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COMMENTS

ACCESS RIGHTS FOR THE SOLAR USER: IN SEARCH OF THE BEST STATUTORY APPROACH

“In the final analysis, almost all the energy available to man is solar: fossil fuels are simply the stored legacy of past photosynthesis, the fissionable elements are formed in a solar furnace; and a thermonuclear fusion reaction is essentially a miniature sun.”¹

The above statement contains a profound fact that was long overlooked in our energy consumptive society. Not until the oil embargo of 1973 did the United States begin to consider solar energy as a viable, efficient replacement for the energy needs of the country. Clearly the substitution of solar for fossil fuels or nuclear energy would require enormous capital expenditure, however, solar power is extremely attractive as a source of energy at the local level.² Moreover, with the onslaught of the need to develop new energy sources it was soon discovered that the legal system did not encourage the wide-scale development of solar power. Basically, the law failed to guarantee a solar user any rights for a continued unobstructed supply of energy.

As a result, throughout the 1970's states not only legislatively encouraged the research and development of solar energy, but also adopted statutes to guarantee access to the sun's rays. Forty-one states have adopted statutes related to encouraging the use of solar energy.³ These solar energy laws can be classified into three types: (1) those that encourage research and development (2) those which encourage solar device installation (i.e. . . tax credits) (3) and those

1. OPHULS, *ECOLOGY AND THE POLITICS OF SCARCITY*, 100 (1977).

2. *Id.* at 100.

3. Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, Nevada, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin.

which create access rights.⁴ Research and development statutes are designed to further a state's policy of encouraging the general expansion of solar energy use.⁵ Many states also provide property and income tax credits for the homeowner or business that installs a solar energy device.⁶ Finally, at the present time twenty-four states have enacted statutes that in some way protect a solar user's right to access.⁷

Although it is now apparent that since 1973 the complexity of solar energy legislation has grown rapidly, the scope of this comment will not allow for a thorough discussion of each statutory response to the problem. Since the author feels that providing a property right to the sun is the most basic element for expanded solar energy use, the discussion will focus upon access rights. This comment will first examine various statutory means of providing access and will then propose suggestions for a comprehensive statute designed to insure access for all solar users.

EASEMENT APPROACH

An easement is generally defined as an interest in land in the possession of another "which entitles the owner of such interest to a limited use or enjoyment of the land in which the interest" is created.⁸ Easements protect the owner

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4. Warren, *Common Problems in Drafting State Solar Legislation*, 1 SOLAR L. REP. 158 (1979).
 5. For examples of research and development type statutes see: ARIZ. REV. STAT. § 41-571 *et seq.* (Supp. 1980); CAL. PUB. RES. CODE § 25600 *et seq.* (West, Supp. 1981); ILL. ANN. STAT. Ch. 96 ½, § 7301 *et seq.* (Smith-Hurd 1979); LA. REV. STAT. ANN. § 30:1151 *et seq.* (West, Supp. 1981); N.Y. ENERGY LAW § 3-101 (McKinney, 1980).
 6. For example: ALASKA STAT. § 43.20.037 (Supp. 1980); CONN. GEN. STAT. ANN. § 12-81 (56 & 57) (West, Supp. 1980); CAL. REV. & TAX CODE § 17052.5 (West, Supp. 1981); KAN. STAT. § 79-32,166 (1977). Other states that have also adopted tax credits for solar users are Arizona, Hawaii, Maine, Maryland, Massachusetts, Michigan, Mississippi, North Carolina, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Wisconsin.
 7. These states are Arizona, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Maine, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Dakota, Oregon, Tennessee, Utah, Virginia, Washington. (The approaches vary from providing the right to express easements, adoption of zoning ordinances for protection of access, applying the doctrine of prior appropriation to the sun, to declaring the shading of solar collectors to be a public nuisance. Each of the various approaches will be a topic of discussion in this comment.)

8. RESTATEMENT OF PROPERTY § 450 (a) (1944).

from interference in its use and enjoyment by third parties, and they are not subject to the will of the possessor of the land in which they exist.⁹ Also, easements are not a normal incident of possession of land owned by the easement holder, and, finally, they are capable of creation by conveyance.¹⁰ While it is clear that an easement is an interest in land, it is also established that it does not amount to an estate in land.¹¹ The parcel of land which an easement affects is known as the "servient estate," while the parcel which is benefited by the easement is the "dominant estate." Easements have also been classified in terms of their effect on the servient estate as either affirmative or negative. An "affirmative easement" is one which allows the easement owner to enter or to do acts upon the servient estate.¹² An example would be the right of the dominant tenant to construct and use a road across the servient estate as a means of access to his parcel. "Negative easement" refers to the power of the easement owner to prevent the servient owner from doing acts on his premises, which in the absence of the easement the servient owner would be free to do.¹³ For example, an easement granting the dominant estate a right to free flow of air or sunlight would be a negative easement, because the servient owner would be prohibited from allowing any use of his land to block the passage of air or sunlight. Likewise, an easement granting a solar user the right to an unobstructed path of sunlight over neighboring property would be a negative easement.

Common Law Protection

By analogy, it has been suggested that the common law easements for light, air and view provided a solution for the solar users need for a source of sunlight. The English doctrine of "ancient lights"¹⁴ would seem at first to provide such a solution. This doctrine provides that if a land owner

9. *Id.* at § 450(b) & (c).

10. *Id.* at § 450(d) & (e).

11. POWELL ON REAL PROPERTY § 405 (1979 ed.).

12. *Id.*

13. *Id.*

14. The doctrine was first proposed in *William Alred's Case*, 9 Co. Rep. 576,

77 Eng. Rep. 816 (K.B. 1611)

has received light from across his neighbor's land for a certain length of time, he acquires a negative easement for that light and the neighbor can be restrained from interfering with that right.¹⁵ Essentially, the doctrine allows for an easement for light and air to be acquired or created by implication. Thus, it appears that the common law provides the perfect answer for the solar users dilemma. As long as the prospective solar user has lived on a parcel that has continued to receive sunlight across neighboring property for a long period of time, the right to this sunlight would be protected. Unfortunately, the doctrine is of no use at all. One prohibitive factor is that the English doctrine of ancient lights has been continually rejected in the United States.¹⁶ The most frequently cited case for this proposition is *Fountainebleu Hotel v. Forty-Five Twenty-Five*.¹⁷ This case arose in Florida and involved a dispute between two hotels. The Fountainebleu and Eden Roc were two luxury hotels on the beachfront in Miami. The Eden Roc had been built sometime after the Fountainebleu, and it sat to the north with its swimming pool area on the south side. Within a few months of the Eden Roc's completion, the owners of the Fountainebleu began construction of a 14 story addition which when completed would cause shading of the Eden Roc's pool and cabana area. The Eden Roc sought to enjoin construction of the addition relying upon implied easements of light and air which they claimed to have enjoyed for over 20 years through their predecessors in interest. The appellate court stated that, absent an express grant, in the United States a landowner had no lawful right to the free flow of light or air across his neighbor's property, and thus it removed the injunction imposed by the trial court. Basically, the doctrine was rejected because the judiciary felt that it was not conducive nor appropriate for the type of development occurring in the United States. However, if the doctrine would provide a right to the sun for a solar user, then possibly in our

15. POWELL, *supra*, note 11, at § 414[8].

16. *Koblegard v. Hale*, 60 W. Va. 37, 53 S.E. 793 (1906); *Lynch v. Hill*, 24 Del. Ch. 86, 6 A.2d 614 (1939); *Maioriello v. Arlotta*, 364 Pa. 557, 73 A.2d 374 (1950).

17. *Fountainebleu Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d

357 (Fla. App. 1959)

age of energy shortages the previous rationale cited for its rejection lacks timely validity.

Unfortunately, even if American courts would suddenly give new life to a long unacceptable doctrine, the inherent limits in the doctrine's scope would preclude its use for protection. The solar user needs a right for substantial amounts of sunlight, but the doctrine of ancient lights was designed to only guarantee enough sunlight to provide indoor illumination during daylight hours.¹⁸ Thus, a neighbor under the doctrine could shade substantial portions of the house in question as long as his actions did not render the house uncomfortable according to the ordinary notions of mankind.¹⁹ Thus, even the broadest application of the doctrine of ancient lights would only provide enough sunlight for a reasonable amount of interior illumination; hardly enough in most cases for a solar collection device.²⁰

Statutory Authorization

Even though the doctrine of ancient lights has been rejected in the United States, it has long been the law that easements for light, air and view can be created by express grant.²¹ Considering the possible limitations on and problems with interpreting express grants for light and air, many states have enacted statutes which allow for the express creation of solar easements.²² Basically, these statutes extend

18. *Colls v. Home and Colonial Stores Ltd.*, A.C. 179 (1904).

19. *Id.*

20. Reitze, *A Solar Zoning Guarantee: Seeking New Law in Old Concepts*, 1976 WASH. UNIV. L.Q. 375.

21. For a collection of cases see Annot., 142 A.L.R. 467 (1943).

22. The states which presently have statutory authority allowing for the express creation of solar easements are: California: CAL. CIV. CODE § 801.5 (West, Supp. 1981); Colorado: COLO. REV. STAT. §§ 38-32.5-100.3 to 103 (Cum. Supp. 1980); Florida: FLA. STAT. ANN. § 704.07 (West, Supp. 1981); Georgia: GA. CODE ANN. §§ 85-1411 to 1414 (Supp. 1980); Idaho: IDAHO CODE § 55-615 (1979); Illinois: ILL. ANN. STAT. ch 96 ½, § 7303(f) (Smith-Hurd 1979); Indiana: IND. CODE ANN. § 32-5-2.5-1 to 3 (Burns, 1980); Minnesota: MINN. STAT. ANN. § 500.30 (Supp. 1981); Missouri: MO. ANN. STAT. § 442.012 (Vernon, Supp. 1981); Montana: MONT. REV. CODES ANN. §§ 70-17-301 to 302 (1979); Nebraska: NEB. REV. STAT. §§ 66-901 to 914 (Supp. 1980); Nevada: NEV. REV. STAT. § 111.370 *et seq.* (1979); New Jersey: N.J. STAT. ANN. §§ 46:3-24 to 3-26 (West, Supp. 1980); North Dakota: N.D. CENT. CODE §§ 47-05-01.1 to 01.2 (1978); Oregon: OR. REV. STAT. §§ 105.885 to 895 (1979); Tennessee: TENN. CODE ANN. §§ 64-9-201 to 206 (Supp. 1980); Utah: UTAH CODE ANN. § 57-13-1 (Supp. 1980); Virginia: VA. CODE §§ 55-352 to 354 (Supp. 1980); Washington: WASH. REV. CODE ANN. §§ 64-04-140 to 170 (Supp. 1981).

the general approach of the long recognized light and air easement into a broader spectrum.

In 1975 Colorado was the first state to adopt a solar easement statute.²³ Section 38-32.5-101 of the Colorado Statutes requires that any easement which is obtained for the purpose of providing exposure to a solar energy collector must be created in writing, and is in addition, subject to the same conveyancing and recording requirements of other easements.²⁴ The next part, Section 38-32.5-102, provides statutory minimums for a solar easement's contents.²⁵ Subpart (a) provides that the easement shall express in degrees the angles at which the solar easement extends over the servient estate.²⁶ Subpart (b) requires that each solar easement state the terms or conditions upon which an easement is granted or will terminate;²⁷ and, finally, subpart (c) demands that the solar easement state any provisions for compensating the dominant owner in the event of interference with the enjoyment of the solar easement, or provisions for compensating the servient owner for maintaining the solar easement.²⁸ Although, Colorado's idea was a new one, and also a step in the right direction, several problems exist with the statutory language. When reading Section 38-32.5-101 of the Colorado Statutes it is impossible to decipher whether the solar easement can apply to passive

23. COLO. REV. STAT. §§ 38-32.5-101 to 102 (Cum. Supp. 1980).

38-32.5-101. Solar easements—creation. Any easement obtained for the purpose of exposure of a solar energy device shall be created in writing and shall be subject to the same conveyance and instrument recording requirements as other easements.

38-32.5-102. Contents. (1) Any instrument creating a solar easement shall include, but the contents shall not be limited to:

(a) The vertical and horizontal angles, expressed in degrees, at which the solar easement extends over the real property subject to the solar easement;

(b) Any terms or conditions or both under which the solar easement is granted or will be terminated;

(c) Any provisions for compensation of the owner of the property benefitting from the solar easement in the event of interference with the enjoyment of the solar easement or compensation of the owner of the property subject to the solar easement for maintaining the solar easement.

24. COLO. REV. STAT. § 38-32.5-101 (Cum. Supp. 1980).

25. COLO. REV. STAT. § 38-32.5-102 (Cum. Supp. 1980).

26. COLO. REV. STAT. § 38-32.5-102(1) (a) (Cum. Supp. 1980).

27. COLO. REV. STAT. § 38-32.5-102(1) (b) (Cum. Supp. 1980).

28. COLO. REV. STAT. § 38-32.5-102(1) (c) (Cum. Supp. 1980).

as well as active systems,²⁹ since the statute merely refers to a "solar energy" collector.³⁰ Also the language in Section 38-32.5-102(1) (a) of the Colorado Statutes fails to specify with enough degree the actual bounds that a solar easement should encompass. The language is very vague and broad and surely adds to the confusion likely to be present in the drafting of solar easements.

A better statutory approach to solar easements is embodied in Section 801.5 of the California Civil Code.³¹ Although modeled somewhat after the Colorado statute, the California legislation leaves no doubt that both active and passive systems are covered because the statute specifically includes both concepts in its definition of a "solar energy system."³² Section 801.5 of the California Civil Code also requires that the dimensions of a solar easement be expressed in measurable terms such as "the hours of the day on specified dates" during which a solar energy device may not be obstructed,³³ and finally requires that the restrictions placed

29. An *active* solar energy device or system is one that utilizes pumps or other mechanical means to circulate fluids or air through tubes located under a solar collector in order to heat the fluid for use in the home. On the other hand a *passive* solar system is one that stores heat from the sun in the building because of design or structural features; no moving parts are necessary.

30. COLO. REV. STAT. § 38-32.5-101 (Cum. Supp. 1980).

31. CAL. CIV. CODE § 801.5 (West, Supp. 1981).

§ 801.5 Solar easement and solar energy system defined; minimum description in instrument.

(a) The right of receiving sunlight as specified in subdivision 18 of Section 801 shall be referred to as a solar easement. "Solar easement" means the right of receiving sunlight across real property of another for any solar energy system.

As used in this section, "solar energy system" means either of the following:

(1) Any solar collector or other solar energy device whose primary purpose is to provide for the collection, storage, and distribution of solar energy for space heating or cooling, or for water heating; or

(2) Any structural design feature of a building, whose primary purpose is to provide for the collection, storage, and distribution of solar energy for space heating or cooling, or for water heating.

(b) Any instrument creating a solar easement shall include, at a minimum, all of the following:

(1) A description of the dimensions of the easement expressed in measurable terms, such as vertical or horizontal angles measured in degrees, or the hours of the day on specified dates during which direct sunlight to a specified surface of a solar collector, device, or structural design feature may not be obstructed, or a combination of these descriptions.

(2) The restrictions placed upon vegetation, structures, and other objects which would impair or obstruct the passage of sunlight through the easement.

(3) The terms or conditions, if any, under which the easement may be revised or terminated.

32. CAL. CIV. CODE § 801.5(a) (1) & (2) (West, Supp. 1981).

33. CAL. CIV. CODE § 801.5(b) (1) (West, Supp. 1981).

on "vegetation, structures, or other objects" which would interfere with the passage of sunlight be stated.³⁴ These requirements allow for a more precise easement to be created and also allow the parties to state exactly the type of activity that is prohibited from occurring on the servient estate.

As a general solution for developing legal rights to access for the solar user, the easement approach has several drawbacks. The two drawbacks most frequently noted are the prohibitive costs associated with acquiring solar easements, and the problems with drafting such technical documents.³⁵ There is little doubt that a person who owns sufficient adjoining land to the south need not worry about the need to acquire an easement, however, his case is an exception because the extent of his land provides the desired access.³⁶ Neither would an individual whose property borders on an interstate highway to the south need to worry about access.³⁷ But, even in a sparsely populated state like Wyoming, most people who desire access live in densely populated municipalities. The costs of solar easements fluctuate according to many factors, such as the location of lands, and whether a residential development is old or new. If the prospective solar user maintains his residence in an older area, he may be required to get easements across more than one parcel.³⁸ Many neighboring land owners will be wary of agreements which may have the effect of limiting their rights to even permit a tree to grow on their property. With such reservations and potential problems the costs of acquiring the rights rise accordingly. In fact, the costs may be so great that the savings potential of the solar system may be wholly depleted. In addition, the obvious problems with drafting these easements will accordingly raise the price. An easement can be drafted so that a certain amount of shading is permitted

34. CAL. CIV. CODE § 801.5(b)(2) (West, Supp. 1981).

35. Gaumitz & Gergacz, *How to Draft and Determine the Value of Express Solar Easements*, 9 REAL EST. L. J. 128, 134 (1980); Gergacz, *Solar Energy Law: Easements of Access to Sunlight*, 10 NEW MEX. L. REV. 121, 134-35 (1979-80).

36. Gergacz, *Solar Energy Law*, *supra* note 35, at 123.

37. *Id.*

38. *Id.* at 135.

during the times of the day when collection is inefficient.³⁹ Unfortunately, the basic foundations of solar energy and its technicalities are not very well understood by most laymen or their attorneys.⁴⁰ Competent draftsmanship is a major problem underlying the easement approach to solar access. As a basic proposition, the creation of property rights in the sun (the easement approach) is good; however, costs and other problems with their creation leave substantial doubt that it is the most viable solution.

THE ZONING APPROACH

Since the United States Supreme Court in *Village of Euclid v. Ambler Realty*⁴¹ upheld the general validity of state zoning legislation, states have granted to their municipalities broad powers to zone and plan community development. At the outset it is important to distinguish between the terms "zoning" and "planning". "Zoning" refers to the legislative division of a community into areas of designated use so that a community can grow in an orderly manner.⁴² "Planning," on the other hand, refers to the creation of master plans based on surveys and studies of present conditions and future expectations in order to predict long-term physical development.⁴³ "Zoning implements and is subject to planning."⁴⁴

Following these basic principles, it has been suggested that zoning provides the ideal approach to solar access problems.⁴⁵ Zoning is considered to be easy to administer and a system that allows for a reasonable balancing of the interests of adjoining landowners.⁴⁶ Since the rise of legislative activity for protecting solar access, a number of states have

39. Generally, 90% of total available energy strikes a collector between 9:30 a.m. and 2:30 p.m.

40. For helpful discussions of drafting solar easements see: Gaumitiz & Gergacz, *How to Draft*, and Gergacz, *Solar Energy Law*, *supra* note 35. The authors discuss the need for stating the bounds of a solar easement, as well as height, and time constraints which should be considered.

41. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

42. *Best v. Zoning Bd. of Adjustment*, 393 Pa. 106, 141 A.2d 606, 609 (1958).

43. KRAEMER, *SOLAR LAW*, 73 (1978).

44. *Id.* at 74.

45. Eisenstadt, Long & Utton, *A Proposed Solar Zoning Ordinance*, 15 URB. L. ANN. 211, 213 (1978).

46. *Id.* at 214.

developed zoning statutes allowing municipalities to consider solar energy development and use.⁴⁷

The approach of each state varies, but for the most part the statutes are designed to encourage at a minimum the consideration of solar energy use at the local level. For example, Section 227.290(2) of the Oregon Statutes allows municipal governing bodies to consider the site slope and tree cover of the land with regard to solar exposure when establishing setback lines.⁴⁸ Oregon also has a statute which allows local planning commissions to recommend ordinances for protecting and assuring access to solar rays.⁴⁹ This approach of giving authority to planning commissions is common in other states also.⁵⁰ The states of Minnesota and California have opted for an approach that utilizes local subdivision regulations for protecting access to incident solar radiation.⁵¹ Section 462.358(2a) of the Minnesota Statutes allows municipalities to consider solar access when developing regulations for future subdevelopment control.⁵² The California Statute allows a municipality, by ordinance, to require as a condition for approval of a subdivision map, the dedication of easements for assuring a right to receive sunlight for each unit in the proposed area.⁵³ As a new approach, Connecticut allows energy-efficient patterns of development for encouraging the use of solar and other renewable sources of energy to be considered when regulations for planned-unit developments are adopted.⁵⁴ Basically, a planned-unit development (PUD) describes a land area developed as a self-contained neighborhood, which incor-

47. These states are: Arizona, ARIZ. REV. STAT. §§ 9-461.05, 9-462.01 (Supp. 1980); California, CAL. GOVT. CODE § 65860.5 (West, Supp. 1980); Connecticut, CONN. GEN. STAT. ANN. § 8-13(d) (West, Supp. 1980); Maine, ME. REV. STAT. tit. 30, § 4956(3-12), 4961 (Cum. Supp. 1980); New York, N.Y. GENERAL CITY LAW § 20(24) (McKinney, Cum. Supp. 1980); Oregon, OR. REV. STAT. §§ 215.110, 227.090, 227.290 (1979); Washington, WASH. REV. CODE ANN. §§ 35.63.080 to 090, 36.70.560 (Supp. 1981).

48. OR. REV. STAT. § 227.290(2) (1979).

49. OR. REV. STAT. § 215.110(1)(g) (1979).

50. For example ARIZ. REV. STAT. § 9-461.05(c)(1) (Supp. 1980) allows for planning commissions to include access to solar energy as a part of a general plan for all categories of land use.

51. See generally: CAL. GOVT. CODE § 66475.3 (West, Supp. 1980); MINN. STAT. ANN. § 462.358(2a) (West, Supp. 1980).

52. MINN. STAT. ANN. § 462.358(2a) (West, Supp. 1980).

53. CAL. GOVT. CODE § 66475.3 (West, Supp. 1980).

54. CONN. GEN. STAT. ANN. § 8-130(b)(2)(D) (West, Supp. 1980).

porates reduced lot size in order to facilitate creation of large open spaces.⁵⁵ The PUD concept is thought by many to encourage the development of solar energy.⁵⁶

There is little doubt that the use of specific ordinances relating to solar access in conjunction with traditional height and set back requirements provide a solar user with a dimension of protection. However, zoning ordinances as a whole lack the necessary certainty required for solar access.⁵⁷ The solar user must be assured, once his system is constructed, that his path of sunlight will not be suddenly interfered with. Considering that zoning ordinances vest no rights in the property owner, and in addition are constantly subject to change and local political pressure, their utility for providing solar access is limited.⁵⁸ In the long run zoning ordinances are best suited for the static, general elements of land use, and not for a dynamic aspect like solar access.⁵⁹ Although zoning ordinances have limited use for providing needed rights to the sun, their general overall use in the siting of structures, which is a necessary factor for increased solar energy development, cannot be overemphasized. This aspect of zoning will be discussed in more detail later.

PUBLIC NUISANCE APPROACH

A public nuisance has been defined as "the doing of or the failure to do something that injuriously affects the safety, health, or morals of the public or causes hurt, inconvenience, or damage to the public generally."⁶⁰ States generally have the power to legislatively declare whatever they want to be a public nuisance, within certain constitutional bounds. The power to categorize a certain activity as a public nuisance falls within the ambit of a state's police power. It has long been settled that all property is possessed subject to the right of a state to regulate use on that property, in order to protect the general welfare and safety of

55. Kraemer, *supra* note 43, at 84.

56. *Id.*

57. Goble, *Siting Protection: A Note on Solar Access*, 2 SOLAR L. REP. 25 (1980).

58. *Id.* at 42.

59. *Id.*

60. Kraemer, *supra* note 43, at 117, citing *Commonwealth v. South Covington*

the public.⁶¹ Although a state's police power is not unlimited, as long as a regulation of property use is justifiable to protect the public interest, and the means utilized are reasonably related to the purpose sought to be protected, then the regulation will be upheld.⁶² In the solar access area, the focus is upon the declaration by a state that the shading of solar collectors be declared a public nuisance.⁶³

The only state thus far to declare that the shading of solar collectors amounts to a public nuisance is California.⁶⁴

61. *Nebbia v. New York*, 291 U.S. 502, 523 (1934).

62. *Berman v. Parker*, 348 U.S. 26, 33-34 (1954).

63. Kraemer, *supra* note 43, at 118.

64. See generally: CAL. PUBLIC RESOURCES CODE §§ 25980 to 986 (West, Supp. 1981).

25980. Short title; public policy

This chapter shall be known and may be cited as the Solar Shade Control Act. It is the policy of the state to promote all feasible means of energy conservation and all feasible uses of alternative energy supply sources. In particular, the state encourages the planting and maintenance of trees and shrubs to create shading, moderate outdoor temperatures, and provide various economic and aesthetic benefits. However, there are certain situations in which the need for widespread use of alternative energy devices, such as solar collectors, requires specific and limited controls on trees and shrubs.

25982. Prohibition of placement or growth of tree or shrub subsequent to installation of solar collector on property of another so as to cast shadow.

After January 1, 1979, no person owning, or in control of a property shall allow a tree or shrub to be placed, or, if placed, or, if placed, to grow on such property, subsequent to the installation of a solar collector on the property of another so as to cast a shadow greater than 10 percent of the collector absorption area upon that solar collector surface on the property of another at any one time between the hours of 10 a.m. and 2 p.m., local standard time; provided, that this section shall not apply to specific trees and shrubs which at the time of installation of a solar collector or during the remainder of that annual solar cycle cast a shadow upon that solar collector.

25983. Violations; public nuisance; notice to abate; prosecution; penalty

Every person who maintains any tree or shrub or permits any tree or shrub to be maintained in violation of Section 25982 upon property owned by such person and every person leasing the property of another who maintains any tree or shrub or permits any tree or shrub to be maintained in violation of Section 25982 after reasonable notice in writing from a district attorney or city attorney or prosecuting attorney, to remove or alter the tree or shrub so that there is no longer a violation of Section 25982, has been served upon such person, is guilty of a public nuisance as defined in Sections 370 and 371 of the Penal Code and in Section 3480 of the Civil Code. For the purpose of this Chapter, a violation is hereby deemed an infraction. The complainant shall establish to the satisfaction of the prosecutor that the violation has occurred prior to the prosecutor's duty to issue the abatement notice. For the purpose of this section, "reasonable notice" means 30 days from receipt of such notice. . . . Each and every violation of this section shall be punishable by a fine not to exceed five hundred dollars (\$500).

§ 25984. Inapplicability of chapter to certain trees.

Nothing in this chapter shall apply to trees planted, grown, or harvested on timberland as defined in Section 4526 or on land devoted to the production of commercial agricultural crops. Nothing in this chapter shall apply to the replacement of a tree or shrub which had been growing prior to the installation of a solar collector and which, subsequent to the installa-

Section 25980 of the California Public Resources Code declares that although the state encourages the planting of trees and bushes to regulate outdoor temperatures, this need is limited in relation to the contra desire to encourage widespread use of solar energy.⁶⁵ Thus Section 25983 of the California Public Resources Code declares that any person who allows a tree or shrub to grow in violation of Section 25982, after notice to remove such tree or shrub, is guilty of a public nuisance upon failure to remove.⁶⁶ Section 25982 of the California Public Resources Code sets up relevant guidelines for the placement of trees or shrubs on property that is located adjacent to a solar collector. Basically, a landowner is prohibited from allowing any tree or bush on his property to be placed or to grow so that it shades more than 10 percent of the previously placed solar collector during the hours of 10:00 A.M. and 2:00 P.M.⁶⁷ The statute is sound because it provides a possible violator with notice, while at the same time allowing for a \$500 fine for violators who refuse to abate the nuisance after a 30 day waiting period.⁶⁸ Also, the Solar Shade Control Act allows for municipalities to opt out by a majority vote of the governing bodies,⁶⁹ and it excepts timberland from its mandate.⁷⁰

Even though the California Solar Shade Control Act is a novel approach to protecting a continual path of sunlight, and is premised on sound legal principles, it has generally been subject to attack. One commentator has suggested that the statute is flawed because it supersedes the value of leaving siting requirements at the local level by imposing a state-wide rule.⁷¹ Another factor mentioned is that it fails to provide for private rights of action because enforcement

64. Continued—

tion of such solar collector, dies.

§ 25985. Ordinance to exempt city or unincorporated areas from previous provisions of chapter.

Any city, or for unincorporated areas, any county, may adopt, by majority vote of the governing body, an ordinance exempting their jurisdiction from the provisions of this chapter.

65. CAL. PUBLIC RESOURCES CODE § 25980 (West, Supp. 1981).

66. CAL. PUBLIC RESOURCES CODE § 25983 (West, Supp. 1981).

67. CAL. PUBLIC RESOURCES CODE § 25982 (West, Supp. 1981).

68. CAL. PUBLIC RESOURCES CODE § 25983 (West, Supp. 1981).

69. CAL. PUBLIC RESOURCES CODE § (West, Supp. 1981).

70. CAL. PUBLIC RESOURCES CODE § 25984 (West, Supp. 1981).

71. Goble, *supra* note 57 at 47.

jurisdiction is placed solely in the hands of county or district attorneys.⁷² Finally, one critic suggests that the period of immunity for previously growing trees should be longer, and that the rigidity of the setback requirements may be unrealistic for collectors on land with steep slopes.⁷³ However, no matter how deep the criticisms go, there is little doubt that the declaration of shading of solar collectors as a public nuisance is fully within the police powers of a state. Such a declaration definitely fosters the public health, welfare, and safety of citizens, by encouraging the use of a non-polluting, renewable energy resource like solar power. It also grants the solar user an added protection, namely a right to a direct path of sunshine.⁷⁴

PRIOR APPROPRIATION APPROACH

The last approach for protecting solar access that will be discussed is the application of the Western water law principles of prior appropriation to solar rights. Underlying, the Western scheme for allocating scarce water resources is the basic principle of first in time first in right. This idea sets up the order of priority that is so fundamental to the allocation of the resource.⁷⁵ Under the doctrine, once a person acquires a water right he can keep that right until his use of the water ceases to be beneficial.⁷⁶ With this system of water allocation firmly entrenched, the New Mexico Legislature in 1977 applied similar concepts to solar access.⁷⁷ Thus far it is still the only state to do so.

72. *Id.* (criticizing § 25983 of the Act, *supra* note 66).

73. Johnson, *State Approaches to Solar Legislation: A Survey*, 1 SOLAR L. REP. 55, 119-20 (1979).

74. Kraemer, *supra* note 43, at 125.

75. Trelease, CASES AND MATERIALS ON WATER LAW 11 (2d Ed. 1974).

76. *Id.* at 46-48.

77. N. M. STAT. ANN. §§ 47-3-1 to 3-5 (1978). (Solar Rights Act).

47-3-2. Declaration and findings.

The legislature declares that the state of New Mexico recognizes that economic benefits can be derived for the people of the state from the use of solar energy. . . .

47-3-3. Definitions.

As used in the Solar Rights Act [47-3-1 to 47-3-5 NMSA 1978]:

A. "solar collector" means any device or combination of devices or elements which rely upon sunshine as an energy source, and which are capable of collecting not less than twenty-five thousand BTU's on a clear winter solstice day. The term also includes any substance or device which collects solar energy for use in:

(1) the heating or cooling of a structure or building;

The New Mexico Solar Rights Act borrows from the water law doctrine of prior appropriation for the property rights in the sun that it creates. Section 47-3-2 of the Act declares the policy of the New Mexico Legislature which is to encourage the general development and use of solar energy throughout the state.⁷⁸ The next portion of the Act, Section 47-3-3, contains several controlling definitions.⁷⁹ A "solar collector" is defined as any device or combination of devices which rely on sunshine as a source of energy, and which must be capable of collecting not less than 25,000 BTU's on clear winter solstice days.⁸⁰ A solstice day refers to the time of the day when the sun is at its highest or farthest point. The section also establishes a "solar right" which is a right to an unobstructed line-of-sight path from a solar collector to the sun, thus permitting the collector to absorb solar radiation.⁸¹ The next section of the Act, Section 47-3-4 is the operative section which encompasses the basic

77. Continued—

- (2) the heating or pumping of water;
- (3) industrial, commercial or agricultural processes; or
- (4) the generation of electricity.

A solar collector may be used for purposes in addition to the collection of solar energy. These uses include, but are not limited to, serving as a structural member or part of a roof of a building or structure and serving as a window or wall; and

B. "solar right" means a right to an unobstructed line-of-sight path from a solar collector to the sun, which permits radiation from the sun to impinge directly on the solar collector.

47-3-4. Declaration of solar rights.

A. The legislature declares that the right to use the natural resource of solar energy is a property right, the exercise of which is to be encouraged and regulated by the laws of this state. Such property right shall be known as a solar right.

B. The following concepts shall be applicable to the regulation of disputes over the use of solar energy where practicable:

(1) "beneficial use." Beneficial use shall be the basis, the measure and the limit of the solar right, except as otherwise provided by written contract. If the amount of solar energy which a solar collector user can beneficially use varies with the season of the year, then the extent of the solar right shall vary likewise;

(2) "prior appropriation." In disputes involving solar rights, priority in time shall have the better right except that the state and its political subdivisions may legislate, or ordain that a solar collector user has a solar right even though a structure or building located on neighborhood property blocks the sunshine from the proposed solar collector site. . . .

(3) "transferability." Solar rights shall be freely transferable within the bounds of such regulation as the legislature may impose. . . .

C. Unless a singular overriding state concerns occur which significantly affect the health and welfare of the citizens of this state, permit systems for the use and application of solar energy shall reside with county and municipal zoning authorities.

78. N. MEX. STAT. ANN. § 47-3-2 (1978).

79. N. MEX. STAT. ANN. § 47-3-3 (1978).

80. N. MEX. STAT. ANN. § 47-3-3(A) (1978).

81. N. MEX. STAT. ANN. § 47-3-3(B) (1978).

principles for acquiring and settling disputes between conflicting solar rights.⁸² Subpart A declares that the use of solar energy in New Mexico is deemed a property right,⁸³ and Subpart B sets out the concepts applicable to disputes involving these rights.⁸⁴ The applicable concepts are those of beneficial use and prior appropriation. Beneficial use is made the basis, measure, and limit of the solar right, unless a written agreement specifies otherwise, and there is also a provision allowing for beneficial use to vary according to seasons of the year if the amount of solar energy that can be used likewise varies.⁸⁵ When a dispute arises, priority in time controls which solar user has the better right.⁸⁶ However, an exception to this general rule allows for the state or its political subdivision to grant a solar right even though the proposed right is shaded by a neighboring structure.⁸⁷ In Subparagraph (3) solar rights are made freely transferable which is another provision sharing water law concepts.⁸⁸ Finally, Subpart C delegates the permitting authority for these rights to county and municipal zoning authorities.⁸⁹

Under the New Mexico Solar Rights Act a landowner basically has the right to divert the sun's rays and put them to beneficial use. Because the solar right created is so similar to a water right, legal questions which arise under the Act can be resolved by utilization of cases arising in the water context. Thus, the statutory scheme enhances dispute resolution. However, this inherent borrowing of water law concepts has been a major focus of the attacks directed at the prior appropriation approach to solar access. One argument centers upon the natural differences between water and sunlight. Sunlight strikes the earth and surfaces thereon at approximately equal levels, and its pattern of direction is diffuse. On the other hand, water is normally channelized and flows in distinct patterns.⁹⁰ Thus it is argued that laws

82. N. MEX. STAT. ANN. § 47-3-4 (1978).
 83. N. MEX. STAT. ANN. § 47-3-4(A) (1978).
 84. N. MEX. STAT. ANN. § 47-3-4(B) (1978).
 85. N. MEX. STAT. ANN. § 47(3)(4)(B)(1) (1978).
 86. N. MEX. STAT. ANN. § 47-3-4(B)(2) (1978).
 87. N. MEX. STAT. ANN. § 47-3-4(B)(2) (1978).
 88. N. MEX. STAT. ANN. § 47-3-4(B)(3) (1978).
 89. N. MEX. STAT. ANN. § 47-3-4(C) (1978).

controlling water allocation are not proper for application to sunlight. A basic principle underlying the prior appropriation doctrine is that in times of shortage junior appropriators must yield to a senior's right for water. Since sunlight is not subject to the natural fluctuations of supply, as is water, it would be impossible to improve another collector's efficiency by shutting down other junior solar users.⁹¹ The idea of allowing more water to remain in a stream for use of senior appropriators in times of shortage does not apply to an unconfined source of energy like sunlight.⁹² These arguments are superficial and overlook an essential similarity between sunlight and water which is that at any given point there is only a finite usable amount of either element.⁹³ Another argument is that, unlike water, sunlight cannot be diverted, and diversion is a requirement of water law.⁹⁴ But essentially when sunlight is being collected and utilized for energy needs it is in fact being diverted. The diversion occurs because sunlight that is collected is no longer being reflected back which would have been its normal course were it not for the collectors.

A final argument directed at the general approach of applying prior appropriation principles to solar access questions its constitutionality. The Supreme Court of the United States has previously found that a landowner owns at least as much of the airspace above his land as he can occupy or use in connection with the surface.⁹⁵ Thus, it is argued that creation of a property right in the sun raises questions of an unconstitutional taking of property without just compensation because of the effects that a solar collector would have on neighboring owners' airspace rights.⁹⁶ This question does not arise in relation to water since in appropriation states water is state property. As a basic proposition, the taking argument is without merit. All a state would have to show is that its regulation is reasonable and designed to

91. *Id.*

92. *Id.*

93. Goble, *supra* note 57, at 49.

94. *Id.*

95. *United States v. Causby*, 328 U.S. 256, 264 (1946).

96. Krusemer, *supra* note 43, at 154.

enhance the public welfare.⁹⁷ A state adopting the prior appropriation approach should have little difficulty showing that encouraging the transition to solar energy enhances the general health and welfare of the public by reducing dependence on foreign oil, as well as, reducing air pollution.⁹⁸

Although, the New Mexico Solar Rights Act presents an interesting and viable approach to providing solar access, it has been attacked for being too simplistic and vague.⁹⁹ One commentator suggests that the Act has several serious flaws. For one, it puts no limit on a solar right except beneficial use, which it fails to define; also, no limits are developed for the placement of solar collectors.¹⁰⁰ In addition, the Act protects the solar right even during times of the day when collection is inefficient,¹⁰¹ which in effect establishes a certain preference for one type of land use.¹⁰² Finally, the Act is criticized for failing to consider vegetation and its effects, as well as a failure to state whether permits are required to perfect a solar right.¹⁰³ These various criticisms of the Act are quite valid, but can easily be rectified at the legislative or local level through zoning. Such remedial measures will be addressed in the next section of this comment in an attempt to devise a comprehensive solar access law.

THE BEST APPROACH

At this point the reader has hopefully acquired a sense for the various statutory approaches for guaranteeing solar access that have evolved. Each of the approaches previously outlined has a sound foundation in seeking to encourage the use of solar power, but each has several drawbacks or problems associated with it. Moreover, there is fallacy inherent

97. *Penn Central v. City of New York*, 438 U.S. 104, 129 (1978). In this case the Supreme Court upheld the declaration of Grand Central Station as an historic landmark. The declaration destroyed a plan to build an office building atop the station. Thus a landowner's right to use his airspace was limited by a reasonable regulation for protection of the public welfare.

98. Goble, *supra* note 57, at 52.

99. Comment, *Access to Sunlight: New Mexico's Solar Rights Act*, 19 NAT. RES. J. 957, 959-63 (1979).

100. *Id.* at 959-60.

101. Goble, *supra* note 57, at 54.

102. *Access to Sunlight, supra* note 98, at 960.

103. *Id.* at 960. Goble, *supra* note 57, at 54-55.

in every approach. The problem is that generally siting or zoning will not provide legal rights to access, nor will granting legal rights to access provide necessary siting requirements. Generally, to insure a solid legal basis for solar energy use, the access issue must be divided by statute into two parts. Part one involves the enactment of statutes requiring local zoning authorities to control the siting of collectors. Part two then directs legislatures to adopt the statutory means for acquiring a property right to solar radiation.¹⁰⁴

The siting or zoning problem associated with solar access necessarily involves issues of competing land uses. Therefore, mandates for solar zoning adopted by legislatures find their foundation in the traditional police power of a state to promote the general public welfare, as well as the power of a state to define and prohibit trespass, and public and private nuisances.¹⁰⁵ The general idea of such statute is to insure that municipalities plan and zone with regard for providing every solar user a direct line of sunlight.

The general approach for assuring solar access through zoning can take many forms. The American Bar Foundation has proposed a number of possibilities. One proposal suggests the enactment of a solar zoning ordinance designed to create three types of districts.¹⁰⁶ Mandatory solar use districts would require installation of solar systems on all new construction or substantial alterations requiring new energy systems, with a general allowance for variances or waivers upon sufficient showing.¹⁰⁷ Affirmative solar use districts would allow for waivers of existing building codes and height restrictions for those desiring to install solar collectors.¹⁰⁸ Finally, other solar use districts would allow municipalities to encourage solar use by enacting variance provisions from building codes and setback requirements.¹⁰⁹ A second pro-

104. Goble, *supra* note 57, at 26.

105. Reitze, *supra* note 20, at 400.

106. Municipal Solar Zoning ordinance, ABF Model Acts 219 (May 1976), as discussed in Reitze, *supra* note 20, at 396-397.

107. *Id.*

108. *Id.*

109. *Id.*

posal would authorize municipalities to purchase or condemn airspace in furtherance of comprehensive plans for use of solar power.¹¹⁰ At a minimum, municipalities could be encouraged to use traditional siting, volume and slope of buildings type ordinances to assure that structures be placed as far away from northern property boundaries as possible.¹¹¹ A shading approach known as a "hypothetical wall" would establish an imaginary boundary marker at each property line and no shading above what would be produced by this wall is permitted.¹¹² Lastly, municipalities could be encouraged to prescribe general standards within which a developer must plan a proposed area.¹¹³ No matter what the approach, it is important for the state legislatures to mandate considerations of solar use siting to their political subdivisions. The actual decisions of how to zone should be kept at the local level. However, the legislatures should demand that county and municipal zoning authorities consider all of the aspects associated with assuring access; namely, planning, zoning, and the effects of vegetation.

The most important duty at the state level is to provide the final step: the creation of a property right in the sun. Since it has been suggested that zoning alone will not provide this necessary step, then it is necessary to decide which of the other previously discussed approaches is the better. With the exception of California, there are at present three states which provide for zoning considerations, as well as the right to acquire legal rights in the sun through express easements.¹¹⁴ California includes the public nuisance approach to vegetation along with the right to express easements.¹¹⁵ Considering that the easement approach involves the cost drawback, as well as the drafting problems, it does not appear to be the most valid approach. Adding to the

110. Required Municipal Use of Eminent Domain to Protect Solar Skyspace, ABF Model Acts 133 (May 1976), as discussed in Reitze, *supra* note 20, at 397-98.

111. Goble, *supra* note 57, at 38. (He calls this the "structural envelope").

112. *Id.*

113. Presently, California and Minnesota have adopted this approach. For citations see *supra* note 47.

114. These three states are: Nebraska, Oregon, and Washington. For applicable citations see *supra* notes 22, note 47.

115. For citations, see *supra* note 54.

costs of solar energy use does not encourage expansion. Likewise, the public nuisance approach is fraught with problems of enforcement and may be politically unacceptable. Of the approaches discussed, New Mexico's application of prior appropriation provides a substantial yet workable solution.¹¹⁶ The doctrine is familiar and heavily supported by precedent in the West. It is important for any such statute to include consideration of restricting solar rights to efficient periods of day light, and to require county and municipal zoning authorities to set up permit systems. With this, the previously mentioned problems with New Mexico's Act can be solved. Delegating mandatory permit requirements to political subdivisions will increase efficiency and also keep basic land-use concerns under municipal control.

WYOMING'S RESPONSE

Recently the Wyoming Legislature passed a comprehensive solar access statute.¹¹⁷ The Act, modeled after the New Mexico Solar Rights Act, provides for "priority in time" and "beneficial use" as the basis for a solar right.¹¹⁸ However, the Wyoming version contains some important differences. Unlike New Mexico's act, the Wyoming legislation clearly includes passive and active systems within its operative definitions.¹¹⁹ Also, the Wyoming act restricts pro-

116. For citations see *supra* note 77.

117. Wyoming "Solar Rights Act," to be codified as WYO. STAT. §§ 34-22-101 to 34-22-106.

118. House Bill: H.B. 5 (1981) to be codified as WYO. STAT. § 34-22-103 (1981) provides:

34-22-103. Declaration of solar rights.

(a) The right to use solar energy is a property right.

(b) In disputes over the use of solar energy:

(i) Beneficial use shall be the basis, the measure and the limit of the solar right, except as otherwise provided by written contract. If the amount of solar energy which a solar user can beneficially use varies with the season of the year, then the extent of the solar right shall vary likewise; and

(ii) Priority in time shall have the better right, except as provided in this act. Nothing in this paragraph diminishes the right of eminent domain of the state or its political subdivisions or any other entity which has such a right.

119. House Bill: H.B. 5 (1981) to be codified as WYO. STAT. § 34-22-102(a) (1981) provides:

(a) As used in this act:

(i) "Solar collector" means a device or combination of devices or elements which rely upon sunshine as an energy source, and which are capable of collecting not less than twenty-five thousand (25,000) BTUs on clear winter solstice day. The term also in-

tection to the times of the day when collection is most efficient, and it contains additional location restrictions embodying the "hypothetical wall" concept previously discussed.¹²⁰ Finally, the most substantial difference in the Act is that it grants to local governing bodies the right to require permits for solar rights while encouraging them to enact solar planning and zoning strategies.¹²¹

The Wyoming legislation is a comprehensive response to the need for encouraging and protecting solar energy use in the state. It satisfies both of the parts discussed in the previous section by allowing for thoughtful siting of solar units and by creating a property right in the sun. This author feels that it is the best legislative response to the access problem yet embodied in one act.

CONCLUSION

In the search for new sources of energy, the interest in solar power as a viable prospect has increased several fold. With this rising interest came a realization of the need to develop legal rights of access for the solar user. Since the common law failed to provide a remedy, statutory approaches in the nature of express easements, zoning and

119. Continued—

cludes a substance or device which collects solar energy for use in the heating or cooling of a structure or building, the heating or pumping of water, the generation of electricity or industrial, commercial or agricultural processes. A solar collector may be used for purposes in addition to the collection of solar energy, including serving as a structural member or part of a roof of a building or structure and serving as a window or wall.

120. House Bill: H.B. 5 (1980) to be codified as WYO. STAT. § 34-22-104 (1981) provides:

(a) The solar right to radiation of the sun before 9:00 a.m. or after 3:00 p.m. Mountain Standard Time is de minimus and may be infringed without compensation to the owner of the solar collector.

(c) . . . Unless otherwise permitted by the zoning authority, no solar right attaches to a solar collector, or a portion of a solar collector, which would be shaded by a ten (10) foot wall located on the property line on a winter solstice day.

121. House Bill: H.B. 5 (1981) to be codified at WYO. STAT. § 34-22-105 (1981) provides in part:

(a) Land-use regulations of local governments may encourage the use of solar energy systems. To encourage or require the use of solar energy systems, local governments may regulate:

- (i) The height, location, setback and use of structures;
- (ii) The height and location of vegetation with respect to property lines;

(b) Counties or municipalities may establish permit systems for the use and application of solar energy

planning laws, public nuisance laws, and prior appropriation ideas were developed as solutions. All of the approaches are based on the desire to encourage the use of solar energy, but few states have gone far enough. For a workable system of solar access, states must not only encourage solar energy use by granting legal rights in the sun, but in addition, siting for solar use must be encouraged at the local level. Thus far the prior appropriation approach working in conjunction with siting ideas appears to be the best for protecting solar users.

As our energy demands increase, which they surely will, solar power usage will likewise increase. In the future, it will be an ever-increasing burden on the legal system to encourage but control this growth. Movement toward a comprehensive solar access statute will provide a good starting block for the race ahead.

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