

NEGOTIATING SOLAR LEASES – ISSUES FOR DEVELOPERS AND LANDOWNERS

SCOTT D. DEATHERAGE
S Deatherage Law, PLLC
2101 Cedar Springs Road
Suite 1010
Dallas, Texas 75201
214-356-0979
scott@sdeatheragelaw.com

The University of Texas School of Law
2012 RENEWABLE ENERGY LAW COURSE
January 27–28, 2020 Austin, Texas

Table of Contents

I.	Introduction	1
II.	Beyond the Law: Building Trust between the Parties	1
III.	First Things First—Lease or Option to Lease; Lease and/or Easement	5
IV.	Show Me the Money—Rent, Royalties, and Other Payments	7
V.	As Good as it Gets—Most Favored Nations Clause	9
VI.	Where Is It Going to Be? —Defining the Area to Be Leased	9
VII.	What Are You Going to Do? —Defining Permitted Uses	10
VIII.	Storing It Up--Energy Storage	11
IX.	To and Fro--Specific Easements	12
X.	How Long Will It Last? —The Lease Term	13
XI.	Taking It to the Bank—Lender and Tax Equity Issues	15
XII.	Mineral Interests and Protections for Solar Farms	17
XIII.	Who Is up Next? —Assignment	18
XIV.	What Could Go Wrong? —Default and Remedies	19
XV.	Who Is Paying the Lawyers? —Developer Payment of Landowner Attorney’s Fees	20
XVI.	Got You Covered—Indemnities and Insurance	21
IV.	Before You Go—Restoration and Restoration Bonds; Transferring Solar Facility to Landowner in Lieu of Restoration	25
V.	Conclusion	26

I. Introduction¹

While there are many similarities in utility-scale solar leases, there is no true "form" lease used across the country. Solar leases address many if not most of the same issues, but the actual language may vary substantially from one developer form lease to another. The contract that emerges after negotiations with a landowner seldom is the same as the form lease first delivered to the landowner by the developer. Good legal practitioners will modify their form lease as new language developer in a particular lease negotiation. An accommodation with one landowner that maintains the developer's objective may save time in negotiation with a future landowner if adopted in the form lease.

Having worked on over 50 solar leases (and wind leases as well), mainly for developers but also for landowners, I have seen a variety of lease forms and different drafting of the same provisions in those forms.

The leases are long, single-spaced documents. Negotiating these leases often take weeks if not months. Patience is key in these transactions.

This paper will address many of the key issues for solar project developers and landowners that are frequently negotiated. As discussed in the next section, the relationship developed with the landowner may provide a significant benefit for both parties in terms of reaching an understanding of both parties' interests and concerns and lead to a more balanced result in a shorter amount of time.

II. Beyond the Law: Building Trust between the Parties

A. Issue: For lawyers and perhaps even more so for the technical people or businesspeople working for solar developers, the negotiation of a ground lease can become a technical process, one of many leases needed for a project and only one of many projects being developed. For the developer representatives, when a landowner or their attorney make significant comments on a lease, they may feel frustration and to some extent disdain for the landowner or their counsel. After all, they are the experts and understand the practical and business aspects of the deal and the needs of their future lenders and investors. The landowner negotiates a lease once; developers, many times.

For landowners, and for counsel representing them, it is a different perspective. In many states, particularly Texas, land may have been in the family for decades or even more than a century. The emotional attachment to the land may run deep with landowners and their families. The landowner and his or her counsel can become frustrated that the developer and its attorney do not agree to revise the lease based on what the landowner and their counsel think are reasonable requests for accommodation of the

¹ This article and the information contained in this article are provided for informational purposes only and not for the purpose of providing legal advice. You should not act or refrain from acting on the basis of any content included in this article without seeking legal or other professional advice. The contents of this article contain general information and may not reflect current legal developments or address your situation. You should contact your attorney to obtain advice with respect to any particular issue or problem. Review of and use of information contained within this article do not create an attorney-client relationship between the author, his law firm, and the reader.

interests of the landowner. They may believe the developer just rejects reasonable changes requested by the landowner.

Emerging from these positions and perspectives are often prolonged negotiations, a lack of trust between the parties, and much frustration.

Experienced lawyers know that the technical and economic aspects of negotiations of contracts are not the only factors influencing how negotiations progress. The emotions of the parties, whether they like or dislike each other, or whether they trust each other, and whether they believe the other side cares about their concerns can play a significant role in the timing and outcome of the negotiations. This is no truer than in the negotiation of a solar ground lease between a solar developer and a landowner.

The personality and business experience, age, and a variety of other characteristics of the landowner can be of major importance. No two landowners are the same. Perhaps no two developers or their representatives are the same.

While there are obviously similarities in solar lease negotiations, no two negotiations are the same. Often, they take their own path and require patience on both sides.

Thus, a certain level of emotional intelligence, adaptability, and willingness to establish trust between the parties is a prerequisite to success.

B. Developer View: Developers and their counsel have spent a lot of time developing their form leases and often these forms have evolved based on negotiations with many other landowners.

Developers and their counsel, however, may be best served by trying to understand the landowner's issues and concerns, while convincing the landowner and his or her attorney that certain provisions and language are necessary to ultimately meet the needs of the investors and lenders who will provide the funding for constructing the solar farm that will produce the income both parties seek.

Steering through the proverbial rock and hard place takes empathy for the landowner and attorney and their concerns, while persuading them of developer or tenant needs and those of the financial parties. What you have to realize and have to convince the landowners is there are people the developer has to negotiate for that are not at the table. The developer is negotiating on behalf of the investors and lenders who may not be identified until later.

I always tell my developer clients to warn the landlord about what is coming. Many landowners may be accustomed to fairly simple crop or cattle leases for their land. Such leases may be only three to four pages long. When the solar lease is sent to the landowners, it is key to let them know in advance that a long lease is coming and why it is so long. Many landowners are upset when they receive a 30-page or longer lease with multiple attachments from a memorandum of lease to solar insolation easements, roadway easements, and utility easements. Combined these documents may be 40 or more pages long.

This can be a shock to the landowner. Key to the process is the developer representative telling them in advance that the lease will be long and that it addresses the concerns of the investors, tax equity investors, and lenders. Spending a little time to explain briefly project finance and the specifics of solar project

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Negotiating Solar Leases - Issues for Developers and Landowners

Also available as part of the eCourse

[2020 Renewable Energy Law eConference](#)

First appeared as part of the conference materials for the
15th Annual Renewable Energy Law session

"Negotiating Solar Leases - Issues for Developers and Landowners"