



The **COST** of a PUFF

DAVID BONE follows up his survey of the growth industry that is wind farming with an outline of the key features of the legal agreements involved in developing a wind farm site

In the first part of this article (July Journal, page 26) I assessed the outlook for the wind farm industry in Scotland and commented on opportunities for lawyers with specialist legal and industry expertise. In this second part, I will provide some guidance for landowners and their solicitors on the main terms of the deal that a developer will wish to negotiate in order to secure rights over land which shows promise as a potential wind farm site.

Having identified land as a possible development opportunity, generally what the

developer will next want to do is put up an anemometry mast so he can obtain some trial windspeed readings from the site. He may also want to check points which might cause difficulties at planning (or indeed be a planning requirement): for instance, carry out a bird breeding survey. Ideally he will not want to spend much time or money on this without tying the owner into some form of agreement. Hence a developer's normal way of proceeding is to try and sign an option agreement with the landowner which gives him an

exclusive right to deal with him for a certain period – which might be anywhere between about two and six years. That allows the developer to move to an agreed form of lease if he can obtain a planning permission for the site during this period. An owner should not rush to tie himself into a project that has little chance of being developed, so he should listen carefully to the developer's assessment of the site, find out about his track record in developing projects and take professional advice at an early stage.

If the owner does decide to enter into an agreement, here are some of the key clauses he needs to look out for:

Option period

The developer will usually take an option for an initial period and will then wish a right to extend this, at his option, in certain circumstances. These might include an application for planning permission not yet being determined, an appeal against refusal of planning not yet being determined, or planning having been obtained but a grid connection still awaited. From the owner's point of



view, while all of these may be valid reasons for the developer being entitled to extend, he may wish an ultimate longstop date or may wish evidence of progress during the option period.

Option payment

The developer will expect to pay something upfront to the owner for signing the agreement and tying himself in through the exclusivity period. This may only be a few thousand pounds, but nevertheless the owner will wish to negotiate what he can and also ensure that, if the option is extended, a further payment is received.

Fees

The owner will wish legal advice on the agreement, may well wish a land agent's advice and, if there is any forestry which may have to be cut back to allow sufficient wind flow,

the owner may need separate advice on this. The owner would be well advised to use professionals with a proven record in these areas (who may not necessarily be the same people who help him with other aspects of his land or estate), because these agreements are not straightforward and there is limited market information on the commercial terms that might be appropriate. The good news, however, is that subject to the owner ultimately signing the agreement (otherwise he should beware the costs he is incurring), the developer will usually meet the owner's reasonable fees as an incentive for him to sign up.

Option area

Although any wind turbines situated on the land will each themselves just stand on concrete bases, which are not too large, the developer will also need cables (usually underground) running between the turbines, plus access tracks between each turbine, space for an electricity substation building and construction compound and, in addition, control over areas around the turbines to ensure the wind resource is not affected by any building or planting. The actual option area can therefore extend to many hectares. What the owner will want to ensure, however, is that he does not lose the use of all of this area – apart from during construction periods, sheep and cattle can generally graze around turbines without any problem and shooting rights can still be exercised provided care is taken, so reservations can be built in for these uses. Any growing of forestry which the developer permits will, however, have to be well away from the wind farm area.

The owner also needs to be aware that the developer will require a head lease of the various areas so, if there is an agricultural tenancy in place, the developer will be looking for the owner to resume the relevant areas of land.

Access

This tends to be something an owner either has or does not have, but be aware that the quality and width of an access route required to allow lorries or cranes with heavy turbines to climb up hills is often considerably greater than that

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required for other activities. Therefore if the owner does not own or have rights over an access route which can be widened and upgraded to the required standard, the developer will be relying on securing such rights from an adjoining owner to make his scheme viable.

Development/disturbance sum

The landowner should also seek a payment on the developer entering onto the site to commence construction. At that point, a lease of perhaps 25 years will already have been signed and substantial works of development and construction (often taking at least nine months) will be about to start, which will restrict the landowner's use of the site. Rent beyond any fixed sum is dependent on wind speed (which is intermittent), so the owner should seek a development sum to provide him with some certainty as to part of his income.

Rent

If the developer proceeds with the site and obtains a planning consent, then he will usually move from an option to a formal lease under which he will pay rent. Unlike a lease of land or a shop, where so much might be paid per acre or square foot rent, rent in a wind farm lease is generally calculated by reference to the amount of electricity exported from the site. This may often be subject to a minimum or base rent. There are, however, many variants on this and the date from which rent commences, so it is essential to obtain good advice on the developer's proposed payment clause. If the wind farm extends across more than one owner's land, the developer usually shares rent across the site as a whole, so that

peaks and troughs of electricity exported from individual turbines are ironed out.

Restoration

Finally, the lease may last for 25 years and what the owner does not want to find is that the developer has run into financial difficulty during the period, stopped generating and left the owner with turbines which the planners wish removed. Ensure, therefore that an adequate restoration bond or account is put in place at the outset of the lease and reviewed regularly to cover these costs. Since restoration is usually covered by the planners in a section 75 agreement, the owner should also be aware that the developer will be looking to bind him into entering into such an agreement.

There are obviously many more clauses in wind farm agreements which need to be carefully considered, but in the space available only the most important have been highlighted. If you do have a client with land which he thinks might be suitable for a wind farm, or a developer approaches your client out of the blue, hopefully this article has at least helped prepare you.

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