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Negotiating a Wind Project Land Agreement requires legal counsel with creativity and skill

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In the current environment of increasing electrical energy demand, rising carbon based fuel commodity prices, and heightened concern over the emission of greenhouse gases and their possible affect on climate change, wind energy is the fastest growing source of renewable electrical power generation in the Northeast. This development is primarily being driven by renewable portfolio standards (RPS) that have been implemented in the Northeast, federal and state tax incentives for the production and implementation of renewable technologies, and anticipation of the possibility of a national RPS or carbon cap and trade system.

Wind projects are subject to numerous real property issues, some of which arise in all projects affecting real property, some which are unique to wind projects. Central to any wind project's success is the security, flexibility, cost-effectiveness and stability of the project's land rights. In the absence of the wind project developer owning the land upon which the project is located, a wind energy lease agreement or easement agreement (generally, together, a Wind Project Land Agreement) is necessary. A properly drafted Wind Project Land Agreement must protect a developer's investment and provide income to the landowner, while offering both parties the flexibility and security necessary to transfer all or portions of the project to anticipate changes in the project's ownership and use of the land.

As competition increases in the wind generation industry, securing land suitable for wind projects becomes ever more important. Every Wind Project Land Agreement must sufficiently define the amount of land subject to the Wind Project Land Agreement and uses the developer may make of the land. Because the feasibility and success of a wind project greatly depends upon wind patterns and annual average wind speed, developers should seek to maximize the amount of land subject to the Wind Project Land Agreement. Doing so presents the developer with a two-fold benefit: (1) the most productive and cost-effective layout of the wind project and (2) insurance that its land rights are expansive enough to respond to changing wind conditions. The developer will also want to control the size, location and type of properties that may be built by the landowner on land not subject to the Wind Project Land Agreement, but which may have a negative impact on the ability of wind turbines to generate electricity. This may be accomplished through the use of noninterference covenants in the Wind Project Land Agreement.

For large wind projects, a developer may be forced to control portions of properties of numerous land owners to aggregate enough land for the project. Such a circumstance may present the developer with unique challenges. For example, because the typical Wind Project Land Agreement provides the landowner with an "Operation Fee" derived from the sale of electricity generated by wind turbines located on the landowner's property, no landowner wants to have solely transmission lines and roads that serve wind turbines located on their land. Landowners and developers may

attempt to remedy this issue by negotiating special minimum payments to landowners whose property is primarily used for transmission lines and roads or purposes other than turbines. Another possible compromise may be conditioning the developer's right to extend the term of the Wind Project Land Agreement on the developer's installation and operation of a fixed number of wind turbines on the landowner's property, provided the land is suitable for the placement of wind turbines.

Even if price levels of carbon based fuel commodities moderate over time, federal and state laws have created incentives for further development of wind projects in the Northeast and across the nation. Negotiating and drafting a Wind Project Land Agreement that provides a developer with the necessary flexibility and security to develop a wind project while at the same time adequately compensates a landowner requires legal counsel with creativity, imagination and skill.

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