



Anatomy of a Utility-Scale Solar Leasing Relationship

Penn State Solar Law Symposium

Utility-Scale Solar Development
For Lawyers, Landowners, & Others

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Brook Duer joined Penn State Law's Center for Agricultural and Shale Law as a staff attorney in 2019. Prior to that, he was an attorney with the Pennsylvania Department of Agriculture for 12 years, serving 8 of those years as Chief Counsel to the agency and supervising the agency's legal office. Brook also has experience practicing law in Lancaster County for 18 years. Brook received a B.S. in Communications from Indiana University of Pennsylvania and a J.D. from the University of Pittsburgh School of Law.



Dan Brockett

Extension Educator, Penn State Extension

Dan Brockett is with the Penn State Extension Energy Education Team. He lectures and teaches on energy development, the economics driving the energy development process, the process and politics of energy development, and the associated impacts to communities, businesses, agriculture, land, and people. He has had the opportunity to provide training for industry, for elected officials, for businesses, investors, regulators and for landowners and has been able to speak throughout the country and around the world.



Why is the industry leasing vs. purchasing?

- Multiple variables are involved in each project, few of which are under the solar developer's exclusive control.
- PV electrical generation is one thing; very capital intensive but under the developer's control
- Getting the electricity to the grid is much more complex matter.
- Making the project economically viable is another complex matter.
- As a result, it is a game of numbers – a lot of possible projects may be investigated, very few are going to be built. Option to Lease fits the bill.



Caveat

- Things can and have moved rapidly in this fledgling industry. Most likely, they will continue to do so over the next few years.
- This presentation will be presenting information about what might be considered a “*generic*” example of a grid-scale solar leasing relationship.
- Every circumstance and solar developer may be unique and have their own approach and employ unique terms that may vary from what is presented here.



The Two Parts of a Solar Development Lease

- ***Preliminary Letter of Intent:*** Sometimes there is a preliminary "**Letter of Intent**" document, which may 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.
1. **Option Agreement** – approx. 10-15 pages
 2. **Lease Agreement** – approx. 40-60 pages (attached to the Option Agreement)
- **If a landowner signs the Option Agreement = also agreeing to the terms of the Lease Agreement in its entirety.** So, all the hard work from the landowner end is up front. And once signed, cannot back out. The option is *unilateral* = only the developer can back out after the option is signed.
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Timeline of the Lease Term

- Option Effective Date (signature on Option Agreement, \$\$ is paid)
 - **Option Phase** — developer's "due diligence" period
 - 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
 - **Decommissioning Phase** (removal and restoration – \$\$ still owed, creates leverage to complete)
 - Termination Date
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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, legal hurdles, 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 still possesses, can 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 usually days. There is no chance to renegotiate terms. (It is just an old-fashioned "Ground Lease.")



“Competing Legal Interests” must be considered*

- 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 competing legal interests to determine the location’s viability.**



Competing Legal Interests (cont.)

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 solar development (unless at least 50% of the generated energy is used on-site). Roll-back taxes will be owed, but most leases clearly provide upfront that the developer pays them. If not, must negotiate for that.
 - FSA/NRCS programs – solar leasing is too new for definitive answers. Check with the entities involved. Likely answer is no.
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Competing Legal Interests (cont.)

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?



4 Basic 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.***

This is not like anything most landowners have ever seen.



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 never 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.** Few attorneys have worked with these exact forms.
 - But the concepts involved are not overly complex from an attorney's perspective. An attorney who negotiates commercial leases is 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 sophisticated 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 no unique concepts** like royalties or subsurface rights.
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3. The tenant has some unique needs to understand.

- These are structures of great value and sophistication = **exclusive possession to the tenant** (landowner will be fenced out of the area devoted to electrical generation).
- 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. mortgage holder).
 - All the lease documents will be recorded and the tenant will need "superior" (prior) liens or legal 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. Landowner may have to negotiate for the same assignment right.



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 land ownership** also. Plan and think ahead because this lease impacts heirs/subsequent owners. It also can impact future property value. How, we don't yet know.
 - **Property tax obligations** will be a shared responsibility for the duration of the lease. The documents being used 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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Other building blocks of the relationship

- The next session will deal with more specifics of lease terms, but just a few quick notes to help build a fuller understanding of the business relationship being created.
- **Termination**
 - **By Tenant** –“for convenience” by paying all rent owed to date only (and proceeding with removal/restoration obligations).
 - **By Landlord – for cause only (Tenant Default)** – This is where things get complicated. Bankruptcies and insolvencies seem likely in this “industry in its infancy.” But most likely the contractual rights and assets will be purchased and there will be a new tenant. Yes, there may be loss of rent. “Forfeiture” of any property (the structures) upon default is “non-negotiable.”



Zoning Approval of the Land Use

Zoning Approval is largely uncharted territory, but getting approvals is on the developer.

- 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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Backstop of Landowner Protection

- **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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Control and Maintenance

- **Maintenance** is 100% on the developer, as is the right to keep the landowner out. Developer has *exclusive possession*.
 - Does landowner want control over:
 - herbicides/pesticides/fungicides being used?
 - ground cover on the leased area?
 - Built-in remedies for failure to maintain the lease acreage?
 - Does landowner need occasional temporary access to the leased area?
 - Shared acreage - Should the developer contribute to maintenance of areas over which it possesses an easement?
- Reserved Uses? Is there some unique desire of the landowner?



BONUS CONTENT



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.



THANK YOU!

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