

Summary of Contract Forms for Solar Rooftop

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This note will consider the different contract forms that groups can enter into as part of a solar rooftop project. In the first stages of a project a group may wish to enter into an initial agreement to give themselves comfort as they go forward with surveys, etc. Groups must also consider what form of final contract would be put in place e.g. a lease/licence/other agreement. Pure Leapfrog have developed a project called LEAP (Local Energy Accelerator Platform) through which groups can have access to all the documents mentioned here. There are discounts for members of CEE and any member of CEE can access to MOU free of charge.

Initial Project Forms

In the initial stages of projects groups may want to enter into an agreement with a potential landlord, another group (if developing in partnership) or with another organisation. Groups should be careful and consider who or what body must consent to the various agreements. There may be a head landlord to a property or in the case of schools, consent beyond the Board of Governors may be required. There are various forms these early project agreements can take but here we summarise the main forms:

- Memorandum of Understanding (MOU)
- Exclusivity Agreement
- Confidentiality Agreement,
- Option to Lease and
- Heads of Terms.

More than one of these agreements may be suitable for particular situations but groups can seek legal advice as necessary to decide what is best for each project.

A Memorandum of Understanding (MOU) is the most informal of the initial project forms and is generally used to start building trust between the community group and other party (usually landlord/school). It is often agreed between parties without either side engaging solicitors. It can be used by any two groups looking to work together on a community energy project (i.e. not just a potential Tenant and Landlord). The MOU provides for the two groups to work together on an exclusive basis towards the particular project. In an MOU the parties set out the steps already taken towards the project and the intended next steps. The MOU is not generally binding other than the exclusivity agreement contained within the agreement (see Clause 3 in the Pure Leapfrog version) which is binding.



An Exclusivity Agreement gives a community energy group time to develop a project with the assurance that a prospective Landlord will not be negotiating with any other party for the duration of the agreement. This time can be used to undertake surveys/investigations of the land and submit planning applications. There is no guarantee that the Landlord would enter into a lease or other contract at the end of the agreement as an exclusivity agreement simply ensures that the Landlord only negotiates with the community group in question.

Confidentiality Agreement: This agreement covers the passing of confidential information between the parties, which they do not want disclosed any further, relating to the development of a project. It can be useful for developing project finances at the start of the project but provides no guarantee that a lease or other contract will be entered into at the end of the agreement. It contains a provision to keep the information confidential for 2 years after the negotiations surrounding the project end.

Option to Lease: (also sometimes called an agreement to Lease) this is a binding legal commitment to enter into a lease if certain things happen and certain conditions are fulfilled (e.g. planning consent obtained, necessary money raised through share offer, etc). It is used where a binding commitment is needed for the project to proceed but it is not clear whether the necessary conditions will be fulfilled. As a binding legal commitment the Option to Lease can be registered in the Land Registry to protect the future Tenant's interest (although this will incur fees). A full lease is generally attached to an Option to Lease in the final form of lease that will be entered into if the Option is exercised (i.e. if the conditions are fulfilled) and the terms of the lease will have to be agreed before the Option is signed. This can incur legal costs which will be lost if the conditions cannot be fulfilled and the project has to be aborted for any reason. This will mean that the group should decide on the appropriate contract form (e.g. lease or licence) early in the process, ideally this would be explored at the MOU stage. Further the lease negotiations (and associated costs) will be incurred when the option agreement is signed rather than later in the project.

The purpose of a Heads of Terms is to record the main points that have been agreed between a group and prospective Landlord. It allows the final details and small print to be drafted while allowing an agreement to be put in place while the details are drafted or final surveys are undertaken. The HoTs can set out the main points of a lease or licence. The HoTs are not binding, however, sometimes the agreement can also contain an exclusivity or confidentiality agreement which can be binding and the agreement to negotiate in good faith (Clause 4 in Pure Leapfrog's precedent) is binding. There is no guarantee with HoTs that a lease/licence will be entered into later. A full lease/licence can be attached to the HoTs as an annex – this can mean that the bulk of the lease or licence negotiations take place at the same stage as the agreement to sign the HoTs.

Final Contract Form

The most usual final contract forms are leases and licences. There are advantages and disadvantages to both and groups should carefully consider which would suit their project best.

Leases are agreements to create a property interest in a certain piece of land for a certain time with the right continuing regardless of who owns the land/building. They can be for any type of property but the vast majority of leases are for residential flats or businesses premises. The majority of schools do not occupy their premises under a lease but many businesses do and this can include some farmers. The



origins of leases go back hundreds of years and as a result “landlord and tenant” law (as it is called) has developed into a complex area of law. Also there are differences between the law in Scotland and the law in England. The Pure Leapfrog precedent is suitable for use in England and Wales only.

Commercial leases are very long documents and use many terms you will probably not be familiar with. Typically they run to dozens of pages although some (but by no means all) of the clauses are pretty standard. Some of the provisions found in a standard lease are not appropriate for a solar PV installation so the Pure Leapfrog form has been modified where possible to make it more relevant and adaptable to rooftop solar.

From the point of view of a community group, a lease may be the appropriate choice if the group thinks that the building the panels are installed on could be sold or change hands during the lifetime of the Power Purchase Agreement (PPA). This is because as an ‘interest in land’ a lease will be transferred to the new owners. However, most leases of solar PV contain break clauses allowing the lease to terminate and for the panels to be removed but have a provision for financial compensation to be paid to the group if that happens. The compensation is calculated according to a pre-agreed formula which is written into the lease. Due to these stricter termination provisions, banks generally prefer to lend against a lease and will not lend if the agreement is in the form of a licence.

Licences are binding contractual agreements so if they are breached the parties can take the matter to court. Licences have a wide variety of uses which can include consent to allowing someone to do something on someone else’s property but without creating an “interest in the land” (unlike a lease which creates an interest in the land). Licences are a useful alternative to a lease for a rooftop solar PV system because they are generally shorter, written in simpler language and altogether easier to negotiate, than a lease. They can also require fewer third party consents and don’t need to be registered at the Land Registry. As a result the legal fees are generally less. A licence to install and operate the panels can be easily combined with a PPA. For any groups where the identity of the landlord is unlikely to change for the duration of the PPA and/or bank finance is not involved, such as with a school, a licence may be a better choice of contract form to suggest at the initial stages of the discussion.

Finally, there has been a case where the authorities in charge of a church school did not want to have anything on the roof of the school that was owned by someone else. This ruled out a licence or lease arrangement and schools are forbidden by statute to accept loans. The solution was a ‘service agreement’ – where the community group signed over ownership of the panels but stayed responsible for the operation and maintenance of the panels, while the school signed over any rights to the Feed in Tariff. This was something designed for a particular set of circumstances and where the landlord would agree to a lease or a licence, either of these forms would be preferable.

Please contact Pure Leapfrog if you have any questions about this document or would like more information on the LEAP documents.

