

ESTABLISHMENT OF A REAL RIGHT OF SUPERFICIES AND AN EASEMENT FOR WIND TURBINES

Hollandse Kust (zuid) Wind Farm Zone Sites III & IV

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[date]

Date

Today, on ***
there appeared before me, de heer *** civil-law notary practising in ***

Contractnummer

1. residing in

by his/her declaration acting as the authorised representative of Mr Ebe Terpstra, Head of the Agricultural Use Section of the Lettings & Valuations Division of the Central Government Real Estate Agency, with its business address in Assen (Postbus 16700, 2500 BS Den Haag), who by granting such authorisation was acting on behalf of the State of the Netherlands, hereinafter also called the State, authorised to do so under the provisions of the Central Government Real Estate Agency Mandate Decision 2016 of 27 June 2016 (Government Gazette, 8 July 2016 no. 35455),

whereby he, the person issuing the authorisation, is acting on behalf of the State Secretary of the Interior and Kingdom Relations, which mandate and authorisation are evidenced by a private power of attorney of

which is attached to this original instrument;

2. ***, with its registered office in *** and its actual place of business at ****, registered in the commercial register under number ***, hereinafter also called 'the **Superficiary**'.

A. INTRODUCTION

- A.1 Following an open procedure [details where necessary] the State has awarded the Superficiary a permit [details] for the operation of Sites III and IV of the Hollandse Kust (zuid) Wind Farm Zone;
- A.2 Following the award of this permit the State and Superficiaries have concluded an Agreement [details of the Agreement] on the Right of Superficies to be created for the wind turbines belonging to the Superficiary and on the Lease to be concluded for the cabling belonging to the Superficiary. This Agreement is attached to this Instrument and is deemed to form part of the Right of Superficies until the Agreement ends by operation of law;
- A.3 The above-mentioned Permit was irrevocably awarded on [date on which the Permit became irrevocable], whereby the Parties by means of this instrument create a Right of Superficies and an Easement for the operation of the wind farm.

The State and the Superficiary, hereinafter also called the '**Parties**', acting in the aforementioned capacity, declared that the Parties have agreed as follows:

B. Definitions

B.1. Unless otherwise indicated, in this instrument the following terms have the following meanings:

- **Dismantling period:**

a consecutive period of *** (***) months/years immediately following the Production Period and in which the turbines are taken out of production and dismantled, including associated works, and in which the Superficiary is able to meet the obligation to transfer set out in Section 12 of the General Terms and Conditions referred to in Section 1(1) of this instrument;

- **General Terms and Conditions:**

the 'State Property and Development Agency (RVOB)'s General Conditions pertaining to a Right of Superficies for Wind Turbines 2012', a copy of which is appended as **Appendix 2** to this instrument and which were lodged with the court registry of the District Court of Utrecht on 8 October 2012 under number 177/2012 and were registered with the public registers for property subject to registration on 5 September 2012 in the register Mortgages 4, part 61912, number 146;

- **the State:**

the State of the Netherlands, the undersigned referred to under 1;

- **Documentation:**

All the information provided by the State in relation to the Location, the Right of Superficies, the Right of Lease and the Works, which information was provided to the Other Party during the preceding open procedure [tender details], including the tender scheme, the Other Party's tender and the supplements and/or changes thereto as a result of further information that has come to the attention of the State. The Other Party cannot derive any rights from the information referred to herein. The purpose of this information is to enable the Other Party to carry out further investigation.

- **Award:**

the decision by the State to award the Agreement, pursuant to which decision the Agreement has been concluded in accordance with the provisions of Section *** of the General Terms and Conditions;

- **Civil-law notary:**

Mr R.A. Spit, civil-law notary at The Hague, or his or her deputy;

- **Superficiary:**

the undersigned referred to under 2;

- **Right of Superficies:**

the independent Right of Superficies over the Immovable Property, for a period of *** years, which entitles the Superficiary to construct, maintain, inspect, operate, remove, change, replace, service and own the Works in accordance with the present designated use, namely the generation of wind energy, to be created by the State for the Superficiary;

- **Agreement:**

the agreement to establish the Right of Superficies concluded pursuant to the Award, set out in the private agreement referred to above under A.4;

- **the Parties:**

The State and the Superficiary;

- **Parcels:**

(i) a parcel of land approximately ** hectares, *** ares and *** centiares (**.**.** ha.) in size, forming consecutive parts of the parcel recorded in the Land Register as ***, section **, number ** (hereinafter also called: **Parcel 1**);

(ii) a parcel of land approximately ** hectares, *** ares and *** centiares (**.**.** ha.) in size, forming consecutive parts of the parcel recorded in the Land Register as ***, section ***, number *** (hereinafter also called: **Parcel 2**);

Etc.....

hereinafter referred to as the '**Parcels**'.

- **Production period:**

a consecutive period starting immediately on the day when four (4) years have expired since the date on which the Permit became irrevocable until the date on which twenty-nine (29) years have elapsed since the issuing of the Permit;

- **Directorate-General for Public Works and Water Management (*Rijkswaterstaat, RWS*)**

Directorate-General for Public Works and Water Management Sea and Delta, PO Box 2232, 3500 GE Utrecht;

- **Open tendering procedure/tender scheme:**

the open tendering procedure relating to the Right of Superficies, as detailed in the Conditions, conducted on ***;

- **Permit**

[Details of the permit], as well as the requirements set for it in the preceding Wind Farm Site Decisions III ([Government Gazette 2018, 2543](#)) and IV ([Government Gazette 2018, 2497](#)) and the Offshore Wind Energy Act (*Wet Windenergie op Zee*) ([Bulletin of Acts and Decrees 2015, 261](#)).

- **Conditions:**

the conditions and provisions applicable to the Open Tendering Procedure/Tender, included in the Documentation;

- **Works:**

The Works to be realised on the Parcels, comprising, among other things, ** (**) wind turbines, and associated works such as, but not limited to, switching gear, metering equipment and grid connection equipment, cables, pipelines, works for conduits for electrical cables and/or the transport of energy carriers, as well as for telecommunication including other accessories, and foundations;

- **Wind farm:**

the Wind Farm known as *** comprising *** Wind Turbines, situated as close as possible to the following locations:

- WT 1 (XY coordinates: X = *** and Y = ***);
- WT 2 (XY coordinates: X = *** and Y = ***);
- WT 3 (XY coordinates: X = *** and Y = ***).

- **Wind turbine:**

a Wind Turbine of the make ***, model *** with a rotor diameter of *** (**) metres, an axis height of *** (**) metres in relation to the foundations of the Wind Turbine and with a nominal capacity of *** (**) MW.

B.2. The definitions may be used in the singular or plural without losing their substantive meaning.

C. CREATION OF A RIGHT OF SUPERFICIES

C.1 For the performance of the Agreement, the State hereby creates for the Superficiary and over the Parcels the exclusive and independent Right of Superficies as referred to in Section 5:101(2) of the Dutch Civil Code, which Right of Superficies the Superficiary hereby accepts.

C.2 The Right of Superficies does not include the internal site cabling with appurtenances (including the cables for electricity conduits and telecommunication, cables and pipes) for the Wind Farm. The Parties shall conclude a Lease independently of this Instrument for this purpose.

Restrictions under public law

The Land Register shows that the Parcels are not subject to any legal restrictions.

Mode of acquisition

The Parcels are the property of the State under the provisions of Section 5:27 of the Dutch Civil Code.

Legal status of the Parcels

The State guarantees:

- a. that it has the authority to create the Right of Superficies and the Easements to be created in this instrument;
- b. that the Parcels are not subject to any third party tenancy rights, agricultural tenancy rights or other usage rights other than those specified in the instrument;
- c. that to the extent of its knowledge the Parcels are not subject to any easements or other special rights, qualitative obligations or other special provisions and that no perpetual clauses are required to be imposed on the Superficiary as a result of agreements with third parties;

- d. that the Parcels are not encumbered by any right in rem or attachment that could affect the validity or exercise of the Right of Superficies and/or easements;
- e. that there is no case, binding advisory procedure or arbitration before the courts in relation to the Parcels;

D. TERMS AND CONDITIONS

The following terms and conditions apply to the Right of Superficies:

Article 1. General terms and conditions

1. The Right of Superficies is subject to the State Property and Development Agency (RVOB)'s General Conditions pertaining to a Right of Superficies for Wind Turbines 2012, hereinafter also called the **General Terms and Conditions**, in so far as not provided otherwise in this instrument or an instrument amending the Right of Superficies. The General Terms and Conditions were lodged with the District Court of Utrecht on 8 October 2012 under number 177/2012 and were registered with the public registers held by the Land Registry Office on 5 September 2012 under part 61912, number 146 of the register Mortgages 4. The Superficiary declares that it received a copy of the General Terms and Conditions before entering into the agreement to establish the Right of Superficies and is entirely familiar with the content of the General Terms and Conditions.
2. The reference to Section 2 and Section 15(2) is not applicable to the Right of Lease.
3. Sections 6(6) and 7 of the General Terms and Conditions are not applicable to the Right of Lease.

Article 2. Other provisions

In addition to the General Conditions, the following provisions shall also apply:

1. Routine maintenance activities, inspections carried out in connection with the State's public function, in so far as not arising from use of the Right of Superficies, shall be at the risk and expense of the State.
2. The Superficiary shall allow the State access to the Parcels at all times in order to carry out maintenance activities and inspections in connection with the public function of the North Sea.

Article 3. Acceptance

On the creation of the Right of Superficies, the Parcels were made available and accepted as found on today's date, including all known and unknown defects.

If the size of the Parcels and/or any other description of the Parcels that appears in the instrument is incorrect or incomplete, neither the Superficiary nor the State may derive any rights from such errors or omissions.

Article 4. Duration; start date:

1. The Right of Superficies shall be created for as long as the Superficiary has disposal of the Permit.
2. The Right of Superficies shall commence today and end by operation of law on the same day as the Permit ends, with the exception of any provisions regarding cleaning up and removal as referred to in Section 12 of the General Terms and Conditions in so far as such provisions have not yet been complied with.

Article 5. Amount of and interim changes to the fee

1. a. The annual fee for the Right of Superficies has been determined on the basis of the total number of megawatts (MW) of the total Wind Farm, namely three hundred and fifty (350) MW, times the percentage of the surface area of the Wind Farm that is located within the 12-mile zone, namely for Site III: 71.85% and for Site IV: 68.23%, times four thousand (4,000) full-load hours times *** euros and ** euro cents (€ **,**) per MWh per year and during the Production Period is therefore *** euros and *** euro cents (€ ***), excluding any VAT due (the **Fee**), with due observance of Section 5(2) payable on *** of each year, with the first payment on *** (**-**-****);
2. a. Notwithstanding the Fee, during the Dismantling Period a fee of *** euros and *** euro cents (€ ***) per year (€ *** per Wind Turbine per year), excluding any VAT due, shall apply, allocated pro rata according to the percentage specified in paragraph 1. If the Dismantling Period ends before the current year for which a fee is due has ended, or the

- Dismantling Period starts during the year for which a fee is due, the fee shall be calculated pro rata;
- b. The fee for the Dismantling Period shall be reviewed on commencement of the Dismantling Period in accordance with Section 4 of the General Terms and Conditions, whereby the date of the instrument shall apply as the starting date for the purpose of indexation;
 3. Article 21 of the General Terms and Conditions shall not apply with respect to the adjustment of the Fee and the fee for the Dismantling Period.

Article 6. Method of payment for the Fee

1. The Fee and the fee during the Dismantling Period must be paid, after invoicing by the State, by direct debit or transfer to account number NL34INGB0705002683 in the name of the Ministry of the Interior and Kingdom Relations. Invoices must be sent to: ***.
2. The sending of an invoice for or the payment of the Fee and the fee during the Dismantling Period, after the end of the Right of Superficies or after the time at which the Fee or the fee during the Dismantling Period can be reviewed, shall not confer a right to extend the Right of Superficies or to an unchanged Fee or fee during the Dismantling Period for the new period.

Article 7. Designated use

The Superficiary is obliged to exclusively use the Parcels for the purposes specified in the Permit.

Article 8. Cables and pipes

1. The State guarantees that it has provided the Superficiary with all information that ought to be made known to the Superficiary, including the position of cables, pipes and signal transmission pathways in, on and/or above the Parcels, on the understanding that the State is not required to provide information about facts of which the Superficiary is aware or could have been aware from its own research, in so far as the Superficiary could be expected to carry out such research according to currently prevailing opinion.
2. If necessary for the construction of the Wind Farm, the Superficiary shall reroute the cables and/or pipelines at its own expense and in consultation with and to the satisfaction of the relevant operator.

Article 9. Waterbed analysis

The Superficiary and the State agree the following with regard to the risk of waterbed contamination in the Immovable Property:

1. The State and the Superficiary have not had an analysis carried out to establish the existence, if any, of ground contamination for the purpose of the present Right of Superficies;
2. The discovery of ground contamination during the term of the present Right of Superficies shall not constitute a defect;
3. The State shall not be liable for any loss suffered by the Superficiary as a result of the existence of ground contamination in the Immovable Property.
4. The Superficiary shall report all existing ground contamination discovered during the operation of the Parcels and during the term of this Right of Superficies to the State without delay.
5. The Superficiary shall make every effort to prevent contamination of the ground belonging to the Parcels during the operation of the Parcels and during the term of the present Right of Superficies.
6. The Superficiary shall always report any ground contamination that occurs during the term of the present Right of Superficies directly to the State and the manager of the waters directly, comply with any resultant orders issued by the manager as referred to in Section 5:16 of the Dutch Water Act (*Waterwet*) regardless of the party on which they have been imposed, directly and at its own expense, and shall also transmit reports transmitted to the manager and decisions received from the manager in this context to the State directly. The aforementioned obligation for the Superficiary to comply with orders directly and at its own expense shall not apply if the Superficiary can prove that the contamination cannot reasonably be attributed to it.
7. The Superficiary shall be liable towards the State for the costs of remedying any contamination of the ground belonging to the Immovable Property during the term of the present Right of Superficies and for all other loss (including any decrease in value of the Immovable Property) and costs the State is faced with as a result of that contamination, unless it can prove that the contamination cannot reasonably be attributed to it.

8. The Right of Superficies shall be deemed to continue until any orders to be implemented by the Superficiary as referred to in subclause 6 have been implemented to the satisfaction of the manager as evidenced by a decision issued by the manager.
9. The Superficiary cannot derive any rights with respect to the State from the obligation to implement orders as referred to in subclause 6 regardless of on whom it has been imposed.

Article 10. Indemnification

1. The Superficiary shall indemnify the State against all claims (of whatever kind) of third parties in respect of loss suffered by third parties which can be attributed to the construction, operation and/or removal of the Wind Farm by the Superficiary.
2. In this Clause, construction, operation and/or removal of the Wind Farm is also understood to mean the removal of anything in, on or above the Parcels.
3. In the event of loss, including consequential loss, which has a causal link with the construction, operation and/or removal of the Wind Farm, suffered by a State user or users of land adjoining the Right of Superficies Property, the Superficiary shall compensate that land user or those land users directly.

Article 11. Public registers

The Superficiary irrevocably authorises the State, following termination of the Right of Superficies, as referred to in Section 8 of the General Terms and Conditions, to make an entry to that effect in the Public Registers at the expense of the Superficiary.

D. MISCELLANEOUS

Article 12. Qualitative obligation; perpetual clause

1. If and in so far as the provisions declared applicable to the Right of Superficies above cannot be regarded as right of superficies provisions, the State and the Superficiary agree that they shall be considered to be qualitative obligations as referred to in Section 6:252 of the Dutch Civil Code and shall devolve as such to successive holders of the Right of Superficies, and that users of the Parcels shall also be bound by these obligations. The choice of address for service specified in the final clauses of this instrument is also made with a view to these qualitative obligations.
2. If and in so far as the provisions declared applicable under C. above cannot be regarded as right of superficies provisions and also cannot be considered qualitative obligations as referred to under 1 above, the State and the Superficiary hereby agree that the Superficiary and its legal successors in respect of the Right of Superficies have an obligation towards the State to, upon transfer of the Right of Superficies, impose the relevant obligations as a perpetual clause on the successive Superficiary or Superficiaries and ensure that they accept these obligations and assume the resulting rights for the State on behalf of the State. Equally, the State and its legal successors in respect of the Parcel or Parcels have an obligation towards the Superficiary to, upon transfer of the Parcels, impose the relevant obligations as a perpetual clause on the successive landowner or landowners and to ensure that they accept these obligations and assume the resulting rights for the Superficiary on behalf of the Superficiary.
The foregoing is subject to an immediately payable penalty in accordance with Section 17(a) of the General Terms and Conditions in favour of the State, the Superficiary or their legal successor or successors. In connection with this perpetual clause, the Superficiary and the State and their legal successors in relation to the Right of Superficies and the Parcels have an obligation towards one another to reproduce in their entirety the provisions declared applicable to the Right of Superficies above in any deed of transfer.

Article 13. Creation of an easement

To create as easements on the parts of the Parcels that remain in the full ownership of the State, recorded in the land register as Municipality of ***, section***, number(s) ***, jointly constituting the **servient land**, for the benefit and enjoyment of the Parcels, being the **dominant land**: the easement entailing the obligation to tolerate rotor blades of the Wind Turbine(s) sweeping over the servient land and their being allowed to be kept there;

hereinafter also called the **Easement**.

The Parties declare that they accept the Easement.

1. The Easement applies only in so far as those parts of the parcels indicated on the attached ground plan or plans with reference or references ****, and that is/are attached to this instrument (**appendix ****) are concerned.
2. The Easement shall end as soon as the Right of Superficies ends and the Wind Farm has been removed in accordance with Section 12 of the General Terms and Conditions and Section 11 of this instrument.
3. The Superficiary, its staff, third parties designated by the Superficiary, as well as anyone carrying out work on the instructions of all of the aforementioned officers, shall have access to the Parcels and also to the servient land or lands referred to in subclause 1 for the purposes of the tasks assigned to them.
4. The Easement shall be entered into with due observance of the provisions set out in the Permit.
5. No fee shall be payable for the Easement described in this Clause. The Parties expressly take the view that the Easement is valueless.

Article 14. VAT/transfer tax

1. VAT

- a. The creation of the Right of Superficies shall be classed within the meaning of [Section 3\(2\)](#) of the Turnover Tax Act 1968 (*Wet op de omzetbelasting 1968*) as a service to be treated as leasing and not as supply within the meaning of the Turnover Tax Act 1968 (lease analogy), as the capitalised value of the Fee plus VAT is less than the market value of the Right of Superficies.
- b. The State and the Superficiary have chosen to opt for taxed rent as referred to in Section 11(1)(5) of the Turnover Tax Act 1968 in conjunction with Section 6a of the Turnover Tax (Implementation) Decree (*Uitvoeringsbeschikking omzetbelasting 1968*). The Parties have decided not to submit a joint request opting for taxed rent, however hereby opt to tax the rent with VAT; this instrument shall be treated as a written lease for VAT purposes. The Superficiary declares, also for the benefit of the legal successor or successors of the State:
 - that it shall satisfy the requirement that ninety percent (90%) or more of the Right of Superficies will be used for activities which are eligible for deductibility of VAT according to [Section 15](#) of the Turnover Tax Act 1968;
 - that the date of creation of the Right of Superficies shall be considered the commencement date for this taxed service/rent;
 - that the financial year of the Superficiary runs from the first of January to the thirty-first of December; and
 - that it has included the documents relating to the taxed service/rent in its records.
- c. If the abovementioned eligibility for deductibility of VAT does not apply, in addition to the Fee the Superficiary shall owe the State an amount corresponding to the VAT that would have been due if the eligibility for deductibility of VAT were indeed applicable. The same applies if it subsequently emerges that the abovementioned eligibility for deductibility of VAT did not exist or ended at any point. In that case, the fee increase described here applies from the time that eligibility for deductibility of VAT ceased to exist. The Superficiary is also obliged to reimburse the State for all non-deductible investment VAT and all other VAT losses, such as VAT on maintenance and overheads, in so far as such losses arise from failure by the Superficiary to meet the requirements for the abovementioned eligibility for deductibility of VAT and the losses are not covered by the Fee increase. The abovementioned reimbursements are immediately due and payable. The above also applies if the State incurs VAT losses following termination of the Right of Superficies.
- d. The VAT payable by the Superficiary to the State under the provisions above shall be calculated on the payment as referred to in [Section 5](#) of the Turnover Tax (Implementation) Decree 1968. Payment of VAT shall be made on the basis of an invoice.
- e. The State declares that the creation contained in this instrument does not fall under the provisions of Section 27 of the Turnover Tax Act 1968.

2. Transfer tax

As the acquirer of the Right of Superficies, the Superficiary claims exemption from transfer tax as referred to in [Section 15\(1\)\(a\)](#) of the Legal Transactions (Taxation) Act (*Wet op belastingen van rechtsverkeer*) as this situation concerns acquisition under a service as referred to in Section 11(1)(b) final paragraph of the Turnover Tax Act 1968, on which VAT is payable, and the Right of Superficies has not been used as an asset to date.

Article 15. Devolution and transfer of claims

The Other Party may transfer the Right of Superficies to a third party to which it is also transferring the Permit only after it has met all the requirements as stated in the Permit relating to a transfer to third parties. The Other Party shall inform the State of the manner in which and time at which the transfer takes place. The Other Party shall not be entitled to transfer the Permit to third parties without also transferring the Right of Superficies.

In witness whereof

For draft

Appendices:

1. Authorisation
2. Drawing of land registry parcels
3. Fee calculation
4. Offshore wind turbine: starting points for consideration **
5. Soil analysis
6. Easement drawing
7. Permit granted to the Superficiary
8. Agreement between the Superficiary and the State dated
9. Lease for Cables and Pipes dated