LEGAL CONSIDERATIONS WITH ENERGY LEASES

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Remember:

This is still not legal advice!
OVERVIEW
Overview

• Energy leases are legal agreements that are going to impact you and your property

• Need to understand how terms could impact you
Overview

• What are common terms?

• Typical agreements

• Length of agreement

• Who all needs to be involved?

• Common Clauses

• Federal and State Laws that could impact
COMMON TERMS

What’s needed from the landowner?
Energy Lease Terms

• **Short version**: the ability to access the wind, convert it to electricity, and send the electricity off-site.

• Usually accomplished via series of easements coupled with an overlying lease.

Slide courtesy of Shannon Ferrell of OK State
Energy Lease Terms

- **Access**: An easement allowing the developer to travel across the property to reach the turbine/solar areas.

- **Construction**: Often tied to access easement. Gives access for construction of turbines/solar panels and support systems.

- **Transmission**: Gives access for transmission lines (underground and overhead) between turbines, substation, and transmission lines.
  - Similar use can be said for solar panels.
Energy Lease Terms

• **“Non-obstruction”:** You agree not to engage in any activity that interferes with wind speed or direction.
  • The same can be said for not obstruction of sunlight for solar

• **Overhang:** You agree to allow turbine blades to overhang your property, even if turbines are on adjoining property.
  • In most cases, solar panels will cease any other use of the particular land it is built

• **Noise:** Allows for noise from operations up to a certain level (usually measured in decibels [dB]), often within a specific radius.
  • Not the case for solar, does not typically generate sound

Slide courtesy of Shannon Ferrell of OK State
LENGTH OF AGREEMENT

How Long Will The lease Run?
How Long Will The Lease Run?

• *Industry average is 20 to 50 years.*

• Useful life of many **wind turbines** is 20 years, so want the lease to run at least as long as the useful life of the turbines.

• The majority of manufacturers offer the 25-year standard **solar panel** warranty, which means that power output should not be less than 80% of rated power after **25 years**.
How Long Will The Lease Run?

• Look out for **automatic extensions** contained in the lease
  • These can hidden and not always easy to spot on your own (good reason to get legal representation)

• **Example**, early wind lease agreements in Oklahoma contained automatic extensions and options that would extend an agreement for 150 years.
  • As one author noted to put 150 years in perspective: *If the agreement had been signed around the start of the Civil War in 1860 the lease would have finally expired in 2010.*
How Long Will The Lease Run?

- Landowner will want to be comfortable with the amount of time that the lease will run

- Need to realize that could be tying up land for not only your lifetime but children’s lifetime.
  - Are you all comfortable with turbines/solar panels being on the property?
  - Do the restrictions that come with turbines work with yours and your children/heirs’ goals?
  - Update estate plan to include lease (prevent surprises!)
  - COMMUNICATE with heirs
How Long Will The Lease Run?

Could also affect sale of land

- Lease may include whether or not project terminates with the sale of the land or transfers to new owner with sale of land

- Typically the latter
HOW DO YOU OWN YOUR PROPERTY
Property Ownership

1. Fee Simple (or fee simple absolute)

2. Life Estates

3. Tenancy in Commons

4. Joint Tenancy (Joint Tenancy with Rights of Survivorship)

5. Tenancy by the Entirety
Why is ownership important?

- Who all is going to need to be a party to the transaction

- Is the property “heir” property?
  - Are we dealing with multiple tenants in common
EASEMENTS & ENCUMBRANCES
Conservation Easements

• Do you have an existing conservation easement on the property?

• Check with the easement documents to see if development allowed.

• May need written permission.
Other Encumbrances

- Is land encumbered in other ways:
  - Mortgage
  - Easements

- Do these restrict your right to sign lease?
Other Encumbrances

• Example:

• Landowner has mortgaged property. Energy company may require lender holding mortgage to sign off that lease takes priority over mortgage.

• Why?

• Energy company wants to be sure that if Landowner does not pay mortgage that the lease takes priority over future buyers in a foreclosure sale
COMMON CLAUSES

Just tell me what they mean!
Common Clauses

- Confidentiality Clause
- Duration Clause
- Rent Clause
- Royalty Clause
- Assignment Clause
- Liability Clauses

- Tax Clauses
- Future Use Of The Land Clause
- Insurance Clause
- Termination Clause
- Remediation Clause
Common Clauses

Confidentiality Clause

• Some contracts include a confidentiality clause to prevent parties being offered a contract from discussing the terms of the contract with other parties being offered a contract.

• Could be narrow or broad
  • Limited to data collected during the option period
  • Could include ENTIRE agreement (all periods and all information)
Common Clauses

Duration Clause

• Typically split in to two periods of time
  • **One** component is a contract to lease the wind/solar development rights for some fixed length of me time
    • 3-5 years and excludes other companies from developing on land
  • **The second** component is the contract for the actual tower and related development, such as access roads.
    • 15-20 years and allows developer to earn back investment (actual energy being generated and sold)

• Watch for AUTOMATIC extensions
  • May want the ability to negotiate before lease extension
How will you be compensated?

Rent and Royalty Clauses: Questions To Ask

- What are your payments for easements?
  - One-time, up-front, or periodic?
  - What unit is used?
- What are your lease payments?
  - Per turbine, per acre, per megawatt, or a “royalty?”
  - Definitions matter!
    - What is included?
    - What is excluded?
    - What can be deducted?
- How will accuracy be verified?

Slide courtesy of Shannon Ferrell of OK State
Rent and Royalty Clauses

WIND TURBINES

• Reports indicate most companies are paying $4,000 to $6,000 annually per megawatt of tower capacity for fixed-compensation packages.

• **For royalty-compensation** packages, 3 percent to 5 percent of gross revenue from electricity sales is common, including renewable certificates.

• Talk to experts in your area to ensure you get what is fair for your market

https://www.ag.ndsu.edu/pubs/agecon/market/ec1394.pdf
Rent and Royalty Clauses

SOLAR PANELS

- Usually set as dollar per acre, **not in royalties**

- Commonly, the price offered is lower in the development phase and higher during the operations phase.

- This makes sense as there should be income generated during the operations period, while this is not true during the development phase.
Common Clauses

Assignment Clause

• Developer can retain the right to assign the lease, sublease the lease or convey the agreement to another party.

• This may be done with or without your consent depending on language in contract
Common Clauses

Liability and Insurance Clauses

• Provision requiring both parties to defend and hold the other harmless from claims arising on the various activities on the land.
  • EX: a wind turbine collapsed on to a neighboring landowners property and destroyed a barn then landowner would want to be held blameless in any claim neighbor would have against wind company

• This is why requiring insurance coverage levels is a good thing
Common Clauses

Tax Clause

• Value of property may increase due to facilities being built.
  • Want to make sure the lease specifies who is responsible for the increases in taxes

• Status of tax liability could change
  • Check with your local assessment office

http://dat.maryland.gov/realproperty/Pages/Maryland-Assessment-Offices.aspx
Common Clauses

Future Use Of The Land Clause

• What rights will you be allowing the wind/solar company in the way of future development?

• Would want to include language in the lease that specifically limits what the developer can do
  • Such as limited to constructing X number of turbines/solar panels, X number of substations, and transmission lines

• Developer may also want to look at limiting the height of structures, or amount of land used, that you or future owners can build upon. They will want to insure that wind patterns/sun access on the property remain relatively unchanged.
Common Clauses

Termination Clause

- Want to consider language that defines when the landowner will have the right to terminate the agreement.
  - Will it be when rent payments and/or royalty payments are so many months behind?
  - When would you want the right to terminate the agreement?

- Will also want to clearly define the times when the wind company can terminate the agreement

- Both parties want to know what causes the agreement to terminate and don’t want to place too much power in one party over another party.
Common Clauses

Remediation Clause

• Most leases include a “remediation clause” or requirement the developer return the land to its original state
  • What the land was before the energy project was built

• Consider taking “before” pictures rather than relying on statements of what the land looked like before the project was instated
FEDERAL AND STATE LAWS
Federal Law

• Will participation impact USDA program eligibility?
  • Environmental Quality Incentives Program (EQIP)?
  • Conservation Reserve Program (CRP)?
  • USDA loan programs?
State Law

• Biggest state law impact on these operations will be state tort law, specifically the tort of nuisance

• A nuisance is an activity or conduct that unreasonably interferes with a neighbor’s use of their property. Falls in two classes:
  • Private nuisance – you only interfere with another’s use of their property
  • Public nuisance – you interfere with the public’s interest in property
Nuisance

Potential nuisance claims with wind farm:

• Noise and vibrations from the turbine blades
• Shadow flicker
• Ice throws
• Blade shear
• Turbine collapse

Potential nuisance claims with solar farms

• Reflected sunlight* (neighboring landowner)

*Theory stated by legal commentators
State Law Claims

• Landowner does not have right to sunlight unobstructed from adjoining lands

• This could change if neighboring land also leased to solar company
Zoning Moratoriums

• What are they?
  • a zoning mechanism used to suspend the right of property owners to obtain development approvals for a temporary period of time while zoning officials study a particular issue and recommend the adoption of new laws or standards to deal with this issue

• Not limited to alternative energy projects
• Triggered when there are no laws/regulations surrounding a new issue
• Gives the local government time to develop legal standards to cover a new issue
• Must be limited to ONLY the issue being researched
WRAP-UP
Wrap-up

• Take away point is:

• Do your due diligence on the company and the lease

• Have reviewed by a competent attorney
Wrap-up

• Understand how lease will benefit you and impact you

• Will potentially be tying up your land for years, want to understand how it will operate
Wrap-up

• Resources available:
  • Maryland Secretary of State, [http://www.sos.state.md.us/](http://www.sos.state.md.us/)
  • Maryland State Bar Association Ag Law Section Directory, [http://go.umd.edu/LegalDirectory](http://go.umd.edu/LegalDirectory)
THANKS!
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