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Briefing Note

Joint Ventures and shareholders agreements in Renewable Energy Projects

Joint ventures or shareholders agreements are entered into for a number of commercial reasons in connection with renewable energy projects. Those reasons include tax planning (primarily Inheritance Tax planning), funding issues, reasons concerning the siting of the project or access to it.

The choice of vehicle will be driven by a complex interplay of tax issues, commercial issues and funding but it is likely to be down to a choice between a limited liability partnership (LLP) and a limited company.

The Main features of each of these vehicles are as follows:

	Tax transparent	Double taxation	Limited Liability	Ability to grant floating charge	Ability to grant shares pledge	Ability to pay dividends	Separate legal entity
LLP	√	×	√	√	×	×	√
Limited Company	×	√	√	√	√	√	√

At the moment, funders prefer the use of a limited company structure because of the ability to grant a shares pledge over the shares in the company. Please refer to our separate briefing note on funding for an explanation of shares pledges.

Scenario 1 – Developer and Landowner

A common situation is a landowner with a site suitable for wind development. Discussions might proceed along granting an option in favour of the developer to develop the site in exchange for a rental payment. From the landowner's perspective, this may create inheritance tax problems.

A way around the IHT problems is to establish a joint venture with the developer in order that the income from the project in the hands of the landowner is treated as trading income and therefore qualifies for Business Property Relief (BPR). The favoured structure in this scenario is an LLP.

From the Developer's perspective they will be concerned about the following key issues:

- The additional costs of compliance for an LLP structure – accounting primarily and the impact on obtaining project finance (if the project is of that scale).

- Ensuring that they have voting control over the LLP

- There are other issues which arise, such as whether the LLP inadvertently creates a Collective Investment scheme and certain work arounds may be required.

From the landowner's perspective, clarity is required on what the developer will be doing and in what timescales. A great deal of care has to be taken to ensure that the land is not sterilised from development as a result of entering into long term contractual arrangements with Developers who sit, inactively, on the project without being in default under the JV documents.

The costs of entering into a LLP on this basis are considerably more than a traditional option and lease however the tax savings usually far outweigh the costs.

The bones of the JV agreement (of whatever form) that would be covered are:

- Percentage interests/shareholdings
- Is the property to be owned by, or more likely leased to, the JV. What are the lease terms.
- Developer obligations to progress planning consents etc.
- Longstop dates- i.e. dissolution of arrangement if consents not obtained
- Appointment of board and management responsibilities
- Profit sharing arrangements
- Transfers of interests/shares (and particularly issues around land sterilisation/tax planning)
- Expulsion/Default
- Drag Along Provisions
- Restrictive Covenants

Scenario 2- Landowner and developer, traditional Joint Venture

This scenario is common where a landowner wishes to participate financially in his scheme beyond a basic lease of the land – where there is an appetite to share risk (usually in going through the consenting, i.e. development stage) in exchange for a share of the upside. The upside may be the long term operation of the scheme or the sale of the consented site.

The issues which arise here are not dissimilar at all to those in scenario one. The landowner will still be very concerned about land sterilisation issues but there will be an enhanced focus on the funding obligations for the JV partners.

The development stage (i.e. obtaining planning and grid consents) ought to be reasonably predictable in terms of costs and therefore the level of capital contribution which may be required. One caveat to that is the costs of a planning appeal and the additional time to take the project through that process.

The JV agreement should deal with a default in providing a capital contribution. There may for example be a degree of tolerance where the non defaulting party can introduce the shortfall in exchange for much higher interest rates but there should be a threshold which, if breached, would allow one member to buy out the other whether at fair value or a discount.

The more complex area is around construction funding. Obviously, the unknown is the level of capacity for which a consent might be granted, bearing in mind that it may take several years to obtain consent. When the variability of project finance is factored in, the discussion becomes even more difficult as the capital contributions can swing by several millions on a big wind project.

Careful thought requires to be given to this aspect and again whether compulsory buy out or dilution is required, how that interacts commercially with bringing in outside parties to fund any gap, the timescales involved, security issues and whether a partner who has taken development risk should always be guaranteed a minimum equity carry in the project after construction (a floor).

Scenario 3- JV between two landowners. Hydro scheme on march burn.

A common scenario is a hydro scheme on a march burn between two neighbouring proprietors. These are often funded by equity from the landowners with an element of debt or project finance sourced externally.

The interests of the landowners are significantly more aligned here than is the case with a third party developer as both parties are likely to wish to drive the project forward at a similar rate.

Land sterilisation becomes less of an issue and what is more of an issue is ensuring that management obligations are clearly defined, that the flow of information between the parties is provided for and that there is a recognition that external consultants are properly signed up on terms that will be acceptable to external funders.

The key pressure points are around ensuring that there is provision to deal with default in providing a capital contribution and dealing with the complexities around a change of ownership in the estate (either planned or unplanned) as well as rights of pre-emption over the project vehicle in those circumstances and how security to a funder will be dealt with and reconstituted on a sale of one of the estates, which can prove to be complex.

Scenario 4- JV for wind turbines between two landowners.

This scenario is common where the there may be an estate owner with a hill suitable for wind turbines but a lack of access to them. A JV may come about with a neighbour who has suitable access and the possibility of a limited number of turbines on his lower ground.

The pressure points in this scenario are around the possibility of the hill farmer obtaining consent for all of the turbines on his property and the lower proprietor “merely” providing an access route- of course, the development may be unlikely to proceed without access. The discussion in this scenario is largely at the outset around a share of the JV vehicle in this scenario and the same JV issues would apply as the hydro JV example, particularly in connection with funding obligations.

Turcan Connell has a wealth of experience in advising landowners and developers on these matters, particularly around the tax drivers for joint ventures and the detailed negotiation of the joint venture documents.

This note is intended as a brief summary of a selection of the issues surrounding Joint Ventures and shareholders agreements in Renewable Energy Projects. No responsibility can be taken for any action taken in reliance on this note and specialist advice should be taken in every case. Turcan Connell would be happy to provide such advice. © Turcan Connell March 2013