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Top 10 Issues to Ensure Your Renewable Energy Lease is Financeable

Karen Lessick and Krystle Campa

Karen Lessick
Vice President & Deputy General Counsel, Legal
Invenergy LLC
Chicago, IL
Klessick@invenergy.com
312.429.2544

Krystle Campa
Shareholder
Fredrikson and Byron, P.A.
Des Moines, IA
kcampa@fredlaw.com
515.242.8910

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By: Karen Lessick, Invenergy LLC and Krystle Campa, Fredrikson and Byron, P.A.

Whether you are developing, negotiating or reviewing a form renewable energy lease or easement, there are important site control considerations relating to financing that could have a great impact on the success of the project. While each renewable energy project being financed will have its own set of nuanced concerns, this note highlights ten general issues lenders will carefully evaluate prior to closing on a financing transaction to lend funds to a developer for construction of a renewable energy project. This is not meant to be a comprehensive list, however, being mindful of these common issues and addressing them early in the site acquisition and curative stages may help streamline the real estate due diligence process when working together with lender parties to achieve financial closing on a project.

CONSIDERATIONS FOR SPECIFIC SITE CONTROL AGREEMENT PROVISIONS

Our initial considerations focus on the language within the project agreement itself. If the project is in the predevelopment stage, these provisions could be implemented into the standard project form of lease or easement agreement prior to circulating it to the field and presenting it to landowners. If the project is farther along in the development stage, it might be the case that a global amendment could become a useful tool to address any of these items. If pursuing a global amendment for a project, however, it is important to collaborate with your counterparties, if known at the time, to ensure all teams are in agreement with the terms of the global amendment for efficiency purposes. You will note many of these considerations relate directly to mortgagee protection clauses. While the site control agreements are entered into between the developer and the landowner, the lenders will expect to see provisions that are carefully drafted and incorporated to protect and secure their interests, as they will provide critical funding for the project and need to feel secure in their investment.

1. Adequate Assignment Rights

Prior to extending a developer funds to finance a project, a lender will look to make sure the developer's site control agreements contain all rights necessary to develop, construct,

operate and maintain the project being financed. Making sure site control agreements contain adequate assignment rights is key to ensuring a developer's successful development efforts; as such, in reviewing site control agreements during a diligence period a lender will look to ensure said rights are present in these agreements.

A lender will be looking to ensure a developer's agreement reflects that the developer can do the following without having to obtain landowner consent: 1) finance and pledge any rights they have under its site control agreements to a lender in connection with any financing transaction, and 2) convey, assign, transfer or sell any of their rights in and to any or all of the project property.

A developer needs to ensure that its efforts to obtain financing are not complicated by having to seek approval from third parties to finance or pledge their interests in project property. For example, a project landowner having consent rights could object to a developer's use of a certain banking institution, take issue with a lender's qualifications, or object generally to a developer taking out financing to construct a project on their land. A developer needs to take care early on when drafting their agreements to prevent the possibility of this type of interference, as once a project is contracted and obligations are owed to multiple stakeholders, it will cause significant hardship to a developer if one or more third parties holding consent rights seek to hold up construction and financing efforts on project parcels overall. Furthermore, developers need to maintain flexibility to structure their transactions as they see fit and are in the best position to determine how to properly do so. Care should be taken to prevent third parties from later being able to interfere with how a developer structures or monetizes its project, as these are strategic business decisions that the developer is in the best position to make for itself.

Additionally, developers to the best of their ability need to maintain the ability to assign their rights in project property freely. If possible, site control agreements should avoid giving third parties the right to consent to any assignment of project property to a different entity. Often times during the development of a project a developer will need to grant co-easements or sub-easements to utility companies to allow for the construction of various improvements. In other

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