

Shout it, Shout it, Shout It Out Loud! Key Elements of Renewable Energy Site Control



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In the context of renewable energy projects, “site control” refers to an agreement that conveys rights permitting the utilization of real property for initial diligence and planning, and ultimately the construction, development, operation, and maintenance of a renewable energy project. While initial site control agreements typically include lease options or purchase options, at the project construction and operation stage, site control can take the form of a lease, a license agreement, or use rights contained in a power purchase agreement. Site control agreements dictate the rights, obligations, and liabilities of the parties, including, but not limited to, the renewable energy developer’s payment obligations.

To evidence site control, a renewable energy developer will often record in the public records a memorandum of the site control agreement (e.g. memorandum of purchase option, memorandum of lease, etc.). Recording a memorandum of site control is important because it provides constructive notice of the real property rights that allow for the development and operation of a renewable energy project. Legally speaking, this constructive notice provides all third parties (including subsequent owners and interested buyers of the property) with the knowledge

that the site control agreement exists, thereby helping protect the real property rights of the renewable energy developer and operator. Moreover, a title insurance policy cannot be issued — and therefore project financing will typically not flow — until a sufficient site control memorandum is recorded in the public records.

A memorandum of a site control agreement (as opposed to the entire agreement) is typically recorded because it allows the parties to provide record notice of site control without revealing confidential commercial terms. For example, while the site control document itself will likely state the agreed upon payment obligations for a renewable energy developer, the developer may not want the public to know that they are willing to lease land at an annual rate of \$2,000/acre if they are negotiating lesser amounts with other landowners.

Notwithstanding, the following provisions of the site control agreement should be included in a site control memorandum:

- The names and addresses of each of the parties.
- A description of the real property, which is frequently a metes and bounds legal description, and should be sufficient for a third party to identify the subject property. With regards to leases, the initial memorandum usually includes a legal description of the entire fee parcel (as opposed to a description of the anticipated leased premises), whereas the final memorandum usually contains a metes and bounds legal description of the leased premises.
- A description of any easement rights (access, utility connection, etc.) pertinent to the renewable energy project and granted under the site control agreement. It is important that these easement rights be included so as to put third parties on notice of such easements, and permit such easement rights to be insured by the title insurance company.
- The term, including any extension and renewal periods (or at least reference to the fact that the term may be extended), and (if applicable) any decommissioning periods. It is important to note that transfer tax could be imposed on a memorandum of lease depending on the total length of the term (as may be extended), and transfer tax could be imposed on a purchase option or other conveyance of a real property interest. Transfer tax varies by jurisdiction (at both state and county levels) and should be evaluated on a project-by-project basis.
- Other key site control agreement provisions include rights of first refusal and negative covenants and restrictions (e.g. landowner restriction from constructing improvements that will shade a solar energy installation or from further encumbering the subject property).
- As best practice, it is recommended that the memorandum include provisions stating that (i) the memorandum only contains certain terms and provisions of the site control agreement and that reference should be made to the complete site control agreement, and (ii) in the case of any inconsistencies between the site control agreement and the memorandum, the terms of the site control agreement govern and control.
- Original wet-ink and notarized signatures of the parties for documents that are to be recorded are still needed for recording purposes (even when recording electronically) as well as any tax documents required for such recordings (e.g. transfer tax forms).
- Finally, the memorandum should be in recordable form. Recording requirements vary by state, and may even vary by counties within a state. Even the best memorandum will not be accepted by the recording clerk if it is not in recordable form.

Recording a memorandum of a site control agreement is a crucial step in securing site control, protecting the rights and interests of the renewable energy project developer, and helping make a renewable energy project financeable. If you have further questions about renewable energy site control, or if you're seeking legal guidance on similar matters, contact [Michael L. Nisengard \(mnisengard@lippes.com\)](mailto:mnisengard@lippes.com) or [Richard R. Capote](#)

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