



**PennState Law**

Center for Agricultural  
and Shale Law

# *Utility Scale Solar Leasing: How It Works and When It Doesn't*



## *Agricultural Law Symposium*

Tuesday, January 12, 2021 , 2:15 PM - 3:15 PM EST



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  - The National Agricultural Law Center
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# RECAP of Solar Webinars to date:

- All are viewable here:

<https://extension.psu.edu/energy/renewable-and-alternative-energy/see-all-renewable-and-alternative-energy/shopby/webinars>

- April 16 - [Energy Markets Domestically and Globally](#)
- April 22 - [Solar Leasing for Landowners](#)
- June 17 – [Utility Scale Solar Development](#)
- July 8 – [Large Scale Solar Development for Landowners](#)



- July 23 - [Prices and Economics of Solar Leasing in Pennsylvania](#)
- July 29 - [Solar Development Trends in the Mid-Atlantic States – Factors Driving their Deployment](#)
- Aug 5 - [Solar Energy Development in Pennsylvania - What's Currently Happening and What's Expected](#)
- Aug 12 - [Solar Energy and Land Use – Designing a Sustainable Outcome](#)
- Sept 9 - [Solar Leasing by Landowners for Utility Scale Projects in Pennsylvania](#)
- Sept 23 - [Utility Scale Solar - Land Use, Policy and Emerging Ordinances - An Interactive Q and A](#)



# Agenda

- Amanda Eyer (PA DEP Energy Program Specialist)
  - Overview of Solar in PA – 10 mins
- Brook Duer
  - Solar Leasing Basic Principles & Leases – 30 mins
- Doug Wolfgang (PDA Director - Farmland Preservation Bureau)
  - Competing Governmental Interests – 15 mins



## **4 Basic Introductory Principles**

- 1. This is an industry in its infancy.***
- 2. This transaction is a commercial lease, on steroids.***
- 3. The tenant has some unique needs to understand.***
- 4. This is a long-term business relationship to maintain.***



## **1. *This is an industry in its infancy.***

- The documents being proposed are not battle-tested by use over decades. This is a new industry, with new documents.
  - Landowners should not sign the developer's forms as-is. There can be many provisions that must be revised for landowners.
  - Few things are off-limits for negotiation because “deal-breakers” have not yet been established.
  - Landowners won't be able to negotiate the contract details themselves and will need an attorney. There are few attorneys who have seen these forms before.
  - But the concepts involved are not overly complex from an attorney’s perspective. An attorney who negotiates commercial leases will be familiar with the basic concepts.
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## 2. *The transaction is a commercial lease, on steroids.*

- This is a leasing transaction, much like other commercial leases. But an average landowner is not used to being a commercial landlord. This is not a farming tenant or a utility easement or a right of way.
  - There are legal considerations that a landowner may never have encountered before due to the sophisticated tenant and transaction being dealt with.
  - **Term:** The lease may last as long 50 years.
  - **Permanent Structures:** The tenant is building structures on another's property which are permanent. (Although they do not become "fixtures" owned by the landlord.)
  - One novel legal concept is the "**solar easement**" over the landowner's surrounding acreage. Otherwise, there are few unique concepts like royalties or subsurface rights.
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### ***3. The tenant has some unique needs to understand.***

- The permanent structures have comparatively greater access, maintenance and transmission requirements.
- The structures, and the income stream they produce, are going to be **used as collateral** to obtain financing. This means the tenant's ability to continue conducting its activity on the land must not be interfered with by any entity who holds a previously-recorded or superior property interest in the land (e.g. your mortgage holder).
  - All the lease documents will be recorded. The tenant may need "superior" liens or interests "**subordinated.**"
- The structures may be sold during the lease term, perhaps multiple times. The ability of the tenant to **assign the lease without landowner approval** will be one non-negotiable term.



## 4. *This is a long-term business relationship to maintain.*

- There will likely be several **tenant identity changes** over the term of the lease and, correspondingly, perhaps some **changes in ownership** on the landowner side also. Plan and think ahead because this lease impacts heirs and any subsequent owners. It also can impact future property value.
  - **Property tax obligations** will be a shared responsibility for the duration of the lease. The documents being used commonly agree that the tenant pays any increased property taxes for the entire term.
  - The landlord needs to ensure that the tenant maintains the required **liability insurance** for the landlord's protection for the entire term.
  - “**Decommissioning**” obligations to remove all equipment and restore the property need to be negotiated and established now, in detail, for an event that may not occur for several decades.
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# The Two Parts of a Solar Development Lease

- **Preliminary Letter of Intent:** Sometimes there is even a preliminary "**Letter of Intent**" document, which can be simply a 1-page form. The primary reason for this is to get the landowner to sign a confidentiality clause so that future terms, especially monetary, are not disclosed to others.
    - Sometimes the documents omit that disclosure must be allowed to attorneys, accountants, advisors, family members, mortgage and other competing property interest holders and municipal/government officials, all as necessary to proceed with the project.
1. **Option Agreement** – approx. 10-15 pages
  2. **Lease Agreement** – approx. 40-60 pages (attached to the Option Agreement)
- **A landowner can't sign the Option Agreement without also negotiating the terms of the Lease Agreement in its entirety.** So all the hard work from the landowner end is up front.
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**1. Option Agreement** - Locks in a due diligence period of 1-5 years during which the solar developer decides if it wants to proceed.

- \$\$\$ to landowner for development exclusivity, access rights to investigate the site & confidentiality.
- "Feasibility Study" / The developer obtains a full title report, full survey, other leases, etc.
- The developer is weighing all circumstances to determine viability -- financially and otherwise.
- No ground is broken; all costs incurred are on the developer. Landowner can still farm, etc.
- If the developer decides to proceed, the landowner cannot back out. The option is unilateral.

**2. Lease Agreement** - If the solar developer decides to proceed, the Lease Agreement is sent to the landowner to sign in a defined period of days. There is no chance to renegotiate terms. (Sometimes leases of this nature are called a "Ground Lease.")

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# Timeline of the Lease Term

- Option Effective Date (signature on Option Agreement, \$\$ is paid)

## • ***Option Phase***

- Lease Effective Date (signature on Lease Agreement, \$\$ is paid)

## • ***Construction Phase*** (the build out – may be a reduced rent amount)

## • ***Operational Phase*** (energy generation – the full rent is paid)

- Renewals (if any) may be exercised

## • ***Cleanup Phase*** (removal and restoration – \$\$ still owed, creates leverage to complete)

- Termination Date
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# Consideration of Competing Legal Interests

- The landowner may have “encumbered” the property in various ways, through such things as:
  - mortgages, other liens or leases, rights of way and easements, enrollment in various governmental programs such as Clean & Green (preferential property tax assessment), FSA/NRCS administered programs with conservation practices requirements, or even an agricultural conservation easement or private conservation easement.
- Before signing, a landowner must consider how these interests will be impacted by a solar lease, and how their existence will impact a developer’s decision to proceed.
  - The Lease documents generally agree, or it can be negotiated, that the developer pays any financial losses caused by the solar lease’s impact upon competing legal interests. But some conflicts with competing legal interests cannot be resolved financially.
- During the Option Phase, the developer is also analyzing these same competing legal interests to determine the location’s viability.



# Competing Legal Interests

## **Existing Mortgage or other Monetary Liens**

- Talk with the creditor, if possible.
- The Lease documents require "Subordination Agreements" signed by the creditor, at the developer's request, to make a mortgage or other lien "subject to the lease" so the solar tenant is not evicted in the event of foreclosure.

**Existing Leases** - Negotiate a buy-out of the tenant, paid by the developer?

**Agricultural Conservation Easements** - If PA government purchased, solar leasing is not permitted.

**Privately-purchased Conservation Easement** - Depends upon the terms, but highly unlikely that solar leasing is permitted. Can solar leasing be negotiated?



# Competing Legal Interests

Other types of recorded or unrecorded interests:

- Hunting Lease – stray rounds will be a problem.
  - Subsurface Rights – will future subsurface rights development interfere?
  - Existing Easements – could conflict with the developer's needs.
    - utilities, stormwater, access/roads
  - Enrollment in Government Programs
    - PA's Clean and Green property tax assessment program does not allow, unless at least 50% of energy is used on-site. Roll-back taxes will be owed, but most leases provide that the developer pays them.
    - FSA/NRCS programs – solar leasing is too new for definitive answers. Check with the entities involved. Likely answer is no.
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## Are you a farm owner considering a commercial solar lease?

If so, here are some questions to consider first.

### 1) Is the farm in an Agricultural Security Area (ASA)?

- a. There are no restrictions or limitations related to commercial solar development on a property that is simply enrolled in the ASA. However, the property will potentially be removed from the ASA when the township does a seven-year review if it no longer meets the evaluation criteria for inclusion in the ASA. There is no penalty for changing use or removing property. The landowner can also submit in writing that they no longer wish to be enrolled and be removed at any time.

### 2) Is the farm in an Agricultural Security Area and preserved through a permanent Agricultural Conservation Easement?

- a. ASA is a prerequisite for the state farmland preservation program. Unlike the ASA designation alone, if the farm is also subject to a permanent agricultural conservation easement, the landowner may not engage in commercial solar development. The deed of easement is in perpetuity and may not be extinguished.
- b. Energy primarily for use on the farm is permitted under the county farmland preservation program's rural enterprise criteria.

### 3) Is the farm enrolled in the Clean and Green preferential assessment program?

- a. If the farm is enrolled in Clean and Green, the landowner may not engage in commercial solar development without triggering rollback taxes on the entire enrolled acreage. However, unlike the Farmland Preservation Program, the landowner may break the covenant and pay rollback taxes and be removed. Any remaining eligible acreage after a rollback tax penalty is triggered is automatically re-enrolled unless the landowner wishes to be removed.
- b. Like farmland preservation, energy primarily for use on the farm is permitted under the definitions of eligibility.

### 4) Is zoning a consideration?

- a. Zoning is done locally by townships under the authority of the Municipalities Planning Code (MPC). It is possible a zoning ordinance will not identify commercial solar as a specific use. In that case, zoning will need to determine if solar may be permitted as another use expressly permitted. Farm owners should check with townships to make sure land is zoned appropriately prior to executing a lease agreement.

### 5) Is solar considered "agriculture" by definition in Pennsylvania's laws?

- a. Although commercial scale solar is often called a "solar farm", it does not meet the definition of normal farming activity under the Right to Farm Act. Therefore, it will not receive protection from local ordinances and lawsuits, otherwise given to agricultural operations.



**6) Must I obtain a permit from Department of Environmental Protection?**

- a. A construction stormwater permit may be required if the panels disturb greater than one acre, per National Pollution Discharge Elimination System (NPDES). Farm owners should consult with county conservation district or DEP for additional information.

**7) Is the farm enrolled in federal Conservation Reserve Program (CRP) or Conservation Reserve Enhancement Program (CREP)?**

- a. Solar panels are not permitted on lands subject to CRP and CREP contracts. Specific questions may be directed to the local USDA Farm Service Agency.

**8) Will the solar panels affect my conservation and best management practices that are part of a conservation plan?**

- a. Farm owners should notify county conservation districts or local USDA-Natural Resources Conservation Service (NRCS) office to update conservation plans as needed. If cost share was received (EQIP, for example), farm owners should first obtain approvals prior to signing a lease agreement.



# Zoning Approval of the Land Use

## Zoning Approval is largely uncharted territory.

- PA zoning ordinances, unless very recently amended to account for solar leasing as a use in the township, will require approval of solar leasing through a ***conditional use*** application to the township supervisors (not the zoning hearing board). (“Uses not otherwise provided for”)
  - “Conditions” can be attached and presently there are no controls over how extensive or on what subject matters those conditions may be. That raises the undetermined legal question of whether, and to what extent, townships will "regulate" solar generation facilities. DEP is not already involved; FERC is the regulatory entity, not PA Public Utility Commission.
  - The lease documents agree that the developer is 100% responsible for getting zoning approval (as well as all other government approvals) but do require landowner assistance.
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# Contract Terms & Conditions

- **Legal Description and Plot Plans:** Attachments to the Option and Lease. Be attentive to potential difference between the total acreage of the Option and the ultimate acreage of the Lease itself. This is one provision that will be undetermined until the Option is exercised and the Lease tendered for signature. The final “configuration” is not determined at the outset.
  - **Appurtenant Facilities:** There are more than just solar panels. Transmission and distribution equipment, sub-station, batteries, overhead or underground lines, buildings, roads, yards, fences, etc.
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# Contract Terms

**Accompanying Easements:** The leased acreage is for actual solar operation, but the lease also grants the tenant various other easements.

- ***Construction Easement*** – temporary.
- ***Access Easement*** – for routine access during the lease term.
- ***Transmission Easement*** – for transmitting power to the grid.
- ***Solar Easement*** – unobstructed access to the sun.





# Contract Terms - example

## • General “Non-Interference” Clauses & Curative Agreements

13.5 No Interference. Owner shall not grant any rights to any person or entity, which would, currently or in the future, impede or interfere with: (a) Grantee’s surface access to the Project and the siting, permitting, construction, installation, maintenance, operation, replacement, or removal of the Project; (b) the flow of solar radiation, or direction of exposure to the sun over the Premises; or (c) the undertaking of any other activities of Grantee permitted under this Agreement.

13.6 Title Review and Cooperation. Owner, at no cost to Owner (provided, however, that Grantee shall not be responsible for Owner’s attorneys’ fees, if any), shall cooperate with Grantee to obtain non-disturbance, subordination and other title curative agreements as reasonably requested by Grantee from any person with a lien, encumbrance, mortgage, lease or other exception to Owner’s fee title to the Premises to the extent necessary to eliminate any actual or potential interference by any such person with any rights granted to Grantee under this Agreement. Owner shall also provide Grantee with any further assurances and shall execute any truthfully accurate estoppel certificates, consents to assignments or additional documents that may be reasonably necessary for recording purposes or otherwise reasonably requested by Grantee.



# Contract Terms

- **Insurance** – Tenant must purchase & maintain liability insurance naming the Landowner as an *additional insured* on the policy for the life of the Option and Lease. Tenant's policy must be primary coverage and on an “Occurrence Basis.”
  - **Indemnity** - Tenant must indemnify landowner for any costs, losses, liabilities arising from tenant’s activities on site. Needs to be all encompassing.
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# Contract Terms

- **Maintenance is 100% on the developer.**  
(don't volunteer sheep to "mow")
  - Does landowner want control over:
    - herbicides/pesticides/fungicides being used?
    - ground cover on the leased area?
  - Does landowner need access to the leased area? Normally a leased premise is 100% in the tenant's exclusive possession.
  - Should the tenant contribute to maintenance of any shared acreage over which the tenant possesses an easement?
  - Built-in remedies for failure to maintain?
- **Reserved Uses?** Is there some unique desire of the landowner?





# Contract Terms

## Example of a “\$\$\$ matching” term for Option payments

16.13 Equal Payments – Option Fees. Grantee hereby represents to Owner that, as of the Effective Date, the economic terms set forth in this Agreement are at least as favorable, if not more favorable, to the economic terms offered as of the Effective Date to other landowners for options or leases in connection with the Project. Grantee agrees that if Grantee enters into an agreement with any other owner in the Project who receives an Option Fee schedule with higher rates than those set forth above or otherwise enters into an agreement with another owner in the Project under which that owner would receive fees or other compensation at a higher rate than offered to Owner, Grantee shall submit such Option Fee schedule(s) and/or other agreement regarding fees and other compensation to Owner within forty-five (45) days of recording any memorandum of such other agreement. Owner may elect to adopt such Option Fee schedule and/or other fee and compensation provisions within thirty (30) days of receiving such notice which would be applicable to future Options fees, but would not be retroactive. Failure of Owner to make such election shall be deemed Owner’s waiver of its right hereunder to substitute Option Fee schedules and/or to obtain such higher fees or other compensation.



# Contract Terms

- **“Mortgagee Protection” clauses**

- The landowner (or its creditors) may be asked to copy the secured creditor of the tenant on communications like notices of default. The loan collateral could be in jeopardy without the secured creditor’s knowledge.

- **Termination**

- **By Tenant** –“for convenience” by paying all rent owed to date only (and proceeding with removal/restoration obligations).
- **By Landlord** - This is where things can get complicated. Bankruptcies and insolvencies seem likely in this “industry in its infancy.” Bankruptcy trustees don’t make anything easy, even if bankruptcy is an “event of default.” Most likely the contractual rights and assets will be purchased and there will be a new tenant be out some degree of rent. “Forfeiture” of property (the structures) upon default is “non-negotiable.”
- **Condemnation** – jointly divide the award between value attributable to “improvements” (tenant) and to “real estate” (landlord).



# Restoration (“Decommissioning”)

- At termination, “surrender possession” and execute any documents needed.
- Restoration Term – ex: 12 months to remove above grade, and at least 3-foot below grade, improvements and restore to pre-lease condition. Pay rent at construction phase amount during restoration? Negotiate option to retain roads, etc.?
- Bond/Financial Security – What will be the cost to remove 30 years from now?

required to pay any further rent during the Restoration Term. Within one (1) year after the Operations Date, Grantee shall provide to Owner and maintain during the remainder of the Term one or more performance bonds, letters of credit, or another form of financial security acceptable to Owner in its reasonable discretion, in each case in form and substance to secure Grantee’s completion of the Restoration. The amount of the financial security for Restoration work will be for the following items: removal of fence and concrete footings and foundations, gates, asphalt pavement, gravel driveways, any topsoil gravel and pad areas, removal of panels, racking, and other generation equipment less the estimated salvage value of the Solar Energy System. The estimate will be developed and signed by a Pennsylvania Professional Engineer. In the event any federal, state, county or local governmental authority with jurisdiction over the Project or the Premises requires bonding or other security securing decommissioning and the Restoration, then Grantee’s satisfaction of those requirements shall satisfy all bonding or other security requirements under this Section 18.2.



# THANK YOU!

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