

Siting Renewables on Conservation Easements: What Land Trusts Need to Know

As the transition to a clean energy system accelerates and renewable energy development pressures increase, land trusts are facing, with far greater frequency, questions regarding renewable energy and conservation easements. *When, and under what conditions, can a land trust allow renewable energy development in a conservation easement?* The answers are different for existing conservation easements without a specific clause permitting renewable energy structures and in yet to be signed and recorded conservation easements. For existing easements, the language of the easement itself dictates whether siting renewables is permissible or not. Many easements prohibit structures outright and so renewable siting is not an option. Also consider whether the proposed use is consistent with any restrictions on commercial use. Amendments to existing conservation easements to permit structures and improvements outside of building areas may be contrary to conservation purposes and may be too high risk to undertake. Please use the 2017 edition of the [Amendment Report](#) to assess any such requests for existing conservation easements.

For new conservation easements before signing and recording, land trusts may consider *renewable energy development when it is consistent with the conservation purposes and does not harm conservation values*. A land trust should address this issue through clear easement language when it elects to allow this activity.

Assessing whether renewable energy is an appropriate activity is a site-specific question that can only be answered after careful analysis of the conservation values of a given property and in the full context of an individual project. As with any easement issue, research and apply best practices and guidelines, specifically, [Land Trust Standards and Practices](#).

Renewable Energy and Conservation Easements: Key Considerations

1. **Conservation values.** First and foremost, the land trust should determine if renewable energy development is consistent with the conservation purposes of the conservation easement. Depending on what conservation values a land trust seeks to protect, different levels of compatibility will likely exist. For example, if the goal is the protection of endangered songbird habitat, there are likely limited (or no) opportunities to allow renewable energy development while also protecting this habitat. On the other hand, if the goal is farmland conservation, some limited flexibility may exist to site renewable energy development and all the associated infrastructure while still achieving conservation objectives.
2. **Siting, scope and scale.** Understanding the siting, scope and scale of the proposed development will help a land trust evaluate its impact on the property's conservation values. Important questions to ask include:

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- Where will the project be located?
 - What is the purpose of the energy development? Is the energy for an on-site accessory use, such as for farm operations and improvements? Or is the principal purpose to generate revenue by supplying electricity into the transmission grid for use off-site of where the system is located?
 - What is the size of the development? For personal use (which generally implies smaller scale of 1-20 kW or less for one residence) or for broader consumption (mid to larger scale or utility scale which is generally considered 1 MW or more)?
 - What is the associated infrastructure and impacts of lines, pipes, roads, pads, water and so forth?
3. **Funding restrictions.** Easements that are partially or completely funded by grants from private foundations or government agencies may be restricted or limited in what the easement can allow. Some state and local officials see energy leases as “double-dipping” and do not support state or local agricultural and open space funding programs that allow renewable energy development on protected or to-be-protected properties. Land trusts need to fully understand the views of funding partners and the potential funding limitations prior to drafting an easement.
4. **Energy lease terms.** Does the landowner have an existing energy lease on the property? If so, the land trust may need to engage with the energy developer to understand the terms of the lease. While evaluating title encumbrances is critical to any conservation easement transaction, it is especially important with respect to energy leases because understanding and assessing lease terms can be difficult and time consuming. Key issues may include:
- *Release of parcels.* Under what conditions, if any, can parcels of land (particularly those identified as possessing important conservation values) be released from the lease? What, if any, is the willingness of energy companies to amend existing leases to ensure the protection of the property’s conservation values?
 - *IRS deductibility.* The lease terms may impact IRS deductibility, so a land trust and appropriate legal counsel need to review the lease in the context of the regulations. See below for further information.
 - *Project costs.* What are the potential costs and who are the responsible parties for the project expenses (such as transportation, infrastructure and maintenance costs)?
 - *Liability.* Are there any additional liability issues associated with any title encumbrance or existing lease?
5. **IRS deductibility.** A land trust needs to understand how easement provisions on renewable energy may impact the potential federal deductibility of an easement donation. There are two different regulatory prohibitions of inconsistent uses. The first disallows deductions where the conservation purpose is the protection of open space and the [terms](#) of the easement permit a degree of intrusion or future development that would interfere with the essential scenic quality of the [land](#) or with the governmental conservation [policy](#) that is being furthered by the donation. (Treas. Reg. §1.170A-14(d)(4)(v)). The second prohibition is more general and prohibits the retention of inconsistent uses and is applicable to conservation easements regardless of the category of conservation purpose under which they qualify (Treas. Reg. §1.170A-14(e)(2)). It is difficult to know what this means for renewable energy development. For example, how many wind turbines might be acceptable under the regulations? The answer is unclear. In some cases, it may be necessary for the landowner to forgo a tax deduction or forego energy siting. The IRS has begun to disallow deductions where *any inconsistent use* regardless of scale is present or allowed. Another option is to leave land areas that

may be subject to potentially inconsistent uses out of the deductible easement with the excluded areas fully restricted including a prohibition on division by a non-deductible easement. This is a risk to the deductible easement if the excluded areas are interior to the conserved land. A third option is to clearly articulate how the siting of renewables is necessary for the protection of the conservation interests pursuant to Treas. Reg. §1.170A-14(e)(3). Third party expert reports will reduce the risk that the IRS disallows the deduction. A mere assertion by the owner or land trust has been insufficient in other cases.

6. **Landowner goals.** Land trusts will need to listen carefully to landowners and prepare language that reflects the shared views, if any, of the land trust and the landowner on renewable energy, recognizing that some landowners may want to reserve the right in order to maintain flexibility while others may want to explicitly prohibit such activity.
7. **Renewable energy credits.** If there are renewable energy credits or tax credits for renewable energy development, who owns them if they are sold in the future or traded into an energy grid? Explicitly address any energy, ecosystem service, carbon or similar credits in the conservation easement deed. Please review the [Practical Pointers on Carbon Offsets](#).

Easement Drafting Considerations

If a land trust has evaluated and documented that the siting of renewables is consistent with the conservation purposes for the subject property, it must contemplate easement protections. When drafting conservation easements, land trusts may address renewable energy by permitting it directly under certain conditions, such as through a specific reserved right, or generally within standard easement clauses regarding potentially permitted uses. Consider including sole discretion language to enable the easement holder to control the scale, scope and siting of the development to ensure that the conservation values are protected. Tie the exercise of sole discretion to the protection of conservation purposes.

Consider these drafting tips for addressing renewable energy in conservation easements:

1. Limit location of renewable energy development to existing or reserved building sites or special use zones without conservation values. Require that all necessary infrastructure and improvements also be located in the special use zones.
2. Consider protecting scenic values by requiring a natural buffer to provide screening of the renewable energy structures.
3. Limit energy development to on-site use. Avoid utility scale projects which generally require more infrastructure, such as transmission lines, roads, grading and chemicals. Consider siting renewables on locations where it is possible to use existing transmission infrastructure as it minimizes pressures for transmission lines elsewhere on conservation lands.
4. Harmonize the easement's limitations on improvements, structures and impervious surfaces with provisions concerning renewable siting. If the easement prohibits all structures and improvements, siting of renewables will be prohibited from the outset.
5. Include provisions governing construction, operation, decommissioning and restoration of renewable energy installation sites guided by best practices satisfactory to the land trust and consistent with conservation purposes.
6. Use similar language to that permitted by the IRS for the extraction of subsurface minerals (oil and gas development). The regulations provide that when subsurface mining activity is (a) limited, (b)

localized and (c) “not irretrievably destructive of significant conservation interests,” it is permitted (see Treas. Reg. §1.170A-14(g)(4)(I)).

7. Research the best management practices for renewable siting for guidance with the goal of identifying only reputable standard setters with a preference for those with conservation missions. Consider, for example, [Great Plains Institute Best Practices: Photovoltaic Stormwater Management Research and Testing](#), [American Farmland Trust’s Smart Solar Principles](#), [U.S. Fish and Wildlife Services Land-Based Wind Siting Guidelines](#), The Nature Conservancy’s mapping tool [Site Renewables Right](#) and Scenic Hudson’s [Solar Siting Guide and replicable Solar Mapping Tool](#).
8. Assess the impact on tax deductibility. In the before and after analysis of an appraisal conducted for the purposes of obtaining a federal tax deduction for a charitable donation of a conservation easement, the calculation of the after value once the conservation easement is in place must account for the value of any retained right to site renewable energy. Such retained right could decrease the value of the easement and in turn reduce the taxpayer’s deduction.
9. Remind the landowner to research property tax treatment of renewable energy in the state and municipality. The siting of renewables could eliminate a property tax exemption or current use tax benefit or could be trigger a distinct property tax exemption for renewable siting. The repercussions of being subject to property tax as opposed to qualifying for an exemption are severe. In a recent Rhode Island case, the court rejected the taxpayer’s argument that a solar energy development was subject to beneficial property tax treatment and concluded that the assessed value of the ten-acre property rose from \$7,500 per acre to \$40,000 per acre following the solar development. *Polseno Properties Mgmt., LLC v. Keeble*, No. 2021-299-Appeal 2023 WL 2125824 (RI Feb. 21, 2023).
10. Consult with stewardship staff and confirm that associated monitoring requirements are feasible.
11. Ensure that you have an increased stewardship and legal reserves fund for the additional work and risk associated with these uses and structures.

Related resources:

- [Amending Conservation Easements: Evolving Practices and Legal Principles](#), second edition, Land Trust Alliance, 2017.
- [Clean Energy, Green Communities: A Guide to Siting Renewable Energy in the Hudson Valley](#), Scenic Hudson, 2018.
- [Conservation Easement Drafting: Pointers for Balancing Risk](#), Land Trust Alliance, last revised April 18, 2019.
- [Conservation in a Changing Climate: Renewable Energy Siting](#), Land Trust Alliance, 2019.
- [Land Trust Standards and Practices](#), Land Trust Alliance, 2017.
- [Model Grant of Conservation Easement and Declaration of Covenants](#), 7th edition, Pennsylvania Land Trust Association, 2019.
- [Pointers for Balancing Risk on Conservation Easement Permitted Structures Following the Full Tax Court Decision in Pine Mountain Preserve v. Commissioner](#), Land Trust Alliance, last revised April 3, 2019.
- [Private Inurement and Impermissible Private Benefit Prohibitions](#), Land Trust Alliance, 2017.
- [Reshaping the Energy Future: Renewable Energy and Land Trusts](#), Land Trust Alliance, 2019.

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Appendix

The Land Trust Alliance provides these examples for informational purposes only. Drafters are strongly advised to work with knowledgeable local legal counsel to custom tailor this language for consistency with the easement as a whole and compliance with state and federal law and that the Alliance is not engaged in rendering legal, accounting, tax or other professional counsel.

EXAMPLE 1

Discretionary Approval

No rights-of-way, easements of ingress or egress, driveways, roads, utility lines, leases, other easements or other use restrictions shall be constructed, developed, granted or maintained into, on, over, under or across the Protected Property ¹without the prior written permission of Grantee, which may be denied, conditioned or approved in Grantee's sole discretion, except as otherwise specifically permitted under this Grant and as appear of record prior to the date of this Grant.

EXAMPLE 2

Owner's Reserved Rights. The Owner reserves the following rights:

Electric Power Generation. Subject to the process and approvals set forth herein, the right to construct, maintain, repair, improve, and remove facilities used for generation and transmission of electrical power, including but not limited to geothermal, windmills, solar arrays and other renewable energy sources, but not expand or relocate said improvements or structures; provided however, that Grantor first obtains the prior written permission of Grantee, which may be denied, conditioned or approved in Grantee's sole discretion. Placement of electrical generation improvements shall be within the Homestead *only* and shall have minimal visual impact from outside the property boundaries, as determined by the Grantee in its sole discretion. Such improvements shall be limited to those for which the sole purpose is to supply energy to the buildings on the Property. Additional electrical generation improvements are permitted with approval by [Land Trust], in its sole discretion based on its sole discretion evaluation of the protection of the purposes of this Conservation Easement. All new transmission lines shall be placed underground. No more than 0.25-acre shall be cleared for electric power generation improvements in the aggregate. No improvements shall be relocated or expanded.

Sixty days prior to the commencement of construction of or site preparation for any new, replacement or additional electrical generation or transmission improvement, the Owner shall submit to the [Land Trust] in writing for [Land Trust]'s review a proposed preliminary site plan that

¹ Capitalized text throughout these example clauses indicates a term that is defined in the larger template from which the example text is extracted. Should a land trust use any of these example clauses, be mindful of what terms require further definition or alternatively, should be replaced with other already defined terms in a land trust's easement template.

shall depict the proposed electrical generation or transmission improvement, including the layout of the site, a sketch of all improvements proposed to be constructed, details of the design and location of access roads and, if pertinent, plans for the cutting or trimming of trees and other vegetation around and between any of said improvements and access roads, and best management practices for the construction, operation and decommissioning of the proposed development. Following submission of complete information, which shall include a site map showing all of the items required in the previous sentence, the [Land Trust] shall have a period of 60 days within which to review the proposal and provide written approval or disapproval or further requests for information pursuant to Paragraphs 10 (Requests for Permission), 11 (Discretionary Consent) and 31 (Notices). Construction and site preparation may not begin prior to the issuance of said written approval. At the expiration of said 60-day period, if the land trust has not issued a determination, then the request for approval is automatically denied.

EXAMPLE 3

Definitions:

“Renewable Energy” is energy that is generated from resources that are naturally replenished at a rate that is greater than or substantially similar to the rate of depletion of the resource, if any, by such energy generation and does not contribute Greenhouse Gases to the atmosphere. Examples include energy generated from sunlight, wind, rain, tides, waves, running water and geothermal heat, and production of energy from anaerobic digesters used to convert organic agricultural wastes into biogases.

“Renewable Energy Infrastructure” is any structure or improvement associated with the generation, storage, use and delivery of Renewable Energy, including but not limited to, solar panels, wind turbines, geothermal piping, associated utilities or battery storage facilities, and fencing or such other structures or improvements as may be developed in the future to harness Renewable Energy provided that all such structures and improvements including without limitation fences are consistent with the Conservation Purposes.

Permitted Uses within the Renewable Energy Overlay

With advance written approval of Grantee, which may be denied, conditioned or approved in Grantee’s sole discretion, Renewable Energy production and associated Renewable Energy Infrastructure for the purpose of generating energy for the agricultural and residential needs of the Property only is permitted within the _____-acre Renewable Energy Overlay Area (as defined by Exhibit B). Renewable Energy Infrastructure shall cover no more than a maximum of ____ acres of said Overlay area and shall be situated to minimize the amount of land that is utilized by said infrastructure all of which is subject to the prior review of Grantee , which may be denied, conditioned or approved in Grantee’s sole discretion and which approval is required to be obtained by Grantor prior to undertaking any Renewable Energy Infrastructure construction, building, placement, site work, ground disturbance, vegetation removal, topography change and any and all other initiation of any preparation for such Renewable Energy Infrastructure as well as disassembly and removal and the site fully restored.

[Size and location of Renewable Energy Overlay to be determined through in-house analysis of pertinent factors and relative size of conserved property. The preference is for the Overlay to be located in

proximity to the Farmstead Complex in order to limit impacts on the remainder of the Property and located off of Prime Soils and Soils of Statewide Significance. If this is a federally deductible easement, this work should be documented by a third-party expert in a full siting report and included in the baseline documentation regarding lack of inconsistent use of the conserved land in order to reduce the risk of disallowance of the donation by the IRS. Please also review all funder requirements for additional documentation required.]

In seeking Grantee approval, Grantor is required to and shall submit plans to Grantee for the construction, maintenance, placement, site work, ground disturbance, vegetation removal, topography change and any and all other initiation of any preparation for such Renewable Energy Infrastructure and disassembly and removal and the site fully restored of Renewable Energy Infrastructure at least 90 days prior to submitting applications for necessary permits, and must demonstrate that the siting and use of said Renewable Energy Infrastructure will not adversely impact the Property's Conservation Values or the Purpose(s) of the Conservation Easement. As part of its review, Grantee may require Grantor to take steps to mitigate potential impacts to Conservation Values (including but not limited to best management practices for stormwater and erosion control, planting screening trees, or pollinator friendly plantings and any other activity or mitigation including project redesign without limitation on conditions that Grantee may impose in its sole discretion). Grantor is required to post a bond naming Grantee, its successors and assigns as Obligee and payee thereunder, in an amount deemed by Grantee sufficient to cover the future disassembly and removal of Renewable Energy Infrastructure from the Property and to furnish information regarding such bond to Grantee prior to commencement. Until the Renewable Energy Infrastructure is disassembled and fully removed and the site fully restored, Grantor shall maintain a bond acceptable to Grantee at all times and shall renew same prior to expiration of its term without allowing any lapse in coverage.

Following the initial installation of any approved Alternate Power Equipment, any later proposed expansion in any manner or respect shall require the Grantee's advance approval following the same process set forth herein.

For the purposes of this Conservation Easement, "Alternate Power Equipment" is any installation or improvement designed to make energy available for collection or conversion from direct sunlight, wind, running water, organically derived fuels, including but not limited to, wood and agricultural sources, waste heat and geothermal sources that can be used without depleting its source, such as, for example without limitation, solar, wind, geothermal and movement of water (hydroelectric and tidal).

Example 4

Renewable Energy/Ancillary Improvements. Without permission from the Land Trust, other improvements, including but not limited to, facilities for the generation and transmission of electrical power, such as windmills and/or [detached] solar arrays may be built within the Building Envelope. Generation of any electrical power shall be principally for use on the Property. Ancillary improvements constructed within the Building Envelope count toward the impervious surfaces limitation as set forth herein. Construction of telecommunications towers is prohibited. All energy production plans, construction and distribution contracts and other agreements must be made expressly subordinate to this Easement and to the rights of Land Trust in this Easement to protect the Conservation Values in perpetuity.

[Limit to particular types of improvements, if appropriate. Consider whether to identify the location of these improvements even within the Building Envelope, if large or visible to the public or likely to impact wildlife, to minimize impact on conservation values. Depending on the circumstances, specify height, footprint and other limitations on the improvements and consider including a Land Trust approval requirement or a pre-construction notice requirement. Consider whether to permit telecommunications towers that are built as part of the other structures.]

Example 5

Ancillary Improvements. Other improvements, including but not limited to, facilities for the generation and transmission of electrical power, such as a windmill and/or methane digesters may be built on the Property only for the use on the Property and only with the approval of the Land Trust, as provided herein.

[Identify the location of these improvements, if possible, to minimize impact on conservation values. Depending on the circumstances, specify height, footprint and other limitations. Consider whether the limit to use strictly on the Property is appropriate or should be extended to adjacent properties under common ownership or another extension.]

Example 6

Alternative Energy/Communications Structures and Improvements. Structures and improvements necessary to undertake alternative energy activities, such as wind, solar, methane, and other similar energy generation activities, as well as communications facilities, such as cell towers or 911 communications towers, are permitted as further described below, so long as they are compatible with the Purposes of this Easement, subordinate to the _____ [conservation] _____ use of the Property and located in a manner that minimizes the impact to _____ [primary conservation attributes, prime or statewide important soils, scenic, riparian, habitat, etc.].

(a) Building Envelope: Within the Building Envelope, Owner may construct structures and improvements limited to flat rooftop panels [and _____] without permission of Land Trust. Other structures and improvements require prior Land Trust approval as set out herein.

[Structures that can be concealed inside or immediately adjacent to existing structures, such as a communications tower that can be inside a silo, may also be permitted without Land Trust approval.]

(b) _____ Area: Subject to the impervious surface coverage limitations set forth herein and the requirement that they affect no more than __ percent of the __ Area, such structures and improvements may be built in the _____ Area with the prior approval of Land Trust as set forth herein. Land Trust may condition approval upon the posting of a bond providing _____.

[The size, nature and duration of the bond would depend on the structure. A bond may be appropriate for the construction period but less necessary thereafter. Consider also the need for any ongoing insurance obligation for Owner, for example, to address land restoration after a devastating storm. The size and character of the structure dictate the importance of a bond or ongoing insurance obligation.]

(c) Location: Before selecting the location of any site for these structures and improvements, Owner shall give Land Trust an opportunity to participate in an onsite meeting to review proposed locations and any required roads by giving notice as provided herein. Owner shall comply with the _____ State Department of _____ [Agriculture and Markets or Environment as appropriate] _____ guidelines for mitigation for impacts caused by construction and operation of such structures.

[This subparagraph is usually fine if the structure and road are confined to the Building Envelope. If not, or if the envelope is large, then selection of the location should be subject to Land Trust approval. If the Granting Owner has plans to build in the immediate future, then the plans should be defined more specifically in the Easement.]

(d) Easement Governs: All plans, construction and distribution contracts and other agreements shall be made expressly subordinate to this Easement and to the rights of Land Trust to protect the Conservation Values in perpetuity.

Example 7

Renewable Energy Generation. Construction, use, maintenance, repair and replacement of one turbine for the generation of wind energy may be permitted upon receipt of Land Trust's prior written approval (which may be granted, conditioned, or withheld in its sole discretion). When considering whether to issue such approval, Land Trust shall weigh and evaluate, among other relevant factors, the overall aesthetic impacts of the proposed turbine in the context of the surrounding landscape, the environmental impacts, the scope of its anticipated energy benefits, and upon Land Trust's request, Owner shall be required to provide Land Trust with written documentation addressing these and other matters deemed relevant by Land Trust.

[Depending on the circumstances, include height, footprint and other limitations and consider whether to limit the location to a portion of the Property.]

Example 8

Wind, Solar and Hydropower Energy. To the extent permitted by, and in accordance with, all then-applicable federal, state and local laws, regulations and requirements, Owner may place or construct facilities for development and utilization of wind, solar and hydropower energy resources for _____ [residential agricultural/ _____] _____ use principally on the Property; provided, however, that there shall be no more than _____ structures

[The opening clause is often used but is essentially redundant as the Owner must comply with law in any event.]

[that may be located within the "Energy Zone" depicted on Exhibit ____.]

[that may be located anywhere on the Property except in the _____.]

[that may not be located in any location where visible from _____ Road.]

[that may be no more than _____ feet in height.]

Installation of wind, hydropower and solar energy structures shall be with prior Land Trust permission as provided herein, and Land Trust shall take into consideration the impact on scenic and ecological Conservation Values and the Conservation Purposes. All plans, construction and distribution contracts and other agreements shall be made expressly subordinate to this Easement and to the rights of Land Trust to protect the Conservation Values in perpetuity. Owner and the Land Trust hereby agree this paragraph is a reasonable restriction under _____ [applicable law].

[Omit one or more of wind, solar and hydropower as appropriate. Consider the risks and benefits of

relying in part on “then applicable” laws when their content is unknown when drafting the Easement. Impose any necessary restrictions or limitations in the Easement without assuming laws in the future will do so. The reference to use “principally on the Property” arises from the fact that connection to the electric grid means that excess electricity at any point will flow off the Property while insufficient electricity will be drawn from the grid. The requirement that the facilities be designed to produce electricity for use principally on the Property imposes a limit on size and scope of the facilities.]

Example 9

Community Commercial Wind Generation. The _____ [*insert general location, e.g., “ridge line at the northeast corner” or more specific designation, identify on map exhibit*] _____ on the Property may have a sufficient wind resource to be suitable for the generation of electric power. Owner and Land Trust may elect to explore wind energy production collaboratively employing ____ [*one / up to ____ / no more than ____*] wind turbines in partnership with _____ community with the objective of providing energy to that community and not principally for economic gain. Any such wind energy project, including the scale, location and all other conditions, shall require the prior written approval of both Owner and Land Trust, and either party may in its sole discretion withhold or condition said approval.

[Provide for allocation of any economic benefit. Consider any limits on the size or footprint of the turbines.]

Example 10

Possible Future Commercial Energy Production. As of the date of this Easement, Grantor and Land Trust mutually agree that current technology for commercial wind and solar energy generation, using tall and visually intrusive wind turbines and large arrays of solar panels, is incompatible with protection of the Conservation Values, and therefore, commercial alternative energy production using such technology is prohibited. If alternative energy production technology changes in the future so that alternative energy production on a commercial scale is compatible with protection of the Conservation Values and Conservation Purposes, Grantor may seek Land Trust’s approval of an alternative energy production plan in accordance with _____ and taking into consideration the impact on scenic and ecological Conservation Values and Purposes. All plans, construction, distribution contracts and other agreements shall be made expressly subordinate to this Easement and to the rights of Land Trust to protect the Conservation Values in perpetuity.

[Set out the limitations and conditions to suit the land and circumstances.]