**Guide to exclusivity agreement/option agreement for CARES Toolkit**

The models for wind farm developments do of course vary but, fairly typically, a potential developer of a commercial wind farm will enter into an exclusivity agreement followed by agreeing heads of terms and then enter into an option agreement giving the developer an option to call for a lease (of typically, 27 years duration). The option agreement gives the developer a period in which to secure planning permission and any other requisite consents to the wind farm development.

Entering into a simple exclusivity agreement prior to the option agreement allows the developer to carry out feasibility studies and allow for negotiation of the option agreement.

**Exclusivity Agreement**

A typical exclusivity agreement will only be a very short document (just a couple of pages) and generally will:

* specify the duration of the exclusivity period (for example, one year);
* provide for payment of an exclusivity fee by the developer;
* prohibit the landowner, during the exclusivity period, from negotiating with or allowing other parties on the property for any wind farm investigations;
* give the developer exclusive rights to erect (subject to the developer obtaining any necessary planning permissions) anemometers to measure the wind speed and wind direction and carry out other surveys, for example, ground condition surveys, initial environmental surveys etc;
* allow for the parties to negotiate the terms of an option agreement/lease if the developer wishes to proceed (but without any obligation if agreement on the terms cannot be reached).

**Option Agreement**

An option agreement usually attaches a draft form of the lease and will typically cover the following:-

* **Option period** – for perhaps, a three - five year initial period. The developer usually has a right to extend beyond the initial period if the planning decision or appeal is pending or a judicial review period is outstanding. The developer will also try to have a right to extend if further time is needed to secure grid connection agreements;
* **Option fee** – this is an annual amount payable for the option period;
* **Surveys** – the developer should have an exclusive right to erect anemometers and carry out surveys and other assessments during the option period;
* **Planning** – the developer will want maximum flexibility to run the planning application as it sees fit. The landowner might push for a reasonable endeavours obligation to obtain planning permission as soon as possible for a scheme as large as is reasonably practicable. The developer will want to seek complete discretion to appeal any planning refusal or adverse planning conditions;
* **Section 75 agreement** – planning permission will typically be subject to a section 75 planning agreement. The option agreement should oblige the landowner to enter into any required statutory agreement (but the landowner will expect the developer to undertake to comply with all obligations in the statutory agreement and cover costs);
* **Option security** - the option agreement will normally provide for the landowner to grant a standard security (fixed charge) to secure the landowner’s obligations under the option agreement. It is normally agreed that such security will rank postponed to any security granted to the landowner’s lenders;
* **Alienation** – the option agreement should allow the developer to assign the option agreement. Typically, the landowner will only allow assignees who are demonstrably capable of performing the developer’s obligations under the option agreement and/or the tenant’s obligations under the Lease. Landowners often also look for assignation payments to be made, except for intra-group assignations;
* **Obligation to bind successors** – the landowner is usually entitled to sell or transfer the property during the option period provided that he procures that the purchaser/transferee enters into a replacement option agreement for the remainder of the option period (and grants a replacement standard security to secure the replacement option agreement);
* **Step-in rights** – the option agreement should allow for step-in rights/a direct agreement if they are required by a funder;
* **Grant of lease** – the landowner is obliged to grant the lease if the developer serves the option notice;
* **Title** – the developer will either satisfy itself on the landowner’s title and access rights prior to entering into the option agreement or those issues should be a suspensive condition within the option agreement.

|  |  |
| --- | --- |
| **James Forbes.jpg** | **James Forbes**  Partner  +44 (0)141 273 6752  +44 (0)7736 083 237  [james.forbes@burnesspaull.com](mailto:james.forbes@burnesspaull.com) |
| **Tamar Tammes 2.jpg** | **Tamar Tammes**  Partner  +44 (0)131 473 6169  +44 (0)7736 083 223  tamar.tammes@burnesspaull.com |

This publication is not intended to be a comprehensive review of all developments in the law and practice, or to cover all aspects of those referred to. Readers should take legal advice before applying the information contained in this publication to specific issues or transactions.

For more information please contact. For more information contact the Burness Paull contacts identified above or contact us at 120 Bothwell Street, Glasgow G2 7JL on 0141 248 4933.