

Ohnstad Twichell, P.C., is a full service law firm having a general and trial practice in North Dakota, Minnesota, and federal courts and offering services in the fields of probate, real estate, estate planning, corporate, employment law, family law, elder law, municipal finance and bonding, taxation, personal injury, criminal, negligence, commercial, insurance defense, water rights and automobile law.

## WIND ENERGY LEASES: WHAT YOU SHOULD KNOW



**Marshall W. McCullough**  
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probate, and taxation.*

The development of wind farms and other renewable and clean energy projects is growing at a remarkable rate across the United States, and especially in the West. In fact, North Dakota is ranked as the number one state for wind energy potential. At Ohnstad Twichell, we have had the opportunity to review leases from many different developers.

There are several legal instruments through which a developer can acquire access to the landowners land and wind resources. A wind energy lease is the most common. It creates a landlord/tenant relationship which grants the tenant the right, for a period of time, to develop energy generation and transmission facilities upon the real estate in exchange for a lease payment. Before the lease is entered into, the developer may require a landowner to sign an option agreement. The option agreement restricts usage of the land while the developer is determining the feasibility of a wind energy project on the property. It also grants the developer a period of time to acquire land from your neighbors. Both the lease and option are legally binding agreements that will govern the landlord/tenant relationship over the life of the project. Some developers combine the option and lease into one document.

The terms and payment structures of the leases can vary greatly between companies. The option period is typically five years or less. Whereas, the actual lease agreement may last anywhere from 30 years to 99 years. In addition, the payment terms can vary greatly. Most leases provide a payment for each wind tower constructed on your property. This may be either a fixed sum or a royalty based upon the energy produced. The payments will typically increase after 12 to 15 years to account for inflation.

Most leases also provide payments for roadways, transmission lines, substations, and similar structures. The amounts paid for these items vary greatly between the companies. As these items will affect the use of your property, you must review these additional items with great care. The lease should also include provisions regarding the potential destruction of crops should the construction occur during the farming season.

The landlord will be required to make certain representations and warranties for the benefit of the developer. For example, the developer will want a representation from the landlord that there are no liens, encumbrances or other wind leases affecting the property other than those specified in the lease. If there are existing liens or mortgages on the property, the developer will require a nondisturbance and subordination agreement from the landlord's lender.

The developer will also require that the landlord restrict hunting operations in the area around the turbines, cooperate in obtaining governmental approvals and permits, ensure property usage, storage disposal, and release of hazardous substances, and allow the developer the quiet use and enjoyment of the property. Again, these are typical provisions in a Wind lease, but you need to know how it will affect your property.

In some areas, the status of the ownership of mineral interests in the land will also be important to the developer. Neither the developer nor its lenders wants to assume the risk of disturbance or damage to the wind project as a result of mining or oil and gas production.

Typically, the developer will require a provision that allows its rights to be assignable to a third party or subject to a sublease. Since the developer may not be the long-term project owner, it is important that the developer seek broad rights to assign its rights under the lease. If the assignee agrees to assume all responsibilities of the developer, the developer should be released from any further obligations under the lease.

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*A legal  
newsletter from  
Ohnstad Twichell, P.C.,  
with offices in  
West Fargo,  
Hillsboro,  
Mayville, Page,  
Hope, Finley,  
and Hatton  
North Dakota.*

The lease will describe the circumstances under which the termination of the lease by either party is permissible. The developer will want to have the right, at any time, to surrender or terminate all or any portion of its right, title or interest in the lease. However, since the developer has spent a significant sum of time and money to build the project, the rights of the landlord to terminate the lease will be limited.

Wind energy development leases are varied and often complex, and the scope of these documents continues to evolve as the industry advances. New investment and financing mechanisms in the renewable sector will continue to impact the nature of these leases. Should you be approached by an individual asking you to execute a wind energy and option agreement, we strongly recommend that you have the document reviewed by a qualified attorney prior to its execution. Ohnstad Twichell is willing and able to review the leases on your behalf and discuss the potential benefits and detriments to you.

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### FARMLAND SALES



**David L. Wanner** works in the West Fargo office and devotes his practice to real estate, estate planning, probate and commercial law.

The attorneys at Ohnstad Twichell are available to consult with clients concerning land sales, and assist clients in the various aspects of land sales from beginning to end. Ohnstad Twichell helps our clients sell their farmland, when the need or desire to do so arises, in the usual course of the practice of law.

Unlike other professionals, the attorneys at Ohnstad Twichell can provide a full range of legal services and advice from the beginning of a land sale through the completion of a land sale. These services include the following:

- Review of income tax ramifications
- Tax-free exchanges
- Review of abstracts and title opinions
- Resolution of title issues prior to sale
- Determination of sale procedures with client
- Preparation of bidder's information packet
- Arranging advertisements for sale
- Direct mailing of sale information to prospective buyers
- Review of bids
- Scheduling and conducting final bidding as directed by client
- Preparation of purchase agreement
- Title work as required
- Closing of sale transaction
- Tax basis investigation and determination

Ohnstad Twichell works with each individual client to structure each sale in accordance with the client's directions and requirements. Please call us if you need any assistance in a land sale. Bob Rosenvold, Marshall McCullough and Dave Wanner are available to assist clients with land sales from the West Fargo office. John Juelson and Ross Keller are available to help clients with land sales from our Hillsboro office. Bill Brudvik, Lee Vinje and Brett Brudvik are available to assist with land sales from our Mayville office.

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### RESIDENTIAL EVICTIONS



**Christopher M. McShane** works in the West Fargo office of Ohnstad Twichell, where he works in the areas of civil litigation and commercial drafting.

Many people in the Red River Valley area own and operate residential rental properties. The properties rented range from the basement apartment in a landlord's home, to multiple-unit apartment buildings. Unfortunately, landlords may experience difficulty with their tenants.

If the situation escalates to the point an eviction is necessary, a civil action must be started and certain procedures must be followed. In North Dakota, the first step in the eviction process is a notice of intention to evict. The notice of intention to evict must be properly served upon the tenant. Improper service of the notice of intention to evict is a common pitfall in residential evictions.

If the problem causing the need to evict is not corrected, an eviction action must be started within 15 days of the service of the notice of intention to evict. To start an eviction action, a summons and complaint must be drafted and properly served upon the tenant. A hearing before a judge of the district court must be held within a short period of time based on the statute of the respective state. The landlord, or a representative of the landlord, must testify as to the breach alleged in the complaint. The tenant may question the person testifying regarding the breach alleged, if the tenant appears at the hearing.

The judge will make a determination regarding whether the tenant should be evicted and how long the tenant has to vacate the premises. This decision is routinely made at the time of the hearing. If the judge decides an eviction is proper, a judgment will be entered the day the decision is made. The judgment must be served upon the tenant, who will hopefully vacate the premises in the time allotted for in the judgment.

*Landlords may experience difficulty with their tenants.*

If the tenant does not leave, or leaves without removing all of their personal property, the Sheriff must be called into action through the issuance of a writ of execution. The Sheriff will accompany the landlord to the premises to ensure the tenant leaves and to allow the landlord to remove any remaining personal property. The personal property of the tenant must be stored and protected. If the tenant desires the return of the property, the landlord can demand payment of the back-rent, any court costs awarded, and the storage fee incurred for the storage of tenant's personal property. These costs must be paid before the landlord is required to relinquish the property.

The most effective way to prevent or control problems with tenants is a well-drafted lease agreement. A lease agreement should specifically address the conflicts which most commonly arise in residential lease relationships, i.e., failure to timely pay rent, maintenance of the facility, and obnoxious behavior. If the conflict is not specifically addressed in the lease, the governing state law will control. An example of this is the charging of attorney's fees in an eviction action. Attorney's fees are not recoverable in North Dakota evictions unless the lease specifically includes an attorney's fee provision.

The attorneys at Ohnstad Twichell have experience with evictions in both North Dakota and Minnesota. If you are currently having difficulties with a tenant, or would like to review your lease form to avoid or reduce future problems, please call the attorneys at Ohnstad Twichell to discuss these issues.

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### **BUSINESS CORNER!!!**

#### **GUARDING GENETIC INFORMATION**



**Susan L. Ellison** works in the West Fargo office and devotes her practice to employment law, family law, and elder law.

On November 21, 2009, the Genetic Information Nondiscrimination Act (GINA) will become effective. This federal law was enacted to regulate the disclosure and use of genetic information in the workplace. Genetic information includes information about a person's genetic makeup and also the person's family members, dating back four generations.

Under GINA, it is unlawful for an employer to request, require, or purchase genetic information about an employee or family member. This means that an employer may not require an employee to take a genetic test or answer questions regarding a genetic test.

Generally, there are limited exceptions to federal laws, as there are with GINA. In essence, as an employer, you are prohibited by GINA from using genetic information in any employment context. Also, if you do have genetic information regarding an employee, that information must be kept confidential and should be segregated from other general information about an employee.

Occasions when genetic information may become an issue in the workplace may involve government officials investigating compliance with GINA, a request for leave under the Family and Medical Leave Act, or mandatory reporting to a public health agency in the event of a contagious disease posing an eminent hazard.

While the average employer may not have even considered acquiring or using genetic information, it is advisable that employers amend their policies on equal employment opportunity to add "genetic information" as a protected category.

Because GINA prohibits employers from requesting genetic information, employers may need to modify their requests for medical information involving a reasonable accommodation under the Americans with Disabilities Act (ADA). Medical release forms may also require modification if such forms broadly request large amounts of medical information because an employee's medical file may include family medical history.

We at Ohnstad Twichell can assist you in updating your personnel manuals and forms to comply with GINA.

Employers are required to be more careful in handling employee medical information.

#### **DON'T FIRE ME BECAUSE I CAMPAIGNED FOR THE WRONG CANDIDATE**



**Sara K. Sorenson** works in the West Fargo office and devotes her practice to employment law and litigation.

As November approaches and political activities increase, your employees may be engaged in numerous political activities inside and outside of the workplace, including campaigning for a candidate you find to be especially repugnant. Before you fire that employee for questionable judgment, consider the following: North Dakota is one of only a handful of states that prohibits discrimination against an employee "for lawful activity off the employer's premises during nonworking

*Employers should amend policies to add "genetic information" as a protected category.*



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hours[.]” In other words, a North Dakota employee is likely protected from firing by virtue of engaging in political activities outside of work. (There is an exception if the activity is in “direct conflict with the essential business-related interests of the employer.”)

An employer, however, can generally regulate political activity during working hours and on employer premises. So, it is acceptable to prevent employees from wearing clothing or displaying items that endorse a particular candidate or political agenda on the employer’s premises or during working hours. An employer may even limit an employee’s political speech on the employer’s premises or during working hours.

The decision to fire or otherwise discipline an employee is a serious one and should always be carefully considered in any situation, but especially so when the reason for the decision is, literally, political.

## NEWS FROM OHNSTAD TWICHELL!!

In September, Robert E. Rosenvold was a speaker at the Giving Point seminars in Fargo and Bismarck. He informed the attendees about charitable estate planning and practical solutions for equitable farm transfers.

Carol Stillwell, Robin Busch, Chantal Stennerson, Dena Ranum, Lucinda Hopewell, Janae Kragero and Kate Fluge all participated in the Cass-Clay United Way Day of Caring, assisting with cleaning homes for four elderly residents.



The information provided in this letter is of a general nature and should not be acted upon without prior discussion with your Ohnstad Twichell, P.C., attorney.

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