Let Your Light Shine Even When the Wind Blows: Special Real Property Considerations in Renewable Energy Projects

By Karen M.T. Nashiwa, Spencer Davis, Olufunke Leroy, and Darnella J. Ward

Karen M.T. Nashiwa is deputy general counsel of Triple Oak Power LLC in Portland, Oregon, focusing on wind energy project development. Spencer Davis is an associate at Mercer Thompson LLC whose practice is focused principally on representing both regulated and non-regulated electric power companies in their development, acquisition, and sale, and ownership and operation of wind, solar, battery storage, natural gas, transmission, biomass, and other energy projects. Olufunke Leroy is a real estate attorney based in the Philadelphia office of Holland & Knight, where she handles all aspects of commercial real estate transactions, including the acquisition, disposition, leasing, development, and financing of commercial real estate. Darnella J. Ward serves as Vice President and Commercial Underwriter for Chicago Title National Commercial Services in Seattle, where she brings a wealth of knowledge and experience to Seattle's Chicago Title Commercial Services operation.

As renewable energy becomes more popular and accessible, so do the regulations and requirements for owning, purchasing, or leasing energy projects. This article discusses the real property considerations in the purchase, ownership, and leasing of certain renewable energy projects.

Real Property Considerations in Purchasing and Selling Renewable Project Projects

Renewable project purchases are generally completed via a purchase and sale agreement in the form of a membership interest purchase agreement (MIPA) or an asset purchase agreement (APA). The purchase and sale agreement governs terms of the transaction, the liabilities of the parties, and guides the diligence process. The type of renewable project being developed, the stage of construction of the project, and the deal structure will determine the real estate diligence performed and the risks taken on by each party.

Preliminary Real Property Considerations in Project Purchases and Sales

Three preliminary real property considerations for purchase and sale agreements for renewable projects are (1) the type of renewable facility; (2) the stage of development, and (3) the structure of the deal.

Type of Renewable Facility: Wind vs. Solar or Battery Storage

Wind project facilities tend to cover more land and are more spread out than solar projects. The volume of real estate documents to obtain as a developer or review as a buyer will be greater than with solar projects. Additionally, there are normally more landowners involved in a wind project. Because the facilities are more spread out, the likelihood of each title encumbrance affecting the project is lower; however, some such encumbrances inevitably will affect the project and the location of the encumbered property in the project can make the encumbrance more or less significant. Third-party subsurface rights are a concern near turbines and the substation but are less of a concern overall than on a solar project.

Regarding solar and battery storage projects, the majority of the project will be condensed into and continuous over one area, which means that each encumbrance on the property has a greater chance of adversely affecting the project. Third-party subsurface rights are also more of a concern and more difficult to obtain title coverage for. Normally, you are dealing with only one or a small number of landowners for a solar project compared to a wind project.

Development Stage: Preliminary Planning, Construction, and Post-construction

In the preliminary planning stage, not much work has been done by the current developer, so it is likely that less real estate information will be shared between a buyer and seller than in a typical real estate transaction, and the seller will be less willing to provide representations and warranties as to the sufficiency of real property rights to successfully develop the project. The seller will also most likely be less

willing to pursue title curatives.

When entering the construction phase, a buyer will want to know that the project has all of the real property rights necessary to successfully develop and operate the project. A seller may be required to pursue title curatives to get the buyer comfortable that the real property rights are not encumbered in a way that could negatively affect the project. Title curatives are often pursued throughout the construction phase, so it is likely that a seller would expect the buyer to take on some responsibility for pursuing title curatives if the purchase was completed prior to construction.

In the post-construction stage, the buyer is paying a premium for a completed project, so it will typically expect to be reassured that all property rights are sufficient for the successful operation of the project. Usually, all major title encumbrances will need to be cured prior to closing.

Deal Structure: Asset Purchase Agreement vs. Membership Interest Purchase Agreement
In an APA, the seller assigns all of the project assets to the buyer. Because all of the assets of the project will be assigned to the buyer at closing, it is important to analyze the assignment provisions in the site control agreements to make sure that the agreements are assignable and that the parties are complying with the assignment provisions. It is also important for the parties to negotiate which pre-closing liabilities will be assumed by the buyer or retained by the seller. Typically, the seller retains rent and other amounts due to the landowner before closing, and the buyer assumes liabilities under the site control agreements from and after closing.

In an MIPA, the seller sells its membership interests in the project company to the buyer. Because the membership interests in the project company are being sold, the parties are not as concerned with assignment language in the site control agreements unless such language restricts an upstream change in ownership. If a title policy is being obtained at closing, then the buyer will want to make sure that it is not imputed with the knowledge of the project company (really, the seller) as it relates to title matters. Title companies normally are willing to issue a non-imputation endorsement if certain requirements are met.

Real Estate Deliverables
The purchase and sale agreement will provide for the delivery of real estate documentation from the seller to the buyer. The seller will want to balance giving the buyer enough time to review real property information so that the buyer can become comfortable with the project against having an ongoing diligence process that delays closing, all while ensuring that the seller provides all the information required under the agreement so that the seller does not breach a covenant, representation, or warranty.

Before closing, the buyer will review the terms of each site control agreement to evaluate risks to the project and will confirm that the correct person or entity has signed such site control agreement. The buyer will also evaluate title exceptions. The seller and buyer will decide who is responsible for curing title issues and which title issues need to be addressed. If the survey is prepared prior to construction, it will normally include the project plans overlaid on the property so that each party can evaluate different title risks. For example, if there is a third-party restrictive easement that was recorded before the project's site control agreement and the preliminary survey shows that a project collection line from a wind turbine runs through the easement area, the project likely will need to obtain a crossing agreement with the third-party easement holder; however, even if there is a third-party restrictive easement on the property, if the preliminary survey (please note that this will need to be confirmed on the final As-Built Survey) does not show any project facilities crossing over the easement area, then no title curative action is needed.

At closing, the seller will likely be required to deliver a title policy to the buyer unless the project is still

in the preliminary stages of development. The extent of title coverage provided at closing is negotiated between the parties. If the sale is closing at or after commercial operation of the project, the seller normally will provide the buyer with an as-built survey showing the final locations of the facilities so that the buyer can perform diligence based on the final facilities rather than the planned facilities. Additionally, closing estoppels are usually circulated to each landowner with whom the project has entered into a site control agreement to confirm that the agreement is in full force and effect and that there are no breaches or defaults to landowner's knowledge, among other things, and then delivered to the buyer within a certain period to closing.

Real Estate Representations and Warranties

The purchase and sale agreement will also contain certain real estate representations and warranties.

Total Real Property Interests Being Conveyed. The buyer will want all site control agreements and all property to be added to a schedule to the purchase and sale agreement. If the purchase agreement is an MIPA, then the buyer will want the seller to make a representation that there is no other property owned by the project company. If the purchase and sale agreement is an APA, then the buyer will want the seller to confirm no other property will be assigned to the buyer. This representation is valuable to a buyer so that the buyer can confirm the entire universe of real property rights it is obtaining and confirm that there are no additional real property liabilities that it is taking on.

Sufficiency of Real Property Interests. The buyer typically will want the seller to make a representation that the property rights being conveyed consist of all property rights necessary to construct, maintain, interconnect, and operate the project. As discussed above, depending on the stage of development, the seller may have good cause to push back on this representation. The seller may also request that the buyer rely on its diligence if it is providing all relevant real property information.

Valid Interest; Only Permitted Liens; No Breach. The buyer will normally request that the seller make a representation that the project company has a valid interest in the property, free and clear of all liens other than permitted liens, and that each agreement is in full force and effect without an existing breach or default. This is another way for the buyer to ensure that it is not walking into an unknown liability. The definition of permitted liens is normally heavily negotiated. The earlier in the development process, the more leverage the buyer has to request that the seller cure the title issues.

Delivery of Documents. The buyer will want the seller to make a representation that true and complete copies of any real property documentation have been provided and that all real property documentation has been provided so that the buyer can confirm that its diligence was based on complete and accurate information.

Wind and Solar Leases and Easements

A wind or solar lease is essentially a specialized ground lease. Apart from usual ground lease considerations, there are special considerations with wind and solar leases.

Onshore Wind and Solar

The first step with onshore wind and solar leases is to check the applicable regulations. For example, South Dakota has special statutory requirements for wind and solar leases and easements. *See* S.D. Codified Laws §§ 43-13-16 through 43-13-20.5. Operations must occur within five years after the effective date of the agreement, and there is a maximum term of 50 years. *See id.* §43-13-17. Tracking the dates of agreements and the construction schedule is very important for developers. The lessee would not want to begin construction on a project four and a half years into a lease only to be hit with supply

chain woes, necessitating negotiating with a lessor for a new lease, often at considerable expense—not to mention what such a replacement lease may mean for priority in the land and title insurance considerations.

Like all other leases and easements, onshore wind and solar leases should be clear on the use of the property. What is allowed for lessors and grantors? What is allowed for lessees and grantees? Because solar panels and solar projects take up most of the surface area, it is not feasible to have shared use of the land during a project's operations term. Additionally, fences are often installed around solar panels, so access to the panels is limited to the project operation. Wind is different. Farmers can, and often do, use the area around wind turbines and other facilities for cattle grazing and farming. Because of the shared-use nature of wind projects, the respective rights and obligations of each party should be clearly set forth. For both wind and solar, the parties may wish to coordinate so that the lessor will not be left with inaccessible property.

Like any construction project, there are applicable setback requirements with which wind and solar projects need to comply. For example, Meade County, South Dakota, requires that wind turbines be set back from the nearest nonparticipating property line by at least 1,000 feet, whereas the setback requirement for a participating property line is two times the turbine height. *See* Meade Cnty., S.D., Wind Energy Conversion System Ordinance 32, art. III, sec. 3(A)(1), (2). Developers often include a setback waiver provision in leases and easements to have flexibility but should strive to comply with all applicable zoning and permitting regulations.

Wind and solar projects may affect neighboring landowners in different ways. For example, wind projects can lead to noise, flickering, and wake issues; solar panels may cause glare; and both projects may cause unpleasant dirt and inconvenience during construction. To encourage support of such projects, developers may enter into agreements where neighboring landowners agree to give an effects easement to the developer. Such neighbor agreements can also prevent litigation.

The events in *John Wendell Woods v. Fayette County Zoning Board of Adjustment*, 913 N.W.2d 275 (Table) (Iowa Ct. App. 2018), illustrate the importance of permitting and good neighborly relations. In 2018, neighboring residents in the City of Fairbank, Fayette County, Iowa, opposing a three-turbine project successfully forced the developer to take down the erected turbines. The developer applied to the Fayette County Board of Adjustment for a special-use permit to construct the turbines, but the board denied the application. While contesting the denial, the zoning administrator requested an opinion from the county attorney as to whether a special-use permit was required. The county attorney opined that a special-use permit was not required, and the zoning administrator approved the developer's applications for zoning compliance. The City of Fairbank and neighboring residents to the turbine property then commenced appeal and litigation. The issue worked its way through administrative review and courts, ending at the appellate level after the state supreme court declined to review the case.

Taxes tend to be an issue of great interest for landowners and developers alike. Mainly, whose responsibility is it to pay which taxes, and when does such obligation kick in? Developers generally will agree to pay for any increases in property taxes associated with their projects. Therefore, if the property loses its lower-rate agricultural classification and is classified as industrial land, the developer will pay for the difference in tax and any associated penalties. In light of this, it is always good to know from the outset what, if any, such taxes and penalties would likely be and for developers to consider them as part of a project's financial modeling. Because solar projects use up so much of the land, solar landowners tend to negotiate for the payment of all property taxes. Developers may agree to pay all taxes or argue that those are the landowner's responsibility because landowners would need to pay for those taxes regardless of

whether landowners leased the property. Finally, as a drafting tip, be sure to address notice requirements for tax statements, have either party pay for the taxes (no one wants to deal with tax foreclosure), and account for reimbursement or offset.

What happens at the end of the project? No landowner wants wind turbines and solar panels left on its property at the end of an energy project. Therefore, standard lease provisions regarding restoration of the surface of the land to a reasonably similar condition should be inserted. So should a timeframe—a year to two years—for decommissioning the project and removing facilities. Many localities require a sort of decommissioning security—a bond, letter of credit, or other types of security—securing payment of decommissioning costs for project facilities. If such decommissioning security is not required, it is nevertheless common practice to have a lease provision obligating the developer to have such security during the operations term of the project. Although a landowner may want such security to be in place by the start of operations, the longer a developer has to post security, the longer such funds are tied up. Therefore, developers will often push that requirement out and tie it to the end of the project's associated power purchase agreement or 20 years after operations begin.

Offshore Wind

Leasing and easement considerations are a bit different with offshore wind projects. Instead of negotiating and securing leases and easements with multiple lessors or grantors, a developer will need to secure such agreements with a handful of counterparties. Because the turbines are in the ocean instead of land, the Bureau of Ocean Energy Management (BOEM) and the state are the lessors. State waters generally extend from zero to three nautical miles off the state's coastline, with the exception that they extend to nine miles for Texas, Puerto Rico, and Florida's Gulf Coast. Federal waters extend from the state water boundary to 200 nautical miles off the coastline. Compared with an onshore project, there may be more lead time needed for counterparty review and public comment.

BOEM awards offshore wind leases via an auction, similar to oil and gas leases on federal land. First, BOEM identifies the area and publishes the information. Then, if there's interest, BOEM conducts an auction for the leasehold rights. The auction winner has the exclusive right to seek BOEM approval to develop the leasehold. BOEM needs to approve the developer's site assessment plan before the developer may conduct site assessment activities and move forward with design and construction. Negotiation of the terms is limited since BOEM basically sets the terms. The BOEM lease includes the right to run a cable to landfall.

Once the transmission cables reach the shore, the wind project is much like an onshore project where rights are needed across land to lay cable and interconnection. Depending on the location, a lease or easement would be required with the county or city at the point of landfall until private land.

Title Considerations for Renewable Energy Projects

Developing and constructing an energy project requires the developer of the energy interest to own or control the land in some fashion and have an insurable interest in the land where the project is to be established. Typically, energy projects are not constructed or developed by the fee owner of the underlying land. Thus, for a title company to provide a title policy, an insurable interest must be established. The most recognizable means to establish an insurable interest in the land for the energy project is to create an easement or lease interest in the parcel or parcels of land where the proposed site is to be placed. Therefore, title considerations should be addressed when planning the site to minimize the risk of loss or damage due to the lack of an insurable interest in the land. Indeed, if the title to the project site fails during or after construction or the energy developer has a loss or a need to defend against a claim related to title issue, the development and operation of the energy project could be impaired.

As such, in addition to all the other investigations and due diligence conducted in procuring and choosing a project location and its feasibility, a complete and accurate title search and examination of land and public records are a must for considering and finalizing the project.

Further, the purchase of a policy of title insurance that reflects the investment in the project real estate and improvements and the quantifiable loss is advisable as an attempt to protect those interests, outlay of capital, and expenditures. To provide title policy coverage, along with the other due diligence, a survey of the project land that evidences plottable (and non-plottable) easements, interests, encumbrances, improvements and buildings, fences, etc.; setbacks both recorded and in the zoning records; and physical features important to the location, construction, and operation of the project (and the proposed site plan for pending projects) is also an important and essential instrument in the title assessment.

This discussion illuminates certain points an energy developer, purchaser, investor, or lender should consider in minimizing the risk of loss arising out of a failure of or defect in title to land, and to effectively shift the risk and the expense to an insurance policy.

RFP (Request for Proposal)

Typically, the developer issues a request for proposal that outlines the parameters of the project, including, but not limited to, the amounts of the policies, coverages and endorsements, the timing for the title work, commitment and pricing for searches, out-of-pockets, and premiums based on the estimated amounts of the policies.

Title Work, Underwriting, and Curative Efforts

Once the developer accepts the proposal, the project is underway, with title searches culminating in commitments. The commitment outlines conditions and potential curative issues that must be satisfied and underwritten to provide coverages under the final policy. It is important for the developer to provide as much detail as possible and information from the seller's due diligence war room to assist with the title search and underwriting and curative process. In addition, survey due diligence, permitting, and zoning issues should be underway, as well as the information relevant to underwriting issues and coverages provided through the primary policy and endorsements.

The pro forma policy should be compiled sooner rather than later to give the scope and "example" of what the actual policy should look like. This will include the standard policy, extended coverage, and endorsement coverages.

The ALTA 36 series of endorsements are promulgated specifically for energy projects (e.g., wind farms, solar farms, traditional electricity-generating facilities, etc.). Such projects may include leaseholds and easements and fee interests. This series of endorsements insures against loss or damage for insured fee estates, leasehold estates, and easement interests used to create rights in the land for some or all the energy project improvements. These endorsements provide specific coverage and modify the policy terms and conditions.

ALTA Endorsements 36-06, 36.1-06, 36.2-06, 36.3-06, 36.7-06, and 36.8-06 provide similar coverage. These endorsements mirror and include elements of the ALTA Endorsements 13-06 (Leasehold—Owner's), 13.1-06 (Leasehold—Loan), and 31-06 (Severable Improvements). ALTA 36-06 and ALTA 36.1-06 insure against loss or damage within title policies for an easement or an easement and a lease. ALTA 36-06 is designed for use with or attachment to an owner's policy; ALTA 36.1-06 is designed for use with or attachment to a loan policy. ALTA 36.2-06 and ALTA 36.3-06 insure against loss or damage within title policies as to a lease, but not an easement. ALTA 36.2-06 is designed for use with or attachment to an

owner's policy; ALTA 36.3-06 is designed for a loan policy. ALTA 36.7-06 and ALTA 36.8-06 insure against loss or damage within title policies as to a fee estate. ALTA 36.7-06 is designed for use with or attachment to an owner's policy; ALTA 36.8-06 is designed for use with or attachment to a loan policy.

Information Needed to Underwrite the Pro Forma Policies

There are certain requirements to underwrite the pro forma policy, including authority from the lessor and lessee, underwriting estate and probate issues, heirships, etc., along with authority for general partnerships, individuals (including powers of attorney), limited liability companies, limited partnerships, and limited liability partnerships, trusts, and corporations. Additional requirements include estoppels as they relate to easement and leases; owner's affidavits to provide extended coverage and address off-record and inchoate lien rights and interests; satisfaction of mortgages and SNDAs reflected in the policy; and any other requirements dictated by the commitment. Additionally, the survey and zoning information are needed to issue and consider endorsements and coverages. Moreover, additional affidavits and underwriting requirements will be required if non-imputation coverage or mezzanine coverage is needed. Finally, if there is any work commenced on the project before or during closings, the mechanic's lien underwriting will be a consideration.

Closing and Issuance of the Policy

If all the issues are addressed as underwritten, then the closing will entail only payment of the invoice or settlement statement along with the recording of documents necessary to establish the desired insurable interest in the easements or leases for the land. If not, then the above issues will prevent, or need to be dealt with before, closing.

Conclusion

Renewable energy developers should always be aware of what stage the project is in and the necessary procedures to follow at each stage. Attorneys should inform their clients about the difficulties and challenges they might face at each stage and adequately advise them to gather the appropriate documents they can early in the process. Moreover, attorneys should advise their clients of the various regulations and restrictions they might encounter at the federal, state, and local levels.