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Renewables Focus

Planning
back to basics

Obtaining planning permission for renewable energy projects remains one of the most significant barriers faced by landowners, developers and operators to date.

Large scale projects will in the majority (if not all) of cases involve obtaining a huge amount of information, from environmental assessments to transport reports, with the more organised developer front loading any application to meet the high expectations of Local Planning Authorities. From the landowner's perspective this process is often taken out of their hands, with the developer/operator progressing any planning application at their cost. If the landowner is to contribute in any way to these costs then care will always need to be taken in order to limit this liability as the planning process can often be both time consuming and expensive.

The grant of planning permission will usually be subject to a number of conditions. Often these conditions will need to be discharged either prior to commencement of the development or prior to use. Conditions will also often be imposed during the course of the construction of the works and thereafter for the duration that the development remains in use. It is common practice for certain types of development, such as wind turbines, to have finite periods of use, with decommissioning requirements being imposed in planning agreements. Failure to discharge or comply with these conditions can risk enforcement action from the Local Authority and given the contentious nature of many renewable energy projects there is a very good chance that any failures would be brought to the attention of an enforcement officer and acted upon.

Knowing who is responsible for discharging and complying with these planning conditions (be it the landowner, developer and/or operator) is therefore of significant importance.

Small scale microgeneration renewable energy projects can often benefit from permitted development rights whereby a formal planning application would not be required. It must however be noted that any landowner should discuss the proposed project with the Local Planning Authority before attempting to rely on these permitted development rights if there is any doubt as to whether they apply. Equally, in some cases the permitted development rights will still impose conditions that must be complied with.

In brief, the planning system when considering a renewable energy project should not be taken lightly. Yes, it is accepted by Local Planning Authorities that there is a need for renewable energy, but material considerations such as the effect on local amenity can often override this. Even where planning permission has been granted, be it in the case of small or large scale projects, the requirements of the Local Planning Authority do not end at this point as conditions dealing with a variety of issues from noise control to landscaping must be complied with.

Given that the landowner is generally the first port of call for any Local Authority wishing to bring enforcement action care must at all times be taken to ensure that the conditions have been complied with and (if the developer/operator is responsible for planning) adequate protection is in place.

David Myers

Also in this issue

Leases of ground based solar PV development – some considerations

A lease of land for solar PV development will usually be for a term of around 25 years, commonly with an option for the tenant to require a short extension, perhaps a further 5 years. This will give the energy company comfort that it can obtain a return on its investment and the flexibility to extend further should Government policy alter in its favour during the initial term. This sort of term should not prove to be too onerous on the landowner either as the land is not being tied up for generations.

An important issues from the landowner's point of view is that the lease will need to be excluded from the provisions of Part II of the Landlord and Tenant Act 1954 so that at the end of the term the developer will not have security of tenure and the landowner will have no difficulty getting his land back. Note that this is in stark contrast to the powers enjoyed by telecommunications operators.

Particular concerns of the landowner

1. What will the rent be? Could there be an additional rent based on a percentage of the revenue generated by solar panels?

2. Security of decommissioning and re-instatement. The Landowner will want to ensure that the developer has the resources to remove all the plant and equipment and make good at the end of the term, otherwise he will be left with that expense.

Some landowners will seek a bond or up-front escrow account up front to guarantee payment of this expense.

Alternatively, the energy company could agree to set up a decommissioning fund say 5 years before the end of the terms and pay a sum of money in each of the remaining years in order to pay for the work.

3. If the landowner is a farmer he will probably require grazing rights which will enable him to claim the single farm payment. In our experience the energy company will usually permit this but it is a consideration which needs to be raised early on as the panels will need to be designed to fixed in a elevated position in order to allow for grazing. This will have cost implications and possibly also planning issues as the panels may be more visible. We are probably only talking about grazing sheep here as pigs will affect the stability of the ground, and it would be unfeasible to raise the panels sufficiently to allow horses underneath; and

4. The farmer landowner will also be concerned about damage to crops and ensuring that compensation is payable when development commences.

Particular concerns of the energy company

1. The Developer will want to resist any break rights in the lease. He is the one going to the expense of the planning application, and the supply installation and management of the plant and equipment so he will not want the landowner to be able to terminate the arrangements early;

2. A related point – the developer will be seeking to protect the revenue to be generated by the apparatus;

3. If the district network operator requires a substation lease and any wayleaves then the Developer will need to ensure that the landowner is required to grant these at no additional cost. Otherwise the Developer could find himself held to ransom;

4. Grid connections may be required over third party land in which case the energy company will be concerned to negotiate the necessary rights at an economically viable price before committing himself to the lease or leases by exercising the option;

5. The ownership of the equipment may be a concern. The lease should be carefully drafted to ensure that ownership reverts to the developer upon termination of the lease howsoever arising. This will be a particular concern of any funder and/or investor in the scheme;

6. The ability to assign the lease to a funder will be a key consideration. Should the developer go bust then any funder will want to be able to step into its shoes and realise the returns from the investment. Therefore the forfeiture clause in the lease will usually provide that any funder is notified of any breach and is given the opportunity of remedying it.

Dealing with protestors unlawfully trespassing on land

In recent months, there have been a number of high profile protests outside proposed fracking sites. Such protests are not exclusive to fracking sites, rather fracking just happens to be the current 'hot' topic that has captured both the public's and the media's attention.

It is not uncommon for wind farms, proposed biowaste sites, hydro-projects and PV panel farms to be met by protesters and, in some instances, protests encampments on or in close proximity to the proposed site.

Prevention is always better than cure. However, that is easier said than done, especially when the land in question comprises many acres of land.

Landowners faced with protestors trespassing upon their land and/or obstructing access to land have a number of options at their disposal, including:-

- issue possession proceedings to recover possession of land;
- pursue an injunction to prevent any ongoing and/or future trespass;
- employ a private certified bailiff to remove any trespassers - care should be exercised here as the landowner may be liable for any unlawful act undertaken, or any damage caused, by the bailiff;
- under section 61 of the Criminal Justice & Public Order Act 1994, provided certain criteria are satisfied, the police have the power (but not a duty) to remove trespassers. Unless the protest poses a risk to, or impacts upon, the wider public, or unless there is a threat to person or property, ordinarily the police will be reluctant to get involved in what they will state is a civil matter;
- under section 77 of the Criminal Justice & Public Order Act 1994 local authorities have the power (but again, not a duty) to make a direction that trespassers have to leave the land. If the trespassers fail to do so it is a criminal offence. However, Local Authorities rarely exercise this power.

Careful consideration must be given by landowners as to how they address any protests taking place on, or in the vicinity of their land. Rollits can provide proactive and reactive advice and assistance to assist landowners to minimise disruption and costs arising from any protestors trespassing on their land.

Chris Drinkall

Solar energy
back to the rooftops?

The Government has recently admitted that it has no idea as to how much agricultural land has been lost to solar fields and clearly will not know the quality of the land lost either. To complicate the issue, many ground based solar installations are grazed by sheep and this (in part at least) remains in agricultural use. It has been suggested anecdotally that lamb production can even be boosted in these fields as the panels can provide shelter. Others cite the benefits of lack of use of pesticides.

Clearly, however, a move in Government policy is occurring. For some time now in planning terms, development of solar installations on brown field sites has been seen as far preferable to the use of agricultural land. However, it seems less and less likely that good quality agricultural land will be permitted for development.

In October 2014 various announcements showed a desire by the Government to support smaller, most likely roof-based, schemes rather than larger field based ones. Briefly, the Renewables Obligation Scheme for larger sites is to end and be replaced by an auctioned system (Contracts for Difference CFD). However Feed-in-Tariff changes could lead to benefits for those installing solar panels on roofs as opposed to stand-alone installations.

The Department of Energy and Climate Change is proposing that developers of schemes larger than 250KW will have to show that a proportion of the electricity generated can be used in the buildings to which the panels are wired. This could be a benefit to owners of farm and other industrial buildings.

Also in October, George Eustace, the Farming Minster, announced the Government's proposal to end the payment of single farm payment to land occupied by solar farms. So, although grazing between the panels would be permitted, no central payments could be claimed.

Many will argue that the proposals are wrong and that green energy targets will be missed. Others will point to the vast quantity of solar fields in Cornwall and the West Country and say that the changes are needed to avoid further blighting the countryside. Whatever the view it appears that more panels are likely to be going on to roof tops and less into fields in the immediate future.

Neil Franklin

No such thing as a secret?

Often forgotten amidst the financial, technical and other specific details of a renewables project are the implications of freedom of information legislation should the project involve a public authority (including private companies wholly owned by public authorities).

For example, when applying for a grant from, or entering into a lease with, a public authority, be aware that information relating to the project and your organisation may have to be disclosed by the authority should they receive a request for information from a third party under the Freedom of Information Act 2000 or the Environmental Information Regulations 2004.

Anybody can make such a request without having to give a reason although, if an authority with which a private organisation is dealing receives such a request, it is good practice for the authority to contact the organisation for representations as to whether or not information relating to that organisation should be disclosed.

Whilst the two aforementioned pieces of legislation each cover different types of information (details of which are beyond the scope of this article), both share the same core principles. Each has the overall intention to be "pro-disclosure" and, as such, works on the basis that requested information should be disclosed unless it is not held by or on behalf of the authority or a statutory exemption applies.

This outcome often contradicts the wishes of private organisations, but the statutory exemptions are limited in scope. Many of them only apply in specific circumstances such as where national security is at stake. Two more general exemptions that businesses often wish to cite in representations are that disclosure (i) would/would likely prejudice a person's commercial interests, and (ii) may result in an actionable breach of confidence.

Given the risk of these exemptions being routinely cited to withhold disclosure, in practice the standard set by the Information Commissioner's Office in its acceptance of their application is high – meaning strong arguments against disclosure are required. It is therefore not necessarily possible to use these exemptions in practice.

In any event, even if the organisation makes such representations the authority retains the final decision-making power and may ultimately disclose the information notwithstanding representations to the contrary.

Our advice to any client involved in a project with a public authority is to be aware of these risks when considering the amount and type of information to be shared, and to agree a contractual protocol at the outset (or at least before any request for disclosure is made) to govern how the public authority will go about consulting with the client prior to making its decision as to whether to disclose.

James Peel

Information

If you have any queries on any issues raised in this newsletter, or any renewables matters in general please contact Neil Franklin on 01482 337250.

This newsletter is for the use of clients and will be supplied to others on request. It is for general guidance only. It provides useful information in a concise form. Action should not be taken without obtaining specific advice. We hope you have found this newsletter useful.

If, however, you do not wish to receive further mailings from us, please write to Pat Coyle, Rollits, Wilberforce Court, High Street, Hull, HU1 1YJ.

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