

Get ready for the solar 'gold rush'

Farmers need to know their rights and obligations before entering into any discussions with solar energy companies

LANDOWNERS hosting large-scale renewable energy developments are the target of a new range of investors looking to access green income. At present there is real investor frenzy in solar Photo Voltaic (PV) investment, but farmers need to be well-informed about what's involved when they are approached by developers.

Renewable energy projects such as solar PV and wind will require farmers to enter legal agreements with project developers. Legal agreements only work where there is a good relationship between the land owner and the developer. The project is effectively a partnership.

Exclusivity Agreement

This is usually a very short form document which outlines the site with reference to a map and establishes the developer's interest.

The developer will want the land owner to sign an exclusivity agreement for a specific period. If the land owner is in discussion with other third parties they are required to cease those discussions.

In some cases there is no Exclusivity Agreement at this stage and its sometime built into a later stage Heads of Terms.

Heads of Terms

The Exclusivity Agreement usually progresses to a Heads of Terms if the developer wishes to proceed with the project.

The Heads of Terms will outline the basis of the project. In most cases, developers will enter into an Option Agreement and that option should then lead to a Lease.

The Heads of Terms usually sketches the format of the Option and Lease agreements and the rights of the developer.

The Heads of Terms will outline the period and term of the Option and the Lease. Most solar projects are seeing leases between 25 and 30 years and generally you are seeing Option periods of anything from one to five years. Most Option Agreements are for three years with a right to extend for another two years.

The Heads of Terms usually sets out the details for upfront and renewal fees. It will also set out who is responsible for various aspects of the agreement such as insurance. The Heads of Terms usually have confidentiality clauses and there may be an exclusivity requirement with it.

Heads of Terms are not contractually binding. They are effectively an agreement to conduct business but other than

exclusivity and confidentiality clauses, they are not binding and you can pull-out.

Option Agreement

An Option for Lease (Option) Agreement usually favours a developer rather than a landowner.

It gives the developer the most flexibility in terms of what they are going to do. This reflects the time and resources the developer will be expending on the project.

The developer has to be a position where they can pull out if the project is not making worthwhile progress. .

Many landowners are being asked at the pre-Option stage to sign a letter of consent allowing the developer to apply to ESB Networks for a grid connection

Other issues which the developer will be exploring include:

- Planning
- Finance
- Power Purchase agreements (PPA)
- REFIT
- Solar Panel procurement agreements

These have to be nailed down by the developer and they must feel that they are in a position to achieve all of these moving parts.

The Option Agreement will see a non-refundable fee paid upfront to the landowner. Effective the landowner is restricting their land use to some extent by signing this Option Agreement.

During the Option Agreement period the developer will prepare and submit a planning application.

The developer is usually required to consult with the landowner and show them copies of relevant documents.

This will all be at the cost of the developer. The developer will require access to the site to carry out searches and surveys etc. The developer may bring machinery and equipment on the site during this time and the landowner should not be interfering with the developer in that respect.

The landowner will not be

allowed to enter any other agreements, leases or licences of their property once they have signed up to the Option Agreement.

They must therefore make any third-party lease holder or owner aware of the implications of the agreement which they have reached with the solar developer.

The Option does not usually completely restrict the landowner from assigning or transferring the lands.

Most solicitors find this to be the number one concern of landowners at the initial stages of these transactions.

Landowners will say that they intend to transfer the lands to their son or daughter and don't want to create potentially bothersome legal issues for the next generation.

In the vast majority of Option agreements, landowners are allowed assign or transfer their lands subject to the developer's consent. The Option usually provides (and if it doesn't, you should insist that it does) that the consent of the developer 'shall not be unreasonably withheld'.

The Option may request the landowner to help sell the project to the neighbours to some degree and to help deal with any of potential planning difficulties.

There is, of course, clear limitations as to what a land owner can do in this regard.

At any time during the Option Agreement the developer can decide when they are ready to progress the option to a Lease.

This will have been agreed upfront when the Option is signed. The developer is required to provide the landowner with sufficient notice of an intention to enter into the Lease.

This notice period will be agreed in the Option Agreement and is typically between one and two months. So, if the developer wished to enter into the Lease in July, the landowner would be given notice of same



LEASES, RENTS, INSURANCE AND OTHER ISSUES

COSTS AND LEASES

Developers usually pay a contribution or all of the landowner's legal and any other professional costs (e.g. tax advisers, surveyors) when the landowner enters into an option.

Lease terms are usually 25 – 30 years. The lease will deal with rights of entry on the land to construct the panels, ancillary infrastructure, and deployment of on-site security fencing.

It may also provide for access to or way-leaves on other land owned or leased by the developer which could include access roads which may also be linking up with third party lands.

The land owner has a right to retain usage of the lands but this will be restricted to uses such as grazing sheep.

A tricky part of these leases from a farmer's perspective is that there can be fairly strong clauses preventing farmers from interfering with the solar project by, for example, letting livestock onto the project area or creating a shadow by planting trees or erecting buildings in proximity to the solar panel footprint.

There may be an option in some leases for an extension for a period of time eve at the end of the 25-30 year lease period.

Comprehensive Due Diligence needs to be completed on the property. The land owner needs to satisfy the developer that he has not entered into other lease agreements.

If there is a bank charge on the property the farmer will have to get the bank's consent before signing a lease.

RENT CLAUSE

Generally the rent is agreed upfront and landowners have the option of index-linked or turnover-based rental agreements.

With some solar leases the rent payment is whichever is the larger figure of these two options. In this scenario, the developer is required to provide the landowner with metre reading and turnover figures.

INSURANCE

Developers will usually insure the site for employer's liability and public liability. Landowners should also consult their own insurance companies to make sure their own insurances are in place.

SITE MAINTENANCE

The land owner may potentially earn more income by providing the company services such as grass-cutting and weed control. These services need to be covered by a separate agreement. Landowners should always seek tax advice both rental and maintenance service payments.

CONDITIONAL CONTRACTS

While Option and Lease agreements are the most common way of developing agreements there are two other ways of doing this. One is a conditional contract subject to specific conditions in that the land owner knows they have a deal if these have been fulfilled.

The final one is one which we never see, an unconditional contract whereby the landowner has a deal and it's going to happen one way or the other.

It's important for land owners to familiarise themselves with previous work completed by the developer and investigate their track record. It's important that the developer knows what they are talking about and can handle the complexities of such transactions.

Farmers must enter into agreements carefully and seek expert advice to negotiate the best possible outcome.

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“LANDOWNERS ARE ALLOWED TO TRANSFER LAND SUBJECT TO THE DEVELOPER'S CONSENT”

