



Assigning Property Rights Through Wind and Solar Easements

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Key Points

- There is an inherent tension between those landowners who erect wind turbines and those who reside on property near the turbines.
- Minnesota has recognized a property owner's right to the wind above their land, enabling property owners to protect themselves from the negative consequences wind turbines can bring.
- Wind Locked, LLC, has seized on the new recognition; with more than 130 members, Wind Locked is stitching together a growing area of Minnesota where turbine encroachment is limited.
- The Texas Legislature should recognize a landowner's property interest in wind and solar rays that reach their land.

Tension Between Wind Industry and Property Owners

Tension between neighboring property owners over the use of property is not a recent phenomenon. Most often, this tension arises not over who owns what land, but over how the one property owner's usage of property can affect their neighbors' usage of property.

Nowhere is this tension being seen more today than in the massive expansion of wind farms across the country in the last 20 years. Due to federal, state, and local subsidies and tax abatements, energy companies are constructing large wind turbines in ever-increasing numbers with little input from the neighbors on the surrounding properties.

The production tax credit (PTC) is a federal subsidy for wind energy that will amount to at least \$48 billion over the next 12 years ([Erickson, 4](#)). There are commonly further levels of subsidization at the state and local levels as well. For instance, Texas has invested \$7 billion in infrastructure to accommodate wind energy through the CREZ lines it has constructed ([Malewitz, 1](#)). The Lone Star State also grants tax abatements for wind energy at the local level (Texas Tax Code, chapters [312](#) and [313](#)).

Wind turbines affect nearby residents in numerous ways, including negative visual appeal, adverse health effects ([Jeffery et al., 1](#)), potentially hazardous operations ([Cattin et al., 5](#)), and detriments to bird and bat populations that serve ecological functions beneficial to farmers ([Smallwood, 1](#)). Additionally, proximity to wind farms can also have a "significantly negative impact on the surrounding property prices" ([Sunak and Madlener, 1](#)).

Charla Bean of Comanche, Texas, had this to say on her experience with wind turbines: "We've enjoyed living in the country—it's peaceful, it's quiet, it's serene. It's no longer like that here" ([Texas Public Policy Foundation, 0:44](#)). "I'm exhausted. We stay that way ... and that's strictly because of the turbines" ([Texas Public Policy Foundation, 2:03](#)).

These problems can lead to strained relations arising between neighboring property owners due to the negative effects wind turbines can have on nearby properties. Yet this tension involves more than just property owners. Because of the subsidies, the tensions spill over to include energy companies and local governments.

The primary role that subsidies have in the spread of windfarms provides limited avenues for concerned property owners to relieve or prevent the tension with their neighbors without going to the government for relief. But this is just the latest of a long line of property disputes between parties with competing interests. How have previous analogous disputes been successfully addressed?

Precedents for Addressing Tension Over Land Use

Government intervention seems to be the primary strategy in society today for settling differences between property owners.

One example of this is the frequent practice of zoning in cities. Zoning laws regulate land use (commercial, residential, industrial, etc.) and density (e.g., height and lot size) ([Furth, 8](#)). The purpose of zoning, as the city of Austin, Texas, puts it, is “to create compatible land uses, ensure proper design and construction standards, and promote the overall public good” ([2](#)).

However, far from promoting the public good, Glaeser and Gyourko have found that zoning strictness is highly correlated with higher costs of living due to its negative effect on supply. They note that “[the evidence] seems to suggest that this form of government regulation is responsible for high housing costs where they exist” ([21](#)).

Houston, Texas, is a prime example of an alternative way for cities to develop. Instead of implementing zoning, Houston has opted for recognizing and enforcing private property rights as expressed through deed restrictions. Deed restrictions are agreements that can restrict certain uses and activities of properties ([City of Houston](#)). Houston chose more clearly defined property rights for its citizens over increased government control via zoning. As a result of allowing for a natural resolution of tension between differing parties, Houston is one of the most vibrant and affordable major cities in America.

The case of Houston is illustrative of the classic example of tension over the use of land: the tragedy of the commons. The tragedy of the commons portrays the destruction of a common resource that occurs when that resource is collectively shared by the public.

In his *Two Lectures on the Checks to Population*, 19th century British economist W. F. Lloyd ([30-31](#)) wrote:

...parallel cases of inclosed grounds and commons; the parallel consisting in what regards the degree of density, in which the countries are peopled, and the commons are stocked, respectively. Why are the cattle on a common so puny and stunted? Why is the common itself so bare-worn, and cropped so differently from the adjoining inclosures? No inequality, in respect of natural or acquired fertility, will account for the phenomenon. The difference depends on the difference of the way in which an increase of stock in the two cases affects the circumstances of the author of the increase.

Private ownership yields superior results in Lloyd’s hypothetical as it incentivizes each land owner to sustain their land

for long-term benefit by limiting the livestock grazing on the land, thus solving a dispute between the livestock owners.

This is an example of how recognizing and enforcing property rights can ease tension between property owners naturally. This can even work in the face of the government intervention land owners are experiencing today though the billions of dollars of renewable energy subsidies that are driving the development of wind farms in Texas, other states, and across the world.

Minnesota’s Response to Tension Over Property Use

Responding to disputes between property owners, wind companies, and local governments caused by renewable energy subsidies, the Minnesota Legislature has enacted a law that has recognized a right to the wind that flows on and over any given property. In other words, Minnesota has chosen the route of proper recognition of property rights to help solve these problems. The relevant part of the statute reads:

‘Wind easement’ means a right, whether or not stated in the form of a restriction, easement, covenant, or condition, in any deed, will, or other instrument executed by or on behalf of any owner of land or air space for the purpose of ensuring adequate exposure of a wind power system to the winds. ... Any property owner may grant a solar or wind easement in the same manner and with the same effect as a conveyance of an interest in real property ([Minnesota](#)).

This recognition of the right to wind is similar to the development of mineral rights in that a property owner is now entitled to a resource their land naturally affords him. One obvious difference is that while minerals are below one’s property, wind is above it. Another difference lies in the fact that minerals are a tangible and resting resource while wind cannot be held and is intermittent. The principle holds the same though: property owners have the right to utilize resources that their property naturally affords them as long as they do not use this liberty to infringe on the rights of others.

Wind access as a property right functions in much the same way mineral rights function in Texas with regards to the severability of the right. The surface rights are distinct from the wind access rights so both rights may be retained together, or one of the rights may be granted independent of the other. Of course, at the time the Minnesota statute was passed, all surface and wind rights remained intact together.

The fact that makes this right consequential is that any wind turbine that is raised could substantially reduce the economic value of wind above nearby properties, thus violating the right of the property owners. The effect of a turbine or other

structure on wind flow is known as the “wake effect,” which can remain significant (that is, limiting the wind energy by 10 percent or more) for the distance of 8 to 10 rotor diameters downwind or 5 rotor diameters crosswind ([Manwell et al., 423-424](#)). This translates to a significant downwind effect at distances of half of a mile and greater for many turbines as the average rotor diameter of a wind turbine is 113 meters and growing ([U.S. Department of Energy, viii](#)).

As we’ll see below, the result of the Minnesota law is that the locus of the tension over the placement of wind turbines shifts back to the adjacent property owners rather than between property owners and the wind companies or government. Which is where the tension should reside, and where it should be resolved.

Wind Locked

A group of landowners in rural southern Minnesota have recently banded together in a unique way to take advantage of their wind rights and ensure that commercial wind turbines and farms won’t be raised in the area. Specifically, area residents created Wind Locked, LLC, a company whose chief goal is to prevent the raising of commercial wind turbines in the area.

Wind Locked functions by collecting rights to wind access voluntarily given by property owners in the area ([Wind Locked](#)). Currently, over 130 property owners have granted their wind access rights to Wind Locked ([Kelly](#)) on the condition that they will not be used. Wind Locked is able to accomplish its goal of preventing commercial wind projects by simply holding onto the rights, safeguarding them, in a sense. If prospective turbines would limit the wind over a property for which Wind Locked holds the wind rights, those turbines would be restricted from construction as they would infringe the rights of another.

By agreeing to combine their wind rights with that of others through Wind Locked, property owners are able to ensure that a larger area is protected from encroachment by wind turbines, giving each landowner greater protection. For example, an individual landowner, even with the right to wind recognized, may only be able to prevent wind turbines from being built roughly three quarters of a mile from their property. While this would limit the negative effects they would be subjected to, turbines a mile or two from their property could still bring them negative consequences. But with Wind Locked, multiple wind rights across a region allow much larger areas to be protected.

The right leaves intact the full utility that the wind provides as a natural resource. All property owners should have the ability to harness the resources that their land affords them.

In other words, the value that the wind can bring can be protected for property owners by recognizing their right to this resource. And this protection can be extended into the future despite changes of property owners who take over surface rights in the region.

The articulation by a legislative body of the concept that wind turbines can violate a property owner’s right to wind access without being built directly on their land is needed. The interference with those property rights has only recently been caused by renewable energy subsidies, especially those given to the generation of electricity from wind. Wind is such an inefficient source of power that using it for such was all but abandoned once fossil fuels and later nuclear fuels came along. As such, a body of common law did not develop around property rights regarding wind over the land as it did with minerals and water. Only because of the subsidies has wind become a significant source of electric generation and, thus, a significant source of conflict between property owners. These new laws have given property owners the same protection of their property rights with wind as they already enjoy with minerals and water.

Effects on Wind Projects

The new recognition of the right of landowners to wind over their land is a positive development in favor of landowners wary of encroachment by wind turbines. However, if the phenomenon seen in Minnesota were to become an impetus of a larger trend of increased property rights regarding wind access, by no means would this be a death knell for the wind industry.

Even if the entire country recognized a right to wind access as Minnesota does, wind companies would still have options to pursue their objectives. One would be simply to purchase enough land to have a large enough buffer zone so as to not reduce the wind access of nearby residents. A second option would be purchasing the rights, via easements, to wind access from any property where this right would potentially be disturbed.

Conclusion

Societies generally have two options when dealing with property disputes: attempting to engineer solutions through direct government intervention or greater recognition of property rights in a way that can lead to a resolution of the dispute of the parties directly involved. Minnesota opted for an increased recognition of property rights and the result is a viable avenue for protection for citizens concerned about the effects of wind turbines on their properties and persons. Inhabitants of Minnesota are already benefiting. ★

Appendix

2018 Minnesota Statutes

500.30 Solar or Wind Easements.

Subdivision 1. **Solar easement.** “Solar easement” means a right, whether or not stated in the form of a restriction, easement, covenant, or condition, in any deed, will, or other instrument executed by or on behalf of any owner of land or solar skyspace for the purpose of ensuring adequate exposure of a solar energy system as defined in section 216C.06, subdivision 17, to solar energy.

Subd. 1a. **Wind easement.** “Wind easement” means a right, whether or not stated in the form of a restriction, easement, covenant, or condition, in any deed, will, or other instrument executed by or on behalf of any owner of land or air space for the purpose of ensuring adequate exposure of a wind power system to the winds.

Subd. 2. **Like any conveyance.** Any property owner may grant a solar or wind easement in the same manner and with the same effect as a conveyance of an interest in real property. The easements shall be created in writing and shall be filed, duly recorded, and indexed in the office of the recorder of the county in which the easement is granted. No duly recorded easement shall be unenforceable on account of lack of privity of estate or privity of contract; such easements shall run with the land or lands benefited and burdened and shall constitute a perpetual easement, except that an easement may terminate upon the conditions stated therein or pursuant to the provisions of section 500.20.

Subd. 3. **Required contents.** Any deed, will, or other instrument that creates a solar or wind easement shall include, but the contents are not limited to:

(a) a description of the real property subject to the easement and a description of the real property benefiting from the solar or wind easement; and

(b) for solar easements, a description of the vertical and horizontal angles, expressed in degrees and measured from the site of the solar energy system, at which the solar easement extends over the real property subject to the easement, or any other description which defines the three-dimensional space, or the place and times of day in which an obstruction to direct sunlight is prohibited or limited;

(c) a description of the vertical and horizontal angles, expressed in degrees, and distances from the site of the wind power system in which an obstruction to the winds is prohibited or limited;

(d) any terms or conditions under which the easement is granted or may be terminated;

(e) any provisions for compensation of the owner of the real property benefiting from the easement in the event of interference with the enjoyment of the easement, or compensation of the owner of the real property subject to the easement for maintaining the easement;

(f) any other provisions necessary or desirable to execute the instrument.

Subd. 4. **Enforcement.** A solar or wind easement may be enforced by injunction or proceedings in equity or other civil action.

Subd. 5. **Depreciation, not appreciation counted for taxes.** Any depreciation caused by any solar or wind easement which is imposed upon designated property, but not any appreciation caused by any easement which benefits designated property, shall be included in the net tax capacity of the property for property tax purposes.

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