ARTHUR COX

Briefing

JULY 2009 PROPERTY GROUP BRIEFING

CONTENTS

Securing adequate Property Interests 1
Planning Issues 3
Contacts 4

ONSHORE WIND ENERGY PROPERTY/PLANNING/ ENVIRONMENTAL ISSUES

Ireland has committed itself to substantially exceeding its E.U. target of 16% for the generation of electricity from renewable sources and the reduction in greenhouse gas emissions by 2020 (referred to as the "20/20/20" targets). The 20/20/20 targets involve an overall E.U. average of a 20% reduction of greenhouse gas emissions, 20% increase in the share of renewables in energy consumption and a 20% improvement in energy efficiency, all by 2020.

The continued development of the Irish onshore wind sector is a key component of Ireland's strategy to meet its 20/20/20 targets. In common with other European countries, the level of technical, legal and financing expertise in the Irish wind sector has increased rapidly in the past decade. Windfarms are typically developed with the benefit of limited recourse financing from funders; in effect, the funders' ability to be repaid is solely reliant on the success of the project concerned. We have considered some of the key property and planning/environmental issues (and have touched on the related financing matters) that should be addressed at the outset of any onshore wind project. The acquisition and documentation of the required interest(s) in land on acceptable commercial terms and obtaining the required planning and environmental consents are critical to the viability of the project.

Securing adequate Property Interests

Option/Lease

(a) **Legal Structure**

Once a potential windfarm site has been identified, negotiations between the landowner and developer usually commence and proceed to agreeing the terms of an option. Under the option the landowner grants the developer the right to call for a lease of the relevant site or sites during a certain period (typically 3 - 5 years). The option structure is intended to give the developer certainty at a reasonable cost for a fixed period in which to progress the other elements of the project such as planning, financing and turbine supply etc.

(b) **Option terms**

The terms of the option and the lease are a matter for commercial negotiation. This includes the nature or amount of any payment to be made to the landowner during the option period. Parties may agree a fixed one off payment, a fixed yearly payment or they might agree a profit sharing mechanism to arise only upon the option being exercised

and a lease actually being granted (usually concurrent with the project reaching commercial operation).

Other typical matters dealt with in the option are:

(i) documenting each party's use/access rights to the site during the option period and ensuring that the landowners use/access will not hinder the developer's investigative works;

(ii) consent for the developer to assign, charge or transfer its interest under the option with (or without) the landowners consent;

(iii) the obligation of the landowner to grant the lease to the developer upon the exercise of the option;

(iv) the inclusion of a fully negotiated and settled form of lease which is to take effect upon the exercise of the option.

(c) **Lease terms**

While Lease terms are again a matter for negotiation and will vary from site to site, they typically include:

(i) the payments that a landowner will receive on certain dates most likely based on energy generation;

(ii) the term (typically 15-25 years);

(iii) the developer's repair and insurance obligations;

(iv) the developer's entitlement to locate turbines;

(v) ancillary issues, such as location of wires, sub-stations etc.

Title Investigation

At or just before the option stage, a developer should consider what level of title investigation/due diligence is appropriate to the project. Ideally, title investigation at the option stage will confirm the ability of the landowner to grant the option (and in due course the lease) without interruption from third parties claiming an adverse interest over the land. Windfarm sites are, not surprisingly, frequently located in isolated or rural locations, and so third party rights i.e. turbary (turf cutting), sporting, forestry, water extraction rights, and especially those which do not need to be registered to be effective, need to be considered. Turbary or commonage rights may be a matter of local knowledge and practice only and so avenues of local knowledge might need to be explored outside of the usual legal investigation. A developer might have to deal with multiple parties and negotiate compensation and/or release terms if third party rights are identified or claimed and substantiated.

Ideally third party property rights will be identified and negotiated away early during the option phase to avert serious cost and project delivery risks at a later date, where they have the potential to interfere with the development. From the developer's perspective, the option should oblige the landowner itself to identify and do everything necessary to discharge any third party rights relating to its property, in advance of the option being exercised. The pressure is therefore kept on the landowner to prove and provide good title in order to really benefit financially from a viable project.

For cost and practical reasons however, it may be the case that full title investigation is postponed until the point when a viable site is determined and just prior to an option being exercised. This can arise for example where windfarm sites comprise a number of different land holdings owned by separate landowners, all of which need to be secured before the project is viable. Given the location and composition of many windfarm sites, third party rights and easements can and do affect titles and can be difficult to resolve. Forewarned is forearmed in this respect. At the lease stage, it is not uncommon that resolution of third party rights issues would coincide with the financing of the project and the culmination of several years work and expense on the part of the developer. Under the project finance structure typically utilised, the developer's solicitor is expected to certify the adequacy of the developer's title to the lender. Such title certification will be a condition to the drawdown of funds from the lender.

The developer also needs to consider as early as possible what access, wayleaves or other rights it must have in place from adjoining landowners or other third parties to operate the windfarm, and negotiate any necessary rights and easements as early as possible.

In practice, it is a judgement call for the developer to strike the balance between his commercial needs and legal commitments while ensuring that

he or she has enough information, and all interests and rights available to him without being overcommitted.

Title for Electricity Infrastructure

Once the option has been granted (or sometimes in advance), the developer will be pursuing other strands of the project. These principally include obtaining planning permission and grid connections. For grid connections, this is likely to involve the construction of an electricity sub-station on site (or nearby) and depending on the connection method being used, reinforcement works and extensive trenching of cables from the project site to the relevant grid connection. The lease must allow for this and the putting in place of all necessary arrangements with the relevant network operator (currently Eirgrid PLC or ESB Networks depending on the size and location of the windfarm). The standard form ESB Networks connection agreement obliges developers to grant a freehold, or a 100 year leasehold interest in a sub-station site to the ESB. Developers have complained that this obligation is onerous. In most circumstances, the developer does not have a freehold interest and will have an option to take a lease for a term in the region of 25 years only. In the CER Proposed Decision on Electricity Network Connection Policy (16 April 2009), ESB recognised these difficulties and proposed that it would consider accepting a lesser interest in a sub-station site (relative to windfarms only) on a case by case basis.

As a matter of commercial imperative (and as a pre-condition to financing) all necessary legal consents rights and easements need to be in place in respect of underground/overground connections from the site to the grid.

Planning Issues

General

Onshore windfarms require planning permissions. The Wind Energy Development Guidelines for Planning Authorities were revised in 2006 by the Minister for the Environment, Heritage & Local Government and are intended to assist decision-makers and developers to make informed decisions in this process. Given the typical complexity and time involved, developers will usually apply for planning permission at the earliest opportunity following the option being put in place. Initial steps include the erection of a wind measuring mast for the purpose of wind resource analysis. Developers frequently erect these before or at the same time as applying for their permission. The 2006 guidelines say that permission for these masts should be granted for approx a 2 year period only. It is only after the option is put in place that the substantive planning application will be prepared and lodged. The planning application must disclose the legal owner and provide a letter of consent from that person to the making of the application. As with any application, windfarms can often be subject to site conditions, including peat stability, local sensitivities to noise, amenity, scenic issues and nature conservation.

EIS

Windfarm projects that are greater than 5MW or 5 turbines require the preparation and submission of an Environmental Impact Statement (EIS) at planning stage. This is a pre-condition to assessment of the planning application. A local authority may also insist that an EIS is prepared for smaller projects that are likely to have a significant effect on the environment. This means that even small windfarm developers may face additional and substantial hurdles at the initial planning stage. European protection of natural habitats has brought this into particular focus, given the requirement for appropriate assessment of the effects of a project on the conservation status of any protected site or species.

Expiry

It is not uncommon for a windfarm to be delayed until its planning permissions are close to expiry. Accordingly, developers are permitted to apply for a more lengthy planning permission than the usual 5 years (i.e. 10 years) under the 2006 Guidelines. A decision to commence actual construction of a windfarm can only be taken once turbine supply is secured and other complex engineering issues are settled and, in most cases, financing secured. The prospect for extending the "life" of a permission remains, where substantial works have been completed. The new Planning and Development (Amendment) Bill 2009 (the "Bill") proposes a further ground for extension, where "considerations of a commercial, economic or technical nature beyond the control of the applicant ... substantially

[mitigate] against either the commencement of development or the carrying out of substantial works". The Bill proposes a cap on the extended period at five years and prohibits applications for second extensions.

Conditions

A planning permission, once granted, may include some potentially onerous conditions from a developer's point of view. For example, a condition was recently included in a permission whereby no turbine on that windfarm was permitted to be out of commission for a period of more than 2 weeks. Although undesirable conditions may be appealed to An Bord Pleanala, developers may be obliged to meet such obligations in order to comply with their permissions.

Retention

Until recently, it had been possible to apply for planning permission after having first carried out the relevant development, i.e. a retention permission. This mechanism has been the subject of criticism by the European Courts of Justice where projects that require an EIS are concerned. For this reason, the Department of the Environment, Heritage & Local Government has written to all planning authorities and An Bord Pleanála, directing them to reject such applications. The new Bill had been expected to address this, by prescribing the "exceptional circumstances" in which such kinds of application might be permitted, but it does not.

The development of windfarms is a complex, lengthy and expensive undertaking. The commercial attractiveness of the wider renewables sector is reflected in the values attributed to existing operational projects and the very large number of potential windfarm projects that are the subject of a connection application to the CER's current Gate 3 connection offer system. The long term success of any potential windfarm project will be determined by obtaining satisfactory (and also "bankable") property rights and mandatory permissions.

A developer is hugely incentivised to devote sufficient time and attention to the early stages of the project, in particular enhancing the project's ability to obtain planning permission and agreeing detailed terms with landowners. The value, at the option stage, in isolating and addressing critical third party rights and other issues can result in the saving of substantial expense at a later date or indeed the salvation of the project itself.

Contacts

For further information please contact:

Rachel Farrell (Commercial Property)
+353 (0)1 618 0345
rachel.farrell@arthurcox.com

Brendan Slattery (Environment and Planning)
+353 (0)1 618 0422
brendan.slattery@arthurcox.com

Garrett Monaghan (Energy and Projects)
+353 (0)1 618 1103
garrett.monaghan@arthurcox.com

Or your usual Arthur Cox contact.