



# Negotiating options and leases for renewable energy schemes

UK

2nd edition, June 2018

Effective from 1 July 2018

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RICS professional standard, UK

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# Contents

<b>Acknowledgements</b> .....	<b>ii</b>
<b>RICS standards framework</b> .....	<b>1</b>
Document definitions .....	2
<b>1 Introduction</b> .....	<b>3</b>
1.1 Context .....	3
1.2 Purpose .....	4
1.3 Scope .....	4
<b>2 Parties to a scheme</b> .....	<b>5</b>
<b>3 The site</b> .....	<b>7</b>
<b>4 Planning and grid connection consents</b> .....	<b>10</b>
4.1 Planning .....	10
4.2 Grid connection .....	10
<b>5 Agreement structure</b> .....	<b>11</b>
5.1 Exclusivity agreements .....	11
5.2 Heads of terms .....	12
5.3 Option for lease .....	12
5.4 Conditional lease .....	13
5.5 Joint venture .....	13
5.6 Cabling schemes .....	14
5.7 Access arrangements .....	14
5.8 Construction compounds .....	14
<b>6 Taxation</b> .....	<b>15</b>
<b>7 The terms</b> .....	<b>16</b>
7.1 Site layout .....	16
7.2 Term .....	17
7.3 Insurance .....	18
7.4 Indemnities .....	18
7.5 Assignment .....	18
7.6 Restoration and reinstatement .....	19
7.7 Community involvement and community funds .....	19
7.8 Tenants' rights and landlords' obligations .....	19

7.9 Minerals .....	20
7.10 Access .....	20
7.11 Break options .....	20
7.12 Competing land uses/interference .....	20
7.13 Planning process .....	20
7.14 Costs .....	22
7.15 User clause .....	22
7.16 Dispute resolution .....	22
7.17 Rental terms and one-off payments .....	23
<b>8 Schedules of condition and reinstatement .....</b>	<b>25</b>
<b>9 Conclusions .....</b>	<b>26</b>
<b>References .....</b>	<b>27</b>



# RICS standards framework

RICS' standards setting is governed and overseen by the Standards and Regulation Board (SRB). The SRB's aims are to operate in the public interest, and to develop the technical and ethical competence of the profession and its ability to deliver ethical practice to high standards globally.

The RICS [Rules of Conduct](#) set high-level professional requirements for the global chartered surveying profession. These are supported by more detailed standards and information relating to professional conduct and technical competency.

The SRB focuses on the conduct and competence of RICS members, to set standards that are proportionate, in the public interest and based on risk. Its approach is to foster a supportive atmosphere that encourages a strong, diverse, inclusive, effective and sustainable surveying profession.

As well as developing its own standards, RICS works collaboratively with other bodies at a national and international level to develop documents relevant to professional practice, such as cross-sector guidance, codes and standards. The application of these collaborative documents by RICS members will be defined either within the document itself or in associated RICS-published documents.

## Document definitions

Term	Definition
<b>RICS professional standards</b>	<p><b>Set requirements or expectations for RICS members and regulated firms about how they provide services or the outcomes of their actions.</b></p> <p>RICS professional standards are principles-based and focused on outcomes and good practice. Any requirements included set a baseline expectation for competent delivery or ethical behaviour.</p> <p>They include practices and behaviours intended to protect clients and other stakeholders, as well as ensuring their reasonable expectations of ethics, integrity, technical competence and diligence are met. Members must comply with an RICS professional standard. They may include:</p> <ul style="list-style-type: none"> <li>• mandatory requirements, which use the word ‘must’ and must be complied with, and/or</li> <li>• recommended best practice, which uses the word ‘should’. It is recognised that there may be acceptable alternatives to best practice that achieve the same or a better outcome.</li> </ul> <p>In regulatory or disciplinary proceedings, RICS will take into account relevant professional standards when deciding whether an RICS member or regulated firm acted appropriately and with reasonable competence. It is also likely that during any legal proceedings a judge, adjudicator or equivalent will take RICS professional standards into account.</p>
<b>RICS practice information</b>	<p><b>Information to support the practice, knowledge and performance of RICS members and regulated firms, and the demand for professional services.</b></p> <p>Practice information includes definitions, processes, toolkits, checklists, insights, research and technical information or advice. It also includes documents that aim to provide common benchmarks or approaches across a sector to help build efficient and consistent practice.</p> <p>This information is not mandatory and does not set requirements for RICS members or make explicit recommendations.</p>

# 1 Introduction

## 1.1 Context

The energy sector has evolved rapidly over the past ten to fifteen years. RICS members have been increasingly involved in renewable energy schemes that inevitably require the use of property. Broadly, the most common schemes originated with wind turbines and wind farms, which have subsequently become less favoured due to challenges with subsidy and planning. Conversely, a drop in manufacturing costs and government incentives has led to a rise in ground mounted solar farms, while battery storage sites have become the next wave of activity as technologies evolve.

In the interim, diesel and gas generator sites are still being used at critical times to support the grid within the capacity market. Other technologies, such as anaerobic digestion and hydroelectric, continue to be rolled out. However, energy technologies involving marine tides and waves are still mainly in the research and development stages.

Such activities and innovations have come from the necessity to lower greenhouse gas emissions and address fossil fuel depletion, as well as the pursuit of renewable energy targets. The *Energy Act 2008* led to the introduction of Feed-In Tariffs (FITs) by the then Department of Energy and Climate Change (DECC) to work alongside the renewable obligations. At the same time, the *Climate Change Act 2008* set a legally binding target for an 80 per cent reduction in greenhouse gas emissions below 1990 levels by 2050.

Renewable obligations used to be the main mechanisms to incentivise large-scale renewable electricity generation, but these ceased to be available for any new development schemes from 31<sup>st</sup> March 2017. Now overseen by the Department for Business, Energy and Industrial Strategy, Contracts for Difference (CfD) have now been phased in to replace Renewable Energy Certificates (ROCs). CfDs provide a guaranteed income stream to the developer who bids for a contract at a fixed level of income per MWh produced and where the government effectively pays (or receives) the difference between 'strike price' and the market price for electricity in the UK.

FITs and the Renewable Heat Incentive (RHI), all administered by Ofgem, generally provide the financial incentive for developers to pursue small-scale renewable energy schemes together with higher regard for low carbon development and increased corporate social responsibility targets and requirements for higher energy performance ratings. The levels of incentive are largely driven by political and social acceptability of technologies, e.g. offshore wind or the use of agricultural land for large scale solar or anaerobic digestion.

Such developers will apply their technical skill and experience and will inevitably require rights over land for construction, access or cabling issues. They will then often arrange for the finance and construction of such schemes. The most common approach taken by a



potential developer is to seek an option granting the rights to trigger a lease. Less commonly, conditional leases are used but joint ventures between landowners and developers are becoming increasingly favoured. Extensions and changes to existing lease arrangements are being requested regularly and there is a need to be aware of the effect of changes on the lease and the financial arrangements for the landowner.

## 1.2 Purpose

This document provides guidance to chartered surveyors acting on behalf of landowners in relation to the negotiation of options and leases for schemes, across the full array of renewable energy technologies currently being rolled out across the UK.

## 1.3 Scope

The scope of this document covers the negotiation of options and leases. It is therefore assumed that the parties will have already considered the options available to them before proceeding with an option or lease.

## 2 Parties to a scheme

Throughout this standard the word 'developer' is used to refer to the party who initially approaches a landowner, obtains planning consent, installs or constructs the scheme and then continues to operate the scheme, albeit that such parties might strictly speaking be a 'tenant' once the initial developer has developed a scheme.

It is not uncommon for renewable energy schemes to involve several landowners, either acting collectively or, in some instances, in competition. With considerable sums of money and varying interests at stake, RICS members should carefully guard against situations where a conflict of interest may exist or may arise.

A protocol should therefore be agreed with the parties involved in the scheme and clear boundaries should be defined in respect of the extent of the surveyor's role. For example, a surveyor acting on behalf of a landowner in respect of the installation of wind turbines might be conflicted if also acting on behalf of a landowner over whose property electricity cables will need to run, but where no wind turbines will be installed. There can also be complications where an agent acting for a landowner in respect of one option or lease could be conflicted if also acting for another landowner in the same scheme who is considering a joint venture.

Developers may take a variety of forms, such as:

- electricity generation companies or distribution network operators (DNOs)
- specialist operators seeking to build out a scheme and sell electricity to third parties
- corporations seeking a greener image and/or satisfying contractual obligations elsewhere, such as private finance initiative contracts; or
- speculators keen to sign up options, which are traded to developers and operators.

It is important to check for 'clean title' of potential sites, with the assistance of the client's solicitor if necessary. It is not uncommon for previous owners of land to have reserved rights or to have sold rights that may impact on the ability to develop a renewable energy scheme. For example, a third party owning mineral rights over a plot of land might have cause to object to deep foundations being drilled for wind turbines, for cable laying or other activities that would potentially sterilise mineral extraction opportunities on that land. Similarly, a solar farm scheme or wind farm might inhibit the exercise of sporting rights reserved by a third party. Hydroelectric schemes might also inhibit the exercise of fishing rights and can impact on users of the water further downstream. Prospective developers should be given access to all relevant title documents so that they can undertake (and be responsible for) their own due diligence.

RICS members might also need to consider the rights of existing tenants either on land on which generating systems are to be constructed or across land on which access or

cabling rights may be required. A full and early understanding of the particular tenancy or occupational rights is absolutely essential. Existing leases and rights granted for other renewable energy generation also now need to be considered.

Consent from mortgagees and banks will invariably be required if there are any charges over the land. Consideration should be given to this at an early stage and time allowed for consents to be obtained. In some instances, mortgagees may want to vary terms and again time delays may be incurred. Renewable energy schemes can potentially carry negative impacts on residential property and a good deal of justification may be required to demonstrate a positive cash flow or an increase in capital value of the security held by virtue of the renewable energy scheme.

Future ownership of the land should also be considered in conjunction with tax planning. The landowner may well be advised to consider future capital taxation and re-structure the ownership at an early stage. See section 6 *Taxation*. Some landowners may be advised to create an LLP. This can be complex and may be unattractive to a developer.

It has become increasingly common for investors and funders to become a party to the negotiation process. They will invariably want the ability to 'step in' to a lease arrangement in order to protect their investment and manage the scheme in order to extract their investment monies again. Very often landowners will be asked to consider terms which are more geared towards the requirements of the funders and investors, as well as the requirements of developers.

## 3 The site

Two essential ingredients for any scheme are planning permission and a grid connection to be able to export power. Regarding the latter, if the grid connection works are economically unfeasible, then the scheme is unlikely to go ahead. In the past few years, availability of grid capacity has become acutely problematic as energy schemes have been built, taking up any readily available spare grid capacity.

The characteristics of a 'suitable site' will vary depending on the technology being deployed for the type of scheme. This could include any of the following:

- **Biomass:** the use of living or recently living plant and animal material as a fuel that is burnt to generate energy, typically in the form of wood chips. This energy can then be used to power steam generators to create electricity, or the heat can be tapped and used for the heating of buildings.
- **Biogas from anaerobic digestion:** when microorganisms break down waste organic matter in the absence of oxygen, a methane-rich biogas is produced. This biogas can then be harnessed and used as a fuel to create energy.
- **Combined heat and power:** this is a means of producing and harnessing both heat and power (electricity) from the same generation process within a specialist cogeneration plant. Most traditional generation processes, such as coal fired power stations, usually only harness one form of energy (electricity), meaning that the other (heat) is often wasted. With combined heat and power it is not, making it a very efficient process.
- **Geothermal:** energy that is obtained by tapping reservoirs of heat that are stored naturally below the earth's surface. Hot water emerges from these reservoirs in the form of steam. This steam is then used to drive turbines which in turn generate power. In instances where the heat reservoirs do not produce enough heat to create steam, the hot water can still be used to heat homes and businesses.
- **Hydroelectric:** the use of free falling or flowing water to power turbines within a generator. These generators in turn create energy.
- **Landfill gas:** similar to biogas from anaerobic digestion, landfill gas is generated by household waste decomposing in an anaerobic environment. By correctly structuring the landfill site, this gas can be harnessed via a network of pipes and wells as it is released, and used to power generators.
- **Sewage gas:** this technique uses the same theory as landfill gas and anaerobic digestion, but utilises the methane gases created by microorganisms as they digest the sewage material in an anaerobic environment.
- **Solar PV:** solar photovoltaic devices use the power of the sun to free electrons from semi-conductive materials (generally silicone) stored in a flat panel. These freed electrons then travel along a gradient through an electrical circuit which creates power.

- **Tidal power:** this is a form of hydroelectric power. Large bodies of water rise and fall due to the gravitational effect of the moon as it orbits the Earth. This is known as tidal range. As this water rises and falls, its power is harnessed to power generators that are tethered below the surface of the water.
- **Wave power:** this is another form of hydroelectric power that uses the motion of waves to power turbines that are placed on the surface of the ocean.
- **Wind power:** the use of air flow over wind turbines to mechanically power electricity generators, either on land (onshore) or at sea (offshore).

To a greater extent, the take up of such schemes will be influenced by government policy and subsidy/incentive regimes. Onshore wind is now regarded as less attractive than offshore wind, in terms of appearance, noise, disrupting the landscape, etc. Similarly, 'Genset' installations involving diesel generators are less attractive environmentally, and in terms of public perception, than battery installations in balancing the grid supplies across the country.

Each of the renewable technologies carries its own unique set of characteristics: access for construction, to feedstock and substrates, to the grid and to wind or solar resources makes renewable energy schemes location specific. The strengths of the locational attributes for the particular scheme, balanced by the constraints against that site, will determine both the developer's willingness to proceed and the level of competition for the site, as well as the likely market value.

RICS members should consider the physical and locational attributes of the site in relation to the specific technology being pursued and a full understanding of the factors required by each technology is therefore essential. For instance, a solar PV scheme might require as many as five acres per MW of installed capacity whereas a 20 MW battery or Genset site might require only one acre. For each site, RICS members should therefore consider the following:

- location
- size
- physical landscape constraints
- planning authority – e.g. stance taken on Grade I and Grade II soils being developed on
- legal or title constraints
- surrounding land uses
- ability to use heat or electricity at the point of generation
- access
- energy resource (including wind speed, water flow, insolation, etc.)
- proximity to grid connection; and
- site constraints such as:
  - residential properties (noise, flicker, visual impact)

- planning designations (Areas of Outstanding Natural Beauty (AONB), Sites of Special Scientific Interest (SSSI), Wild Lands National Parks, etc.)
- Ministry of Defence (MOD)/National Air Traffic Services (NATS)/local airports and aerodromes
- telecoms line of sight links
- highways/rights of way
- ecology and environment
- geology
- landscape/cumulative impact
- archaeology.



# 4 Planning and grid connection consents

Planning and grid connection consents are the two most important components of any scheme. They are equally essential and a scheme cannot progress without both being in place. The ability of the developer to actually deliver a scheme is also key, in terms of expertise and experience in securing planning and building schemes, as well as financial strength. RICS members will need to satisfy themselves and their clients in this regard.

## 4.1 Planning

Part of the skill of the surveyor is to assess the likely chances of planning success. If the various constraints are stacked heavily against the developer, the negotiations might focus more on option payments, with the developer's risk being reflected by lower rents during the lease stage. If there is limited chance of planning success, competition for the site will also be reduced and rental value might be affected in any event. RICS members should be aware, however, that developers should bear the risk and costs of obtaining planning and should carry out their own full feasibility assessment. Landowners may wish to share some of the cost in return for an equity stake in the project (see 5.5).

## 4.2 Grid connection

Unless the energy is being consumed by an adjoining user, a connection is essential to be able to export energy to the grid, be it gas or electricity. In relation to electricity, a G59 application form is usually submitted to the DNO. Such applications and any resultant offers are personal to the applicant, they do not attach to the land itself. Therefore, if a developer makes the application then the landowner could inadvertently tie themselves to that developer, where the grid capacity being sought is the last of any such capacity feasibly available in that locality.

A landowner who does not wish to sign an exclusivity agreement with a developer still effectively does so if they allow the developer to obtain the last available grid capacity when the developer has no obligation to transfer or novate that grid capacity to the landowner. If the developer does have control over the grid capacity then this can influence the stance taken in relation to negotiation of commercial terms for any option or lease. Some DNOs also require a 99-year lease for any substation that they are required to build.

Thought also needs to be given to the potential for alternative grid arrangements and the potential for the addition of battery storage to existing generation.

# 5 Agreement structure

The most common form of agreement is an option for lease, given that developers generally want to have total control over the schemes. This is on the basis that the majority of landowners lack the necessary expertise or appetite for risk. However, there may be benefits to a landowner where they can be more actively involved and hence joint ventures have steadily increased in proportion. Initially, developers will likely seek an exclusivity agreement and the proper parties may then agree heads of terms for the then more binding option for lease or conditional lease. The various different types of agreement that might be used are set out in the following sub-sections.

## 5.1 Exclusivity agreements

Most developers will request the security of an agreement that provides exclusivity of a specific site. Such agreements can carry seemingly attractive incentives. However, care should be taken as the payments are often nominal and genuine interest on the part of the developer can fade to relative apathy causing progress to slow.

Exclusivity agreements can be used by developers to effectively sterilise sites, or to tie up potentially competing schemes and to improve the chances of planning success on a nearby scheme. To prevent this, exclusivities should be short and contain milestones to ensure that terms and documents are agreed by given dates, failing which the exclusivity agreement could be terminated.

Most seriously, exclusivity agreements prevent landowners from seeking interest from alternative developers. An exclusivity agreement of two years, for example, might force a landowner keen to progress a scheme of one sort or another to compromise on terms to a greater extent than they would if dealing in an open market. The impact on the commercial offering can be dramatic and the alternative for the landowner might be to wait for the exclusivity agreement to expire; however, that could mean that they miss an opportunity if market conditions change and commercial interest subsides in the interim.

Exclusivity agreements can be argued to be unenforceable or ineffective, but a negotiated break may be costly and a breach could carry litigation repercussions if a developer has invested substantial amounts of money in site investigations and surveys. Landowners' interests might be better served by an initial assessment of the site by the surveyor and the grant of exclusivity only once the outline terms of the scheme have been agreed between the parties. Such an exclusivity agreement might only be for three to six months to allow solicitors to draft and complete legal documents.

If a joint venture is being considered, then a landowner will most certainly require a more detailed contract that sets out the co-operation agreements between the parties, allowing exclusivity to be terminated at various junctures.

If a landowner wishes to avoid granting exclusivity, then sub-section 4.2 regarding consents to submit G59 applications should be borne in mind, as this can have the same unintended effect.

## 5.2 Heads of terms

The heads of terms initially put forward by developers can sometimes be exceptionally brief. While there may be no desire for chartered surveyors to conduct legal work, renewable energy scheme options and leases can require vast amounts of detail, much of which might sensibly be discussed and agreed with the client's solicitor at an early stage and included in the heads of terms. This can help avoid a potentially lengthy battle at the legal stages. Time and costs may be saved if key principles are aired and agreed beforehand in the heads of terms.

While heads of terms are not generally binding, and should be headed 'subject to contract', they do form the principal basis of the agreement and still require a good deal of thought and care.

The signing of heads of terms could trigger a payment to the landowner, especially if the terms also grant some exclusivity. The size of that payment will depend on the scale and nature of the scheme in question and what can reasonably be negotiated between the parties.

Some developers might request that the parties consider option agreements without agreeing heads of terms, but given the potential problems with exclusivity agreements, heads of terms carrying exclusivity might be a preferred alternative.

## 5.3 Option for lease

The most common approach adopted by developers is to seek an option agreement, entitling them to trigger a lease on the grant of satisfactory planning consent. The option will set out the rights granted to a developer during the option period to enable them to compile the planning application documents, lodge an application and, if necessary, appeal a decision. The option period will depend on the particular technology being considered and the size of the scheme, both key factors in determining the timescale for obtaining planning consent, but the option period might range from 6 to 12 months and up to several years, particularly if the scheme might require a connection involving the National Grid.

The option will need to provide a balance between protecting the landowner's interests and ensuring that a scheme is ultimately developable. An overly restrictive option is more likely to result in a developer withdrawing rather than a landowner being able to negotiate further financial incentives. Finance and sign-off at board level can consequently be delayed to the frustration of all parties. To ensure flexibility, the wording of the option agreement should be very carefully considered and compromises will need to be made by both sides.

Although key principles and commercial terms should be set out in the heads of terms, careful thought is required in the wording and RICS members should liaise closely with solicitors through the drafting stages of the option. A draft copy of the proposed lease should be attached to the option agreement and heads of terms will therefore need to cover both the option stage and the lease stage. The option should contain reference to the lease and a commitment by the parties to enter into an agreement in substantially the same form.

On signature of the option, an option fee is usually payable, although the size of the option fee is reduced for new developments due to the risk of not obtaining planning or any income for a new site. In addition, annual option fees are often payable, increasing year on year to encourage the developer to progress the scheme promptly, or alternatively such sums can be paid in a 'rolled up' sum (i.e. an upfront lump sum to cover a number of years). Option fees are sometimes linked to the projected output or target installed capacity.

Under certain circumstances the option may be extended, for example, if a planning decision is awaited, or an appeal is to be lodged, or for a judicial review. Such extensions should attract further option fees.

In some instances, it might be appropriate to have an option, followed by a lease for the construction phase and a separate lease for the period of operation.

## 5.4 Conditional lease

Far less common than an option for lease is a conditional lease. This involves the parties commencing negotiations on a lease document that enables the developer to progress a scheme but at a nominal rent until construction works begin (subsequent to planning consent). The lease provides the developer with the flexibility to terminate the agreement at relatively short notice and without penalty should they fail to obtain a planning consent. Essentially, the core terms remain the same as for an option for lease, except for the function of the option itself. The conditional lease reflects the fact that the commercial rent cannot be paid until the scheme is developed.

## 5.5 Joint venture

RICS members may be called on to advise landowners whether they should consider making a financial investment in the development, i.e. a joint venture. Not all landowners will have the financial resource or appetite for investment but the opportunity should be considered. Most developers will be agreeable to the idea of a joint venture and many of them will have template documents to use as a starting point.

The level of return achieved by a landowner will reflect the level of risk to which they are exposed and the level of investment made. Landowners can choose how much practical involvement they have and the commercial offering for the use of their land should vary accordingly. Some developers will offer improved income streams if a landowner shares in the initial costs associated with obtaining planning consent. Others will offer a share of the profit in return for a contribution to the investment of the constructed scheme.

Joint venture arrangements are becoming more commonplace on the basis that landowners can share in the returns achieved while making use of the developer's expertise in planning and developing the scheme itself. A profit share based on a landowner's investment in the costs of constructing the scheme could also produce a better return than a pure rental arrangement, but landowners wishing to avoid taking any risk will more likely accept a rental stream. Joint ventures are generally considerably more complicated than lease agreements.

## 5.6 Cabling schemes

Landowners may be approached solely in respect of a cabling scheme in order to allow power to be exported to the grid. Typical examples might be an offshore wind farm scheme or an interconnector cable from a foreign generating source. Where cables connect schemes that are in excess of 50MW of peak output, such schemes might be regarded as of national infrastructure importance and the developer may well be able to exercise compulsory purchase powers. In that event RICS members will need to refer to the RICS professional statement *Surveyors advising in respect of compulsory purchase and statutory compensation, UK*, 1st edition (2017). Otherwise this is a straightforward negotiation between landowner and developer, usually involving an option for a fixed-term easement.

## 5.7 Access arrangements

Similarly, landowners may be approached only in respect of a requirement to take access to a development site other than via the usual access for the land in question. Typical examples could include a requirement to bring heavy machinery on site; the need to carry 40-metre wind turbine blades to a remote site where road widening is required; or, an oversail required over third-party owned land. Compulsory purchase rights might exist that will prevent any ransom situation. Terms still need to be agreed for the acquisition of the necessary rights if the scheme proceeds.

## 5.8 Construction compounds

In some instances, the option and lease might cater for a construction compound to allow the contractor a designated area for equipment, construction materials, offices and machinery storage. Alternatively, this can be by way of a separate licence agreement and possibly on third-party owned land, a fixed term licence generally works well but landowners need to ensure that reinstatement provisions are robust.

## 6 Taxation

It is not within the scope of this standard to discuss tax implications at length, however, it is worth considering that income derived through a trading DIY/self-funded or joint venture scheme may be more tax efficient than rental income.

Rental streams will be subject to income or corporation tax but the long-term implications go beyond this. If previously undeveloped land is to be used for a renewable energy scheme, the capital value of that property will increase dramatically and a change of ownership will trigger a charge for capital gains tax or inheritance tax on death.

While agricultural property relief will not be available on the land accommodating the scheme, a joint venture scheme might benefit from business property relief (BPR). An increase in trading turnover and profit might also assist arguments for BPR across a wider portfolio. Conversely, additional rental income from a lease could tilt the balance of reverse streams and undermine an argument for BPR across a broader mix of asset classes within a property portfolio.

Schemes being considered at only the heads of terms stage may carry limited 'hope value' in addition to the basic property value. As planning looks more likely, or once planning consent is granted, the capital values involved can increase significantly. Invariably, early tax planning and consideration is highly recommended. In every case, future ownership and tax planning need to be considered at an early stage.

It is also very important to consider the VAT treatment of the project. In certain circumstances, it will be worth considering making an 'option to tax' if one is not already in place over the land. Different projects will have different VAT considerations and advice should be sought.



# 7 The terms

It is essential that consideration is given at the outset to how any future value created by the developer might be captured. Due care and attention should be given to the drafting of any clauses in this respect which will need to be site specific.

## 7.1 Site layout

In respect of the design and layout of the scheme, developers will not wish to be restricted to any particular design or size of scheme. It is important, however, that landowners and RICS members have the strongest understanding possible in relation to the likely scheme once all site constraints and factors have been considered and planning policies satisfied. Developers will need flexibility and cannot expose themselves to substantial development costs only to find that they need to renegotiate terms for a minor design amendment.

Levels of certainty as to the likely final scheme will vary according to the technology being developed. For example, an anaerobic digestion plant site is unlikely to be moved far in terms of its location; similarly, a hydroelectric scheme will be location specific, however, a wind farm scheme might vary substantially in terms of the numbers of turbines as well as their individual locations, access roads and grid connection issues. Some flexibility in the exact location of turbines is recognised in the planning process by typically permitting a 50m micro-siting allowance and the legal documents may well need to cater for this.

Whatever the technology, RICS members should consider setting a maximum or minimum generating capacity, to both maintain an element of control and to fully understand the likely impact on the property. Site requirements will, of course, vary enormously between technologies but endeavours need to be made to obtain an indication of the maximum possible extent of the development. RICS members should restrict the extent of the development as far as possible, where acting for a landowner, or to maximise the site and increase flexibility where acting for a developer. It is worth noting, however, that technologies develop rapidly – with an option period, turbines may become available that were not even designed at the time of the option being granted.

The full layout implications need to be considered by the surveyor, who will at least need to identify design principles and known variables. Under the option, the landowner is often given the ability to have input in the design and layout, but is likely to be given limited ability to withhold their consent or object to the overall design and will usually have even less ability to object to amendments required by local planning authorities. The principles of the design therefore need to be agreed and covered in the option and sensitive areas need to be excluded from the option area being considered.

The ability for electricity or heat generated from the scheme to be used on or near the site could carry financial advantages for a landowner. This might provide a positive benefit for planning application purposes, adding to arguments of sustainability and localism.

The position of the grid connection may also influence site location and layout.

## 7.2 Term

Most option periods are typically three to five years, extendable in certain circumstances, while lease terms will usually be for 25 years from project completion. The term can be linked to:

- the expected life of machinery
- the length of the power purchase agreements; or
- the duration of the subsidy or incentive underpinning the development.

Lease agreements in England and Wales will invariably fall within the security of tenure provisions of Part 2 of the *Landlord and Tenant Act 1954* and some developers will seek to include rights to renew or extend the lease. This can provide significant additional value for the developer if the scheme is sold on.

The 1954 Act does not apply in Scotland where there is no security of tenure. Given the length of the option period and lease term, consideration needs to be given to long-term ownership and future management issues. Commercial offerings are generally unimpaired by a referral to grant security or lease extensions, but a landowner who wants to retain control will generally wish to resist any options to extend and to contract out of the 1954 Act security of tenure provisions. Presently, it is not anticipated that legislation will be introduced to protect any installed technologies, in the same way that utilities or telecommunications are protected. It might be possible that greater protection is afforded to renewable energy schemes to protect and support the nation (generating capacity).

Where lease terms have been agreed at only 25 years, developers may wish to reopen negotiations to secure an additional term if the investors should require it.

Erosion of subsidies for certain technologies is likely to result in developers seeking longer land options so that they can see if changes in factors, such as build costs and power prices, allow projects to become economically viable. Landowners will need to carefully consider the implications of longer term options compared to alternative opportunities.

RICS members should be aware of the implications of the type of agreement used. For example, where a residential property owner allows a developer to install solar panels on the roof of the house, the lease will very likely fall within the scope of Part 2 of the *Landlord and Tenant Act 1954* and will attract security of tenure. This could also amount to a breach of any mortgage agreement. Furthermore, attempts to create a licence for the installation might also be regarded as the 'mis-labelling' of a commercial lease, with security issues subsequently arising.

## 7.3 Insurance

Developers should be required to hold ample insurance cover, not only for their equipment but for public liability and employers' liability. Insurance should also be a requirement of many funding arrangements and some insurers may stipulate certain additional measures, for example, palisade fencing and 24-hour CCTV surrounding ground-based solar panels. Developers may seek to limit their insurance levels and RICS members should consider what will be appropriate both during the option and lease stages, where levels of activity and construction will be very different. The developer might also be asked if they maintain insurance to cover rent in the event of an insured risk occurring.

## 7.4 Indemnities

Indemnity is frequently an area of much debate between solicitors, but remains a key issue for landowners. General principles might be agreed with the client's solicitor and confirmed in heads of terms. Developers are likely to exclude consequential loss or economic loss and, while it is unusual in property transactions (except perhaps for telecommunications sites) they may seek to limit their indemnity levels. Again, such levels will need to be considered against the nature of works on the site and levels of activity. Such caps cannot legally be applied to instances of personal injury or death.

Indemnity levels will often vary between the option and lease to reflect the differing levels of activity conducted by developers. In each case, provisions will need to be made for compensation for crop loss or failure to reinstate adequately.

Landowners will generally want to be indemnified against all possible losses, costs, claims, damages, proceedings, suits, etc. arising out of the use of the site by the developer. Legal and professional costs may also be specified in the indemnity clause. Given the complexity of schemes it might be appropriate for parties to consider professional indemnity insurance of consultants involved in the project.

## 7.5 Assignment

Developers will need flexibility in order to transfer ownership of the scheme and to deal with the scheme within the realms of the overriding parent company. Commonly, special purpose vehicles (SPVs) are used in order to isolate liabilities, but parent companies will need the ability to trade their rights as schemes are frequently bought and sold in part or as a whole.

If funding is required, the banks may require the ability to intervene in the arrangement and run a scheme in the place of the initial developer (or to 'step in'). Any such restrictions could halt the finance and will prevent a scheme from proceeding, an issue of which developers are all too aware.

Care needs to be taken so that the assignment clause does not allow the strength of the covenant to be overly weakened. Parent company guarantees and/or authorised guarantee agreements therefore need to be considered.

Care should also be taken in relation to restrictions on assignment but a change in control of a company could have much the same effect. Authorised guarantee agreements and specific financial tests or creditworthiness criteria can be employed to safeguard the landowner's interest and maintain the quality of the covenant. Developers, on the other hand, will want total flexibility if possible.

## 7.6 Restoration and reinstatement

Restoration and reinstatement should be mostly controlled by the planning consent, which is likely to stipulate permission for a limited period of time, following which reinstatement should take place in accordance with conditions. Developers should also be contractually bound to reinstate in accordance with the landowner's wishes.

To safeguard the position, a restoration bond should be put in place by the developer. If this is with the local planning authority (LPA), RICS members need to satisfy themselves that the bond is both sufficient or that there are provisions for review and arbitration, and that the landowner has sufficient access to it. A further bond should be put in place with the landowner if required, but developers will usually prefer a single bond if required for the particular technology.

## 7.7 Community involvement and community funds

Many developers will provide a community fund into which monies are paid on an annual basis depending on the size of the scheme. Such schemes may be required by the LPA but, again, landowners can seek to stipulate such terms.

The use of the funds will be decided by the community given that they are intended as a return of benefit to the community. Some developers will enable local residents to invest in the scheme to a limited extent but with fixed annual returns, and the availability of such opportunities should be discussed with the developer. Government policy in Scotland, for instance, specifically encourages this.

Increasingly, large and small-scale generation is being sought by community groups and there may be an opportunity for the landowner to invest and receive lower cost electricity.

## 7.8 Tenants' rights and landlords' obligations

Developers will seek maximum flexibility to build, construct, maintain, operate, repair, renew and re-power their respective schemes. Developers will also seek maximum obligations from the landlord. A balance clearly needs to be found between the objectives of the parties, but each right or obligation needs to be considered in light of the development itself and the likely consequences and issues arising to the landlord. If, for example, the landlord's property is subject to a tenancy, the landlord should be careful not to be obligated or covenanted to do any more than they are able to do or grant any more rights than are strictly reserved out of the tenancy.

## 7.9 Minerals

As in section 2, mineral rights need to be considered. Schemes requiring the construction of access roads or funding for screening, etc. may require the use of borrow pits elsewhere on a landowner's property. The terms for the use of such material should be agreed, along with an appropriate mineral payment based on the tonne or cubic metre of material excavated. Provision also needs to be made for the depositing of spoil if this is not to be taken off site. The treatment of top soil might also be a relevant consideration.

## 7.10 Access

Routes, timing and notice periods need to be agreed for both option and lease stages, along with the extent to which the rights can be granted by the developer to third parties, the use of vehicles and machinery and of course the construction and maintenance of the access route itself. Payments for access might be considered, particularly across third party owned land or prior to the grant of an option – i.e. an access licence.

## 7.11 Break options

Given the level of investment made by developers, break options available to a landlord are likely to be limited to forfeiture and major breaches at both the option and lease stages. Even then, funders or investors will require 'step in rights' to remedy any breaches and take control of the assets that they have a financial interest in. Tenants will be keen to have break options for reasons of major economic change affecting the viability of the scheme or in the event some physical issue prevents the scheme from operating, such as a failure to obtain grid connection. Landlords may seek a minimum rent being paid in full for a fixed number of years in the event of an early break. Landowners who may wish to include a break option for possible alternative development purposes ought seriously to think about whether or not they wish to pursue a renewable scheme or the alternative development since the two are unlikely to be compatible.

## 7.12 Competing land uses/interference

Renewable energy schemes need to be compatible with surrounding land uses. In a wider estate context, sporting, farming and forestry interests could conflict with renewable schemes and reservations need to be made as necessary. Such reservations might include, for example, a protocol for the exercise of sporting rights in relation to wind turbines and solar panels.

## 7.13 Planning process

In relation to the option agreement, timescales should be considered for the preparation of and submission of a planning application. Generally, developers will want to proceed as quickly as possible and the enforcement of a fixed timescale protects the landowner from a

tardy approach and guards against the possibility of 'land banking' by enabling the landlord to terminate the agreement in the event of a failure to perform. The developer will seek greater flexibility, of course.

Generally, if a landowner enters into an option for lease, then the planning application will be in the name of the developer. If a joint venture is agreed, RICS members will need to consider whether the planning application should be in joint names of the developer and the landowner or on an SPV between the two.

Landowners may be prevented from objecting to any planning applications in relation to their land, but should not be obligated to overtly support the scheme as political issues may make this difficult. Any support should be on a voluntary basis, but in reality most landowners would be happy to provide support where they can. Some schemes might involve public consultation and developers will commonly run an exhibition to engage with the local community.

Large wind farm schemes may require 12 to 24 months of ecological survey work in addition to at least 12 months of anemometer testing, plus a lengthy process of consultation with the Ministry of Defence (MOD), National Air Traffic Services (NATS), Scottish Natural Heritage (SNH) or Natural England, Royal Society for the Protection of Birds (RSPB) and the Highways Authority as well as the Local Planning Authority. Similarly, solar, anaerobic digestion (AD) and hydro schemes may have significant ecological effects and an environmental impact assessment is likely to be required on any larger scheme, incurring substantial cost and delays. Impact on historic buildings is also a key planning concern.

If planning consent is granted then developers may require the ability to object or appeal against certain planning conditions in order to make the scheme developable or to improve it, but generally such submissions will be in the mutual interests of both landowner and developer. If planning permission is refused then the developer may wish to have a period of time within which they might make an appeal. The appeal process itself could easily take 6 to 12 months or more.

If a satisfactory planning consent has been granted then the developer may delay triggering a lease while they confirm they are able to satisfy certain conditions precedent, or to obtain finance or finalise procurement or construction contracts. However, landowner interests are best served by a developer triggering the lease as early as possible; RICS members will need to consider the timescale in detail and cover this adequately in the option.

Developers may require the right to tie landowners into planning agreements (Section 106 agreements in England and Wales or Section 75 agreements in Scotland), usually for habitat creation or tree planting, to mitigate an environmental impact elsewhere. Such agreements should be approved by the landowner who should be compensated for any losses incurred. Landowners may seek to influence such agreements to deliver environmental benefits which they would have in any event desired, thereby enabling the works to be done at the cost of the developer.



## 7.14 Costs

Unless the landowner is entering into a joint venture agreement, the general principle should remain that the developer meets all reasonable legal and professional costs incurred in the matter. An undertaking is required at the earliest stage to cover discussions over the heads of terms, completion of the option agreement and any further dealings in entering into the lease or any requests for further consents, etc.

Capped costs should be guarded against, as dealings can become protracted through no fault of the landowner, and if caps cannot be renegotiated then the landowner can be exposed to significant costs, particularly if the developer withdraws. Costs should be recovered in respect of any planning agreement, records of condition, negotiations with tenants or other third parties. Generally, developers accept this position but many will suggest that their precedent form of agreement should require no more than £1,500 to £2,000 of solicitor costs and invariably such caps are substantially exceeded. Some developers may incentivise rapid completion of legal documents.

If mortgagee's consents are required, there will likely be administrative charges and further legal costs which also need to be considered.

Landowners might also have to liaise with third-party environmental regulators in respect of environmental schemes already covering the site. The cost incurred will need to be borne by one of the parties. Further costs can be incurred in updating plans for agri-environment or subsidy schemes, unless the developer is also to provide amended plans to reflect the development.

Due to the delays that can be incurred between the heads of terms and option stage, it is recommended that costs should be settled at least on signing heads of terms but periodically thereafter until agreements are concluded. Costs also need to be recovered in respect of disturbance compensation claims, either following construction or decommissioning. Thereafter, the lease indemnity clause should then govern this issue.

## 7.15 User clause

User clauses and tenants' rights should be considered in tandem and the need for detail will depend on the type and size of the scheme.

## 7.16 Dispute resolution

While arbitration might be the normal route for dispute resolution, certain aspects of a scheme agreement may require a specialist independent expert. Fundamental differences between arbitration and the use of an independent expert are as follows:

- The arbitrator makes the decision based on the submissions made by the parties while the expert makes their own assessment and is not bound to consider any submissions.

- The arbitrator will make an award within the values contended for the parties while the expert is not bound to award between the values sought.
- The arbitrator has the power to order discovery of documents through the courts while the expert has no power to order discovery unless specifically ordered to.
- The arbitrator has the power to award costs and interest whereas the expert does not, unless specifically agreed in their remit.
- The arbitrator cannot usually be found to be negligent whereas the expert can be liable for damages if found negligent.

## 7.17 Rental terms and one-off payments

Reference has already been made to the payment of exclusivity, heads of terms and option fees. In addition, one-off payments can be secured on the grant of planning consent, on commencement of construction works or on commissioning the renewable energy scheme. These payments are frequently agreed on a rate per megawatt of capacity installed or can be negotiated fixed figures. The purpose of the payments is to reflect the fact that rents can otherwise be delayed while construction takes place and to reflect the various progressive stages of the development. Developers will rarely be in funds until contracts for land occupation, grid connection, equipment delivery and power purchase are all in order, and hence such payments are made within the lease stage.

Rents are linked to turnover, but minimum guarantees should also be secured, again, potentially based on a rate per megawatt of capacity installed. Turnover-based rents can be expressed as Income rents based on percentages or can be expressed as an output rent being a payment made for each kilowatt hour or megawatt hour generated and exported to the grid.

Income rents should be based on the percentage of gross revenue to include all sources of revenue including Contracts for Difference, levy exemption certificates, FITs, renewable obligation certificates (ROCs) and any other subsidy on top of the wholesale electricity price itself. Such sums should be set out in a power purchase agreement, but this is unlikely to be provided to the landowner.

Output rents provide a safety net to either the market forces impacting on the value of renewable electricity or a developer or operator entering into a power purchase agreement, which may not have been agreed on an arm's length basis. An output rent would be based on a fixed rate per unit of electricity generated rather than as a percentage of value produced by the scheme.

Since rent is dependent on turnover, it is important to understand the mechanisms of the FITs and CfDs system. Both systems are likely to be reviewed and RICS members will need to monitor proposed changes and assess how this might impact on the income streams.

On some schemes, more often with smaller schemes, it may be possible to run the output cables to the landowner's property, allowing them to use some of the electricity produced.

For example, on roof mounted solar schemes the rent might be a more nominal figure. However, the property owner might benefit from free or cheaper electricity where they might otherwise be paying 8p to 12p per unit in the retail market. In this example, electricity not used by the owner would be exported to the grid and paid for accordingly through a power purchase agreement. In any event, the developer would receive the generation element of the FIT accordingly. Similarly, heat from anaerobic digestion and biomass schemes can be used on site, potentially adding significant benefit to a landowner.

Often, a very nominal rent will be offered in the final year of the lease for decommissioning purposes. Depending on the scheme, decommissioning will often only take a matter of weeks rather than anything approaching a full year. It would be the case, therefore, that the developer would benefit from use of the site for several months without having to pay a rent to the landlord. Rents should therefore be paid up to the date when the equipment is shutdown and grid export ceases.

Further rents or payments can be obtained in respect of substations, cabling, anemometers, access roads or control kiosks. Rates will vary depending on the size of installation and the alternative options available to the developer.

On the basis that an option and lease together could run for 30 years or more, all figures contained in option and lease documents should be indexed, e.g. increased in line with RPI or CPI, ideally from the date that heads of terms are signed.

## 8 Schedules of condition and reinstatement

It is commonplace for there to be issues with reinstatement of land following development works carried out by a developer. RICS members on both sides of a transaction should be acutely aware of this and the fact that a disturbance and the failure to reinstate can cause more frustration to a landowner than some of the key commercial terms.

The parties need to be very clear as to what format reinstatement should take and to ensure that a clear record of condition is agreed between the parties. This should be compiled by the landowner (or their advisors) and then agreed with the developer. The parties should also be clear as to what recourse will take place if there is disagreement as to the extent of the reinstatement at the end of the construction period. The same process should be followed in the event further construction works are required mid-term.

In some instances, it may be preferable for cables and foundations to be left in the ground below a certain depth. This may have a lesser impact on the land but the landowner might well want to begin any discussions on decommissioning from the assumption that all equipment will be removed.

Perhaps, more importantly, reinstatement of the site at the end of the lease is critical. In some schemes, the landowner might agree to take control over the apparatus and to act as the developer going forward. While this might come with several complications, even without any subsidy or incentive in place, the generating equipment may carry significant value at the end of the lease. In such cases, the landowner would discharge any obligation on the developer to reinstate. There can be further complications with such clauses, such as how a developer is compensated in the event they have invested significant sums of money in equipment in the final stages of a lease. Or whether such a clause provides a disincentive for the developer to maintain and repair equipment if there may be an imminent requirement to transfer ownership to the landowner. Compensation provisions can be agreed to deal with this issue.

## 9 Conclusions

In light of the inevitable ongoing review of subsidies and the likelihood of financial support being reduced as technology costs decrease, there is a need to progress schemes as quickly as possible in the mutual interests of both landowners and developers.

Agreements need to balance carefully the needs of the developer against the landlord's desire to protect their immediate and wider property interests and maximise revenue. The role of chartered surveyors is not only in the negotiation of terms, but also in managing the expectations of landowners and clients. RICS members should ensure they adequately understand the issues so as to respond with clear advice and specific instruction where required.

While agreements need to be tailored to the specific requirements of the site and the parties involved, the prospective landlords and tenants may be restricted by interests of outside parties and compromises should be made if schemes are to advance. If schemes cannot be physically constructed or financed they will not advance. The skill of the surveyor is in establishing a full picture of what truly constrains a scheme. RICS members need to be able to advise on those terms that pose an acceptable risk to the client and those that actually make a scheme unacceptable to the client. This while still paying due regard to the role of the agent in facilitating the transaction.

# References

## Legislation

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## Publications

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