

# Top 10 Real Estate Considerations for **SOLAR DEVELOPMENT**



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# INTRODUCTION

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Securing all of the necessary real estate documents (e.g., leases, easements, options, and crossing agreements) is one of the most critical and state-specific items in the development of utility-scale solar projects. Bricker Graydon has created a top ten list of practical considerations relating to the real estate aspects of solar project development in Ohio.

## 1. Document Margins

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For purposes of recording a document with a county recorder in Ohio, the margins for the first page of a document need to be 3" at the top and at least 1" on all other sides. For all other pages, there needs to be a 1.5" margin at the top and at least 1" margins on all other sides. Failure to do this results in increased recording costs, which can add up on projects with significant numbers of recordable documents.

## 2. Acknowledgements and Remote / Electronic Notarization

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Under Ohio law, a lease with a term longer than three years must include notarized signatures. Having the memorandum acknowledged and recorded does not alleviate the requirement for the lease to be notarized/acknowledged. Recent changes to Ohio's notary law also require that the following

be added to the notary block for most real estate documents other than affidavits: “No oath or affirmation was administered to the signer with regard to the notarial act.” Further, Ohio’s Notary Modernization Act, which took effect on September 20, 2019, does allow for both remote online notarization (a notarial act performed by an Ohio notary public who has been authorized to perform notarizations when a signer personally appears before the notary using audio-visual technology instead of being physically present in the same location as the notary) and electronic notarization (a notarial act performed by a notary public using his or her electronic seal and electronic signature on a digital document). Importantly, an electronic notarization is an in-person act where the notarial act procedures remain the same (e.g., appearance in person, verification of the signer). The Ohio Secretary of State’s office has a database of remote online notaries. You can select a specific county, and indicate “yes” in the “Online Notary” drop-down function found [here](#).

### 3. Local Zoning and the OPSB

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The developer should be aware of township or municipal zoning classifications for each property located within the project site. For utility-scale solar projects, however, Ohio law indicates that a project with an Ohio Power Siting Board (OPSB) certificate will preempt any specific zoning challenges. This preemption stems from Ohio Revised Code 4906.13(B), which states, “No public agency or political subdivision of this state may require any approval, consent, permit, certificate, or other condition for the construction or initial operation of a major utility facility or economically significant wind farm authorized by a certificate issued pursuant to Chapter 4906 of the Revised Code.” In fact, the Ohio Supreme Court interpreted this statute to mean that “power siting projects are exempt from local regulation.” *State ex rel. State Edison Co. v. Parrott* (1995), 73 Ohio St.3d 705, 707. While this preemption argument can assist a developer with local zoning issues, it is not a failsafe and you should be prepared to face challenges and educate the local government (e.g., the county prosecutor) regarding this issue. If

the project does not trigger OPSB jurisdiction and must comply with applicable local zoning ordinances, there should be an understanding from the beginning of the formal and informal processes regarding how variances or other changes are granted.

### 4. Surveyor and Title Company

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Be strategic about choosing a survey or and title company. Whether as part of the initial development of the project, or during the financing process, it is important to strategically select a surveyor and title company familiar with the development of energy projects in Ohio. For example, an Ohio surveyor with experience in the county in which the project is being developed can provide very practical advice about the local approval processes (e.g., the lot split/subdivision process) and help ensure those processes are completed more quickly and cost-effectively.

### 5. Legal Descriptions

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As most developers know, each county recorder’s office operates a little differently. To be safe, all legal descriptions in Ohio should include a metes and bounds description of the relevant property (whether under an option, lease or easement) along with the Section/Township/Range, the county auditor’s tax parcel number(s) and a prior instrument reference. Taking a more comprehensive approach as to the legal description will increase the odds that there are no issues with getting documents recorded.

### 6. Subdivision/Lot Split Process

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If the project only requires the acquisition of a portion of a tract of land, you will likely have to go through a process at the local level (think county or township) to subdivide the land. Depending on the locality, this can take two routes. Ideally, it will be a very simple

process which can be accomplished by having a new legal description filed of record as part of a new deed. While this legal description will have to be approved by the county auditor and map department (creating a new parcel number), this process is fairly routine and can be handled in coordination with your Ohio counsel and surveyor. However, in some localities, it can be a longer process that requires application to and approval from a local or regional planning commission. A developer should keep in mind that there are a number of requirements that come into play when dealing with these planning commissions, including:

- Jurisdictional triggers based on the size of the parcels being created
- Road frontage requirements (sometimes as much as 75 to 100 feet)
- Access issues, including ensuring the new parcel is not landlocked and has access to a public road (typically an easement accomplishing this will not be sufficient)
- Availability of utilities to the parcel. If a lot split/subdivision will be part of the project, the developer should engage Ohio counsel and an Ohio surveyor

## 7. Road Use Maintenance Agreements (RUMA)

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Road Use Maintenance Agreements have become fashionable as of late with the influx of companies into Ohio developing wind energy, oil and gas and large, interstate natural gas pipeline projects. Under a RUMA, the energy developer promises to improve and repair the public roads it uses and there are a series of risk shifting provisions negotiated into these agreements (e.g., pre- and post-construction videos of the public roads, bonding, and indemnities). Each county and township approaches RUMAs differently, but they are becoming more widespread in Ohio. Be prepared for an early discussion with the county engineer and other elected officials in the project area to better understand what will be required, if anything.

## 8. Good Title Work / Property Ownership

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It is crucial to have good title work done early in the project to ensure a lease, easement, option or purchase agreement is being entered into with the correct fee owner of the property, and also to determine what other encumbrances are on the property (e.g., old easements, mineral reservations). It is also important to understand Ohio's title nuances. For example, if property is owned by a trust, there must be a statutorily-compliant memorandum of trust recorded before the trustee signs a lease, easement or other conveyance document.

## 9. Notice and Cure Provisions

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Federal and state courts in Ohio have both concluded that notice and cure clauses in leases for the development of energy projects are enforceable. For example, in *Kelich v. Hess Corp.*, 6th Cir. No. 14-3411, 2014 WL 7331014, \*2, the United States Court of Appeals for the Sixth Circuit found that a payment error under an energy lease was insufficient to terminate it because the landowner did not comply with the notice and cure provision in the lease. In that case, the notice and cure provision stated as follows: "Failure to pay or error in paying any rental or other payment due hereunder shall not constitute a ground for forfeiture of this lease and shall not affect Lessee's obligation to make such payment, but Lessee shall not be considered in default on account thereof until Lessor has first given Lessee written notice of the non-payment and Lessee shall have failed for a period of thirty (30) days after receipt of such notice to make payment." Strategically drafting and incorporating a notice and cure provision in your real estate documents in Ohio is critical and can help to prevent inadvertent termination events and reduce the likelihood of issues during project financing.

## 10. Use of the Public Right of Way

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Developers often have to consider whether to utilize the public right of way for the installation of project facilities, especially electric transmission lines. While this is a useful way of limiting the need for private easements, it comes with some logistical challenges that can have a direct impact on project financing. Typically, the three options for utilizing a public right of way (state highway, county road or township road) will be to get a permit, franchise or easement. Each locality is a little different, so it is critical that discussions with local governments begin early in the development process when routing options are still available. Each of the three options carries its own risks, and in some situations could have an impact to project financing (e.g., a permit provides the least protection to a developer because it is easily revoked). Where applicable, a developer could also look at co-locating its electric transmission lines with existing utilities to minimize disturbance within the public right of way.

## CONCLUSION

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Most developers have template real estate documents used for projects around the country, which are modified and updated depending on the state in which a project is located. Having “Ohioized” such template documents for countless renewable energy developers, Bricker is ready to answer any questions you may have about selecting and securing your project site.

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