

Negotiation Part 2

Peggy Kirk Hall

Associate Professor, Agricultural & Resource Law

Ohio State University

aglaw@osu.edu

farmoffice.osu.edu

Maintenance

1. Consider locations of maintenance areas

1. Inside the project site
2. Around the project site
3. Temporary construction use areas
4. Easement areas, roads
5. Transmission facility areas

2. Maintenance needs

1. Vegetation, noxious weeds, pollinator habitat
2. Fences
3. Access points
4. Project infrastructure

3. Waiver of nuisance impacts from ongoing maintenance is common



Landowner's reserved rights

Factors to consider

1. The “occupied area” of project site has a **larger footprint** than other types of energy developments.

- Typical for developer to have **exclusive** rights in the occupied area.
- Also, to have a general **exclusive right** “to collect and convert the solar resources” on the property.

2. The developer may seek to lease only a **portion** of a farm.

- Consider landowner's uses of remainder of the property.

3. Capitalizing on the **development period**.

Reserved rights to consider

1. Crop production

- During development phase
- Negotiate crop damages formula:
- NASS county avg. x price x acres x multiplier

2. Grazing

- During development phase
- Inside or outside the project site?
- Removal of infrastructure at construction

3. Oil and gas

- Surface estate conflicts
- Prohibition near project site
- May require accommodation agreement

4. Hunting and recreational uses

- Developer may establish zones
- May conflict with prohibitions against leasing

Landowner protection: insurance

Common approach: developer to maintain commercial general liability insurance policy with landowner as named party.

- For loss or liability caused by developer's occupation of property
- For combined single limit coverage per occurrence
- Different amount during development phase?
- Does stated amount address landowner needs?
- Is there a "self-insurance" allowance?
- Required notice of termination to landowner

Landowner protection: indemnity

Common approach: Developer to indemnify against liability for physical damage to property, landowner and public caused by developer's negligence.

- Exceptions for negligent acts or omissions and willful misconduct of landowner or landowner's guests or tenants.
 - Other limiting language?
 - What about wildlife interferences?
- Rights to take “reasonable security measures” to protect against liability,
 - Including building fencing in locations developer determines.

Assignment and condemnation

Common approach: *Broad* assignment rights as determined by developer.

- “Or to anyone under sublease”
- Require notice of assignment to landowner.

Common approach: Sharing of condemnation award based upon determination of value attributed to property versus improvements.

- Developer entitled to “value of leasehold estate”?
- Extinguishment of lease terms upon taking.

Termination

Common approach: Developer may terminate at any time.

- With notice to landowner?
- Landowner may **not** terminate during development phase
- Landowner may have limited rights to terminate upon material defect and failure to cure, according to procedures defined in lease.

Decommissioning and restoration

Consider post-construction restoration also

- Provisions for restoring construction areas, laydown yards, parking lots to condition pre-construction condition, including:
 - Soil compaction
 - Drainage interferences

Decommissioning and restoration

Common approach: Developer will remove solar facilities at end of lease term and has one year to complete removal, with easement rights.

- Limitations to removing *above ground facilities* or X feet below surface, may not be sufficient for return to agricultural production.
- Restoration provisions? “Shall return in good order and condition”
- Soil compaction and drainage impacts?
- Removal of roads and other improvements?
- Clarification of owner’s right to remove facility if developer fails to do so
 - Reimbursement and salvage value
- **Consider bond or other financial security**
 - What is a sufficient amount? “Net removal cost”
 - When must it be established?
 - Payable to whom?
 - Some leases defer to whatever bonding local or state regulations require
 - Review or increase in bonding amount over lease time period or new developer