



PennState Law

Center for Agricultural
and Shale Law

Negotiating the Best Deal for a Landowner

Penn State Solar Law Symposium

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

Tuesday, June 15, 2021

Hour 3 / 2:30 pm – 3:30 pm EDT



Part 1



Brook Duer

Staff Attorney, Penn State Center for Agricultural and Shale Law

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.

Part 2



Peggy Hall, J.D.

Associate Professor, Ohio State University

Peggy Kirk Hall is an associate professor and field specialist in agricultural and resource law. Hall is a graduate of The Ohio State University (B.S., M.S., Natural Resource Policy) and the University of Wyoming College of Law (J.D.), where she served on the Land & Water Law Review. She is a Past President and Board Member of the American Agricultural Law Association (AALA); Past Chair of the Ohio State Bar Association Agricultural Law Committee and served as an Advisory Board Member for the National Agricultural Law Center. Hall has received the AALA's Distinguished Service Award (2018) and Excellence in Agricultural Law Award (2016), and in 2018 received Ohio's

Distinguished Service Award from the National Association of County Agricultural Agents. Hall currently teaches Agribusiness Law, AEDE 3170, in the College of Food, Agricultural and Environmental Sciences at The Ohio State University and directs research and outreach projects for OSU's Agricultural & Resource Law Program.



Outline of Contract Terms – Part 1

- **Obligations as a newly-minted Commercial Landlord:**
 - Title
 - Cooperation
 - Non-Interference
 - Competing Legal Interests
- **Property Taxes & Other Resulting Financial Obligations (resulting from the Lease)**
- **Legal Descriptions, Plot Plans, Appurtenant Facilities & Accompanying Easements**



Outline of Contract Terms – Part 2

- **Maintenance & Reserved Rights**
- **Landowner Protection: Insurance & Indemnity**
- **Decommissioning & Restoration**
- **Assignment, Condemnation, Termination**



Title Obligations of Landlord

- *This is a fairly tolerable clause; many being used early on were not in the landowner's best interests.*

Section 7.1. Title and Authority. Lessor is the sole owner of the Lessor Property, Lessor Improvements, Easement Premises and Lease Premises in fee simple and each person or entity signing the Agreement on behalf of Lessor has the full and unrestricted authority to execute and deliver this Agreement and to grant the easements and rights granted herein. All persons having any ownership interest in the Lessor Property, Lessor Improvements, Easement Premises and Lease Premises (including spouses) are signing this Agreement as Lessor. When signed by Lessor, this Agreement constitutes a valid and binding agreement enforceable against Lessor in accordance with its terms. There are no encumbrances or liens against the Lease Premises except as listed on Exhibit F. There are no leases or agreements, including crop farmer leases, affecting the Lease Premises, except as set forth on Exhibit F. Lessor agrees to deliver any documents necessary to correct any title defects which would, if not corrected, adversely affect Lessee's rights hereunder or its ability to obtain and maintain financing of the Facility.



Cooperation Clauses (during Option and Lease Terms)

Section 3.7. Cooperation Regarding Utility Easements. Lessor acknowledges that the Facility must be interconnected to the network or grid of Utility, and that such interconnection may require Lessor to grant separate easements to Utility for access, transmission, facilities, or the like. Lessor agrees to negotiate in good faith, and to cooperate with, Lessee and Utility for the purpose of effecting the interconnection.

- *Shouldn't these have all been explicitly included? Too open-ended.*

Section 7.4. Cooperation. Lessor shall cooperate with Lessee to obtain non-disturbance and subordination agreements from any person or entity with a lien, encumbrance, mortgage, lease or other exception to Lessor's fee title to the Lease Premises, Access Premises, and Distribution Premises to the extent necessary to eliminate any actual or potential interference by any such lienholder with any rights granted to Lessee under this Agreement. Lessor shall also cooperate with Lessee to obtain and maintain any approvals, authorization and permits needed in connection with the analysis, development, construction, maintenance, and operation of the Facility. Lessor shall also provide Lessee with such further assurances and shall execute any estoppels certificates, consents to assignments or additional documents that may be reasonably necessary for recording purposes or requested by Lessee or any of its Lenders.

- *Seems tolerable, but hopefully the "due diligence" took care of this.*



Landlord's expenses in “Cooperation?”

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.

- ***“At no cost to” landowner, landlord, lessor, etc. – CANNOT BE INCLUDED TOO OFTEN!***
- ***An obligation for attorneys' fees reimbursement should likely kick in at some point.***



Non-Interference Clauses

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.

- *This one is fairly vague and might not be in either party's interests.*

Section 7.2. Quiet Enjoyment. Lessor covenants that Lessee shall have the right of quiet use and enjoyment of the Lease Premises, Access Premises and Distribution Premises for the Lease Term in accordance with the terms of this Agreement without any interference of any kind by Lessor or any person claiming through Lessor. Lessor and its activities on the Lease Premises, Access Premises and Distribution Premises and any grant of rights Lessor makes to any other person shall not interfere with any of Lessee's activities pursuant to this Agreement, and Lessor shall not interfere with any of Lessee's activities pursuant to this Agreement, and Lessor shall not interfere or allow interference with the receipt of sunlight over the Easement Premises or otherwise engage in activities which might impede or decrease the output or efficiency of the Facility, except as otherwise permitted pursuant to this Agreement.

- *More explicit. Most leases do have a separate "Solar Easement" clause.*



Competing Legal Interests

- Last session we discussed at some length.
- How will lenders and others (anyone holding any type of contingent interest -- a single stick in the bundle) react?
- Notify mortgage holders and others before the developer does.
- While the due diligence performed during the option period should disclose and provide the necessary resolutions, remember that this is a continuing obligation for the life of the lease. How will the successors in title view their obligations?



Competing Legal Interests (cont.)

- This type of clause is now in the chain of title. How diligently will it be enforced?

Section 6.1. Liens. Except as expressly provided in this Agreement, Lessee shall keep the Lease Premises and Lessor Property free and clear of all liens and claims of liens for labor, materials, services, supplies and equipment performed on or furnished to Lessee or the Facility on the Lease Premises in connection with Lessee's use of the Lease Premises. Lessee may contest any such lien, but shall post a bond or utilize other available means to remove any lien that is created during the contested proceeding. Lessee agrees to otherwise remove any lien or encumbrance for which it is responsible pursuant to this paragraph within ninety (90) days of the creation of any such lien or encumbrance.

- With the structures becoming collateral for the developer's financing, there are millions of dollars at stake.
- "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.



Property Taxes & Other Resulting Expenses

- In addition to increased property taxes, there many potential expenses/financial losses that may arise to the landowner in construction and operation.
- Thankfully, the forms being used are generally very explicit on the developer's responsibility. Ex:
 - Crop damage
 - Damage/removal/replacement of stormwater features or subsurface drainage systems.
- **“The cost of doing business”** = reimbursement for loss of preferential tax assessment / roll-back taxes under PA's Clean and Green Program. Unleased acreage can be re-enrolled after the entire enrolled “parcel” is removed from the program.



Property Taxes

- At this point, we have little to go on re: what to expect in property tax assessments in Pennsylvania on grid-scale solar improvements.
- *Income method or replacement cost?* (very likely it will be *income method*)
- This will be a long-term business relationship and an annual process will need to be established for “splitting the tax bill.”
- mutual right to an Assessment Appeal:

(c) Either party may contest the validity or amount of any levied taxes, assessments or other charges for which each is responsible under this Agreement as long as such contest is pursued in good faith and with due diligence and the party contesting the tax, assessment or charge has paid the obligation in question or established adequate reserves to pay the obligation in the event of an adverse determination.

- The skeptic in me says this is not necessarily going to be smooth.



Section 4.2. Taxes, Assessments and Utilities.

(a) Lessor shall pay, when due, all real property taxes and assessments levied against the Lessor Property, including the Lease Premises, Easement Premises, Access Premises and Distribution Premises, and all personal property taxes and assessments levied against any of the Lessor Improvements. Subject to Section 4.2 (c), if Lessor fails to pay any such taxes or assessments when due, Lessee may, at its option, pay those taxes and assessments and any accrued interest and penalties, and deduct the amount of its payment from any payment (including Rent) due from Lessee to Lessor under this Agreement.

(b) Lessee shall pay all personal property, production and other taxes and assessments levied against the Facility or its energy production when due, including any equipment within the Access Premises or Distribution Premises. If the Lessor Property or Lease Premises experiences any increase in the amount of real property taxes assessed against it as a result of the installation of the Facility on the Lease Premises, including any reclassification of the Lessor Property or Lease Premises pursuant to applicable law, Lessee shall pay or reimburse Lessor an amount equal to the increase caused by the Facility no later than ten (10) days prior to the date on which the applicable real estate taxes are due to be paid by Lessor, provided that not less than thirty (30) days prior to such due date Lessor provides Lessee with copies of the applicable current and past statements of real estate taxes payable for the Lessor Property or Lease Premises and any related information demonstrating the increase was caused by the Facility and the amount of the increase.]



Contract Terms defining acreage leased

- **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.
 - **Acreage for 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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“Right to Relocate” clause

Section 2.4. Location of Facility; Right to Relocate. Upon completion of design and layout of the Facility, Lessee shall identify specifically that portion of the Lease Premises that will be occupied by the Facility and related facilities, as well as the Access Premises and Distribution Premises, if any, and the parties agree to amend the description of the Lease Premises in Exhibit A to conform to the final Facility design. Notwithstanding the foregoing, Lessee reserves the right to relocate or reconfigure the Facility upon the Lease Premises during the term of this Agreement. Lessee agrees to cooperate with Lessor to locate the Facility on the Lease Premises in a manner that minimizes interference with agricultural or business operations of Lessor or Lessor's other tenants, to the extent consistent with Lessee's planned use of the Lease Premises. Upon any such relocation, the parties agree to amend the description of the Lease Premises in Exhibit A to conform to the relocated Facility design.



Other Easements frequently included

Accompanying Easements: The leased acreage is for actual solar operation, but the lease also grants the tenant various other easements over the landowner's remaining acreage.

- ***Construction Easement*** – temporary.
- ***Access Easement*** – for routine access during the lease term.
- ***Transmission Easement*** – for transmitting power to the grid.
- ***Nuisance Easement*** – for tenant's impacts on remaining lands from day-to-day power generation activities.
- ***Solar Easement*** – unobstructed access to the sun.



Who gets the real benefit from grazing sheep?

Section 2.7. Grazing Lessee agrees to allow Lessor to rotationally graze sheep or other approved animal species owned by the Lessor within the Lease Premises under a rotational grazing and watering plan supplied by Lessor for approval by Lessee. Lessee will coordinate with Lessor to plant and maintain the Lease Premises with a seed mix that is suitable for animal grazing and pollinator habitat. Lessor will be responsible for providing any and all watering facilities, livestock gates, animal protection, and supplemental insurance needed for grazing operations. Lessee shall be compensated by Lessor for any damage to the solar plant equipment caused by Lessor grazing activities, and for the cost of any reseeding or tree replacement required due to overgrazing. Lessor waives any right it may have to seek compensation from Lessee of its agents or contractors for injuries suffered by any animals grazing within the Lease Premises.

- *This was just gratuitously included in one lease. The details would need to be much more explicit and primarily this is being seen as a third party agreement.*
- *The solar developer should be paying for the maintenance of vegetation.*



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.



THANK YOU!

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BONUS CONTENT

These topics are anticipated to be covered in other ways during this webinar, but just in case there is more time for discussion:



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?



“Decommissioning”

- At termination, developer “**surrenders possession**” and will execute any documents needed to clear title.
- **Restoration Term** – ex: 12 months to remove improvements above grade, and at least 3-foot below grade, and restore to pre-lease condition. Pay rent at construction phase amount during restoration? Negotiate option to retain access roads, etc.?
- **Bond/Financial Security** – Who will determine the amount? What will be the cost to remove 30 years from now?
- It is highly recommended that a new bond be required:
 - Every 5-10 years, reflecting current costs (seems to be only feasible way)
 - Upon every assignment/change of “tenant” - the bond must reflect the current tenant’s identity or it is useless.

Note on statutorily-required bonding: To whom does the bond pay out and how is the bond obligation measured? (There is no governmental obligation to “restore” the site, so the municipality cannot be the obligee?)



Contract terms that protect the landowner

- **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.
-



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.
-



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.