



Pennsylvania General Assembly
Public Hearing on

Utility Scale Solar Development and Agricultural Land

Senate Agriculture and Rural Affairs Committee
Tuesday, September 21, 2021

Written Testimony of Staff Attorney Brook Duer

On behalf of Penn State Law's Center for Agricultural and Shale Law, I want to thank Senators Vogel and Schwank, Committee staff, and Committee members for scheduling and taking the time to conduct this hearing.

This issue is rapidly emerging, of significant importance, and requires thoughtful analysis before grid-scale solar electrical generation moves further towards establishing itself in Pennsylvania. At this time, we are still looking at an industry in its infancy in Pennsylvania. According to numbers obtained from the PJM Interconnect on July 2, 2021, only 7 of the 62 active projects approval to sell electricity to the grid in Pennsylvania are operational.

In 2019, Penn State Extension asked the Ag Law Center to partner on education for farmers and rural landowners due to the rapid proliferation of solar leases and options to lease being offered across the Commonwealth. That proliferation has not slowed in the years since.

Throughout 2020 and 2021, a small team led by Extension's Tom Murphy and Dan Brockett, has conducted dozens of webinars for farmers and landowners, and later including, municipal and other government officials, planning professionals, municipal solicitors, private practice attorneys, agricultural trade associations and those involved in conservation and land trusts. I remain impressed that some of these webinars still draw several hundred attendees when conducted from Penn State Extension's platform.

We expanded the team to feature many other experts in various areas, including some of our panelists today, and included Professor Mohamed Badissy from Penn State Dickinson Law, who is conducting a research project on Pennsylvania municipal ordinance provisions, or more appropriately the lack thereof, on solar development.

We have spent countless hours trying to educate all the various stakeholders on how these leases and options to lease are constructed and operate. In the interests of time, and because we have a panelist here who is a private practice attorney who can also address actual lease terms, I am going to leave lease terms to him and the question and answer process.

I wish to simply outline a few "big picture" truths that have become evident over the last few years of conducting solar leasing education.

In a nutshell, these are not typical farm lease transactions, particularly at the outset. Tens of millions of dollars are being proposed to be borrowed and invested to build and operate what is essentially a "power plant" on the surface of property that is simply leased.



The property is not owned by, and therefore not under the complete control of, the party who borrows millions to capitalize and operate the project. Moreover, the solar facilities on the surface will be pledged as collateral for that capital. That is a lot of value resting on a fairly “thin” legal string for security.

The landlord who retains title to the property upon which the “power plant” will sit is most likely a completely inexperienced, or minimally experienced, landlord in any capacity. The term of this commitment is several decades. Farmers and rural landowners are proposed to become long-term landlords in very sophisticated commercial real estate leasing relationships with tenants that are engaged in the multi-million-dollar business of generating electricity.

Almost assuredly, the title to the property will change hands during the lease term, as will the identity of the party who owns and operates the solar generating facilities on the surface. Some of these projects may change hands on the tenant side before they are even built or in the first few years and perhaps even multiple times. Some of these projects may in fact be put together on paper by parties who have little intention of operating them, but simply to “flip” them at some point in the process. It is hard for a landowner to know who they are dealing with when every developer is comparatively new to this industry.

Having outlined only these small details, it is hopefully apparent that a landowner should never sign solar leasing documents without the involvement of an attorney representing their interests and providing legal counsel throughout the process. These documents are extremely variable from developer to developer, they are not “battle-tested,” and they contain extensive, complex and long-term commitments. Yet, we have seen landowners come forward with executed documents who did not consult an attorney.

Unfortunately, the most attractive land to be developed for solar facilities, or most other uses for that matter, is land that is flat, level and cleared. Hence, solar leasing is now another potential development pressure on farmland. The Commonwealth of Pennsylvania has gone to very successful lengths, through various statutory measures like the Agricultural Area Security Law, the funding and purchase of agricultural conservation easements and the Clean and Green preferential tax assessment program, to provide economic incentives to counter that pressure. Presently, all those incentives are available equally to alleviate this new development pressure in the identical manner.

However, regarding utility scale solar development, the Commonwealth does lack any state statutory authority to regulate solar facility siting. Presently, the only government entities vested with authority regarding solar facility siting are county and municipal government through zoning and land development ordinances. And we know from the research of Professor Badissy of Penn State Dickinson Law that specific authority has not yet been exercised to any great degree.

Surrounding state governments have taken recent legislative action to become more involved in siting decisions for utility scale solar development. The generic term “Solar Siting Law” appears to be the emerging terminology for these types of measures.

- New York enacted the Accelerated Renewable Growth and Community Benefit Act, effective April 3, 2020. It established an Office of Renewable Energy Siting (ORES) with whom an application must be filed, and approval obtained, for locating grid-



scale solar developments within the state. Regulations defining the process were proposed and adopted as final on March 3, 2021. The law requires solar developers to conduct both public informational meetings and local government informational meetings at least 60 days before filing an application for approval.

- Ohio enacted amendments to existing law via “Substitute Senate Bill 52,” effective October 11, 2021. It revises approval procedures of the existing Ohio Power Siting Board for the construction of a “large solar facility,” defined as a single interconnect (i.e. not a community solar project) with \geq 50 megawatt capacity. Counties may designate by voter referendum “restricted areas” where large solar facilities may not be constructed. Similar to New York, a public and County government informational meeting must be held at least 90 days before application, but Ohio includes a provision that the County Commissioners may thereafter by resolution prohibit or limit the size of a proposed project before application to the state siting board.
- It is important to point out such laws generally establish state government jurisdiction over and bonding requirements for decommissioning of a solar site, including the authority to step in and complete decommissioning upon default. Ohio’s new law, for example, requires a decommissioning bond payable to the state, updated in amount every 5 years, and sets a 12-month decommissioning deadline.
- Presently, because Pennsylvania has no government obligation to step in and complete decommissioning upon default, requiring a decommissioning bond payable to the state or local government is not effective because there is no government obligation. Presently in Pennsylvania, decommissioning is strictly a private contractual commitment by a tenant to a landlord/property owner under a lease.

Penn State Law’s Ag Law Center is more than happy to provide more input on these and other statutory mechanisms employed in other states to regulate solar siting that may be of interest to members of the Pennsylvania General Assembly.