# Considerations in Connection with Clean Energy Project Development in Illinois

**Session Moderator: John F. Young**
Clean Law PC, Chicago
john.young@cleanlawpc.com
312-806-1882

**Karen A. Lessick**
Invenergy, Chicago
klessick@invenergyllc.com
312-224-1400

**David D. Streicker**
Polsinelli, Chicago
dstreicker@polsinelli.com
312-873-2941

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# About The Faculty

**JOHN F. YOUNG** is the founder and President of Clean Law PC. John regularly advises renewable energy developers and operators on an extensive array of real estate and other clean energy project development and acquisition matters, having previously served as the leader of the real estate energy team for an Am Law100 law firm and as in-house counsel to one of the world's largest renewable energy developers. While in-house, he was responsible for handling all legal aspects of the company's North American real estate development, as well as serving as primary counsel for Department of Defense initiatives and various joint venture relationships, project acquisition and divestiture, construction projects, power purchase agreements, purchasing/supply chain master service arrangements, corporate governance issues and regulatory/utility compliance matters.

John obtained his Juris Doctor, cum laude, Order of the Coif, from Northwestern Pritzker School of Law in 2000 and his BSBA-Accounting, summa cum laude, from University of Missouri - St. Louis in 1993.

**KAREN A. LESSICK** is Vice President & Deputy General Counsel at Invenergy LLC in Chicago. She is an experienced real estate and transactional attorney with over ten years of experience, specializing in the renewable energy industry.

**DAVID STREICKER**, Polsinelli. Clients look to David for counsel on complex energy and infrastructure development matters throughout the country. David advises clients on issues including project siting and permitting, project acquisition and related due diligence, public/private partnerships, tax and project finance incentives, power purchase and off-take agreements, gas supply agreements, project operating agreements, environmental and natural resources regulation, utility regulation and related legislative drafting matters, as well as litigation support. David's energy sector clients include entities developing electric generation assets (wasteto-energy, gas, wind, solar, and CHP), coal conversion projects (CTL and SNG), electric transmission/smart-grid, bio-refining campuses, chemical plants, and mining projects. His transportation related matters center around the development of intermodal and airport related projects.

Prior to joining Polsinelli, David served as general counsel and ethics officer for the Illinois Department of Commerce and Economic Opportunity (DCEO), which is the State of Illinois' primary economic development agency. In this capacity, he was the state's lead attorney for all major development projects, including energy related assets, transportation, brownfields/military base reuse, manufacturing expansion, and headquarters relocation. Among the many matters that David actively participated in while at DCEO was the opportunity to lead the state's legal efforts to successfully land the FutureGen Project – the world's first near zero emission coal fired power plant. This assignment included extensive legislative and project development work, as well as close interaction with various levels of federal, state, and local government. In addition to his project development experience, David is an experienced litigator, having tried many matters in both state and federal courts, along with administrative hearings, binding arbitrations, mediations, and matters before the Illinois Commerce Commission.

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# Land Use and Development Considerations Related Renewable Energy Projects in Illinois Agricultural Areas

Land Use Law in Illinois 2022

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David D. Streicker
Polsinelli PC
dstreicker@polsinelli.com
(312)-873-2914

# Overview of Development Considerations

- Renewable projects are unique in that significant infrastructure is developed on primarily leased property in agricultural areas, and the land in and around the project will continue to be used for agricultural purposes, eventually returning to agricultural use when the project is decommissioned.

    - This triggers various land use and zoning considerations and potential obstacles that are not present with other developments.

- The size and scale of renewable development can trigger both multi-county and county-municipal level considerations (and on some occasions even extend across state lines).

    - Differing permitting and zoning requirements often apply to different areas of a single project – whether for wind or solar.

- Renewable project development can result in considerable organized (and unorganized) opposition, putting pressure on local officials and resulting in a difficult permitting processes – whether or not the project area is zoned – with the potential to end up in litigation.
- Many zoned and un-zoned counties have passed wind and/or solar siting ordinances, creating a patch-work of various siting structures across the state, that are often dramatically different and subject to change on short notice.

# Overview of Topics to Be Covered

- Future Energy Jobs Act (PA 99-0906) and Clean Energy Jobs Act (PA 102-0662) – What is Driving Development
- Division 12 of the Counties Code (Zoning)
- Wind Project Siting Considerations
- Solar Project Siting Considerations
- County Level Building Permit Authority, Comprehensive Plan Development, Township & Municipal Zoning
- Agricultural Impact Mitigation Agreements (Ties Land Leases to Siting Approvals)

# FEJA & CEJA

**Future Energy Jobs Act**

- Public Act 99-0906, effective June 1, 2017, substantially revised the Illinois Renewable Portfolio Standard
- This bill was also known or referred to as the nuclear bailout bill
- Required the Illinois Power Agency to develop a long-term renewable energy procurement plan

**Clean Energy Jobs Act**

- Public Act 102-0662, effective September 15, 2021, again substantially revised the Renewable Portfolio Standard and Illinois Power Agency Procurement Process
- Added significant incentives for renewable generation
- Again, bailed out additional nuclear facilities.

# Division 12 of the Counties Code

- 55 ILCS 5/5-12001, Authority to Regulate and Restrict the Location of "Structures"

  - Zoning Power Does Not Extend to Buildings or Structures of a "Public Utility"

- 55 ILCS 5/5-12001.1 Provides Authority to Regulate Certain Telecom "Facilities" and Radio Broadcast Towers
- 55 ILCS 5/5-12020 – Applies to Wind Farms, allows for the establishment of "Standards"

  - a/k/a the WECS Statute (PA 95-0203, passed in 2007)

- No Similar Authority For Solar Farm Development
- **Question for the Next Category for Discussion**: If Wind Farms are not "Structures," Where do Things Stand with Regard to Solar Zoning Authority?

# Wind Farm Zoning Authority

**(55 ILCS 5/5-12020)**

Sec. 5-12020. Wind farms, electric-generating wind devices, and commercial wind energy facilities. Notwithstanding any other provision of law or whether the county has formed a zoning commission and adopted formal zoning under Section 5-12007, a county may establish standards for wind farms and electric-generating wind devices. The standards may include, without limitation, the height of the devices and the number of devices that may be located within a geographic area. A county may also regulate the siting of wind farms and electric-generating wind devices in unincorporated areas of the county outside of the zoning jurisdiction of a municipality and the 1.5 mile radius surrounding the zoning jurisdiction of a municipality. There shall be at least one public hearing not more than 30 days prior to a siting decision by the county board. Notice of the hearing shall be published in a newspaper of general circulation in the county. A commercial wind energy facility owner, as defined in the Renewable Energy Facilities Agricultural Impact Mitigation Act, must enter into an agricultural impact mitigation agreement with the Department of Agriculture prior to the date of the required public hearing. A commercial wind energy facility owner seeking an extension of a permit granted by a county prior to July 24, 2015 (the effective date of Public Act 99-132) must enter into an agricultural impact mitigation agreement with the Department of Agriculture prior to a decision by the county to grant the permit extension. Counties may allow test wind towers to be sited without formal approval by the county board. Any provision of a county zoning ordinance pertaining to wind farms that is in effect before August 16, 2007 (the effective date of Public Act 95-203) may continue in effect notwithstanding any requirements of this Section.

A county may not require a wind tower or other renewable energy system that is used exclusively by an end user to be setback more than 1.1 times the height of the renewable energy system from the end user's property line.

Only a county may establish standards for wind farms, electric-generating wind devices, and commercial wind energy facilities, as that term is defined in Section 10 of the Renewable Energy Facilities Agricultural Impact Mitigation Act, in unincorporated areas of the county outside of the zoning jurisdiction of a municipality and outside the 1.5 mile radius surrounding the zoning jurisdiction of a municipality.

(Source: P.A. 100-598, eff. 6-29-18; 101-4, eff. 4-19-19.)

# Solar Project Siting

- If Wind Farm Assets Are Not “Structures” (A County Does Not Need to Enact Zoning to Regulate Wind Farm Siting) Where Does this Leave Counties with Regard to Solar Farm “Standards”?

  - Are Solar Assets “Structures” Subject to Zoning?

  - Is Additional Authority Needed to Regulate Solar Project Siting in Illinois?

  - Can a County Have a Stand-Alone Solar Ordinance Similar to what It can do for Wind?

- Do Developers want to ask this Question?

  - Stated Another Way, is the Path of Least Resistance Simply to work with the County?

  - Will the be Unintended Consequences of a Challenge?

# Other Potentially Relevant Authority

- 55 ILCS 5/5-1063 Building Regulations and Permits
- 55 ILCS 5/5-13001 Allows for the Establishment of Building and Setbacks from Various Roads and Corporation Limits
- 55 ILCS 5/5-14001 Allows for the Development of a “Harmonious” Regional Development Plan
- Article 110 of the Township Code allow Townships within a County that is not Zoned to Establish a Zoning Ordinance

  - We know from the WECS Statute that Only a County can Establish Standards for Wind Farms

  - No Such Prohibition Exists for Solar, where does this Leave Us?

- Don’t Forget Municipal Zoning (65 ILCS 5/11-13-1) and Extraterritorial Municipal Zoning (1.5 Miles Outside of Corporation Limits) in Counties that are not Zoned

  - See 65 ILCS 5/11-13-26 (Companion to WECS Statute)

# Agricultural Impact Mitigation Agreement

- PA 100-0598 Extended the Obligation of Wind Farms to Enter into an Agricultural Impact Mitigation Agreement to Solar Farms (Renewable Energy Facilities Agricultural Impact Mitigation Act)
- See 505 ILCS 147 for AIMA and Related Requirements & Definitions of Commercial Wind and Solar Facilities
    - Note Key Difference Between Wind and Solar AIMA Timing Requirements (Wind AIMA Needs to Be in Place Prior to the Public Hearing, Solar 45-days prior to Construction – 147/15(c) and (c-5))
- Every AIMA in the State (Wind, Solar, Transmission, Pipeline) is Processed Through the same Office with the Illinois Department of Agriculture
- Boilerplate Agreements for Wind and Solar Available at:
    - https://www2.illinois.gov/sites/agr/Resources/AIMA/Pages/default.aspx

# AIMA Provisions

- The actions set forth in this AIMA shall be implemented in accordance with the conditions listed below:

  A. All Construction or Deconstruction activities may be subject to County or other local requirements. However, the specifications outlined in this AIMA shall be the minimum standards applied to all Construction or Deconstruction activities.

  B. Except for Section 21(B-F), all actions set forth in this AIMA are subject to modification through negotiation by Landowners and a representative of the Facility Owner, provided such changes are negotiated in advance of any respective Construction or Deconstruction

  C. Execution of this AIMA shall be made a condition of any Conditional/Special Use Permit. A copy of this AIMA shall be mailed to each Landowner. Within 30 days of execution of this AIMA, the Facility Owner shall provide postage and mailing labels to the IDOA for mailing to all Landowners. If the Facility Owner becomes aware that a Landowner was not included on the list of Landowners to which a copy of this AIMA was mailed, the Facility Owner shall notify the Department and provide postage and a mailing label as soon as possible.

In the case of a new Underlying Agreement with a Landowner, the Facility Owner shall incorporate this AIMA into such Underlying Agreement.

# AIMA Provisions

- **Deconstruction of Commercial Wind Energy Facilities and Financial Assurance**

A. Deconstruction of a Facility shall include the removal/disposition of the following equipment/facilities utilized for operation of the Facility and located on Landowner property:

1. Wind Turbine towers and blades;
2. Wind Turbine generators;
3. Wind Turbine foundations (to depth of 5 feet);
4. Transformers;
5. Collection/interconnection substation (components, cable, and steel foundations), provided, however, that electrical collection cables at a depth of 5 feet or greater may be left in place;
6. Overhead collection system;
7. Operations/maintenance buildings, spare parts buildings and substation/ switching gear buildings unless otherwise agreed to by the Landowner;
8. Access Road(s) (unless Landowner requests in writing that the access road is to remain);
9. Operation/maintenance yard/staging area unless otherwise agreed to by the Landowner; and
10. Debris and litter generated by Deconstruction and Deconstruction crews.

B. The Facility Owner shall, at its expense, complete Deconstruction of a Commercial Wind Energy Facility within eighteen (18) months after the end of the Useful Life of the Facility.

C. During the County permit process, the Facility Owner shall file with the County, a Deconstruction Plan.  A second Deconstruction Plan shall be filed with the County on or before the end of the tenth year of the Commercial Operation Date.

# AIMA Provisions

D. The Facility Owner shall provide the County with Financial Assurance to cover the estimated costs of Deconstruction of the Commercial Wind Energy Facility. Provision of this Financial Assurance shall be phased in over the first 11 years of the Project's operation as follows:

1. On or before the first anniversary of the Commercial Operation Date, the Facility Owner shall provide the County with Financial Assurance to cover ten (10) percent of the estimated costs of Deconstruction of the Facility as determined in the Deconstruction Plan provided during the county permit process.

2. On or before the sixth anniversary of the Commercial Operation Date, the Facility Owner shall provide the County with Financial Assurance to cover fifty (50) percent of the estimated costs of Deconstruction of the Facility as determined in the Deconstruction Plan provided during the county permit process.

3. On or before the eleventh anniversary of the Commercial Operation Date, the Facility Owner shall provide the County with Financial Assurance to cover one hundred (100) percent of the estimated costs of Deconstruction of the Facility as determined in the Deconstruction Plan provided during the tenth year of the Commercial Operation Date.

The Financial Assurance shall not release the surety from liability until the Financial Assurance is replaced. The salvage value of the Facility may only be used to reduce the estimated costs of Deconstruction in the Deconstruction Plan if the County agrees that all interests in the salvage value are subordinate or have been subordinated to that of the County if Abandonment occurs.

E. The County may – but is not required to – reevaluate the estimated costs of Deconstruction of any Commercial Wind Energy Facility after the tenth anniversary, and every five years thereafter, of the Commercial Operation Date which reevaluation must be performed by an independent third party Professional Engineer licensed in the State of Illinois. The County shall provide the Facility Owner with a copy of any reevaluation report. Based on any reevaluation, the County may require changes in the level of Financial Assurance used to calculate the phased coverages described in Section 21 D. required from the Facility Owner. The Facility Owner shall be responsible for the cost of any reevaluation by a third party Professional Engineer.

F. Upon Abandonment, the County may take all appropriate actions for Deconstruction, including drawing upon the Financial Assurance. In the event the County declines to take any action for Deconstruction, the Landowners may draw upon the Financial Assurance.

# Overview of Considerations Relating to Site Control Agreements

- In addition to the development provisions covered earlier in our presentation today, to increase the likelihood that a project can be successfully developed and achieve operations, a renewable energy developer should make sure to take into account various other considerations needing to be addressed and included in their underlying site control agreement.
- An underlying site control agreement can take many forms, whether it be a lease, easement, or purchase option (if the developer intends/needs to purchase certain parcels for use in the project).
- Depending on the type of site control agreement, considerations that should addressed and that we'll cover in the next half of this presentation include the following:
  - Assignment Rights;
  - Term Length;
  - Cooperation Provisions;
  - Limitation of Termination Rights; and
  - Rights to Cure in the Event of Default.

# Assignment Rights

- Developers should always reserve all rights necessary to grant and assign various interests in and to their project property.
  - There is good reason for this - **developers need to be able to freely develop, construct, maintain and operate their project** without having to first obtain permission from others to take necessary action.
  - **At various points in a project's development** a developer might need to assign the rights that they have been granted through their site control agreement, and when such a need arises they want to make sure their **assignment rights are not at all limited** or constrained.

# Assignment Rights Cont.

a. When might a developer need to assign its rights? The following are situations where assignment may be necessary:

   i. **An assignment of site control agreements** from a holding co. to project entity:
      1. This is generally done as a best practice prior to a permit application being made to ensure a developer can show adequate site control in name of its project when they submit a permit application.

   i. A developer might need to **assign or pledge its assets in connection w/financing**, including its site control agreements

   i. A developer might need to assign **rights for access to project property**:
      1. A developer might need to grant sub-easements, co-easements, or access easements in connection with developing a project.
      2. **Examples**:
         a. Grant of easement to a utility co. to tie lines from a substation to a switchyard
         b. Grant of easement to a utility to use a shared access road servicing a substation and switchyard;
         c. Grant of easement to its other development entity for phase II of a project.

# Assignment Rights Cont.

- Issue to look out for:
  - Landowners will often ask to have the right to consent prior to a developer assigning its rights under a site control agreement; however, *developers should always try to limit restrictions to their right to assign*. There are a few reasons for this:
    - A developer is in the best position to know what needs to be done to ensure successful development of the project. Having to obtain third party consent could complicate a developer's efforts.
    - If a landowner has consent rights, it could hold up efforts to reach financial close by refusing to consent to various assignments needing to be executed.

# Assignment Rights Cont.

- Sample Provisions Providing for Adequate Assignment Rights:

- Collateral Assignments: Grantee shall have the absolute right in its sole and exclusive discretion, without obtaining the consent of Owner, to finance, mortgage, encumber, hypothecate, pledge or transfer to one or more Mortgagees any and all of the rights granted hereunder, including the easements granted herein, and/or any or all rights or interests of Grantee in the Property or in any or all of the Facilities.

- Non-Collateral Assignments: Grantee shall have the right, without the prior consent of Owner, to sell, convey, assign or transfer (including granting co-easements, separate easements, subeasements) any or all of its rights hereunder in and to any or all of the Property provided such transfer is related to a Project. Grantee shall be relieved of all of its obligations arising under this Agreement, as to all or such portion of its interests in the Property transferred, from and after the effective date of such transfer, provided such rights and obligations have been assumed by such transferee.

# Term Length

- Developers should **not allow for any material deviations** in term length for a project. **Term lengths should be the same** across all leases a developer enters into with landowners for any property to be included in the project.
- Examples of deviations to term length within site control agreements that should be avoided:
  - Where multiple landowners have site control agreements with a developer but the terms in each landowners' site control agreement vary in length
    - *Ex: landowner A has a 20-year term, and landowner B has a 30-year term*
  - Where separate site control agreements entered into between landowners and a developer provide for terms of the same *cumulative* length but said terms are uncertain to commence unless the parties reach an agreement after **renegotiating** certain term
    - Ex. Landowner A has an agreement with a developer that has a 35-year initial term but gives the developer the option to extend the agreement for an additional 5-year term upon expiration of the initial term *should the parties reach an agreement on updated payment terms*.
      - Here, the total term length is uncertain at the time of execution of the site control agreement. It could be 40 years, or the term could end at 35 years.

# Term Length Cont.

**Why is it a problem to have various site control agreements for project property with deviating term lengths?**

- Developers looking to sell their project cannot properly show prospective purchasers what project costs will be in this type of a scenario. Rent payments a developer might pay to a landowner could be uncertain.
- Since it could not be said with certainty that an agreement would extend for a total term, a buyer would not be able to feel comfortable that it had adequate site control for the entire term that they would be planning for the project to operate for.
- Should a developer contract the project to deliver power for a set length of time, if some of its site control agreements expire prior to the end of the term its project contracts are for (say for example, a PPA with a set term), a developer who loses the ability to operate all or a portion of its project due to the loss of rights in and to that project property will then be in breach of any project contracts and subject to liability pursuant to same.

# Cooperation

- Development of a fully operational and constructed renewable energy project requires the cooperation of many parties. As such, it's important to include provisions requiring the reasonable cooperation of all parties to the site control agreement within the site control agreement when drafting.
- **Cooperation is required at many stages**. Some examples of when cooperation is needed include:
  - 1) In reaching an agreement on language and provisions to be included in site control agreements;
  - 2) In obtaining any fully-executed estoppels that might be **required prior to a sale** of the project to a third-party purchaser or **closing** should a developer pursue obtaining construction financing;
  - 3) **In modifying site control agreements** after execution at a later date should it be determined that amending an agreement is necessary to clarify the parties' true intent as to any given provision of the agreement; and/or
  - 4) **to reinstate the agreement** should it be terminated, **to preserve** a developer and any mortgagee's rights and/or **security interest** in and to the property.

# Cooperation Cont.

Sample Provisions Requirement Reasonable Cooperation Amongst Parties:

- Title Insurance and Financing. Owner agrees that Owner shall execute and deliver to Grantee any documents reasonably required by the title insurance company and/or a financing party within five (5) business days after presentation of said documents by Grantee; provided, however, in no event shall such documents materially increase any obligation or materially decrease any right of Owner hereunder.

- Estoppel Certificates. Owner shall execute such estoppel certificates (certifying as to such matters as Grantee may reasonably request, including without limitation that no default by Grantee then exists under this Agreement, if such be the case) and/or consents to assignment (whether or not such consent is actually required) and/or non-disturbance agreements as Grantee, any transferee of Grantee or Mortgagee may reasonably request from time to time. The failure of Owner to deliver any estoppel certificate within fifteen (15) days after Grantee's written request therefor shall be conclusive evidence that (i) this Agreement is in full force and effect and has not been modified; (ii) any amounts payable by Grantee to Owner have been paid through the date of such written request; (iii) there are no uncured defaults by Grantee; and (iv) the other certifications requested by Grantee in its estoppel, are in fact, true and correct.

- Amendments. Provided that no material default in the performance of Grantee's obligations under this Agreement shall have occurred and remain uncured, Owner shall cooperate with Grantee in amending this Agreement from time to time to include any provision that may be reasonably requested by Grantee for the purpose of implementing the provisions contained in this Agreement or for the purpose of preserving the security interest of any transferee of Grantee or Mortgagee.

# Cooperation Cont.

- Question for Consideration:

  **When a project faces no significant opposition, is it still important to include cooperation provisions within a site control agreement?**

- Answer: Yes!
- Why?
  - Landowners who were previously supportive of a project could change their mind at any time for various reasons. Reasons they might change their mind include:
    - Ex. After learning that other landowners received more favorable payment terms, a landowner might become frustrated with a developer and no longer act in a way supportive of the developer’s project unless that developer agrees to modify the landowner’s site control agreement to add in the more favorable payment terms.
    - Ex. A previously supportive landowner might pass away, and their heirs could decide to contest the validity of a developer’s site control agreement with that landowner. They might also be generally uncooperative should they not see the benefits of the project to the area within which it is located.

# Limitation of Termination Rights

**Care should be taken to limit landowner termination rights in a developer's site control agreements.**

- Why?
  - Should an agreement be terminated for any reason, a developer could lose rights to access all or a portion of the project site. A developer could also lose the ability to operate portions of the project if an agreement is terminated, then subjecting it to liability under contracts it may have entered into to supply a set amount of power from the project.
- If an agreement is terminated and a landowner cannot use or access the facilities placed on project property subject to that agreement to generate or deliver power, it will be subject to liability under contracts the project company has entered into.

# Limitation of Termination Rights Cont.

- Question for Consideration: Is it okay to allow a landowner the right to terminate an agreement, but only in circumstances where there has been a monetary default by the developer?
  - Answer: No!
- Why?
  - Landowners often make this request, which seems reasonable but can actually be a difficult thing for a developer to agree to. This is because a developer will often obtain significant funds from a lender to construct a project. There are other remedies available to make a landowner whole in lieu of termination rights, which if granted and exercised by a landowner could jeopardize an entire project. During negotiations, its helpful to point out that while it is a valid concern on the part of a landowner, the goal of all parties is to reach a time where a project is built and operational, as that is the point at which a landowner will begin to receive the most lucrative payments under a site control agreement. Providing for termination rights within an agreement makes prospective purchasers of the project as well as lenders who might extend funds for its construction uneasy, which jeopardizes the likelihood that the project can reach the stage in which these most lucrative payments can be made to the landowner – the phase where the project is operational.
  - The increase the likelihood that a developer can successfully build the project, its in all parties' best interests to draft an agreement that make sthe project as attractive as possible to 3rd parties who might contribute to it successfully reaching the operating stage.

# Limitation of Termination Rights Cont.

- Sample Provisions relating to limiting termination rights that a developer could use in its site control agreement:
  - Owner's Right to Terminate. Owner shall have the right to terminate all or any portion of its rights in this Agreement after the [___] th (___th) anniversary of the Effective Date if, at the time Owner's written termination notice is delivered, Grantee has not commenced construction of its Facilities for the Project on or near the Property.
  - Remedies. Notwithstanding anything in this Agreement to the contrary or any rights or remedies Owner might have at law or in equity, if any of Grantee's Facilities are then located on the Property and Grantee fails to perform any of its obligations hereunder beyond applicable cure periods, Owner shall be limited to pursuing damages and Owner amy not commence any action to terminate or cancel this Agreement.
    - If a landowner absolute will not enter into an agreement without the right to terminate, and the developer absolutely needs that land to construct the project, a developer could offer the following alternate 'Remedies' language to the landowner as a compromise. This language seems to generally be acceptable to buyers and lenders, but still offers the developer adequate project:
      - *Remedies (alt. language). Notwithstanding anything in this Agreement to the contrary or any rights or remedies Owner might have at law or in equity, if any of Grantee's Facilities are then located on the Property and Grantee fails to perform any of its obligations hereunder beyond applicable cure periods, Owner shall be limited to pursuing damages and Owner amy not commence any action to terminate or cancel this Agreement, unless a court with jurisdiction has required Grantee to pay to Owner damages relating to this Agreement within a set time frame, and Grantee thereafter fails to pay to Owner said damages within this time. If Grantee fails to pay Owner these damages as required by this Section, after providing a Notice of Default and subject to Section 12 of this Agreement, Owner may then terminate the Agreement. For the avoidance of doubt, should the time frame set by a court exceed a period of twelve (12) months, regardless of this set time frame Grantee shall have no more than twelve (12) months to pay any such damages required.*

# Rights to Cure in the Event of Default

**A developer should ensure its site control agreements provide for the right to cure in cases of both monetary and non-monetary default.**

- Why?
- Once a developer, its lenders, or a 3rd party purchaser has expended significant funds to progress the development or construction of a project, these parties will look to ensure that adequate rights to cure prospective issues are provided for in site control agreements. These parties will need to see that once these funds have been expended, protections are in place to make sure site control agreements can't be easily terminated and result in a loss of site control for all or a portion of the project.

# Rights to Cure in the Event of Default Cont.

- Additional Consideration:
- Not only should rights to cure be present, but adequate timeframes within which a cure can be effectuated should be provided for. A developer should give itself an initial timeframe of at least 60 days to cure (after receiving a notice of default), with additional time periods then built onto this initial timeframe to allow any mortgagee of the developer to step in and effectuate a cure should the developer be unable to cure or choose not to do so.
- These timeframes give a developer, lender, or future purchaser comfort that even in the event of an oversight or mistake that could lead to said party being in default under the site control agreement, they will have adequate time and opportunities to effectuate a cure before action can be taken against them that could cause them to lose the ability to continue developing, constructing, or operating the project.

Polsinelli PC

150 N. Riverside Plaza, #3000

Chicago, IL 60606

(312) 873-2941

Invenergy LLC

1 S. Wacker Dr., Suite 1800

Chicago, IL 60606

(312) 429-2544

Clean Law PC

301 W. Grand Ave, Suite 133

Chicago, IL 60654

(312) 806-1882

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