



Agricultural Solar Energy Development: Understanding Lease Agreements for Utility- Scale Installations

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Introduction

If you own farmland in Michigan, you have likely been contacted recently by an energy company or developer seeking to secure sites for utility-scale solar energy projects. The state's 2016 Clean and Renewable Energy and Energy Waste Reduction Act requires Michigan's electric service providers to supply 15 percent of their energy from renewable sources by 2021. This law, along with declining costs for solar panels and other economic factors, has generated new interest in solar energy projects for Michigan.

This bulletin provides farmers and other landowners with information about land lease agreements for utility-scale solar developments. Before signing papers for any type of arrangement with an energy company, you should seek legal advice from an attorney who is licensed in this state and has appropriate experience with real estate transactions and, preferably, solar projects. The information contained in this bulletin is provided by Michigan State University Extension for educational purposes only and is not intended to be taken as legal advice. This document is written for use in Michigan and is based on only Michigan law.

Utility-scale solar projects can have a significant impact on you, your family, and your farm. A thorough understanding of proposed legal documents helps ensure a successful outcome. You should also seek the advice of your CPA or other proper financial professional to learn the potential effects on your income taxes, farm program participation, and other money matters.

Potential landlords or lessors for solar installations should also research the energy company who will be your tenant or lessee. Look for a track record of projects in Michigan along with the "Three Rs" – reviews (e.g., Google), ratings (Better Business Bureau, etc.), and references (usually on the company's website).

Due Diligence

Over the course of a solar project, the landowner may be asked to sign multiple types of agreements. Most companies begin with a **letter of intent**, then proceed to an **option**, and ultimately enter into a **lease** or **purchase agreement**.

During the time periods covered by a letter of intent or an option, the solar project developer will perform its **due diligence**. Also known as the examination, feasibility, or permitting period, it allows the energy company to determine the suitability of the site before making a long-term commitment or greater investment.

The company, its agents, or third parties it hires will likely conduct a physical inspection, land survey, topographic study, environmental report(s), and title search. The company will also identify and begin the process of obtaining necessary government permits, such as building and zoning. Other possible permits may include water well, soil erosion and sedimentation, wetlands, drain crossings, and driveways.

Key Considerations:

- Understand the nature and scope of the access you are granting. Consider any limitations you might need to prevent conflicts with your farm operations or other activities on your property. The due diligence period can last from a few months up to a year, which usually can be extended either automatically or upon notice.
- Make sure the company is agreeing to restore your property if necessary and repair any damage caused by the inspections, testing, and other due diligence activity.



- The letter of intent or option should provide that the company obtains and pays the fees for government approvals, such as a zoning permit, but it may require you to cooperate. Landowners should fully understand the impact on their property from any requested zoning change.
- Contact your local tax assessor if you are entering a lease *of less than 40 acres for more than 1 year* because it may require approval under the state's Land Division Act. Although practice varies among local governments, it is technically a new "parcel" as the term "division" is defined in the Act.

Letter of Intent

After your first contact from a solar developer, most landowners quickly receive a letter of intent, term sheet, or preliminary agreement. The form of this document can vary from something very short and informal to one which includes a lot of detail about the proposed project and lease.

In addition to allowing time for due diligence, the company uses this arrangement to reserve the site. Upon signing, the landowner cannot shop the property to other companies and, often, must keep any information about the potential solar project strictly confidential. Typical language reads as follows:

The Landowner agrees not to solicit or negotiate, or permit its agents or employees to solicit or negotiate, or furnish information to any other solar power entity, concerning the construction and development of a solar panel project on the Landowner's property.

Key Considerations:

- Can the landowner still change their mind once the letter of intent is signed? It depends. The letter of intent may or may not create a binding obligation to lease the property. It might if signed by the landowner with agreement to the essential leasing terms, such as the property, the length of the term, and the rental amount. Instead, look for explicit language that the letter or agreement is "not to be interpreted as a binding contract" or is only a "framework for negotiations."

Option to Lease

Like the letter of intent, an option provides the solar company additional time for due diligence before it proceeds with the project. The company may be considering other sites, waiting for financing, or working on government approvals. The option is normally a detailed form of agreement, which looks similar to the lease and may have the proposed lease attached.

In contrast to the letter of intent, the option is a binding commitment by the landowner. The company, as the option holder, is not bound but instead may choose whether or not to exercise the option and enter into a lease (or purchase agreement). The option document should include details on how the option holder provides notice to the landowner of its decision to trigger the option.

Key Provisions

- Know the time period during which the option is in effect when you cannot lease or sell the property to anyone else.



- Look for the consideration, which is the legal term for payment or compensation. Some type of consideration – usually money – is required to make the option legally binding. It may be a lump sum payment.
- Make sure the option preserves your right to plant crops or lease the property for planting, although it may require you to provide notice before doing so. You must have a *written* provision in the option for you to be paid by the company if it exercises the option, proceeds with installation, and the crops cannot be harvested or sold.

Land Lease

A lease is an agreement with a property owner under which someone else has full possession and use of a parcel of real estate, a building, or a portion of either for a stated period of time and pays periodic rent. Solar projects are considered commercial leases, which are highly flexible and essentially limited only by the negotiation of the parties. The key provisions for solar leases are outlined below.

The Parties

- How the property is titled – meaning who legally owns it – determines who must sign the lease or other documents. It may be just you and your spouse. But if the owner is your corporation, limited liability company, trust or other entity, you will need to know which officers, members, managers or other persons must approve the lease and whether a resolution or similar document is needed to show that authority. The solar company should also document its authorization to enter into the lease as the tenant.
- Farm families should consider their succession plans before entering into a solar lease. You may need to ensure that it would not impede a gift of the property to your children, a transfer to a trust, or a sale to a third party if it will not stay in the family.
- The lease will almost always allow the solar company to transfer its entire interest to any other company as a “successor or assign.” This might then occur when the developer is not the eventual operator of the project or the company is restructured or sold for any reason. An assignment is typically allowed without the landlord’s consent, but you may be able to negotiate for the original tenant to remain liable for any obligations it has under the lease.

The Property

- The most significant potential effects from the lease concern the location of the property involved, how it will be used, and what portion of it cannot be used in any other way. The landowner will be restricted from entering into the specific project site and possibly other areas. You will want to consider whether your current or potential activities on the property will be impacted, such as crops, housing, hunting, timbering, water use, and mineral rights.
- The areas of property affected may change during the various solar project phases, including development, construction, operation, and expansion. The lease may use different terms, such as premises or project area, to refer to the property for the various purposes. You should carefully review the definitions for any terms referring to the property, including the preliminary or final premises. All such areas of the property should be identified for you on a survey paid for by the tenant.



The Term

- The term refers to the length of time the lease is in force. Solar leases typically run from *20 to 30 years or more*. The term of the lease may not begin on the date you sign it, but may instead specify another date.
- *Take note of any renewals that will lengthen the term either automatically or upon notice given by the tenant. Some leases also include an opportunity for the tenant to purchase the property at the end of the lease.*

Rights of First Refusal

- A right of first refusal in favor of the solar company may be included in the lease or granted by a separate document.
- If agreed to, this right is triggered when the landowner receives — and intends to accept — a good faith written offer from a third party who wants to buy the property. The solar company is then entitled to receive notice of the offer's terms and has a specified period of time to choose to buy the property on the same terms.
- You should know how much of your property is subject to any right of first refusal and for how long, including renewals or extensions.
- The right is not triggered by transfer of the property upon death of the owner. But you should otherwise consider whether a right of first refusal makes sense for your situation. Some sellers find that potential buyers are less interested in a property that is subject to a right of first refusal, which may lower its value.

Rent

- The rental amount for a solar lease is ordinarily calculated on a per acre, per megawatt produced, or percentage of the power sales revenue basis. Take note of how many acres are included or other language in the lease that figures into the amount. You should also negotiate to receive a percentage of any timber sales made necessary by the project.
- Rents are usually paid once or twice a year instead of monthly like other leases. Be aware that rent likely will not begin until sometime after signing the lease. Solar leases usually identify an event that triggers the rent, such as when construction begins or when the project is fully operational and power is being supplied.
- The lease should provide a way for your rental payments to increase over time. Known as an escalator clause, the rent will be raised by a pre-set amount or by a percentage that is based on inflation or some other external measure. The time period for increases often corresponds with renewal terms, but may be negotiable.

Easements

- In a solar lease, the landowner will agree to grant the tenant various easements that allow for construction, operation, maintenance, and removal of the project. These rights over your property provide access to the specific site – through which the developer, its agents, contractors, sub-lessees, or others may enter your property at any time without notice. Easements are also used to connect the solar project into the broader power grid. Another easement may protect the company's solar access by restricting or requiring permission for any construction by the landowner because it might block the sunlight. The scope of the easement language is often very broad:



Landlord grants to Tenant an easement for light, vehicular and pedestrian ingress and egress, and utility access over, under and across all property owned by Landlord which is adjacent to or in the vicinity of the Premises as reasonably necessary for Tenant's use of the Premises and to access the Premises. Landlord agrees to execute and deliver any separate easement agreements for the benefit of Tenant and the Premises as Tenant or the utility to which the system is interconnected may reasonably request.

- You will want to review all proposed easement locations, which should be shown on the survey, and make sure you understand the extent of each. Easements must stay unobstructed by other uses. Negotiation may be necessary to limit the areas included and minimize any impacts on farming, including underground uses and overhead interference with equipment. Avoid granting “exclusive” easements, which prohibit any use of the easement area by the landowner or others.

Existing Encumbrances

Landowners will need to understand how any existing encumbrances, i.e., other interests in the property, may be affected by a solar lease agreement.

- **Mortgages** — Granting any new interest in your property, such as an option or lease with a solar company, may be considered a default under the terms of your mortgage. You may need to get permission from your lender, who will usually okay it but may require a “subordination agreement” with the tenant to ensure that its mortgage interest is not compromised. Note that your mortgage may also include an “assignment of rents” clause, which means that your lender would get the rental payments from the solar lease if you are otherwise in default under the mortgage.
- **Existing Easements** — Ask to review the tenant’s title search to identify any easements or similar agreements already impacting the property for access, utilities, wells, septic, or mineral and subsurface rights.
- **Restrictive covenants** — Farmland preservation or other conservation agreements may prevent use of the property under a solar lease. **The Michigan Department of Agriculture and Rural Development (MDARD) has confirmed that a commercial solar panel installation is not permitted on land enrolled in a Farmland Development Rights Agreement under the PA 116 Program because the use is not considered agricultural.** The land would need to be removed from the program prior to construction of a facility. For more information on the qualifications and repayments required for that process, please contact MDARD’s [Farmland Preservation Office](#) at 517-284-5663.
- You should take note of whether the lease gives you the right to otherwise “encumber” the property. If not, you may be prohibited from granting other easements or getting a new mortgage unless your lender agrees that the lease would survive a foreclosure of the mortgage.
- Also look for whether the tenant may encumber or grant others rights to the property. For example, the tenant’s leasehold interest can be used as security for a mortgage or the tenant may want to grant some access rights to others. The lease should prohibit the tenant from allowing construction liens to be filed against the property, and the tenant should be required to post a bond to remove any construction liens as provided under Michigan statute.



Taxes

Solar projects and leases can cause significant, unexpected changes in your property taxes under Michigan law. You should talk to your attorney and local assessor before signing anything. The common provisions found in leases are highlighted below.

- The lease should state who pays what portion of the taxes for real estate and personal property, whether on a direct or reimbursement basis. Personal property should be assessed and billed in the name of the solar company. Take note of any duty you have to provide the tenant with bills or notices regarding taxes and assessments. Also be aware that the lease may include the tenant's right to contest any assessment or tax levy, using the property owner's name and requiring you to cooperate.
- In Michigan, a property's taxes are calculated from its taxable value. Without changes to a property, annual increases in the taxable value are limited to 5 percent or the inflation rate, whichever is less. However, an assessor must "uncap" a property's taxable value in the year following an ownership transfer. **By statute, a lease with a term exceeding 35 years, including all possible renewals, is considered a transfer of ownership for purposes of uncapping.** Landowners can limit the length of the lease or include carefully drafted language that shifts the burden to the solar company for any increase in the taxes from uncapping its value.
- A tenant's commercial solar installation may also result in loss of the parcel's eligibility as a qualified agricultural property and its exemption from certain local school operating taxes. This would trigger additional taxes, which the tenant should be obligated to pay under the lease. You should also discuss this matter with your assessor in advance. A separate parcel of the lease area can be created for tax purposes only in order to retain the remaining property's exemption.
- As the landowner, you will also want the right under the lease to pay any delinquency in the tenant's tax obligations in order to avoid forfeiture or foreclosure. This provision should, of course, also give you all rights and remedies available to collect any such payments made from the tenant.

Liability

- The lease should spell out each party's responsibility to acquire and pay for casualty and liability insurance to cover risks arising from injuries to solar company employees and other visitors and damage to the solar equipment or the landowner's property, structures, equipment, crops, etc. Security measures can be required to reduce risk of injury or damage.
- Your attorney should carefully review the lease's indemnification clauses by which a party agrees to pay for the damages, and in some cases the defense costs, of the other party if a claim is asserted by a third party. The example below limits the landlord's responsibility for injury and damages to your own negligence. Be careful not to assume any responsibility for other parties who use your property, such as hunters.

Tenant will indemnify and defend Landlord against all claims for bodily injury or property damage relating to (a) the condition of the Premises; (b) the use or misuse of the Premises by Tenant or its agents, contractors, or invitees; or (c) any event on the Premises, whatever the cause. Tenant's indemnification does not extend to liability for damages resulting from the sole or gross negligence of Landlord or for Landlord's intentional misconduct.

- Requesting that the landlord be an additional insured on the tenant's insurance policy can offer additional protection.



Termination

- Decommissioning occurs when a solar project reaches the end of its useful life and the lease terminates. The solar company should agree in the lease that decommissioning calls for removal of its structures and debris along with restoration of your land similar to its original condition, including soil and vegetation. A deadline to complete decommissioning should also be stated. Your community's zoning ordinance may also require the developer to submit a decommissioning plan prior to permit approval.
- The lease can provide the landowner with financial assurances to cover the high costs of decommissioning. Such security from the tenant can be in the form of an escrow, letter of credit, bond, or corporate guaranty.
- The lease may also be terminated if there is a default, which means certain acts or failures to act as defined in the lease. Defaults typically happen when rent or other payments are not made, but may include any breach of the lease by either party. Look for language that requires notice to the defaulting party and provides a "right to cure" or fix the problem within a certain amount of time to prevent termination of the lease. Also take note of any provisions in the lease that limit the remedies or damages available to the non-breaching party if a breach occurs.
- Unfortunately, it is possible for a solar company to sign a lease, start the project, but fail to complete the installation. Landowners should insist that the decommissioning resources be available upon abandonment of the project or any early termination of the lease. Although it seems obvious, the term "abandonment" should be defined in the lease to avoid any dispute about when the owner can act to restore the land if the tenant fails to do so.

Miscellaneous Clauses

- Landlords and tenants under a solar lease are typically responsible for their own property's maintenance, repairs, and utilities. Double check this assumption and note that any existing easements may provide otherwise.
- The lease will require you to make certain warranties and representations. This typically involves information about the status of the property like its ownership or environmental issues. Although your word is good, you are not an expert on these matters and responsibility for any misrepresentations, even unintentional, may continue even after the end of the lease. Therefore, any such promises should include the phrase "to the best of my knowledge" or similar.
- The lease can also require the tenant to make warranties and representations. A common promise is that the tenant will comply with all laws.
- Be aware of any duties you have under the lease to provide the tenant with notice of some matter. Failure to do so may be considered a default or breach of the lease.
- Solar leases, options, and other similar agreements will include a promise by the landowner to keep all terms of the documents and other tenant information strictly confidential. It should allow an exception for communicating with your attorney and accountant. Understand that this clause prevents you from discussing rental rates or other compensation with your neighbors and other owners. Violations will have serious consequences, which may be triggered even after the project terminates for any reason.



Closing Clauses

- Entire agreement — Also known as an integration clause or merger clause, this language declares that the lease is the complete and final agreement of the parties. In other words, you will not be able to rely on or make a claim about anything that is not written into the lease even if promised during discussions or written in a previous document.
- Choice of law — This clause should provide that Michigan law governs the lease and any disputes because states' laws differ on real estate issues.
- Forum and venue – Look for a clause stating that any lawsuits will be filed in Michigan courts, preferably local, to avoid the costs and inconvenience of out-of-state litigation.
- ADR — Alternative dispute resolution (ADR) clauses are generally helpful to avoid lengthy and expensive litigation. Mediation is a process in which the parties must voluntarily reach agreement to any settlement of a dispute while arbitration binds the parties to the decision of an arbitrator if they disagree. Take note of how the parties will pay or split the fees and expenses of any ADR.
- Attorney fees — Under the American system, each party generally pays its own attorney fees in a lawsuit unless the parties agree otherwise. Avoid promises to pay the solar company's attorney fees if possible, but at least make sure any promise to pay fees is mutual, usually on a "prevailing party" basis. This means that the non-prevailing party, i.e. the loser in a dispute, pays the prevailing party's fees and its own.

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