

SOUTH DAKOTA CODIFIED LAWS
CHAPTER 43-13
EASEMENTS AND SERVITUDES

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43-13-16. Wind easement defined.

For purposes of §§ 43-13-17 to 43-13-20.5, inclusive, the term, wind easement, means a right, whether or not stated in the form of a restriction, option to obtain an easement, 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, or an agreement to refrain from developing a wind power system.

Source: SL 1996, ch 260, § 1; SL 2010, ch 213, § 1.

43-13-17. Granting of wind easements--Filing of written easement or memorandum--Maximum term--Development of energy potential required--Encumbrances.

Any property owner may grant a wind easement in the same manner and with the same effect as a conveyance of an interest in real property. The easement shall be created in writing, and the easement or a memorandum thereof shall be filed, duly recorded, and indexed in the office of the register of deeds of the county in which the easement is granted. Any such easement runs with the land or lands benefited and burdened and terminates upon the conditions stated in the easement, except that the term of any such easement may not exceed fifty years. Any such easement is void if no development of the potential to produce energy from wind power associated with the easement has occurred within five years after the effective date of the easement. Any payments associated with the granting or continuance of any such easement shall be made on an annual basis to the owner of record of the real property at the time the payment is made. If the easement holder mortgages or otherwise encumbers to any party any part of the easement holder's rights and interests under the easement, any such mortgage or encumbrance on the easement is the responsibility of the easement holder and attaches only to the easement holder's rights and does not otherwise attach to the land or obligate the property owner. Each wind easement agreement shall include a statement disclosing that the easement holder may mortgage or encumber any part of the easement holder's rights and interests under the agreement unless otherwise specified in the agreement.

Source: SL 1996, ch 260, § 2; SL 2003, ch 227, § 1; SL 2009, ch 222, § 1; SL 2010, ch 213, § 2.

43-13-18. Required terms and provisions of wind easements. Any deed, will, or other instrument that creates a wind easement shall include:

- (1) A description of the real property subject to the easement and a description of the real property benefiting from the wind easement;
- (2) 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 wind is prohibited or limited;
- (3) Any terms or conditions under which the easement is granted or may be terminated;
- (4) 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; and
- (5) Any other provisions necessary or desirable to execute the instrument.

Source: SL 1996, ch 260, § 3.

43-13-19. Severance of wind energy rights limited.

No interest in any resource located on a tract of land and associated with the production or potential production of energy from wind power on the tract of land may be severed from the surface estate as defined in § 45-5A-3, except that such rights may be leased for a period not to exceed fifty years. Any such lease is void if no development of the potential to produce energy from wind power has occurred on the land within five years after the lease began. The payment of any such lease shall be on an annual basis.

Source: SL 1996, ch 260, § 4.

43-13-20. Holder of wind easement, wind lease, or easement for essential services to accommodate reasonable development of another such holder--Exception.

The holder of any wind easement, wind lease, or easement for essential services shall accommodate the reasonable development of another holder of any wind easement, wind lease, or easement for essential services except for competing developers of wind energy projects. For purposes of this section, the term, essential services, includes any electric transmission and distribution lines and associated facilities, telecommunications facilities, and rural water systems.

Source: SL 2009, ch 223, § 1.

43-13-20.1. Extension of development period--Filing of affidavit.

The five-year development period specified in §§ 43-13-17 and 43-13-19 shall be extended to a maximum development period of twelve years for any wind developer that files a sworn affidavit with the Public Utilities Commission. The affidavit is for informational purposes only and shall:

- (1) State the intention of the wind developer to pursue a proposed wind energy project of five hundred megawatts or greater in nameplate capacity and a transmission solution for the project involving an interstate electric transmission line with a design of 345 kV or greater; and
- (2) Describe the geographic area covered by the project.

The twelve-year period applies to any wind easement or wind lease for property within the geographic area described in the affidavit and held under a wind easement or wind lease by the developer filing the certification or its affiliate, member, or partner.

The twelve-year maximum development period commences on the earlier of the effective date of the wind easement or wind lease or the date the wind easement or wind lease was executed by all parties to the agreement.

Source: SL 2010, ch 213, § 3.

43-13-20.2. Development of potential to produce energy from wind power.

For purposes of §§ 43-13-17 to 43-13-20.5, inclusive, development of the potential to produce energy from wind power associated with the wind easement or wind lease occurs when the foundation is poured for the first wind turbine to be installed on any property that is part of any one wind energy project, on any property that is part of any single construction stage of a wind energy project, or on any property that is described in the notice required by § 49-41B-25.1.

Source: SL 2010, ch 213, § 4.

43-13-20.3. Contents of written easement or memorandum.

In addition to any other requirements of law, the filing required pursuant to § 43-13-17 shall include the following information:

- (1) The names and addresses of the parties;
- (2) A legal description of the real property involved;
- (3) Description of property rights conveyed;
- (4) Term of the wind easement;
- (5) Description of any restrictions placed on the property for essential services as defined in § 43-13-20; and
- (6) In the case of a third party acquisition, the name and address of the party for which the wind easement is acquired.

This information shall be contained in a separately filed and recorded document. Nothing in this section prohibits the filing of additional documents between the parties.

Source: SL 2010, ch 213, § 5.

43-13-20.4. Waiting period for execution of wind easement or wind lease.

No wind easement or wind lease may be executed by the parties until at least ten business days after the first proposed easement or lease has been delivered to the property owner.

Source: SL 2010, ch 213, § 6.

43-13-20.5. Confidentiality agreements.

No wind developer may require a property owner to maintain the confidentiality of any negotiations or terms of any proposed easement or lease except that the parties may agree to a mutual confidentiality agreement in the final executed wind easement, wind lease, or a separate document. Any disclosure of trade secrets or competitive business plans of the developer may be subject to the confidentiality agreement whether occurring before or after execution of the wind easement or wind lease.

Source: SL 2010, ch 213, § 7.

**NORTH DAKOTA CENTURY CODE
CHAPTER 17-04
WIND ENERGY PROPERTY RIGHTS**

17-04-01. Wind option agreement - Definition - Termination. A wind option agreement is a contract in which the owner of property gives another the right to produce energy from wind power on that property at a fixed price within a time period not to exceed five years on agreed terms. A wind option agreement is void and terminates if the following have not occurred with respect to the property that is the subject of the wind option agreement within five years after the wind option agreement commences:

1. A certificate of site compatibility or conditional use permit has been issued, if required; and
2. A transmission interconnection request is in process and not under suspension.

17-04-02. Wind easement - Definition. For purposes of sections 17-04-03 and 17-04-04, the term wind easement means a right, whether stated in the form of a restriction, easement, covenant, or condition, in a deed, will, or other instrument executed by or on behalf of an owner of land or airspace for the purpose of ensuring adequate exposure of a wind power system to the winds.

17-04-03. Wind easements - Creation - Term - Development required. A property owner may grant a wind easement in the same manner and with the same effect as the conveyance of an interest in real property. The easement runs with the land benefited and burdened and terminates upon the conditions stated in the easement. However, the easement is void if the following have not occurred with respect to the property that is the subject of the easement within five years after the easement commences:

1. A certificate of site compatibility or conditional use permit has been issued, if required; and
2. A transmission interconnection request is in process and not under suspension.

17-04-04. Severance of wind energy rights limited. Except for a wind easement created under section 17-04-03 and as otherwise provided in this section, an interest in a resource located on a tract of land and associated with the production of energy for wind power on the tract of land may not be severed from the surface estate. However, nothing in this section may be construed to prohibit or limit the right of a seller of real estate to retain any payments associated with an existing wind energy project.

17-04-05. Wind energy leases - Termination. A lease for wind energy purposes is void and terminates if the following have not occurred with respect to the property that is the subject of the lease within five years after the lease commences:

1. A certificate of site compatibility or conditional use permit has been issued, if required; and
2. A transmission interconnection request is in process and not under suspension.

17-04-06. Requirements for wind easements and wind energy leases.

1. In a wind easement and a wind energy lease, the easement and lease:

- a. Must be delivered to the property owner with a cover page containing the following paragraph with the correct term of years in the blank and in at least sixteen-point type:

Special message to property owners

This is an important agreement our lawyers have drafted that will bind you and your land for up to _____ years. We will give you enough time to study and thoroughly understand it. We strongly encourage you to hire a lawyer to explain this agreement to you. You may talk with your neighbors about the wind project and find out if they also received a proposed contract. You and your neighbors may choose to hire the same attorney to review the agreement and negotiate changes on your behalf.

b. May not be executed by the parties until at least ten business days after the first proposed easement or lease has been delivered to the property owner.

c. May not require either party to maintain the confidentiality of any negotiations or the terms of any proposed lease or easement except that the parties may agree to a mutual confidentiality agreement in the final executed lease or easement.

d. Must preserve the right of the property owner to continue conducting business operations as currently conducted for the term of the agreement. When a wind energy facility is being constructed and when it is completed, the property owner must make accommodations to the developer, owner, or operator of the facility for the facility's business operations to allow the construction and operation of the wind energy facility.

e. May not make the property owner liable for any property tax associated with the wind energy facility or other equipment related to wind energy generation.

f. May not make the property owner liable for any damages caused by the wind energy facility and equipment or the operation of the generating facility and equipment, including liability or damage to the property owner or to third parties.

g. Must obligate the developer, owner, and operator of the wind energy facility to comply with federal, state, and local laws and regulations and may not make the property owner liable in the case of a violation.

h. Must allow the property owner to terminate the agreement if the wind energy facility has not operated for a period of at least three years unless the property owner receives the normal minimum lease payments that would have occurred if the wind energy facility had been operating during that time. For the purposes of this subdivision, the term "normal minimum lease payments" means a payment in the lease or easement called a "base amount" or "minimum payment", or similar language, or if this language is not provided for in the lease or easement, payments at least equal to the periodic payments received by the property owner in the last calendar year that the wind energy facility was in full operation.

i. Must state clearly any circumstances that will allow the developer, owner, and operator of the wind energy facility to withhold payments from the property owner.

2. The owner of the wind energy facility shall carry general liability insurance relating to claims for property damage or bodily injury arising out of the construction or operation of the wind energy facility project site and may include the property owner as an additional insured on the policy.

3. If the terms of the wind easement or wind energy lease are not in accordance with this section, the court may reform the easement or lease in accordance with this section, void the easement or lease, or order any relief allowed by law.

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.

History:

[1978 c 786 s 21](#); [1981 c 356 s 248](#); [1982 c 563 s 16](#); [1987 c 312 art 1 s 10](#); [1988 c 719 art 5 s 84](#); [1989 c 329 art 13 s 20](#); [2007 c 136 art 4 s 15](#); [2008 c 296 art 1 s 25](#); [2010 c 333 art 1 s 33](#)

NOTE: The amendment to subdivision 2 by Laws 2008, chapter 296, article 1, section 25, is effective June 1, 2012. Laws 2008, chapter 296, article 1, section 25, the effective date, as amended by Laws 2010, chapter 333, article 1, section 33.