

Wind power installations in the United States in 2008 were the largest on record, breaking the previous record set just one year earlier. Roughly 8,000 megawatts (MW) of new wind power capacity was added in the United States in 2008, bringing the total at the end of the year to 25,170 MW. This additional wind power capacity converts into approximately \$17 billion invested in the U.S. economy. Federal tax incentives, including the production tax credit set to expire in 2012, environmental concerns, and uncertainty about the future of other energy sources have helped to encourage this growth. The economic stimulus bill passed in February 2009 should further accelerate growth in the wind energy field, because several components in this legislation provide benefits to renewable energy (which encompasses wind energy) projects, including an extension of the wind energy production tax credit, a grant program through the Treasury Department for developers of renewable energy, a loan guarantee program for manufacturers and developers through the Energy Department, and a tax credit for certain energy manufacturers. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

This growth in the wind industry presents opportunities for attorneys, particularly for those who have a real estate practice. Landowners need legal counsel to review the leases or easements presented to the landowner by the wind project developer. Wind project developers need legal counsel for real estate matters, including resolving zoning and permitting issues, preparing landowner documents (such as easements or leases), determining ownership and legal descriptions, and addressing exceptions to title. This article focuses on the agreements entered into by the landowner and the developer that allow the developer to use the landowner's real property for a wind project.

Types of Agreements

Well-tailored landowner documents share some common attributes. Landowner documents must address the developer's concerns that the wind project can be

Kathleen K. Law is a 2008–10 RPTE Fellow and a member of the Des Moines, Iowa, office of Nyemaster Goode, P.C.



WIND POWER

Developing Real Property for a Wind Project

By Kathleen K. Law

Reprinted with permission from *Probate & Property* July/August 2009 (American Bar Association)
Copyright © 2009 American Bar Association

developed, permitted, constructed, marketed, sold, and operated in a profitable and timely fashion. In addition, the documents must address landowner concerns about how the land will be used by the developer, including among other concerns the effect the wind project will have on the landowner's and neighbors' quality of life, whether the payment terms are fair and sustainable for the term of the agreement, and what will happen in the event of bankruptcy or failure of the wind project. The attitude of both the developer and the landowner must be one of cooperation to make sure that the documents address the needs of both parties, or the wind project

Many developers enter into a separate option agreement with the landowner for a wind project before entering into the easement agreement.

may not be built. Specific terms in landowner agreements tend to vary based on the type, use, and value of the real property. For example, in places such as Iowa, with a high percentage of valuable land on which row crops such as corn or soybeans are grown, drainage tiles and crop loss compensation might be the landowner's greatest concern. In other areas of the country, cattle guards and fire protection may be the greatest concern.

There are generally two types of legal agreements by which developers obtain from landowners access to the landowner's land and wind resources: leases and easements. A lease conveys the exclusive right to possess certain property for a certain time period and under certain circumstances. An easement conveys narrow rights to use part of a landowner's property rights. Although leases and easements secure dissimilar types of property rights and contain different terms and obligations,

in the wind industry, the terms "lease" and "easement" are used without much precision and interchangeably, which can create confusion. In recent years the easement has become the standard agreement for landowner documents in the wind industry, so this article will discuss common provisions found in wind farm easement agreements; however, the comments apply equally to lease agreements.

Property Affected

Some easement agreements provide that the "easement area" is all land owned by the landowner. Others define the "easement area" as only the land needed for the various wind farm improvements, such as turbines, collection lines, and access roads. A better approach is to initially include in the "easement area" all land owned by the landowner (at this point the developer probably is not certain where the turbines and other improvements will be placed), with the landowner reserving the right to amend the definition later. When the wind farm improvements have been placed, the parties amend the easement agreement to narrow the "easement area" to only the areas on which wind farm improvements are located and to show the location of such areas. The developer, however, should retain a wind non-obstruction easement over all of the landowner's property.

Location of Turbines

The easement agreement should include a provision identifying which party decides where the turbines will be located. One approach is to allow the developer to choose the turbine sites in its sole discretion. Other easement agreements allow the landowner to have input or even require the landowner's approval for the placement of the turbines. The latter is usually a better approach. Turbine placement can greatly affect the landowner's farm operations or other use of its property; therefore, landowners should be hesitant to sign an easement agreement in which the landowner has no control over where the turbines are located. Even if the developer gets to decide

where the turbines are located, the parties may want to include a provision stating that, where reasonably possible, the developer will place the turbines in the location that will have the least effect on the landowner's current use of its property.

Option/Evaluation Period

Many developers enter into a separate option agreement with the landowner for a wind project before entering into the easement agreement. An option obligates the landowner to enter into an easement agreement if the developer chooses to exercise its option but gives the developer time to gather options on enough land to construct the wind project before binding itself to actual easement agreements with the landowners. In the alternative, some developers include an option or evaluation period in the easement document itself.

No matter which approach is taken, the option period must be long enough to allow the developer to gather the necessary land, develop a site plan, obtain necessary permits and zoning approvals, and attend to other pre-construction matters. It cannot be so long, however, that it deters the landowner from entering into the option (or the easement agreement if the option period is included in the easement agreement itself). Some states have statutes that limit the length of the option period. See, e.g., S.D. Codified Laws § 43-13-17 (easement is void if development has not begun within five years of when easement was created); Minn. Stat. § 500.30 (option terminates seven years after it was created if the wind energy project has not commenced by then). Agreements may also include an option to renew for an additional term or terms.

The option or easement agreement must let persons other than the developer enter onto the real property to survey, conduct soil borings, erect meteorological (met) towers, and to complete other tasks necessary for the developer to determine whether it can successfully develop the wind project. Although the landowner should be compensated for the option period, the

landowner's focus should remain on the long-term compensation received under the easement agreement and the time needed by the developer to evaluate whether the project will or will not be built. Some agreements provide for a one-time payment to the landowner for the entire option period; others provide for several payments over the term of the option, usually annually.

Term

The easement's term must be long enough for the developer to recover its costs and make a profit. The projected lifespan of most wind projects is around 30 years. Most easement agreements are for an initial term of 25 to 30 years, although some easement agreements have an initial term of 50 years. Many easement agreements also provide for one or more extension terms, typically around 10 years each.

The drafter of the easement agreement should be aware that some states have laws limiting easement terms. In South Dakota, for example, an easement term is limited to 50 years. S.D. Codified Laws § 43-13-17. In jurisdictions without such limitations, however, landowners may be reluctant to tie up their land with an easement that will outlive the landowner and bind future generations.

Types of Easements

Easement agreements typically grant several types of easement rights. The most common types of easements are the following:

Turbine Site—This easement covers the area in which the wind turbine and its foundation are located. The turbine site easement also can include access roads, crane pads, and parking areas.

Access—This easement is for vehicular and pedestrian ingress to and egress from wind farm improvements, either located on the landowner's property or an adjacent site.

Collection Facilities—This easement is for the construction, operation, maintenance, replacement, relocation, and removal of collection facilities. These collection facilities may include the substation, batteries, underground cables and wires, and other equipment that

is used to connect the wind turbines to transmission lines attached to the grid.

Overhang—This easement gives the developer the right to allow the blades of wind turbines on adjacent properties to overhang the landowner's property.

Construction—This easement is for constructing, maintaining, repairing, replacing, and removing the wind improvements, whether such improvements are located on or off the landowner's property.

Wind Non-obstruction—This easement grants the developer an exclusive right to use, maintain, and capture the flow of wind currents over the landowner's property. It prohibits a landowner from doing anything on its property that would interfere with wind speed or direction over any wind turbine site or meteorological tower located in the project. It is very important to the developer that nothing disturb the wind flow through the wind project because interference with wind flow may affect the performance of the wind turbines. The developer can enter into wind non-obstruction easement agreements with landowners who have no wind improvements on their properties. These easement agreements would not contain the other easements described in this article.

Noise—This easement gives the developer the right to generate and maintain audible noise levels up to a stated decibel level on the landowner's property. Even though wind turbines do not make much noise—the noise level of a rotating wind turbine has been described as approximately the same as a running refrigerator—it is important to the developer that the landowner expressly permit the wind turbines to operate at a minimum noise level.

Shadow—This easement grants the developer the right to cast shadows of the wind turbine towers, rotors,

and meteorological towers onto the landowner's property. The easement agreement also can require the developer to take reasonable measures, such as planting trees, if shadows or the "flicker" of light created by turbine operations negatively affect the landowner.

Collection Line—This easement allows the developer to construct, operate, maintain, replace, and remove underground and aboveground electrical collection lines, telecommunication



lines, and related lines, poles, and appurtenances that connect the collection facilities to the substation.

Meteorological Tower Site—Certain properties within the wind project can include a meteorological tower that measures wind speed. This easement would apply to those properties.

Compensation

Easement agreements generally place all costs associated with the project's development on the developer so that payments are "net" to the landowner. The drafter or reviewer of the easement agreement should approach document review from that perspective.

For example, are taxes and damages going to be paid by the developer or landowner? Does the payment scheme have holes or flaws?

Many easement agreements compensate the landowner on a per megawatt (MW), per year basis. For example, if the easement provides that the landowner will receive \$4,000 per MW per year, and if the MW number is based on the turbine's nameplate capacity, then a two MW turbine placed on the landowner's property will generate to the landowner \$8,000 each year. This approach seems to work well and be equitable for both the developer and the landowner because, first, the



developer may not know the size of the turbine at the time it enters into the easement agreement; and second, larger turbines must be placed further apart than smaller turbines. In addition to this per MW payment, easement agreements may provide for payment to the landowner for the various easements (for example, a flat fee per foot of collection lines, per acre for access easements, and so on). Some easement agreements, in lieu of a per MW payment, give the landowner a percentage of gross revenues. Other easement agreements give the landowner a combination of the above.

Most easement agreements provide for an escalation in payments over the lease term, based on a certain consumer price index published by the U.S. Bureau of Labor Statistics, a

flat percentage increase, or another formula. The payments can escalate on an annual basis or on another schedule, such as every five years during the easement term. Because the term of the easement agreement can be 30 years or longer, it is unlikely a landowner would agree to sign an easement agreement if some type of escalator is not included.

If the payments are, in whole or in part, based on gross revenues, the easement agreement should contain a precise definition of gross revenue. Likewise, if the easement payments begin at the commencement of construction or commercial operations, the easement agreement should contain a precise definition of when commencement of construction or commercial operations occurs.

The landowner should be reimbursed if the landowner incurs penalties or becomes subject to reimbursement obligations resulting from the land being removed from the federal conservation reserve program. The landowner also should consult with a tax advisor to make certain that the payment structure does not trigger any adverse tax consequences. For example, if the easement agreement contains perpetual easements, the landowner should obtain tax advice to determine whether for income tax purposes the easement may be considered a sale of land.

Crop Damage or Compaction

Many wind projects are placed on agricultural land, which means that during construction of the wind improvements, it is possible that the landowner will lose all or part of its crop. The developer should explain the construction process to the landowner and not downplay the effect construction might have on the landowner's property. Most easement agreements contain a section regarding crop damage payments. Under the easement agreement, a landowner should not be able to collect more than one crop damage payment per growing season. Some easement agreements include an extra payment to the landowner if significant compaction occurs during construction. The easement agreement

should state precisely how crop damages will be calculated. For example, how will the parties determine what the crop yield might have been if the crops had not been destroyed during construction? This expected yield could be determined by taking the average of the landowner's last three crops. In addition, what price will be used? Some easement agreements use Chicago Board of Trade prices on one or more specific dates, or the price for the crop at the local grain elevator on one or more dates. The easement agreement should provide that, if the landowner and developer cannot agree on the extent of the crop damage, an extension agent or crop adjuster agreeable to both parties will make the determination.

Right to Mortgage or Convey

Most easement agreements allow the developer to mortgage, collateralize, assign, or otherwise encumber the developer's interest without the landowner's consent. In addition, the developer usually has the right to sell, assign, lease, or convey its interest in the easement agreement without the landowner's consent. Without this ability, the developer would likely not be able to finance or sell the wind project. The easement agreement also should give the developer's mortgagee the right, but not the obligation, to cure a default of the developer.

Tax Credits

A condition precedent of developer's obligations under the easement agreement may be the availability of federal production tax credits. Without these tax credits, many wind projects would not be feasible. In addition, most easement agreements provide that if the developer or any tax credit investor in the wind project becomes ineligible for any tax benefit, credit, or incentive, the parties will amend the easement document or replace it with a new easement agreement so that the developer and tax credit investor are eligible for the applicable credit or incentive.

Insurance

Under the easement agreement, the developer typically is required to provide

liability insurance insuring both the developer and landowner against loss caused by the developer's use of the property. Some easement agreements require the developer to provide a certain level of worker's compensation insurance, automobile liability insurance, or other types of insurance.

Removal of Improvements at the End of the Term

Most easement agreements require the developer to remove all wind improvements to a certain depth (typically 48 inches) and within a certain period (around 12 months) after the easement term ends or the easement agreement is terminated. If the developer fails to remove the wind improvements within this time frame, the landowner should be entitled to remove the wind improvements at the developer's expense, less salvage value. In addition, the developer should be required to file a quitclaim deed transferring all of the developer's interest in the property to the landowner. If the developer fails to timely file the quitclaim deed, the landowner should be entitled to file an owner's affidavit of termination of the easement agreement, with adequate notice to the developer of the filing; and if the developer does not file an objection in the public records within a certain time frame, the easement agreement should provide that the owner's affidavit has the same effect as if the developer had filed the quitclaim deed.

Some easement agreements require the developer to post a bond or provide for other security, such as a cash deposit in a local bank, in an amount necessary to pay for the removal of the wind improvements if the developer is unable to pay for removal itself. Posting of the bond can be required at the beginning of the easement term or after several years of the term have passed. Generally, the best time to require a bond to be posted or other security to be given is around years 15–20 of the wind project. Before this time, the turbines are new and have a high salvage or resale value. In addition, by approximately year 13 or 14 the financing is usually paid off, freeing up cash for a removal security deposit to be posted around year 15.

By year 20, the risk that the equipment might break is greater, so a bond or security deposit should be in place before that time.

Property Tax Increases

Normally easement agreements provide that the developer pays any increase in property taxes directly attributable to the wind improvements or a reclassification of the property. The landowner is generally required to submit the tax bill to the developer on receipt so that the developer has time to pay the property taxes on or before the due date.

Zoning and Permitting

The easement document normally requires the landowner to cooperate with the developer in complying with or obtaining zoning and land use approvals and permits, environmental impact reviews, building permits, and other approvals or permits necessary to construct and operate the wind project. In some cases the landowner is required to execute applications for such approvals. In others the developer acts as the landowner's agent and the developer will sign the approvals on the landowner's behalf.

Most Favorable Terms Clause

Wind farm projects involve numerous landowners, so the easement agreement should include a "most favorable terms" clause. This gives early-signing landowners comfort that holdouts or those who sign later will not receive more favorable treatment from the developer than the early-signing landowner received. If such a clause is inserted into the easement agreement, the developer should make certain that its personnel who work with the landowners are relatively sophisticated and understand the easement agreement to avoid problems. Certain situations, however, may provide the developer with good reason to change, delete, or add a term to the easement agreement for a particular landowner. If so, the developer will need to go back and offer the changes to those landowners who have already signed the easement document. If a landowner does not

want to accept the changes, the developer should have the landowner sign a document stating that the changes were offered to the landowner, but the landowner refused. Because this process is time-consuming, the developer should provide a draft of the easement agreement to several or all of the landowners so that the landowners can provide the draft to their legal counsel for review. This step allows the developer to address the landowners' concerns and to provide an easement document that the landowners will sign. Because each landowner will likely have a different number of wind farm improvements (or none) on its property, this most favorable terms clause should clarify that it is not intended to mean that each landowner will receive the same total compensation.

Title Issues

Before entering into an easement agreement, title work must be done to determine the ownership, legal description, and exceptions to title. The easement agreement will provide that the landowner must notify the developer of all liens and other exceptions to title except those disclosed by the public record. If the land is used for agricultural purposes, one of these unrecorded exceptions to title can be a farm lease. If so, the landowner should provide to the developer adequate information about the tenancy so that the developer can draft and obtain a nondisturbance agreement from the tenant. In addition, the landowner should be required to cooperate with the developer to obtain nondisturbance agreements from each lienholder and to cooperate with the developer to cure other exceptions to title.

Conclusion

Drafting easement agreements for a wind project developer or reviewing easement agreements for landowners can provide interesting and challenging work for a real estate attorney. Because wind energy continues to be a growing industry throughout the United States, there should be many opportunities for those interested in pursuing this type of work. ■