

Establishing Site Control is Just the Beginning: Initial Real Estate Diligence of Renewable Energy Projects



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October 7, 2024 | **ARTICLES**

Once site control is established for a renewable energy project, one of the project developer's next steps is performing its due diligence to determine if the site is a viable option for the contemplated project. A key part of this initial diligence includes a review of real estate documents. Real estate due diligence is extremely important for identifying matters and potential obstacles that may impact a proposed development. Undertaking real estate diligence at an early stage is beneficial to allow the developer to proactively address and efficiently ensure successful project development.

Initial real estate diligence efforts frequently focus on reviewing and assessing (among other real estate diligence reports) title reports, title encumbrance documents, and surveys. Depending on the size and location of the project, mineral rights, and pipeline identification may also be an important component of initial diligence review. Finally, a Phase I Environmental Site Assessment (ESA) meeting applicable ASTM standards should be completed prior to obtaining full site control (i.e., execution of a lease or purchase of the property). A Phase I ESA can identify any environmental conditions or development restrictions (such as conservation easements) that may exist at the

property and, in certain instances, can provide the developer with legal liability protections for pre-existing contamination.

A review of a title report will disclose recorded title encumbrances that may prohibit or otherwise affect project development. Some title encumbrances, such as utility easements, conservation easements, and rights of way, could require a shift of the project location within a site in order to avoid a conflict with a pre-existing use right (such as a gas line easement prohibiting any structures from being built within the easement area) or an area that cannot be developed. The existence of easements and rights of way could also necessitate documentation such as a crossing agreement that will provide for shared land use privileges or a letter of no objection which will expressly permit the renewable energy development.

Some property is bound by recorded declarations, use restriction covenants or similar instruments which restrict how a property can be utilized and/or developed. The terms of these title encumbrances must be carefully reviewed for a host of potential issues, such as land use restrictions (e.g., the property may only be used for agricultural or residential purposes) and approval requirements (e.g., a declarant must approve all building plans prior to construction). Failure to obtain required waivers or consents that address these issues at the early stages of project development risks exacerbating development hurdles and increasing development expenses.

A title report will also disclose mortgages, deeds of trusts, and similar liens of record that encumber the property, thereby informing the developer as to any non-disturbance agreements needed. Title reports will frequently advise as to the amount of any taxes then owed, as well as any tax benefits a property receives. The latter can be helpful in determining, for example, if a property has an agricultural tax exemption which could potentially be lost upon the development of the renewable energy project. A title report may even disclose a pre-existing lease providing a different tenant with superior lease rights.

Reviewing an ALTA survey at initial development stages advises the project developer of specific site matters that must be taken into consideration. A survey will depict the location of any plottable title encumbrances, show where an easement is located, and where a declaration may and may not encumber land. An ALTA survey will show if and how the parcel has access to any public or private roadways and can also identify site features such as boundary lines, setback lines, wetlands, and existing improvements.

In many jurisdictions, oil, gas, and mineral rights may have been previously severed from the fee ownership of the property. When such rights are severed, the developer should determine the owner of such rights, if there are any easements or agreements granted in connection with such rights, and if any statutes govern the exercise of such rights. In addition, any pipelines, wells, mines, or other improvements constructed or installed at the property must be taken into consideration. A Review of any severed oil, gas, and mineral interests will help determine if the proposed location of renewable energy improvements is affected and if any crossing agreements or letters of no objection are needed.

Initial review of real property diligence matters, including existing title, title encumbrances, and a survey, identifies land rights that may impact a proposed project and frequently shapes the project's design in a manner to accommodate existing title matters. In addition, this review will assist the developer in determining if the renewable energy project will need to obtain title-related documents prior to project construction, such as use waivers, use consents, crossing agreements, or letters of no objection. Identifying these real estate encumbrances during the initial diligence review will identify project development requirements and help pave the way to successful project

development.

For further guidance or inquiries specific to your project needs, please reach out to Michael Nisengard (mnisengard@lippes.com) or Richard Capote (rcapote@lippes.com) from the Real Estate Practice Team at Lippes Mathias