

Wind Farm Legal Issues

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Key Question – Is Your Client’s Property a Potential Target for a Wind Farm?

- Constant 11-13 mph wind speed
- Proximity to existing transmission lines
- No endangered species, high bird activity, or highly valued aesthetics
 - Might be possible to mitigate bird problems
- Local community and political support

Crafting an Equitable Agreement

- Always evaluate the agreement with an eye toward the risk faced by the landowner.
 - Environmental concerns
 - Issues that could be raised by neighbors
 - Nuisance
 - Zoning issues; set-back requirements

Wind Energy Development

- Primary Issues
 - Landowner must stay abreast of liability issues
 - Trespassers
 - Third party usage
 - Environmental/aesthetic issues
 - Nuisance

Industrial Wind Farms

- The next generation of nuisance lawsuits?
 - Nuisance defined – an unreasonable interference with another person's use and enjoyment of their property
 - Private – must be substantial and unreasonable
 - Public – involves an interference with public health, safety, comfort, convenience, or is illegal

Recent Case Law

- *Burch v. Nedpower Mount Storm, LLC*, 320 W. Va. 443, 647 S.E.2d 879 (2007)
 - Wind farm with 200 wind turbines in close proximity to residential property could constitute a nuisance
 - Homeowners had sued to permanently enjoin construction and operation
 - Noise, eyesore, flicker and strobe effect of light reflecting from blades, potential danger from broken blades, ice throws, reduced property values

Burch v. Nedpower Mount Storm, LLC

- Additional findings of the Court:
 - Even though State Public Service Commission approved the facility, such approval did not abrogate the common law of nuisance
 - Wind farm not a nuisance per se, but could become a nuisance
 - Thus, plaintiffs' claims were sufficient to prospectively enjoin a nuisance
 - Plaintiffs can adduce sufficient evidence to prove their allegations in an effort to abate the nuisance

Recent Case Law

- November 2007- VT Board of Civil Authority ruled that a wind turbine reduced the value of adjacent property by 10 percent
 - Evidence showed turbine within 300 feet of petitioner's home
 - Noise, blinking lights, glare from blades, vibrations

Setback Requirements

- Supreme Court NY:
 - Approved minimum setback requirements for wind turbine placement away from residences, public roads, and other properties not containing wind turbines
 - Court says that the setback requirement was not a de facto unconstitutional taking under NY Constitution
 - There was an appropriate rationale including environmental concerns

Public Opposition to Large-Scale Wind Farms

- *Porter v. Gentry County Commission*
 - Sued the county commission which approved the construction of large-scale wind farm adjacent to his property
 - Landowner claimed physical attack by county commissioner
 - Claimed wind turbines were a nuisance
 - Turbines causing a “strobe-light” effect, loud, loss of equity and marketability of home
 - Case pending in Federal district court

Crafting an Equitable Agreement

- What are the developer’s intentions concerning the use of the land?
 - Construction clause should limit construction phase to 3-4 years (with compensation to landowner for loss of property usage during this time)
 - Note: The necessary construction time is shortening with developments in technology. As such, the construction clause could be shortened.

Legal Issues During the Development Phase

- Lawsuits and claims related to developer's actions
 - This becomes a contractual issue
 - Independent contractor/employee analysis
 - Control issue

Limiting Liability Exposure

- Dealing with potential liability via the contract – the development phase
 - A landowner must be careful to expressly limit their potential tort liability
 - Written provision- not liable for negligence of others with respect to the wind generation operation
- Insurance
 - Landowner should ensure that liability insurance is in place

Wind Energy Development

- Primary Issues
 - What is the developer's intent?
 - Have they developed wind farms elsewhere?
 - Is financing in place? The typical investment is at least \$100 million

Assignment Issues

- Does the developer intend to assign the agreement?
 - If so, who are the potential assignees?
 - In the event of assignment, it is not acceptable for the landowner to have no recourse against either the parent company or the developer where the landowner has no right to object to the assignment

The Development Phase

- A shorter term is generally preferred (3 years as opposed to 5 or 6 years)
 - Include a release provision after the first three years whereby operator releases landowner from the exclusivity provision if a similar or better offer comes along
 - Note: Allowing the operator to “sit” on the property for 6 years with no commitment to develop the wind resource could be used as a blocking maneuver with the landowner paying the price

The Development Phase

- Does the developer want to develop the land or simply use a portion of the surface for a term of years?
- Is a set number of turbines guaranteed to be constructed by a certain date
 - If not, will developer guarantee a minimum amount of payments?
 - What about a CPI adjustment?

Crafting an Equitable Agreement

- Insert clause language requiring removal of all improvements the developer makes upon termination of the agreement
- On a related note:
 - May need a “good faith” negotiation clause with respect to the location on the property where the facilities will be placed so as to minimize the impact on existing farming operations

Issues/Questions

- Are payments based on revenues generated by the turbines?
 - Can you get information on how owner’s revenue will be calculated?
 - Fixed rate per Kw or MW may be the way to go

Issues/Questions

- Can the developer sell/transfer without landowner consent any of the land use rights obtained under the agreement?
 - If so, will original developer remain liable if the new developer or holder of the easement right does not pay the landowner or otherwise defaults?

Legal Issues for Landowners

- What events allow the developer to terminate the agreement?
 - Anytime without cause?
 - Can I go to court? Binding arbitration?
 - Do I have any termination rights? If so, how do I exercise those rights?
 - What happens to the structures upon termination?
 - Who pays for removal?
 - How soon do they have to be removed?
 - How are payments due under the agreement to be handled?

Issues/Questions

- Upon termination, what happens to the structures and facilities erected on the property?
 - What must the developer remove?
 - Who pays for the removal?

Wind Energy Development

- Site selection is the key to development and the avoidance of legal problems in the future:
 - Windy (based on windy days and velocity)
 - Near transmission lines
 - Access to roads
 - Few environmental concerns
 - FCC must establish safeguards to prevent migratory birds from dying in collisions with telecommunication towers along the Gulf Coast.
American Bird Conservancy, Inc, et al. v. FCC, No. 06-1165, 2008 U.S. App. LEXIS 3437 (D.C. Cir. Feb. 19, 2008)
 - Community support – zoning, use permits, etc.

Other Legal Issues Associated with Industrial Wind Farms

- High-pressure tactics
 - Manufacturing phase and landowner agreements
- Fraudulent conduct
- Interference with airport radar
- Contract rescission
- Net metering
- Wind “theft”

Contract Rescission

- *Boyle, et al. v. McGlynn, 814 N.Y.S. 2d 312 (2006)*
 - NY- plaintiff bought defendant’s farm and residence
 - Sought to have sale contract rescinded based on seller’s alleged fraud and misrepresentations for not disclosing plans for large-scale wind farm nearby
 - Seller claimed that he had no duty to plaintiff and cited doctrine of caveat emptor as a complete defense
 - Summary judgment for seller denied

Federal Farm Program Payments

- Important to understand the impact for farmers when negotiating wind energy agreements
 - Consult local FSA - will farmer lose benefits or suffer penalties?
 - If farmer is participating in direct and counter-cyclical payment program- prohibition on making nonagricultural use of acreage enrolled

Wind Farms on CRP Land?

- Wind turbines can be placed on CRP land, but...
 - USDA has veto authority:
 - USDA may approve the project only if the project is “consistent with the conservation of soil, water quality, and wildlife habitat”
 - Consequences for violating the contract
 - Who pays?

Crafting an Equitable Agreement

- Will the agreement cause any USDA program violation?
 - If so, include clause language requiring developer to indemnify landowner for any lost government payments or imposition of any penalties
 - Draft broadly here – refer to USDA (and its agencies) administered programs

Legal Issues for Landowners

- Fundamental principle: A landowner should never sign a wind energy agreement without first having the agreement reviewed by legal counsel
 - These are long term agreements
 - Numerous terms require negotiation to produce a fairer agreement

What are the Issues?/Questions to Ask

- Area of land impacted
- Length of time property usage impacted
- Are payments adequate for property rights given up?
 - Inflation factor - \$4,000/1.5 MW turbine may no longer be adequate

The Payment Issue

- There often is a material disparity between the rate for a 1.5 MW unit and a 2.5 MW unit
 - Why not a fixed rate per Kw or MW regardless of the size of the unit?

The Payment Issue

- If lump-sum payment is paid up-front, is it a fair amount?
- Tax consequences of payments (state and federal)
 - Unofficial IRS position is that “turbine payments” are also subject to self-employment tax

Note on Real Estate Taxes

- Best to have real estate taxes billed directly to the operator
 - Better administration if County Treasurer billed the amount attributable to the operator’s improvements to the operator

Negotiating a Wind Energy Agreement

- Common problem:
 - Once proposed and submitted to landowner, the energy company tends to not want to negotiate changes to the agreement's terms
 - Does landowner have meaningful options?
 - Does landowner have legal representation?

Crafting an Equitable Agreement

- Is the proposal a lease or an easement?
 - Lease should probably be at least 20 years, but doesn't need to exceed 30 years
 - Is there a right of renewal?
 - Is renegotiation possible?
 - Avoid perpetual leases (may violate rule against perpetuities)

Crafting an Equitable Agreement

- If easement is involved, what does it include?
 - Turbine sites?
 - Substations?
 - Air space?
 - Buffer areas?
 - Vegetation restrictions?
 - Building restrictions?
 - Transmissions?
 - Associated rights-of-way

Crafting an Equitable Agreement

- Is a sale of the land contemplated?
 - How is the selling price computed?
 - FMV + wind energy value

Crafting an Equitable Agreement

- What is the amount of compensation to be paid?
 - How is “gross revenue” defined?
 - Is it a flat amount annually, an annual payment per tower, a percent of gross proceeds, based on KW hours generated annually, selling price of MW per year?
 - Is an inflationary factor built in?
- What is the compensation structure?
 - Payment timing
 - Payment frequency
 - Payment for loss of crop cultivation
 - Take care in defining “crop” and “cultivation”

Crafting an Equitable Agreement

- How much land is covered?
 - Think small – negotiate larger for additional payment

Crafting an Equitable Agreement

- If the agreement is assignable, clause should be inserted that ensures the original developer's liability if the assignee defaults

Crafting an Equitable Agreement

- Is landowner willing to consent to mortgagee of the developer?
 - If so, language should be included that limits the landowner's obligations to the mortgagee.

Crafting an Equitable Agreement

- Include an indemnification clause that indemnifies the landowner for any liability incurred as a result of permissive activities on the property
 - Crop tenants
 - Custom harvesters
 - Subsurface tenants

Crafting an Equitable Agreement

- What are the landowner's rights concerning usage of the property?
 - Farming
 - Hunting
 - Recreational activities (e.g., agri-tourism)
- Insert language that requires landowner to be treated as favorably as neighbors executing similar agreements
 - Take care in defining "neighbor"

Crafting an Equitable Agreement

- Require that the agreement be recorded (not just a memorandum of the agreement) to eliminate the necessity of having to locate a copy of the lease in the event of sale or mortgage of the property

Crafting an Equitable Agreement

- From a landowner's viewpoint, it is not advisable to agree to a confidentiality clause concerning the terms and conditions of the agreement

Crafting an Equitable Agreement

- Have the agreement reviewed by the landowner's insurance agent for analysis of any additional risks created by the wind energy project

Zoning Ordinances, Building Codes and Land Use

- Few ordinances pertain specifically to wind systems
 - Generally few or no codes that restrict the use of a wind turbine
 - Federal regulations exist concerning structure height within 10 miles of an airport
- Note – typically, local officials are not well versed in wind energy production and development issues

Wind Farm Economics

- Farmers typically receive \$3k-6k per year for each turbine in Iowa (depending on location, size of turbine). Although, prices are rising as competition expands.
- The land taken out of production for a turbine (pads, access road and ancillary equipment) reduces income for corn farmers by about \$165/turbine
 - USDA estimates – projected revenue (2008-2009) for corn is \$846/acre; projected expenses of \$513/acre; net income of \$333/acre

Wind Energy Contract Provisions

- Term of years – life of turbines
- Surface rights – ingress/egress
- Transmission rights
- Land use restrictions
 - Hunting?
 - Pasture burning?
- Compensation
- Assignability – critical for financing
 - Insert clause that ensures the original developer's liability if assignee defaults under the terms of the agreement

Legal Issues for Landowners

- How much of the land is subject to the agreement?
- Length of agreement
- Am I compensated fairly for the property rights I have given up?
 - Understand the economics and mechanics of wind energy production (Do the research!)
- Tax consequences of wind energy payments (subject to Congressional whim (and that of state legislators, too))
- Is payment based on wind energy production? Is it a fixed amount?

Wind Energy Agreements

- Have an insurance agent review the agreement
 - Landowner faces potential liability if their property poses any threat to the general public. Issues to be dealt with in the contract:
 - Wind turbine throwing a blade
 - Tower collapsing onto neighboring property
 - Set-back requirements
 - Attractive nuisance issues (safety fence?)
 - Ice accumulation on blades which is then thrown when blade starts turning

Liability and Insurance

- Homeowner policies
 - Many can be extended to protect against liability brought about by damage or injury caused by a wind turbine
 - Wind turbine can be protected by insurance coverage against damage as a result of fire, lightning, ice or theft
- Comprehensive farm liability policy

Risk Evaluation for Landowners

- Long term (20-30 years)
- Evaluation of developer
- Evaluation of operator
- Project ownership and control will change
- Worst-case scenarios (e.g., tornados)
- Energy market changes
 - Note – Numerous ethanol plants are now in bankruptcy
 - What if the tax subsidies are scaled back or end?
 - The issue is largely political

Risk Evaluation for Landowners

- Unrealistic expectations
- Environmental issues
- Siting, zoning, permitting
- Family and neighbor acceptance

Environmental Concerns

- Aesthetics
 - Viewscape, viewshed, scenic byways
 - Flicker from blades
 - Usually not a problem over ½ mile away
 - FAA lighting requirements (blinking light)
 - FAA restrictions if located close to airport
 - Noise issues (usually not objectionable)
 - For residences over ½ mile away, noise is usually not a problem
 - County zoning, conditional use permits
 - Note: Wabaunsee Co. Kansas has banned large-scale wind farm development (the ban has been upheld judicially)

Wind Farming in General

- Potential for economic benefit for rural landowners
- All agreements must be evaluated carefully by legal counsel
 - Attempt to negotiate any unfavorable terms

Wind Farming – Concluding Thoughts

- Each project should comply with local level review and a cost/benefit analysis that is required of other industrial-scale development
- A site-specific assessment is necessary if the area is environmentally sensitive
- Reliability of wind energy is problematic, and it is not competitive with fossil fuels without subsidy

Thank You!

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