

Alternative Energy Systems and Conservation Easements: Can they work together?



New Hampshire Land Trust Coalition

Thursday October 13, 2016

My topics today

- “Conservation Purpose” – the disconnect between common understanding and the tax code
- Drafting and structuring issues
- Several examples of real conservation easements attempting to accommodate renewable energy facilities

Personal Perspective

- Corporate Counsel at the Harris Center for Conservation Education, as a volunteer
- Admitted as a lawyer only in NY, not NH
- See conservation easement questions – particularly risks - from the perspective of the land trust
- Limited experience with renewable energy projects

“Conservation Purposes” – the Common Understanding

- Global Warming/Climate change/reduction of dependence on fossil fuels
- Clean water
- Clean air

“Conservation Purposes”

The Tax Code, IRC 170(h)

(4) Conservation purpose defined

(A) In general

For purposes of this subsection, the term “conservation purpose” means—

(i) the preservation of land areas for outdoor recreation by, or the education of, the general public,

(ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,

(iii) the preservation of open space (including farmland and forest land) where such preservation is—

(I) for the scenic enjoyment of the general public, or

(II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy,

and will yield a significant public benefit, or

(iv) the preservation of an historically important land area or a certified historic structure.

IRC § 170 (h) 4 (a) – Pts i & ii

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IRC § 170 (h) 4 (a) – Pt iii

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Strategy Number One

- Seek compliance with 170(h) by making the renewable energy resource a necessary component of one of the permitted conservation purposes – part of the farm or forest operation

IRC § 170 (h) – No inconsistent Uses

- In addition to the affirmative requirements, the Code prohibits inconsistent uses which frustrate the “purposes” of the easement
 - Consider “Renewable Energy” versus “Scenic Values”

Strategy Number Two

- The landowner typically retains the right to use the land for any purpose “not inconsistent” with the purposes of the easement
 - Whether this is so is open to non-trivial questions
 - A debate is raging in the conservation community on this issue – see Antrim Wind

IRC § 170 (h) – Baseline Documentation

- Baseline Documentation gives us an opportunity to explain how the CE satisfies the Code requirements

Summary of Challenge

- Swimming upstream – the Code is not especially receptive to renewable energy
- Uncertainty – not aware of any particularly helpful guidance on this subject; no safe harbors
- Limited guidance from decisions – rarity of audit and of court cases
- Draconian penalties – if the CE crosses the line, the deduction is lost; no “do overs”

Summary of Challenge

- But we have at least two threads of argument
 - “Part of the conservation purpose”
 - “Not inconsistent with conservation purpose”
- Both are fact based

Structuring the Easement - Drafting

- Should be aware that including renewable energy provisions in an easement risks tax deductibility –
- Land Trust should make this clear to donors - at least to the extent that they intend to claim a deduction - but pass the responsibility to the tax advisors of the donor *in writing*
- Nevertheless, structure and draft the easement to facilitate a tax deduction, if possible

Structuring the Easement - Drafting

- There is a risk of losing the deduction
- The following points make suggestions as to how to cope with the risk
- Lots of grey areas – no guarantees!

Structuring the Easement - Drafting

- Develop your renewables in easements which do not depend on a tax deduction
- Remember that state law – NH RSA 477:45 – is much broader than the tax code – “appropriate to retaining or maintaining such land or water area, including improvements thereon, predominantly in its natural, scenic or open condition, on in agricultural, farming, open space or forest Farming, open space or forest use, or *in any other use or condition consistent with the protection of environmental quality . . .*”

Structuring the Easement - Drafting

- If possible, keep the energy development off the easement area
 - use an exclusion area
 - the exclusion area should be broad enough to allow for repair, replacement, etc. in the future

Structuring the Easement - Drafting

- If not possible to keep the renewables off the easement area, define/limit the area of renewables development
 - Take this into account in the appraisal
- “Floating” uses may be susceptible to the same challenges as floating house lots – *Belk* case reasoning seems to apply

Structuring the Easement - Drafting

- Consider whether the renewable energy development violates other “conservation purposes” - especially “scenic views”? And “relatively natural habitat”?
 - This is a difficult judgment call – usually a subjective judgment – another variant of the inconsistent use
 - Perhaps you can limit the renewables to an area not visible from roads or other public places or place them in an area where otherwise “relatively natural habitat” is already disturbed

Structuring the Easement - Drafting

- As noted, it helps to limit extent of energy to that “necessary” for agriculture, forestry, education, public recreation and other allowed “conservation purposes”
 - This seems to be a rule of thumb used by a lot of drafters
 - Same logic as allowing roads, barns, dams, etc necessary for these purposes
 - Attempt to make the non-conservation purpose part of the conservation purpose

Structuring the Easement - Drafting

- Use limits which can be monitored by your usual monitors;
 - a straightforward “use for agricultural purposes” probably doesn’t work because you don’t have any way of measuring where the electricity goes and the monitor won’t be there 24/7/365
 - design capacity versus estimated use – nameplate capacity - limitations

Structuring the Easement - Drafting

- height, bulk, etc. are useful measurable monitoring standards
- electrical limits present technical challenges for monitors and should probably require professional reports

Examples

- Extracts of randomly selected CE's – not necessarily “models” but at least used and approved by somebody
 - Faulkner to Monadnock Conservancy, Cheshire County Registry of Deeds [CCRD] Book 2942, page 297 (2016) re all types of renewable
 - Skove to Monadnock Conservancy, CCRD Book 2928, page 995 (2015) – Art 3B – general
 - Brooks to Monadnock Conservancy, CCRD Book 2854, page 462 (2013) Art 3E – general
 - duBois to HCCE, Hillsborough CRD Book 8324, Page 588 (2011) – general - wind solar methane biomass
 - Faulkner to SPNF, CCRD Book 2405, page 630 (2006) re windmill
 - Faulkner to Nature Conservancy, CCRD Book 1781, page 481 (2000) – Art 6.11 re hydropower

Comments on Other Easements

- DuBois to HCCE – Handouts page 8
 - Context
 - Relatively large CE for us – 470 acres adjoining an existing easement with Monadnock Conservancy
 - Complicated use plan – some managed, some forever wild, educational uses, agricultural uses, an American chestnut plantation
 - Very sophisticated donor – philanthropy, easements, professional advisors, Rick
 - Special Provisions
 - Definitions
 - Power limits
 - Location of facilities
 - Subordination
 - Removal

Further Examples

- Antrim Wind Energy – Harris Center, *see* Site Evaluation Committee Website – www.nh.nhsec.gov – projects/Antrim Wind /Docket 2015-20/application/appendix 10 - land conservation mitigation package – a series of easements, not yet approved, as part of a mitigation package –
- Doscher, **The Next Frontier, Conservation and Renewable Energy, *Saving Land (LTA)*** 2010 describes two wind farm projects