. Mortgage may require all lease payments be applied to the debt
 3. The lender may need to sign off on the lease agreement
 4. Lender could claim the debt is now under-secured and require accelerated payment of the entire balance
 5. May affect ability to obtain financing in the future – lenders may balk at these agreements and the terms set forth therein after-the-fact
 6. Wind company (Developer) may need a subordination and non-disturbance agreement from the lender stating that the lender will not interfere with project
 - a. Lender will have to subordinate Landowner loan to Developer's loan on the Turbine itself

- b. Make sure if there are additional costs to prepare, review or record these documents that the Developer pays this
- b. Federal Farm Programs**
- i. Require Developer to compensate landowner if any monies lost or penalties imposed from existing (and future?) farm programs
 - ii. Don't forget about the Tenant who may have the right to all farm program monies – need to specify that the Landowner (or the Tenant if applicable) will be compensated
 - iii. Conservation Reserve Program – CRP
 - 1. Wind projects affecting up to 5 acres per CRP contract may be approved by the FSA – have to get prior approval
 - 2. If exceeds 5 acres, must get nat'l approval – will consider environmental impacts of project
 - 3. If transfer of land or regardless, Developer must obey terms of contract so must provide copy of contract to Developer. If sale, Developer must be added within 60 days of sale or risk having CRP contract terminated and all payments returned to govt
 - iv. Conservation Security Program – CSP
 - 1. Probably acceptable use of land for wind energy, but need approval from USDA
 - 2. Must notify USDA within 60 days of contract signing
 - 3. Who receives future CSP payments – landowner or Developer?
 - v. Environmental Quality Incentives Program – EQIP
 - 1. Get USDA approval whether sale or lease
 - 2. USDA may terminate contract and require landowner to repay all payments made
 - 3. May change calculation of future payments (probably a reduction)
 - 4. May want to seek approval and/or modification of EQIP contract prior to signing agreement with Developer
 - vi. Wildlife Habitat Incentive Program (WHIP)
 - 1. Contact NRCS to determine if wind project ok
 - 2. May want to modify contract with NRCS prior to signing agreement with Developer
 - vii. Farmland Protection Program (FPP)
 - 1. Get pre-approval from USDA
 - viii. Grassland Reserve Program (GRP)
 - 1. Get pre-approval from USDA
 - ix. Wetlands Reserve Program (WRP)
 - 1. Get pre-approval from NRCS
 - 2. Usually limited in time by NRCS so Developer will want to know that
 - x. Swampbuster provision of the Food Security Act
 - 1. Check with NRCS office to see if your farm qualifies – if it does, then farmer could lose eligibility for future enrollment in any farm programs
 - 2. fines
 - 3. return of past farm program payments
 - xi. Make Developer responsible for attorney's fees for reviewing all contracts, etc.

c. Income Tax

- i. Lump sum payment or payments spread out over a series of years may affect income tax liability differently
- ii. May affect depreciation schedule on tax return

d. Property Tax

- i. Property tax may increase in Iowa after first 5 years – can later increase by up to 30% (I.C. §427B.26)
- ii. Make sure Developer is responsible for all increases in tax liability attributable to the wind turbine, and all attorney fees and costs Landowner incurs to collect from Developer and/or appeal valuation on behalf of Developer
- iii. Do not let them say the lease payments are for taxes – when they have the ability to replace and upgrade equipment at any time thereby increasing value and increasing tax liability. Will require Developer to cooperate with request of separate tax statement from treasurer – one for Developer improvements and one for Landowner without Developer improvements
- iv. Does landowner have right to be notified if Developer doesn't pay taxes and can landowner pay and charge to Developer

e. Sales or Use Tax on Wind Energy Equipment

- i. Make sure Developer is solely liable and holds landowner harmless therefrom
- ii. Currently, electricity generated by wind is exempt from energy generation/sale tax, but want clause that if the law ever changes, Developer is solely liable for this tax

f. Existing Farm Leases

- i. Make sure Landowner has ability to lease to farm tenants.
- ii. All leases with farm tenant will be subject to terms of Developer agreement. Must provide copy of lease to all farm tenants. May spook future farm tenants who don't understand the lease. Farm tenant may want attorney to look at the lease and that involves extra cost to tenant and possibly landlord.

g. Agreements with Local Utilities

- i. Can landowner sign easements (e.g., rural water, neighbor re drainage tile, etc.) without prior written approval of Developer?

h. Documents for Developer's Convenience

- i. If there are additional agreements the Landowner has to sign for Developer's convenience (e.g., financing agreements), want Developer to pay attorney fees to review same. Be sure to specify payment terms (e.g., within 60 days of submission of invoice to _____(address) or 18% interest thereafter)

i. Contractors and Subcontractors

- i. Require waiver/release of mechanic's liens for real estate itself to landowner by all contractors and subs prior to beginning construction
- ii. Make all contractors and subs subject to the terms of the agreement also and Developer responsible if subs fail to abide by the agreement

III. NEGOTIATION ISSUES

a. Duration of Agreement

- i. Long-term – usually a “Development Period” (up to 10 years) with a long-term lease 40-50 years
- ii. Conditions for renewal if any

1. Automatic or renegotiated?
 2. Can Developer repower the project without need for additional approval from Landowner? (E.g., replace/upgrade turbines and equipment) – Note: this may increase the size or the design of the structure in the future and landowner may have no say.
 3. May want to limit the # of turbines placed on land and may want to limit repower ability without renegotiation
- b. Compensation
- i. If early termination by Developer – what compensation is there to the Landowner?
 - ii. General guidelines
 1. \$2500 to \$5000 per turbine per year OR
 2. \$3000 - \$4000 per MW of electricity generated per year OR
 3. 2 to 4% of the project's gross revenues
 4. Before signing should attempt to learn the investment and cash flow projections for the planned wind project
 5. Do you want to renegotiate for a higher price? Probably won't agree to it.
 6. Developer gets tax credits
 7. Developer gets governmental subsidies
 8. Developer gets revenue from selling the environmental attributes of the wind energy separate from the electricity itself (called RECs – renewable energy certificates or green tags, green certificates or tradable renewable certificates – which represent the environmental, social, and other positive attributes of renewable energy taken separately from the actual electricity produced)
 9. Should seek the right to verify with the purchasing utilities any data used to calculate payments or right to independently audit the books at specified intervals to verify payment computations
 10. Make Developer pay audit fees if there is a variation that is found that was erroneously in favor of the Developer
 11. Require Developer to provide independent audit results at Developer's expense every ____ (5, 10?) years to keep them honest?
 12. Payment Schedule
 13. What each payment is for
 14. How the payments are to be calculated
 15. Whether there are minimum guaranteed payments
 16. Whether the minimum payments are in addition to or subtracted from the other payments
 17. How and to whom payments are made
 18. Whether any option payments will be credited against any subsequent purchase, lease or easement payments if the option is exercised
 19. Will there be additional payments to landowners for the right to build improvements other than turbines on the property (e.g., substations or roads or storage facilities, etc.) - Yes
- c. Scope of Land Subject to Agreement
- i. Usually requires about 60 acres of land for each megawatt (MW) of installed capacity

- ii. About 3 acres of that 60 acres will be used for turbines, access roads and related equipment – so will be taken out of production
- iii. Verify exact amount used in writing
- iv. How many turbines per _____ # acres – minimum of 1000 feet between them
 - v. Can Landowner limit the # turbines on our farm to a maximum #?
- vi. Possible to enroll all land at the beginning and later withdraw part from the encumbrance of this agreement?
 - 1. Is there a penalty for doing so and what is that penalty?
 - 2. Is there a limit on the % or # acres that can be withdrawn later?
 - 3. Some companies allow Landowner to have approval/veto rights of final site plan
 - 4. Veto Power – Want to make sure there is no liability to the Landowner from the Developer if Landowner fails to approve final site and Developer incurs additional expense
- d. Uses of the Land by Developer
 - i. Right to cross over adjacent property to access the turbines (you may be the adjacent property)
 - 1. Landowner wants them to put the ground back to the way it was after all construction is completed if there were temporary construction damages (e.g, temporary road for construction) within a reasonable time period – remember it's ag ground and Landowner must consider ag timelines (planting/harvesting).
 - 2. Does Landowner want to limit – no road on our ground unless there's a turbine – or no roads at all – wind easement only?
 - 3. Create access roads – perhaps to a turbine located on someone else's adjacent property
 - ii. Right to run power lines to transport electricity
 - iii. Wind easement only – prohibit constructing obstacles
 - iv. Collect wind data
 - v. Conduct environmental testing
 - vi. Construct the turbines
 - vii. Can landowner construct his own turbine at any point in the future?
 - viii. Can landowner hook up his electricity to turbine and get his personal electricity for free?
 - ix. Be sure to spell out Landowner rights – including but not limited to plant, cultivate, harvest, livestock, retain gas/oil/mineral rights, hunt, enter upon and inspect property, possessory rights, right to lease farm (pasture, crop, livestock, etc.), grain bins
- e. Allocation of Liabilities
 - i. Clause requiring Developer to defend and hold landowner harmless from any claims or future loss or damage to persons or property arising from use and occupation of land
 - ii. Developer will require same from landowner re losses caused by landowner
 - iii. Is there a liquidated damages clause?
 - iv. Include provision of defense attorney and all arrangements associated therewith, attorney's fees and costs and damage awards

- v. Make Developer install and maintain security fence around turbine to protect against trespassers, children, pets, livestock? Or only if Landowner requests it in writing and then must install within ____ days as weather permits. No liability to Landowner due to trespassers – not on Landowner’s insurance – only on Developer’s insurance
- vi. Roads
 - 1. Who maintains, repairs, etc.
 - 2. To whose satisfaction
 - 3. Level of traffic in area
 - 4. What if road needs repaired and Developer doesn’t agree? Reasonable efforts and timely response, in accordance with Landowner’s satisfaction and agricultural practices and timelines
 - 5. Who can use the roads – consider large farm equipment and potential future uses of the property
 - 6. What about requirements to control noxious weeds per state and county regulations? Who pays? Who’s responsible around the roads and turbines?
- vii. Make Developer liable for any future liability for environmental impacts
- viii. Require Developer to provide insurance to protect against damages
 - 1. List landowner as a co-insured
 - 2. Developer must provide proof of insurance prior to construction and at least annually or as requested by landowner
 - 3. Give landowner notice if failure to pay premiums and opportunity to pay premiums if Developer does not – problem = \$\$\$\$
 - 4. Damage to real property – roads and compaction
 - 5. structures, fences, waterways, tiling, utilities, pipelines, etc.
 - 6. Crop damage
 - 7. personal injury
 - 8. livestock
 - 9. nuisances – sound, wind effect, light-blocking, flicker shadow, interference with tv/radio/communication reception, view-blocking, effects on wildlife, property values, safety, electromagnetic radiation (potential negative health effects)
 - 10. Court will balance usefulness of alleged nuisance against the interference with the neighboring land
 - 11. Loss of property values due to traffic, noise, above nuisances – will likely not be able to develop farm later for housing if that is a possibility
 - 12. Neighbor may want to install own turbine – small – for personal use and this turbine may impact/affect that – make sure Developer gets all necessary easements and holds landowner harmless therefrom
 - 13. environmental impacts
 - 14. business interruption
 - 15. Right to notice to landowner if dev’t fails to pay insurance – problem – landowner has right to pay on behalf of Developer but will be huge sum

- of money (usually an umbrella package for whole wind farm, not just landowner's portion of the land)
 - 16. Agreement to terminate agreement if fails to pay insurance or taxes or meet obligations of contract?
- f. Assignment of Contract Rights and Liabilities
 - i. Can either party assign contract?
 - ii. Developer always want broad rights to sublease, assign, mortgage, pledge, etc., usually without requiring landowner's consent
 - iii. Does Landowner want to require consent from landowner in certain situations?
 - 1. Allow us to investigate the qualifications of the assignee?
 - 2. Make original Developer liable if assignee fails to uphold original terms even if subcontracted out or assigned
- g. Covenants of Title
 - i. All title work will be cost and responsibility of Developer, including any clearing of defects that affect Developer only. Must be reasonable.
- h. Liens and Encumbrances
 - i. Be sure that this agreement will not restrict landowner's right to secure future credit
 - ii. Can the Developer make payments on the landowner's mortgage and apply those payments to amounts owed to landowner?
 - iii. Any subsequent sale will be subject to the wind lease
 - iv. Developer will require notice if landowner defaults on mortgage
 - v. Make sure all review of outside agreements (mortgages, security agreements, etc.) will be paid for by Developer – attorney fees
- i. Termination of the Agreement
 - i. Developer will want right to terminate at any time for any reason
 - ii. Do Landowner want to require can only terminate if good cause and what is "good cause"?
 - iii. Termination if material default of terms of agreement
 - 1. Failure to make payments as required
 - 2. Failure to develop the project or meet devt milestones within time period (e.g., siting permits, signing power purchase agreements, initiating or substantial completion of construction)
 - 3. Failure to maintain adequate insurance
 - 4. Abandonment or non-operation of turbines – may be on your property but not working so you're not getting paid according to output (miss out on profits)
 - 5. Bankruptcy or insolvency of Developer
 - 6. Non-payment of taxes
 - 7. Failure to make reasonable efforts or use due diligence in carrying out the terms of the agreement
 - 8. What is the process for termination
 - a. Formal notice
 - b. To Whom
 - c. Where
 - d. What form
 - e. Opportunity to correct the problems

- f. Time period and method of correction
- g. Time period and method of evaluating sufficiency of correction
- h. If early termination by Developer – compensation?
- j. End of Project Life and Remediation of Site
 - i. Does landowner want opportunity to purchase the existing windmill rather than requiring Developer to remove and remediate? What terms?
 - ii. What must be done to remove or remediate turbine site, roads, underground cables, cement foundations
 - iii. For ag land, common to just bring in 3 feet of dirt to cover the cement foundations
 - 1. Tiling problems
 - 2. Grading problems
 - 3. Or do you want to require entire thing be removed and land put back to original
 - want all of concrete dug out and removed at Developer’s sole expense
 - within 6 mos of termination of contract – weather permitting
 - 4. Take pictures before construction begins so can prove grading, etc. prior to
 - iv. Bonding/escrow requirements at beginning of project set aside for remediation – proof annually and notice to landowner if lapses
 - v. Make sure Developer is responsible to release agreement from recorder’s office and must pay all recording fees and attorney fees to enforce – within 60 days of termination
- k. Dispute Resolution
 - i. If Binding Arbitration required – who pays, what if unhappy with
 - ii. Consider requiring references from other Landowners
 - iii. Ask about prior projects
 - iv. Experience
 - v. Financial backing – ability to follow through on project
- l. Other Rights and Obligations of Parties
 - i. Agreement will need to be recorded – make sure it’s at Developer’s expense
 - ii. Installing and using power or telephone lines and payment of utility bills
 - iii. Installing and maintaining signs – allow? Size, location, type? Subject to landowner approval?
 - iv. Permitting Developer to give tours of the project site
 - v. Taking steps to control noise
 - vi. Providing notice to landowner prior to commencement of construction or other due diligence activities
 - vii. Employing licensed, bonded, insured subcontractors, contractors, architects, engineers
 - viii. Installing, marking and enclosing guide wires around turbines
 - ix. Installing security devices/fences
 - x. Distributing proceeds in case of condemnation – all proceeds to Landowner – no interference from Developer if abandonment or non-operational
 - xi. Complying with and obtaining necessary siting and permitting conditions – all liab on Developer only
 - xii. Do you want to spell out a procedure for modifying the agreement in the future

APPENDIX

427B.26 SPECIAL VALUATION OF WIND ENERGY CONVERSION PROPERTY.

1. a. A city council or county board of supervisors may provide by ordinance for the special valuation of wind energy conversion property as provided in subsection 2. The ordinance may be enacted not less than thirty days after a public hearing on the ordinance is held. Notice of the hearing shall be published in accordance with section 331.305 in the case of a county, or section 362.3 in the case of a city. The ordinance shall only apply to property first assessed on or after the effective date of the ordinance.

b. If in the opinion of the city council or the county board of supervisors continuation of the special valuation provided under this section ceases to be of benefit to the city or county, the city council or the county board of supervisors may repeal the ordinance authorized by this subsection. Property specially valued under this section prior to repeal of the ordinance shall continue to be valued under this section until the end of the nineteenth assessment year following the assessment year in which the property was first assessed.

2. In lieu of the valuation and assessment provisions in section 441.21, subsection 8, paragraphs "b" and "c", and sections 428.24 to 428.29, wind energy conversion property which is first assessed for property taxation on or after January 1, 1994, and on or after the effective date of the ordinance enacted pursuant to subsection 1, shall be valued by the local assessor for property tax purposes as follows:

a. For the first assessment year, at zero percent of the net acquisition cost.

b. For the second through sixth assessment years, at a percent of the net acquisition cost which rate increases by five percentage points each assessment year.

c. For the seventh and succeeding assessment years, at thirty percent of the net acquisition cost.

3. The taxpayer shall file with the local assessor by February 1 of the assessment year in which the wind energy conversion property is first assessed for property tax purposes, a declaration of intent to have the property assessed at the value determined under this section in lieu of the valuation and assessment provisions in section 441.21, subsection 8, paragraphs "b" and "c", and sections 428.24 to 428.29.

4. For purposes of this section:

a. "Net acquisition cost" means the acquired cost of the property including all foundations and installation cost less any excess cost adjustment.

b. "Wind energy conversion property" means the entire wind plant including, but not limited to, a wind charger, windmill, wind turbine, toLandownerr and electrical equipment, pad mount transformers,

poLandownerr lines, and substation.