**40+ legal and economic issues that landowners (especially farmers) who are considering leasing**

**to a wind (or solar) developer, should seriously consider before signing anything. You’ve been offered a deal that sounds too good to be true: Big Money, No Work, No Risk, etc. How can you pass that up?**

*The typical landowner/wind developer agreement is among the most inequitable and restrictive contracts anywhere. One lawyer said a wind contract turned out to be: “the most one-sided, unconscionable, overreaching contract I had ever examined in my entire fifty-four years of law practice!”*

*The result is that the landowner gives up an exceptional amount of rights, and can essentially*

*become a caretaker for much of his property.*

**The Landowner needs to see the reality of their “economic windfall” in proper perspective:**

The developer a landowner deals with, is not their friend or partner. The developer has

ONE objective: to maximize his profit — regardless of the impact on the landowner!

John Adams, esq: “The net result of the agreement is to essentially dedicate the whole property to the operation of a wind turbine plant, and anything inconsistent with that operation will be prevented.”

The developer that landowners are dealing with now, will NOT likely be the people they will

be dealing with in a few years. **(These projects can be resold** **several times, as tax breaks** **and incentives get used up.)** There will be no one to complain to that: “this is what I was told” or “this is what I was promised.” Furthermore, subsequent wind project owners will likely be shell corporations with no assets.

There are major differences between leases and easements. Most wind contracts are

actually easement agreements. University of California, Real Estate Group: “A lease is an agreement in which the landlord agrees to give the tenant the exclusive right to occupy real property, usually for a specific term.” “An easement, gives the owner’s permission, to use his real property. It transfers to the easement holder an interest in the real property that encumbers the record title.” Terminating

easement rights can be difficult and expensive.

A contract: where two parties commit to exchange something of equal value. This implies a

BALANCE of responsibilities and rights between the parties.

The most important question a landowner should ask a competent attorney: “is this wind contract a balanced agreement?” Any objective assessment would say NO. (See some reasons why in the following 13 pages...)

Unbalanced example “a”: It’s usually specified that the developer may "enjoy" the landowner’s

property without any interference by the owner (or anyone else), & that the owner

must actively "protect and defend" the developer's rights. Does the contract commit the wind developer

to protect and defend the landowner’s right to enjoy his own property? NO!

Unbalanced example “b”: If someone gets hurt in any way, on or off the property, possibly due to the wind turbines, the landowner may be held legally liable. Why should the landowner have any liability from actions or inactions of the developer? A high probability example is a neighbor’s health being affected by proven infrasound problems.

Unbalanced example “c”: If the landowner is sued because of actions/inactions of the developer, some wind contracts state the landowner must pay his own legal costs. Department of Agricultural, Food and Resource Economics, Michigan State University: “Litigation with a third party can arise in many situations. For example, assume a neighbor, claiming to be affected by the noise of the turbine, sues to halt the operation of the turbine.” The cost of responding to that lawsuit should be borne by the developer.

Unbalanced example “d”: Most wind contracts have an “assignment” clause. This lets the developer assign the contract and turbines to any party of his choosing —without the landowner’s permission

(or sometimes knowledge). The terms of any contract are only as good as the parties behind them. Subsequent assignees will likely be shell, paper corporations with no assets.

Unbalanced example “e”: Some wind contracts allow the developer to put a mortgage on some of the lessor’s land. The contract may require the landowner to give permission. If the developer (or a subsequent assignee) defaults on their mortgage, the landowner could permanently lose some of his property.

Unbalanced example “f”: Developers usually demand extraordinarily broad rights — like extensive easements. Martinsburg Wind Energy contract #4.1.1: “An easement, right and entitlement on, over, across and under Property for any audio, visual, view, light, noise, vibration, air turbulence, wake, shadow flicker, electromagnetic, television reception, ice or other weather created hazards or other effect of any kind whatsoever...”

Unbalanced example “g”: Easements are NOT an ordinary part of a lease, and are not advisable.

Ontario Federation of Agriculture: “Do not allow a conversion to an easement as it will be more difficult, perhaps impossible, to discharge at the end.”

Unbalanced example “h”: The developer protects his financial interests, but there are usually no provisions to protect the landowner’s (e.g. the value of his property). Ontario Federation of Agriculture

“Add a clause requiring the wind developer to make whole any losses in resale value that might

occur as a result of the lease or a turbine being in place. Such losses might not be covered by rent.”

Unbalanced example “i”: The developer often demands exceptional, open-ended rights, which can even include future unspecified wind development. Martinsburg (NY) Wind contract: “Undertaking any activities that the Developer (or a sublessee) determines are necessary, helpful, appropriate or convenient in connection with, incidental to or for the benefit of one or more Projects.”

Unbalanced example “j”: The developer usually gives himself the right to basically terminate the contract at will. Most landowners neglect to include terms about their rights and options for termination. In contracts prepared by wind developers, landowners are never automatically given the right to terminate at will!

Unbalanced example “k”: Contracts typically say that the state where the developer is incorporated (e.g. Delaware) determines applicable laws, & where court cases will be heard. Landowners should insist that laws and court venues, be from the Landowner’s home state.

Unbalanced example “l”: It is usually specified that the landowner is prohibited from making any comments about the wind project. What good reason justifies removing a person’s fundamental right of free speech? Why would anyone consent to giving up such a significant Constitutional freedom?

Unbalanced example “m”: The developer is an LLC. That means that even if the landowner has a legitimate claim against the wind project, that the developer has shielded himself from most lawsuits.

An LLC is a “Limited Liability Corporation.” Why would anyone enter into an agreement, where the other party is immune from many claims against them?

If a landowner has a mortgage on his property, granting an easement to a wind developer may trigger a

default, and necessitate full payment of said mortgage. Farmer’s Legal Action Group: “In most cases, when there is a mortgage on the land, the terms of the landowner’s agreement with the lender will require that that lender be involved in the negotiations with the developer.”

Several NY leaseholders had liens put on their property, due to a dispute the wind developer

had with contractors over reportedly unpaid bills. These legal filings were against the landowner, not the developer. This shows how easily leaseholders can be legally dragged into something that they have

nothing to do with — and no control over.

In many cases, local laws don’t do a good job of addressing decommissioning. This means

the landowner may become liable for substantial costs when turbines are abandoned —which will eventually happen! Since these costs are substantial, the landowner should NOT leave this matter up to legislators to specify. Those representatives have no obligation to protect the landowner! It is solely the landowner’s responsibility to assure that the developer will properly decommission the property.

A wind energy contract can undermine farmland value — beyond the owner’s lifetime. Wind Energy in NYS — Issues for Landowners: “Often the highest prices for farms or large plots of land are not offered by other farmers, but by residential developers. Not having the ability to sell your land for its maximum value represents a very substantial cost that may be on the scale of hundreds of thousands of dollars.”

When a turbine is erected on a parcel, the assessed value of that property goes up.

**{In NYS, payment of additional property taxes is exempt for a period of only 15 years (see NYS**

**Real Prop Tax Law, Sec 487).}** Each state handles this differently (so check yours). **{In NY if the developer defaults or goes bankrupt after the 15 years, the property owner would be liable for a substantial increase in property taxes.}**

To reduce the health impacts to his family and employees, landowner should require that all turbines be at least 1 mile from his property’s residences.

John Adams, esq: Otherwise “the owner waives any right to complain about ‘any effects attributable’ to the property’s turbines.” Which is more important: your family’s health, or extra income?

Having wind turbines on farm property may have other (nonturbine) adverse health affects for people on the landowner’s property and on his neighbors’. There is evidence that exposure to high frequency voltage transients may cause an increase in cancer risk.

A variety of events can trigger a contract default — which frees the developer from all obligations, including making any more landowner payments. Martinsburg Wind contract #27.1 & 27.3:

“Failure to perform any covenants, conditions or terms of this Lease, including but not limited to

the obligation to pay the taxes… or failure to make a payment when due on a mortgage, or to allow

the Operating Areas to become subject to a lien…”

It is in the legal interest of the landowner to have this contract publicly recorded. Most wind developers circumvent this by recording a “Memorandum” instead of the real agreement. Martinsburg Wind contract Witnesseth & #9: “Upon execution of this Lease, the Parties shall execute a Memorandum, and take all reasonable steps and execute all documents necessary to record the Memorandum with any appropriate governmental entity. Lessor consents to such recordings.”

What if (after signing an agreement), a landowner finds that the developer gave more favorable terms to a neighbor? Bernard Nordling, esq: The landowner has few, if any options — unless they wisely included a “favored nations” clause in their agreement with the developer.

Most wind contracts tie up a property for 20 to 40 years. That is a VERY LONG time. Bernard Nordling, esq: The landowner should give very careful thought as to how the developer’s legal constraints on the property will affect any possible future sale or transfer. A lot can happen in 20+ years!

Wind turbines will likely reduce crop yields: as they can have an adverse affect on local weather —

for up to 15 miles away! “Wind turbines increase water loss from the soil by 30%± downwind.”

Study: “Results show that wind farms significantly affect near-surface air temperature and humidity”

for 15± miles downwind of the turbines.

Wind turbines will likely reduce crop yields: as unavoidable bat killings will dramatically increase harmful

insects on all nearby farmland. A study from the University of Colorado, estimates that as many as 900,000 bats were killed by wind turbines in 2012. This will either reduce crop yields or necessitate a large increase in use of pesticides (which has many other adverse consequences).

Wind turbines will likely reduce crop yields: as turbines can severely restrict the ability to do

crop-dusting in the area. Illinois Agricultural Aviation Association: “Farmers with wind turbines may lose the option of aerial application of farm protection products, seed, fertilizers, etc. on their land. Possibly more significant is that neighboring farmers, who have no wind turbines (and consequently no income

from them), stand to lose that option as well...”

Wind turbines will likely reduce crop yields: from extensive soil compaction that results from the delivery

and assembly of turbines. Penn State Agricultural Extension: Soil compaction is the reduction of soil volume due to external factors; this reduction lowers soil productivity and environmental quality.

Having wind turbines on farm property may be a fire hazard for the buildings and crops in the vicinity.

Due to such events as lightning strikes, wind turbine fires have caused as much as $6 million

in nearby property damage. Most local fire departments are not equipped to handle such high-rise fires.

Having wind turbines on farm property may adversely affect animals on the landowner’s

property and his neighbors’. Wind turbines produce “dirty” electricity. Underground cables to wind turbines can cause significant stray voltage. One non-participating (but adjacent) farmer who sued was awarded $1.7 million in a jury trial.

Having wind turbines on farm property may adversely affect animals on the landowner’s property and his neighbors’. There is documented evidence of wind turbines’ low frequency noise, etc. causing problems with a variety of farm animals (e.g. dairy cows, pigs, poultry, sheep and goats).

Having wind turbines on their property adds major new risks, and will substantially increase the landowner’s need for extra insurance coverage. Bernard Nordling, esq: Before signing any agreement, the costs of this new insurance should be carefully calculated, and factored it.

Having wind turbines on their property can adversely affect federal estate taxes, which may come into play in 20+ yrs. Roger McEowen, professor of Agricultural Law: “The placement of wind turbines on farmland will impact valuation for federal estate tax purposes upon the owner’s death.”

Having wind turbines on farm property may make the farm ineligible for certain federal subsidy programs.

Roger McEowen, professor of Agricultural Law: “For farmers considering wind energy easements and

participating in the Direct and Counter-cyclical Payment Program, authorized by the 2002 Farm Bill,

there is a prohibition against making nonagricultural use of acreage enrolled in the program.”

In addition to paying for legal and financial advice, etc. the landowner will incur additional

costs to get this contract. Farmer’s Legal Action Group: “In most cases, before finalizing a wind contract a developer will want a title report prepared by a title insurance company… Many developers will

also require a physical survey of the property….”

John Adams, esq: says these include—roads and general access to each of the turbines

to be as the developer determines, – transmission lines and transformer stations to be sited as the developer determines, – the right to patrol property (security guards), – the right to remove trees on and immediately adjacent to the licensed lands, – the right to free and unobstructed wind, – the right to veto (for any reason) any structure within 3000± feet of a turbine.

Contracts are for 1+ acre plots for each turbine, but there are “sweeping ancillary rights” that affect the rest of the property. The “deal” offered to the landowner is very high risk, severely limits his property use, and is distressingly low. T B Pickens said he expected to make 25%± profit as a wind developer. For each $3± million turbine, that amounts to $750,000± /year. Out of that annual profit, the landowner gets $10,000±. Roger McEowen, professor of Agricultural Law: “From a landowner's perspective, many wind energy leases and/or easements are inadequate, unfair and offer limited economic benefits when compared to the revenues generated (and tax subsidies received) by wind energy developers.”

These are just a sample of the ramifications (economic and legal) that can occur with these very

restrictive leases… Please consult a competent, aggressive attorney, and a CPA for legal and financial advice. The key message to remember: “There is no free lunch!”

One of the main arguments used by landowners for entering into wind agreements, is that they have the right to do whatever they want to with their land. Yet by signing most wind contracts they agree to give up an enormous amount of their rights as to what they can subsequently do with their land!

**The Landowner needs to see the reality of their “economic windfall” in proper perspective:**

What if a Landowner has already signed a contract?

They should consult with a lawyer to see what their options are.

Some Possible Outs Are —

1 - misrepresentation on the part of the developer,

2 - if the developer withheld some key information,

3 - the developer didn’t live up to some condition,

4 - the landowner got inadequate legal representation,

5 - claim based on it being an Adhesion Contract,

6 - violation of the “right of quiet enjoyment”

of the property (the hardest to prove).

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John Droz, jr. is NOT a lawyer, but is a physicist. He has been an activist for environmental issues for over 30 years. The primary objective of his free help is to educate citizens about protecting their health, safety and welfare. He received undergraduate degrees in physics and mathematics from Boston College, and a graduate degree in physics from Syracuse University. He has been a participating member of several environmental organizations (like the Adirondack Council, Adirondack Wild, Protect, and the Sierra Club).

[Disclaimer: The science-oriented views expressed in this presentation may not necessarily reflect the political agenda of these organizations.] These areas of interest and expertise (science & environmentalism) have merged with his focus on energy matters. John’s basic position is that we

should be taking aggressive measures to solve our energy and pollution issues, but should not be wasting time and money on illusionary solutions — which are primarily promoted by those with vested financial or political interests in them. This presentation is copyrighted and is for personal use only. Any quoting,

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As has been emphasized several times, please consult with a competent attorney before entering into any legal contract — especially one with the extraordinary complexity that a typical wind energy lease/easement is.