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Solar Access Rights in Wyoming

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SOLAR ACCESS RIGHTS IN WYOMING

In 1981, the Wyoming Legislature passed the Solar Rights Act (the "Act").[1] In doing so, the Legislature recognized not only the need to promote the use of a resource which, by the year 2020, is projected to supply twenty-five percent of the nation's energy needs,[2] but also the need to develop a set of rules which would make the transition into the solar age as painless as possible for the State of Wyoming. Yet in its efforts to develop a viable approach for the orderly development of solar access rights, the Wyoming Legislature may have created more problems than it did solutions.

This comment is concerned primarily with identifying and analyzing some of the issues which could hinder orderly implementation of the Act. Part I sets out in some detail the basic structure of the Act, comparing, where relevant, the Act's provisions with the law of water rights which serves as the basis for many of the Act's substantive provisions.[3] Part II moves to a discussion of the police power and the power of eminent domain—two areas of the law which, as will be seen, bear directly on the viability of the solar access rights "scheme." Finally, because the Act requires local governments to establish permit systems so that individuals may obtain "solar rights,"[4] Part III compares one municipality's—Laramie's—solar access ordinance with certain broad provisions of the Act.

PART I—THE SOLAR RIGHTS ACT

1. The Origin

Modeled after the New Mexico Solar Rights Act,[5] and drawing its ultimate foundation from the water law doctrine of prior appropriation known so well to the arid Western States,[6] the Act boldly declares that "the beneficial use of solar energy is a property right."[7] "Beneficial use," which provides "the basis, the measure and the limit of the solar right,"[8] is not specifically defined under the Act. Instead, it is implicitly defined in the definition of "solar collector." A solar collector is any one of a number of specifically described structures which are capable of collecting, storing, or transmitting a minimum of twenty-five thousand BTU's[9] on a clear winter solstice day.[10] The energy which is collected, stored, or transmitted, must generally be used for heating purposes or must be converted into electric

1. WYO. STAT. §§ 34-22-101 to -106 (Supp. 1983).
2. Comment, *Solar Rights: Guaranteeing A Place in the Sun*, 57 OR. L. REV. 94, 96-97 (1977).
3. Comment, *Access Rights for the Solar User: In Search of the Best Statutory Approach*, 16 LAND & WATER L. REV. 501, 514, 521 (1981).
4. WYO. STAT. § 34-22-105(b) (Supp. 1983). *See infra* note 17 for definition of solar right.
5. Comment, *supra* note 3, at 521.
6. 2 SOLAR LAW RPTR. 1171 (1981).
7. WYO. STAT. § 34-22-103(a) (Supp. 1983).
8. WYO. STAT. § 34-22-103(b) (i) (Supp. 1983).
9. A BTU (British Thermal Unit) is the amount of heat required to heat one pound of water one degree Fahrenheit (25,000 BTU's equals about 7.3 kilowatt hours).
10. WYO. STAT. § 34-22-102(a) (iii) (Supp. 1983). ("Winter solstice day" is defined as "the solstice on or about December 21 which marks the beginning of winter in the northern hemisphere and is the time when the sun reaches its southernmost point.").

energy; however, "other applications" of the energy are specifically allowed for at least one type of collector.[11]

2. Priority

The Act further tracks water law by providing that "priority in time shall have the better right."[12] The practical utility of such a provision in a solar rights act is, however, highly suspect, except during the permitting stage which will be described in the section that follows. In water law, during times of shortage a "senior" water user can put a "call" on the river and thereby require "junior" appropriators to stop diverting.[13] The effect, of course, is to increase the divertible supply of water to the senior. On the other hand, if one solar collector required every junior collector to stop collecting, no such benefit would accrue to the senior because of "the impossibility of improving one collector's efficiency by closing down others."[14]

3. The Permit System

The Act itself is not self-implementing, instead delegating the responsibility for its enforcement to local government entities[15] by requiring the establishment of permit systems.[16] Although some of the details of permit systems are set out in the Act, much of the detail is left to local governments. Thus, the Act does provide that a solar right[17] will vest on the date a solar permit is granted, after which time the solar user has two years to put the collector to beneficial use.[18] Those with existing solar collectors must apply for permits within five years from the date the permit system is established; their priority date, however, relates back to the time their solar collectors were first put to beneficial use.[19] Individuals applying for

11. WYO. STAT. § 34-22-102(a) (i) (Supp. 1983). Set out in full this provision reads:
> "Solar collector" is one (1) of the following which is capable of collecting, storing or transmitting at least twenty-five thousand (25,000) BTU's on a clear winter solstice day:
>
> (A) A wall, clerestory [sic] or skylight window designed to transmit solar energy into a structure for heating purposes;
>
> (B) A greenhouse attached to another structure and designed to provide part of the heating load for the structure to which it is attached;
>
> (C) A trombe wall, "drum wall" or other wall or roof structural element designed to collect and transmit solar energy into a structure;
>
> (D) A photovoltaic collector designed to convert solar energy into electric energy;
>
> (E) A plate-type collector designed to use solar energy to heat air, water, or other fluids for use in hot water or space heating or for other applications; or
>
> (F) A massive structural element designed to collect solar energy and transmit it to internal spaces for heating.

12. WYO. STAT. § 34-22-103(b) (ii) (Supp. 1983).
13. F. TRELEASE, CASES AND MATERIALS ON WATER LAW 105 (3d ed. 1979).
14. S. KRAEMER, SOLAR LAW 156 (1978).
15. " 'Local government' means a city, town or county." WYO. STAT. § 34-22-102(a) (iv) (Supp. 1983). The Act further provides that cities and towns shall regulate solar access rights within their boundaries; counties shall regulate solar rights within their boundaries and outside city limits. Local governments may jointly regulate solar rights by agreement. WYO. STAT. § 34-22-105(b) (v) (Supp. 1983).
16. WYO. STAT. § 34-22-105(b) (Supp. 1983).
17. " 'Solar right' is a property 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." WYO. STAT. § 34-22-102(a) (ii) (Supp. 1983).
18. WYO. STAT. § 34-22-105(b) (iii) (Supp. 1983).
19. WYO. STAT. § 34-22-105(b) (vi) (Supp. 1983).

permits to accompany buildings yet to be constructed are protected from interference with their solar rights as of the date they applied for a building permit.[20]

It is during the permitting process that the concept of priority acquires practical utility. An applicant for a solar permit needs assurance that his access to the sun will not be obstructed by southerly landowners during the time following the grant of his permit but before construction of his collector is completed. Although the ability essentially to enjoin building or planting through the use of a solar permit is obviously not the same as putting a "call" on the river for the reasons discussed above, the net effect during this permitting stage is the same: the senior appropriator retains his initial appropriation undiminished.[21]

4. Restrictions on Solar Access Rights

Several other statutory provisions also impact upon the local governments' implementation of permitting systems and thus are worth noting. One restriction on solar rights is the Act's provision for a "deemed abandonment" of a solar right which is not beneficially used for a period of five or more years.[22] Implicit in this abandonment provision is the notion that beneficial use is a continuing obligation—another notion not unknown to water law.[23] Although one can infer from the mere presence of an abandonment provision this continuing obligation, other abandonment-related issues are not so easily inferred.

For instance, one might wonder whether an abandonment will be "deemed" if the years in which the solar collector did not operate beneficially did not occur successively, as is required under Wyoming's water statute.[24] Since the Act borrows so heavily from water law in almost all respects, there would seem to be no good reason for interpreting the five-year "period" any differently from the way it is defined under the water statute. This void in the Act could easily be corrected by local governments in their ordinances by requiring the years to occur successively.

It is also unclear under the abandonment provision whether an abandonment proceeding must be initiated in order for an abandonment to be "deemed," as required under the water statute,[25] and if it must, it is unclear who must bring such an action. Under the water statute, either an "affected water user"[26] or the State Engineer[27] may initiate such an action. Since implementation of the Act is left to local governments, however, obviously the State Engineer would not be a party to a solar rights abandonment proceeding. Instead, the task would probably fall on a comparable local official, for example, the City Engineer. On the other hand, the

20. WYO. STAT. § 34-22-105(b) (iv) (Supp. 1983).
21. KRAEMER, *supra* note 14, at 156. "A solar user will generally have to compete with land uses on nearby property that will obstruct his solar supply rather than another solar user." *Id.*
22. WYO. STAT. § 34-22-104(b) (Supp. 1983).
23. *See, e.g.*, Basin Electric Power Coop. v. State Bd. of Control, 578 P.2d 557 (Wyo. 1978).
24. WYO. STAT. § 41-3-401(a) (1977).
25. WYO. STAT. § 41-3-401(b) (1977).
26. *Id.*
27. WYO. STAT. § 41-3-402(a) (1977).

"affected user" concept could easily be carried over into the solar setting, for example, by defining "affected user" to encompass a certain physical area surrounding any solar collector.

Finally, the Act provides two physical limitations on solar rights. First, the Act declares that before 9:00 a.m. and after 3:00 p.m. Mountain Standard Time radiation from the sun is "de minimus" and thus solar rights during those times "may be infringed without compensation to the owner of the solar collector."[28] And second, the Act provides that "no solar right attaches to a solar collector, or 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."[29] By providing that no solar right attaches to a collector which would be shaded by a hypothetical ten-foot wall located on the property line, the Legislature apparently attempted to balance competing land uses: on the one hand, the northerly landowner's newly-created right to an unobstructed line-of-sight path from his collector to the sun; on the other, the southerly landowner's right to make traditional, zoning-authorized uses of his property, such as building fences along the property line. Indeed, to the extent that all of these restrictions on solar rights represent a balancing of competing interests, any notion that the right created by the Act is *absolute* should effectively be dispelled.[30]

5. The Extent of the Solar Right

Perhaps the most puzzling aspect of the Act lies in attempting to determine the extent of the right created by the Act. We have seen that the right created is a property right, but it is not an absolute right, being limited by certain statutory restrictions. Moreover, the right created is limited by certain concepts borrowed from water law, such as priority and beneficial use. The purpose of this final section in Part I is to set out certain provisions which will serve as parameters for the broadly-defined right created by the Act, and which, as a result, cast a shadow upon the nature of that broadly-defined right.

Section 34-22-105(a) of the Wyoming Statutes provides that "local governments *may encourage* the use of solar energy systems" by regulating "[t]he height, location, setback and energy efficiency of structures; [t]he height and location of vegetation with respect to property lines; [t]he platting and orientation of land developments; and [t]he type and location of energy systems or their components."[31] With regard to this section, two points should be stressed. First, the regulation envisioned by this section is discretionary with the local governments, unlike the provision dealing with the establishment of permit systems, which is mandatory.[32]

28. WYO. STAT. § 34-22-104(a) (Supp. 1983).
29. WYO. STAT. § 34-22-104(c) (Supp. 1983).
30. *See* Comment, *Access to Sunlight: New Mexico's Solar Rights Act*, 19 NAT. RESOURCES J. 957, 959 (1979). The problem with an absolute right, as the author suggests, is that it may result in a "taking" of property without compensation, assuming that the solar right diminishes the value of the southerly landowner's land. *See, e.g.*, United States v. General Motors Corp., 323 U.S. 373 (1945). Whether a "taking" might still occur, notwithstanding the restrictions upon solar rights imposed by the Act, is the subject of the discussion in Part II of this Comment.
31. WYO. STAT. § 34-22-105(a) (Supp. 1983) (emphasis added).
32. *See supra* text accompanying notes 15 and 16.

Second, although this regulatory power is discretionary, it cannot be utilized so as to discourage the use of solar energy systems.

Section 34-22-105 cannot be read without reference to three other provisions of the Act relating to the power of local governments. First, section 34-22-104(c) mandates that solar collectors be located on a "solar user's property so as not to unreasonably or unnecessarily restrict the uses of neighboring property."[33] This provision may have been intended to complement section 34-22-105 by attempting to place the burden of properly locating solar energy systems, at least initially, upon the solar user himself in the event the local government failed to enact ordinances specifying acceptable locations for structures and vegetation.

Another section relating to the power of local governments is the Act's provision precluding local governments from prohibiting the use or construction of solar collectors "except for reasons of public health and safety."[34] Although the quoted language sounds very much like language usually associated with the police power,[35] thus possibly providing specific authorization for what may have existed even without such authorization,[36] its practical importance may be diminished in light of the third and final section relating to the powers of local governments.

Section 34-22-105(b)(ii) provides, in pertinent part, that "[i]f a local government sets height or locational limits on structures or vegetation, the local government may restrict the solar permit to the airspace above or surrounding the restrictions."[37] This provision is clearly meant to complement the provision previously discussed which allows—but does not require—local governments to encourage the use of solar energy systems by regulating the height, location, and setback of structures and vegetation.[38] Depending on the locational requirements established by local governments for solar collectors, however, it is possible that this provision could act as a complete prohibition to the establishment of a solar system. This might result, for example, where a residence bordered on an area zoned for much taller buildings. In such a case, were a permit to be limited to the airspace above a hypothetical building built on the boundary line of the two zones, the effect might well be to give the permittee no access right at all.

33. The Act does not provide a definition for "unreasonably or unnecessarily restrict." Thus the extent to which local governments can cut-back on the rights created by the Act by narrowly defining this term and others is of crucial importance and will be analyzed in Part III of this Comment.
34. WYO. STAT. § 34-22-105(c) (Supp. 1983).
35. *See, e.g.*, Netherton, *Implementation of Land Use Policy: Police Power vs. Eminent Domain*, 3 LAND & WATER L. REV. 33, 35 (1968). "Under the police power, private use of land is regulated for the advancement of some acknowledged public interest. It is customarily thought that this 'advancement' consists of preventing a condition or activity which is injurious to health, safety or morals of the community and, in a somewhat less definable way, the general welfare." *Id.*
36. *See* WYO. STAT. § 15-1-103(a) (xli) (1977).
37. WYO. STAT. § 34-22-105(b) (ii) (Supp. 1983).
38. *See* WYO. STAT. § 34-22-105(a) (Supp. 1983).

PART II—POLICE POWER VS. EMINENT DOMAIN

1. Introduction

Much has been written in recent years concerning the relationship between the police power and the power of eminent domain.[39] While at one time the distinction between the two may have been clearly discernible, at least to some commentators it now appears blurred.[40] In the context of solar access rights this distinction is crucial, because if the value of one's property is significantly diminished due to a solar user's access rights, such diminution in value might constitute a "taking" without just compensation in violation of the fourteenth amendment.[41] On the other hand, if it could be shown that sunlight, "like water and air, appears in connection with private property but is public in nature and in need of governmental regulation," the state might then "claim the right to regulate this resource under the police power for the protection of the general welfare."[42] The issue thus is when, if ever, could a grant of solar access rights constitute a "taking."

It has long been recognized that states can regulate, through their police power, the use of private property to promote the public health, safety, morals, and general welfare.[43] In order to ascertain whether a certain regulation of property represents an exercise of the police power as opposed to a "taking" for which compensation must be awarded, several judicial doctrines have been applied.

A. The "No Valid Regulation is a Taking" Test

The 1877 Supreme Court case of *Mugler v. Kansas*[44] is the leading authority for the proposition that valid regulatory measures do not constitute "takings."[45] *Mugler* involved a Kansas statute which prohibited the sale of beer; Mugler, as a result of the prohibition and as the proprietor of a brewery, was forced to close down his operations. In upholding the statute, the Court first noted that power is lodged in the legislature to determine what measures are appropriate for the protection of public morals, health, and safety,[46] and then went on to hold that:

39. *E.g.,* Netherton, *supra* note 35; Stoebuck, *Police Power, Takings, and Due Process,* 37 WASH. & LEE L. REV. 1057 (1980); Sax, *Takings and the Police Power,* 74 YALE L. J. 36 (1964); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria,* 44 So. CAL. L. REV. 1 (1970).

40. *See, e.g.,* Netherton, *supra* note 35, at 37-38: "It is in this area of the police power's positive aspects that the lines of distinction become blurred, and courts have trouble developing consistent patterns to describe those situations in which non-compensable regulation of land use will be permitted and those in which acquisition with compensation will be required."

41. *See* Comment, *Access to Sunlight: New Mexico's Solar Rights Act,* 19 NAT. RESOURCES J. 957, 959 (1979). The fifth amendment taking provision was incorporated into the fourteenth amendment in Chicago B. & Q. R.R. Co. v. Chicago, 166 U.S. 226 (1897).

42. KRAEMER, *supra* note 14, at 155. It should be noted that the "taking" question does not arise under water law because in states that follow the prior appropriation doctrine water is deemed property of the state. *See, e.g.,* WYO. CONST. art. 8, § 1.

43. *E.g.,* Berman v. Parker, 348 U.S. 26 (1954); East N.Y. Sav. Bank v. Hahn, 326 U.S. 230 (1945); Nebbia v. New York, 291 U.S. 502 (1934); Licenses Cases, 46 U.S. (5 How.) 504 (1847).

44. 123 U.S. 623 (1887).

45. Stoebuck, *supra* note 39, at 1060.

46. 123 U.S. at 660-61.

> A prohibition simply upon the use of property for purposes that are declared, by *valid* legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests.[47]

In order to reach such a result, however, the Court had to determine that the statute constituted a "valid" legislative enactment. This much the Court inferred from common knowledge. That is, "that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks."[48] This apparently was all that was necessary for the enactment to be deemed "valid."

B. The "Too Far" Test

The "too far" test arose out of Justice Holmes' majority opinion in *Pennsylvania Coal Co. v. Mahon.*[49] *Mahon* involved a challenge to Pennsylvania's Kohler Act, which prohibited coal mining in places where the subsidence of a house would occur. Pennsylvania Coal owned the mineral estate underlying Mahon's property, but because of the prohibition it could not mine in the vicinity of Mahon's house. Since the prohibition effectively prevented Pennsylvania Coal from enjoying its severed mineral estate, the Court concluded that the statute went "too far," thus constituting a fifth amendment taking.[50] Whether a given regulation results in a taking was thus recognized to be a question of degree.[51]

C. Balancing and Substantive Due Process

Some courts have approached police power "takings" by applying a test which balances the urgency of public need for regulation against the degree of loss to the regulated landowner.[52] This test is essentially a restatement of the Supreme Court's three-part test of substantive due process announced in *Lawton v. Steele.*[53] Under the *Lawton* test, for a regulation of property to be constitutional a court must find that the interests of the public require interference, that the means are reasonably necessary for the accomplishment of the purpose, and that the means are not unduly oppressive upon individuals.[54] Yet as one commentator has recognized,[55] substantive due process has traditionally been used as a test of the validity of governmental acts, rather than as a test of police power takings. That is, substantive due process constitutes the initial area of inquiry in which the court asks whether the purpose addressed by the legislature is one which

47. *Id.* at 668-69 (emphasis added).
48. *Id.* at 662.
49. 260 U.S. 393 (1922).
50. *Id.* at 415-16.
51. *Id.* at 416.
52. *E.g.*, Truner v. County of Del Norte, 24 Cal. App. 3d 311, 101 Cal. Rptr. 93 (Cal. Ct. App. 1972); William Murray Builders, Inc. v. City of Jacksonville, 254 So.2d 364 (Fla. Dist. Ct. App. 1971).
53. 152 U.S. 133 (1894). *See* Stoebuck, *supra* note 39, at 1065.
54. *Id.* at 137.
55. Stoebuck, *supra* note 39, at 1066.

the legislature may legitimately address; if the regulation satisfies this initial hurdle, *then* the issue becomes whether or not the regulation constitutes a "taking." Indeed, even the remedies generally differ depending upon whether the court applies a due process or a fifth amendment "taking" analysis: if the court determines that the regulation does not meet substantive due process requirements, the regulation simply is invalidated;[56] on the other hand, if the court determines that a "taking" has occurred, just compensation must be awarded.[57] Balancing, consequently, has been described as a "false taking test."[58]

Nonetheless, a number of courts, including the Wyoming Supreme Court, continue to apply substantive due process in situations where the issue arguably is whether there has been a "taking." The Wyoming Supreme Court addressed itself to one such situation in *Weber v. City of Cheyenne.*[59] In *Weber,* the City of Cheyenne annexed certain property adjacent to the then existing boundaries of the City, including property that Weber had contracted to purchase. Following annexation, the City zoned Weber's property for residential purposes only. Weber, however, had to construct a gasoline station on the property in order to comply with his contract of purchase, which specifically limited use of the property to business purposes. He applied for a permit to build the station but the permit was denied, the City stating that it had no power to change the zoning of the property, which was required before the permit could be granted. Weber then instituted an action against the City to restrain it from enforcing that portion of the ordinance which classified his property for residential use only.[60]

The Wyoming Supreme Court restrained enforcement of the ordinance against Weber, agreeing with his contention that the ordinance worked an arbitrary and oppressive result because it deprived him of "any really beneficial use of his property."[61] In so holding, the court quoted from a number of decisions which specifically utilized the substantive due process type of "taking" analysis.[62] Although the Wyoming Supreme Court has resorted to this balancing test in response to similar "taking" situations on other occasions,[63] in the context of solar access rights one must be prepared to argue based on all the various tests for police power takings. This is particularly true in light of the Supreme Court's most recent pronouncement on the subject in *Penn Central Transp. Co. v. New York City.*[64] There, the Court in effect gave up trying to formulate a test for police power takings, confessing that it had "been unable to develop any 'set formula' for deterining when 'justice and fairness' require that economic injuries cause by public action be compensated by the government. . . ."[65]

56. *See, e.g.,* Weber v. City of Cheyenne, 55 Wyo. 202, 97 P.2d 667 (1940).
57. *See* WYO. CONST. art. 1, § 33: "Private property shall not be taken or damaged for public or private use without just compensation"; U.S. CONST. amend. V: "[N]or shall private property be taken for public use, without just compensation."
58. Stoebuck, *supra* note 39, at 1066.
59. 55 Wyo. 202, 97 P.2d 667 (1940).
60. *Id.* at 668.
61. *Id.* at 672.
62. *Id.* at 671-73.
63. *See* State v. Hull, 65 Wyo. 251, 199 P.2d 832, 835 (1948).
64. 438 U.S. 104 (1978).
65. *Id.* at 124.

Penn Central is, however, relevant to the present discussion because even though the holding was limited to the facts of that case,[66] the central issue was quite similar to the issue presently under consideration.

D. Penn Central v. New York City

Pursuant to a New York State enabling Act, New York City adopted its Landmarks Preservation Law in 1965.[67] The Landmarks Law was typical of many urban landmark preservation laws in that it attempted to achieve its goal of preserving landmarks not by acquisition of historic properties, but by providing both restrictions on development and various incentives to encourage preservation by private owners.[68] One such landmark designated under the Landmarks Law was Grand Central Terminal (Terminal), owned by Penn Central Transportation Company. In order to increase its income, Penn Central entered into a lease agreement with a United Kingdom corporation (Corporation) under which the Corporation was to construct a multi-story office building above the Terminal. Penn Central and the Corporation then applied to the Landmarks Preservation Commission for permission to construct the office building; the Commission, however, denied the permit application, stating in its decision that construction of a multi-story building above the Terminal would reduce the Terminal's "flamboyant Beaux-Arts facade" to "an aesthetic joke."[69]

Penn Central and the Corporation then filed suit in New York Supreme Court, Trial Term, claiming that "the application of the [Law] had 'taken' their property without just compensation in violation of the Fifth and Fourteenth Amendments and arbitrarily deprived them of their property without due process of law. . . ."[70] Although the trial court granted Penn Central declaratory and injunctive relief barring the city from using the Landmarks Law to impede construction of a building atop the Terminal, both the Appellate Division and Court of Appeals of New York were of the view that the restrictions were reasonable and therefore did not unconstitutionally deprive Penn Central of its property.[71] In further explanation, the court of appeals indicated that there could be no "taking" since the Landmarks Law had not transferred control of property to the City, but only restricted Penn Central's use of it.[72]

On appeal to the United States Supreme Court, the judgment of the court of appeals was affirmed,[73] although the Court disagreed with portions of the court of appeals' reasoning. For instance, the Court clearly disagreed with the court of appeals' premise that there could be no "taking" because Penn Central's use of the property had only been restricted. In a significant footnote, the Court stated that "we do not embrace the proposition that a 'taking' can never occur unless government

66. *Id.* at 138 n.36.
67. *Id.* at 108-09. The facts are all taken from the Court's opinion.
68. *Id.* at 110-11.
69. *Id.* at 117-18.
70. *Id.* at 119.
71. Penn Central Transp. Co. v. City of New York, 50 A.D.2d 265, 377 N.Y.S.2d 20 (1975), *aff'd*, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977).
72. 366 N.E.2d at 1274.
73. 438 U.S. 104, 138 (1977).

has transferred physical control over a portion of a parcel."[74] Thus, the Court clearly recognized the concept of police power takings.

The Court's opinion is best characterized as a survey of the various approaches it has utilized over the years in which putative police power regulations were challenged as "takings." Included in its "survey" were citations to *Mugler*,[75] *Mahon*,[76] and to a number of cases which analyzed the particular regulation in substantive due process terms.[77] Though in the end the Court relegated itself to an ad hoc, factual inquiry limited to the "present record,"[78] portions of its opinion arguably are applicable to the issue whether a granting of solar access rights constitutes a "taking."

Penn Central, for instance, argued that awarding compensation was the only means of ensuring that certain property owners were not singled out to endure financial hardship due to use restriction imposed by the Landmarks Law.[79] In rejecting this argument, the Court stated that: "It is, of course, true that the Landmarks Law has a more severe impact on some landowners than on others, but that in itself does not mean that the Law effects a 'taking.' Legislation designed to promote the general welfare commonly burdens some more than others."[80]

Another argument rejected by the Court which arguably impacts on the solar access issue was Penn Central's contention that the Landmarks Law effected a "taking" because its operation had significantly diminished the value of the Terminal.[81] The Court rejected this argument by merely citing a number of its previous decisions which held that diminution in property value, standing alone, could not establish a "taking."[82]

Finally, and perhaps most relevant to the solar access issue, Penn Central argued that because the airspace superjacent to the Terminal was a valuable property interest, the Landmarks Law had in effect "taken" its "air rights" above the Terminal, irrespective of the value of the remainder of the property.[83] Although the Court disagreed with Penn Central's basic characterization of the effect of the Landmarks Law,[84] it based its rejection of Penn Central's argument upon a different, though related, ground:

> the submission that [Penn Central] may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. Were this the rule, this Court would have erred not only in upholding laws restricting the development of air rights, but also in approving those prohibiting both the superjacent and the lateral development of particular

74. *Id.* at 123 n.25.
75. *Id.* at 126.
76. *Id.* at 127.
77. *Id.* at 125.
78. *Id.* at 138 n.36.
79. *Id.* at 131.
80. *Id.* at 133.
81. *Id.* at 131.
82. *Id.* and cases cited therein.
83. *Id.* at 130. *See* United States v. Causby, 328 U.S. 256 (1946).
84. 438 U.S. at 130.

parcels. "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole. . . .[85]

With this background in mind, we will now turn to an analysis of the Act and attempt to determine whether the method of obtaining access rights to the sun it envisions should be viewed as a police power taking.

2. The Solar Rights Act: Reasonable Regulation or Compensable Taking?

The first part of the discussion which follows will analyze the constitutionality of the Act as if it were adopted as the solar ordinance of a local government "as is." Utilizing a hypothetical involving two landowners and applying the various judicial doctrines for police power takings discussed above, the discussion will outline the basic arguments one might expect to be advanced both for and against the constitutionality of the Act. Then, the remainder of this comment will compare two provisions of Laramie's solar access ordinance which, it can be argued, constitute invalid deviations from the Act's general provisions.

A. Adoption of the Act "As Is"

Suppose a landowner, "N" (the northerly landowner), decides to build a one-story, passive solar[86] home in a residential area zoned for two-story homes. Two years after N build his home the local government certifies its beneficial use.[87] Sometime thereafter, "S" (the southerly landowner) buys the lot south of N and applies for a permit to build a two-story home which, we will assume, would shade N's passive solar home sufficiently to render it no longer beneficially usable. If S's building permit is denied due to N's solar access rights, can S succeed in arguing that his property has been taken without just compensation?

N of course would argue, perhaps along the lines of *Mugler* and *Mahon,* that the ordinance is simply a valid regulation adopted pursuant to the Act and the police power for the protection of the public health, safety, and general welfare.[88] As such, N might then further argue that the restrictions imposed on S's property are analogous to height restrictions imposed by zoning laws which are for the benefit of property owners generally, and which are clearly within the police power.[89] N might thus conclude that the restrictions upon S's property clearly do not go "too far."

85. *Id.* (citations omitted).

86. A *passive* solar system is one which stores heat in the structure because of design or structural features, without the necessity of moving parts. An *active* solar system, on the other hand, is one which utilizes pumps or other mechanical devices to circulate fluids or air through tubes lying underneath the collector in order to heat the fluid for use in the home. Wyoming's Solar Rights Act clearly comprehends passive solar systems. *See* WYO. STAT. § 34-22-102(a) (i) (A) (c) (Supp. 1983).

87. "The local government shall certify the [solar] right and its beneficial use within two (2) years of its vesting." WYO. STAT. § 34-22-105(b) (iii) (Supp. 1983).

88. *See supra* text accompanying note 42.

89. 8 MCQUILLAN, MUNICIPAL CORPORATIONS § 25.145 at 510-11 (3d ed. rev. 1983).

N might further point to section 34-22-106[90] of the Act—providing for the recordation of solar permits—as evidence that S acquired the south lot with notice of N's access rights, and to several other sections of the Act which indicate that the means used to implement its provisions were reasonable, rather than oppressive, and thus clearly within substantive due process strictures.[91] For instance, N could point to section 34-22-104(c), which requires collectors to be located on user's property so as not to unreasonably or unnecessarily restrict uses of neighboring property, and argue that the granting of his permit *necessarily* embodied a determination that his system did not unreasonably or oppressively burden uses of neighboring property.

Finally, N might make several arguments based on the Court's language in *Penn Central.* First, N might argue that compensation is not due S since S has not been singled out to endure financial hardship.[92] Everyones' property, N would reason, is at least in theory burdened by the Act's creation of solar access rights. N might concede that since not all landowners will seek access rights, in certain circumstances the impact upon some landowners will be more severe than upon others. This result, N would argue, does not "in itself mean that the [Act] effects a taking."[93]

N might further argue that S cannot succeed in establishing a "taking" simply by showing that he has been denied the ability to develop the airspace superjacent to his property he believed was available for development.[94] Rather, N would stress that the nature and extent of his interference with S's use of his property should be the real inquiry. By characterizing the issue in that way, N might simply argue that, although S may have lost the use of a portion of his property rights, he clearly has not been denied all gainful use of his property since presumably he could still build a one-story residence.[95]

S, on the other hand, might first attack the validity of the ordinance based on *Mugler.* In order to make this argument, S might accept N's analogy to the law of zoning, but instead stress the fact that S's intended use is authorized by the zoning laws. Thus, S could argue that the ordinance should contain a provision, consistent with zoning laws generally,[96] for at least the opportunity to obtain a variance.[97] Otherwise, S might argue, N's

90. WYO. STAT. § 34-22-106 (Supp. 1983) provides in full: "The granting of solar permits and the transfer of solar rights shall be recorded pursuant to W.S. 34-1-101 through 34-1-140. The instrument granting a solar permit shall include a description of the collector surface, or that portion of the collector surface to which the solar permit is granted. The description shall include the dimensions of the collector surface, the direction of orientation, the height above ground level and the location of the collector on the solar user's property."
91. *See supra* the discussion in section 4 of Part I.
92. *See supra* text accompanying notes 79 and 80.
93. *Id.*
94. *See supra* text accompanying notes 83-85.
95. *Id.*
96. 8 MCQUILLAN, *supra* note 89, § 25.166 at 585.
97. *See, e.g.,* WYO. STAT. § 15-1-608 (1977):
> (b) The board [of adjustment] has the power to:
> (ii) Vary or adjust the strict application of any ordinance adopted pursuant to this article in the case of any physical condition applying to a lot or building if the strict application would deprive the owner of the reasonable use of the land or building involved. No adjustment in the strict application of any provision of an ordinance may be granted unless:

solar access rights to the airspace superjacent to S's property are absolute[98] and therefore must, by definition, constitute a "taking." Although S's argument might be well taken in the context of zoning laws,[99] N might argue that the whole concept of variances is inimical to a law which recognizes solar access rights as "property rights."[100] Furthermore, N could point to numerous provisions of the Act which indicate that the right created by it is far from absolute.[101] Finally, given that legislative enactments are stamped virtually with a presumption of validity, S's burden of proving a taking because of the alleged invalidity of the ordinance may be insurmountable.

If S's *Mugler* argument were rejected by the court, S might take issue with N's contention that the regulation of S's property does not go "too far." In order to succeed in this argument, S might contend that solar access rights are not analogous to zoning laws in that solar access rights do not impose identical restrictions upon all structures located in particular physical communities. That is, other persons owning property within the vicinity of N and S' properties presumably would not have access rights to the same extent as N. This might be due to several factors, such as the changing slope of the land. Precisely the same argument was made in *Penn Central,* however, and was rejected by the Court.[102] As the Court there noted, zoning laws often affect some property owners more severely than others, yet they have not been invalidated on that account.[103] Furthermore, whether solar access rights are analogous to zoning ordinances or not, the mere diminution in S's property value, assuming it were diminished, would not seem to be a valid basis upon which to argue that the regulation of S's property went "too far".[104]

A different approach which S might pursue would be to argue that a grant to N of solar access rights constitutes a "taking" of his property because it is arbitrary and oppressive and thus violative of substantive due process. Although the Wyoming Supreme Court, as noted earlier, has applied substantive due process in police power taking type situations, it has not struck down a regulation of property unless it denied the owner of "any

> (A) There are special circumstances or conditions, fully described in the board's findings, which are peculiar to the land or building for which the adjustment is sought and do not apply generally to land or buildings in the neighborhood, and have not resulted from any act of the applicant subsequent to the adoption of the ordinance;
> (B) For reasons fully set forth in the board's findings, the circumstances or conditions are such that the strict application of the provisions of the ordinance would deprive the applicant of the reasonable use of the land or building, the granting of the adjustment is necessary for the reasonable use thereof and the adjustment as granted is the minimum adjustment that will accomplish this purpose; and
> (C) The granting of the adjustment is in harmony with the general purposes and intent of the ordinance and will not be injurious to the neighborhood or otherwise detrimental to the public welfare.

98. *See supra* note 30.
99. 8 MCQUILLAN, *supra* note 89, § 25.166 at 585.
100. *See supra* note 17.
101. *See supra* section 4 of Part I.
102. 438 U.S. at 133.
103. *Id.*
104. *See supra* text accompanying note 82.

really beneficial use of his property."[105] Also, unlike some courts which use substantive due process as a "taking" test, the Wyoming Supreme Court uses it only to strike down an oppressive ordinance which deprives the owner of any beneficial use of his property.[106] Consequently, since S can still build a single-story home, he has clearly not been denied all beneficial use of his property.

Finally, S might argue for an ad hoc analysis of the effect of N's solar access rights upon his property, contending simply that all the relevant considerations, taken together, establish that his property has been "taken." This, apparently, is the current approach adopted by the Supreme Court.[107] Assuming this to be the case, one can only conjecture what the Court would do with the Solar Rights Act. If one assumes the "considerations"[108] discussed in *Penn Central* are relevant to the solar access rights issue, it would seem that those considerations weigh decidedly in N's favor. First, it would be difficult to S to argue that any hardship resulting from the Act's application is peculiar to him. The Act applies uniformly to and its implementation is required of all local governments in the State;[109] thus, it is not unlike the Landmarks Law, which burdened certain landowners for the benefit of society generally. Second, though the value of S's property might be diminished due to N's access rights, the Supreme Court has stated that diminution in value does not, of itself, result in a "taking." Finally, it seems clear that S cannot succeed in establishing a taking by merely showing that he has been denied the ability to develop the airspace superjacent to his property. However, even if S could not succeed in establishing that his property had been "taken," he might still argue that the ordinance is invalid because his property is being regulated for a private, rather than a public, use.

B. Public Use

Both the police power and the power of eminent domain may only be employed for "public uses";[110] thus, S might attempt to argue that the protection provided by the Act is limited to, and in fact benefits only, individual landowners as opposed to the public generally. Although the "public use" requirement is in fact an implicit component of substantive due process,[111] a few courts have utilized it as a test of police power takings.[112] Generally, however, the public use requirement has been utilized by

105. *See supra* text accompanying note 61 and accompanying text. S might also try to recover under the "or damaged" provision of the Wyoming Constitution. *See supra* note 57. It would seem, though, that the "or damaged" clause, as interpreted by the Wyoming Supreme Court, would not be of much benefit to S because he would have to show that "he [had] sustained special damage differing in kind and not merely in degree from that sustained by the public generally." Sheridan Drive-In Theatre v. State, 384 P.2d 597, 599 (Wyo. 1963). Thus, the same sort of reasoning applied by the United States Supreme Court in *Penn Central* and in *Noble State Bank*, applies; and based upon this reasoning, one could conclude that S has not suffered damage different from the public generally. Of course, the contrary arguments discussed in the text are applicable here and should not be lightly dismissed.

106. *See supra* text accompanying notes 51 and 61.

107. *See supra* text accompanying note 78.

108. 438 U.S. at 124-28.

109. *See* WYO. STAT. § 34-22-102(a) (iv) and § 34-22-105(b) (Supp. 1983).

110. 11 MCQUILLAN, *supra* note 89, § 32.39a at 350.

111. *See* Stoebuck, *supra* note 39, at 1066.

112. *See supra* note 52.

the courts as an independent prerequisite to the use by states and local governments of both the police power and the power of eminent domain.[113]

Although S's argument possesses a certain superficial appeal, inasmuch as N would clearly receive the immediate benefit from airspace restrictions on S's property, it does not seem to follow from the broad definition of "public use" usually employed by the courts. Justice Holmes, for instance, in *Noble State Bank v. Haskell,* described the police power as extending "to all the great public needs."[114] *Noble State Bank* involved a challenge to an assessment levied by the State Banking Board of Oklahoma. Every bank existing under the laws of the state was required to contribute one percent of its average daily deposits for the purpose of creating a Depositors' Guaranty Fund. Noble State Bank stated that it was solvent and therefore should not be required to contribute to the fund.[115] Requiring it to join the fund, the bank argued, would amount to a taking of private property for private use without compensation.[116] The Court agreed that because of the law a portion of the bank's funds would be used to pay the debts of a failing rival.[117] There were, however, "more powerful considerations on the other side."[118] In language that seems particularly appropriate to the present issue under consideration, the Court stated that:

> In the first place, it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. And in the next, it would seem that there may be other cases beside the everyday one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume.[119]

Justice Holmes' description of "public use" provides persuasive authority N might advance for his conclusion that the Solar Rights Act furthers a "public use." First N could argue that the overall thrust of the Act is to provide *protection,* not just protection for certain individuals, but "mutual protection" for all those who would seek a property right in the sun. Though each property owner might be burdened, N would argue, each receives a correlative benefit in the opportunity to gain a solar access right. Thus, N might further argue, if there is any "taking" as a result of the Act, it is "comparatively insignificant" when compared to the "public advan-

113. *See, e.g.,* Berman v. Parker, 348 U.S. 26 (1954); State v. Hull, 65 Wyo. 251, 199 P.2d 832, 835 (1948). It should be noted that the "public use" requirement was implicitly utilized by the Supreme Court in *Penn Central* as one of the factors to be "considered" in attempting to determine whether the Landmarks Law constituted a police power taking. As discussed above in the text, Part II, section D, the Court considered the extent to which certain individuals were burdened more heavily than the public generally as one such factor. This inquiry, as suggested by the Court's analysis in *Noble State Bank,* is tantamount to the "public use" requirements. There is, however, no language in the Court's opinion which would suggest that "public use" is no longer an independent requirement and, consequently, this comment assumes that it continues to be.

114. 219 U.S. at 111.

115. *Id.* at 109.

116. *Id.* at 110.

117. *Id.*

118. *Id.*

119. *Id.* at 110-11 (citations omitted).

tage" of a lessened dependence on scarce resources presently being used to heat and supply electricity for buildings and homes.

PART III—LARAMIE'S SOLAR RIGHTS ORDINANCE

1. Introduction

Laramie's solar rights ordinance,[120] passed in 1983, is the most comprehensive and far-reaching one of its kind yet to be adopted in the State; consequently, it may also be one of the first challenged. The permit system[121] created by the ordinance in order to obtain a solar right generally tracks the Solar Rights Act—with some important additions. The purpose of this section, however, is not to highlight the similarities between the Act and Laramie's ordinance; the purpose is to highlight their major differences. Thus, this section will analyze two provisions in Laramie's ordinance which, in this author's opinion, will be the most controversial.

2. Unreasonable or Unnecessary Restrictions

In the area of restrictions on solar access rights, Laramie's ordinance deviates from the provisions of the Act in one important respect. After providing, as does the Act,[122] that solar collectors be located on the solar user's property so as not to unreasonably or unnecessarily restrict uses of neighboring property, the ordinance provides this definition of "unreasonable or unnecessary restriction": "Unreasonable or unnecessary restriction shall include, but not be limited to, any restriction which would prohibit the uses allowed by city code."[123] The effect of this provision can easily be seen by resorting to our hypothetical involving N and S.

Under the hypothetical, the zoning area encompassing N and S's land is zoned for two-story structures. Because the erection of two-story structures is a "use allowed by city code," and, under the hypothetical, because N's use would prohibit S's erection of a two-story structure, N's building a one-story, passive solar home is, by definition, an "unreasonable or unnecessary restriction." Since N's use is an unreasonable restriction, S, it would seem, should be allowed to build his two-story home, even though it

120. Laramie, Wyo., Ordinance 762 (July 5, 1983).

121. The process for obtaining a solar right is essentially as follows: A potential, or existing, solar user first obtains a solar permit application from the City Engineer. The application requires that the names of all "potentially affected owners" be listed. "Potentially affected owners" are defined as persons owning property in fee simple, or contract purchasers of property, whose property lies within three-hundred feet of the solar collector for which a permit is being sought. Additionally, the potential solar user must file a scaled plan describing, *inter alia*, the height and location of structures and vegetation on the potential user's and neighboring property, and the orientation of the collector After this information is obtained, the permit applicant files his permit forms with the City Engineer, who reviews the application and either grants or denies a permit. Upon reaching his decision, the City Engineer sends a notice to the applicant and to potentially affected owners advising them of his decision and of their right to appeal to the Solar Board of Review. Hearings before the Solar Board are subject to the Wyoming Administrative Procedure Act and are open to the public. The Solar Board may either rescind or modify the decision of the City Engineer. Thereafter, a solar permit is issued, rescinded, or modified as is necessary to comply with the decision of the Solar Board. If the permit is issued, the approved permit application and site plan are required to be recorded in the county clerk's office. Laramie Ordinance, *supra* note 120, §§ 1-8.

122. WYO. STAT. § 34-22-104(c) (Supp. 1983).

123. Laramie Ordinance, *supra* note 120, § 4(a).

would shade N's home. If N felt aggrieved by this result, S would argue, he could apply for a variance which, if granted, would preclude S from building a two-story home.[124] Yet this cannot be the correct analysis because N, we assumed, already had obtained a solar right. Thus if S were allowed to build his two-story home and if N's variance application were denied, could not N then argue that *his* property had been taken?

This question is posed merely to illustrate the most extreme situation that could conceivably arise under Laramie's system. In all practicality, however, the situation would never arise in Laramie because N, it would seem, would never have been granted a solar permit initially. That is, the Laramie City Engineer, who first decides whether a permit will be granted or denied,[125] would probably have deemed N's proposed use an "unreasonable and unnecessary restriction" and consequently have denied N a permit. Or, if N had obtained a solar permit, and thus a solar right, it would have been limited to the airspace superjacent to an imaginary two-story home built on S's property.[126] This is the result under the Laramie system because, even if an area were completely undeveloped, a potential solar user could expect his solar right to be limited to the airspace superjacent to the highest zoning-authorized structure which could be built within three-hundred feet of his property, unless, as was suggested above, he could obtain a variance.

Thus Laramie has considered the interests of potential solar users with the interests of property owners generally to build to the maximum height permitted by the zoning laws, and has come down on the side of the landowner's right to build. One might well question, however, Laramie's authority to enact such a provision, given that the overall thrust of the Act, as mentioned earlier, is the establishment and *protection* of solar rights.[127] Consequently, the remainder of this discussion will analyze whether or not this provision should be considered as being "preempted" by the Act.

3. Preemption

Where a state statute and a municipal ordinance conflict, fundamental principles of state supremacy require that the ordinance give way,[128] unless, however, the statute plainly gives predominance to the ordinance.[129] The harder question, and the one of principal importance to this discussion, is that of determining when a conflict actually exists.

As was discussed earlier in this comment, the Solar Rights Act specifically delegates the power, and in fact requires local governments, to establish permit systems by which individuals may obtain solar rights.[130] There are in the Act, however, certain provisions which must be included in all local government permit systems. Thus, the Act falls into a sort of

124. *Id.*, § 7.
125. *See supra* note 121.
126. WYO. STAT. § 34-22-105(b) (ii) (Supp. 1983).
127. *See supra* note 17. The Act would, of course, be meaningless if it did not provide protection for solar rights.
128. 5 MCQUILLAN, *supra* note 89, § 15.20 at 73.
129. *Id.*
130. *See supra* text accompanying notes 15 and 16.

middle ground, somewhere between complete preemption and complete delegation.

The provision of the Act with which we are primarily concerned at this juncture is section 34-22-105, the section relating to local government authority.[131] This section allows, but does not require, local governments to regulate the height and location of structures or vegetation, then "the local government may restrict the solar permit to the airspace above or surrounding the restrictions."[132] Consequently, since the City of Laramie has set height and locational restrictions in the form of zoning restriction specifically incorporated into the solar ordinance,[133] it would seem that Laramie's restriction does fall within the plain language of the Act. But this does not end the inquiry, for "a thing may be within the letter of the statute and yet not within the statute because not within its spirit, nor within the intention of its makers."[134]

Thus, although Laramie's ordinance may not conflict directly with the letter of the statute, it can be argued that it conflicts indirectly in that it *discourages* that which it should *encourage*. As noted earlier, section 34-22-105 allows local governments to set height and locational limits on structures and vegetation, yet it is only empowered to set such limits so as "to encourage" the use of solar energy systems.[135] Consequently, it can be argued that Laramie, by defining "unreasonable or unnecessary restriction" to include uses authorized by city zoning ordinances, has in effect discouraged the use of solar energy. Referring to our continuing hypothetical, N, it would seem, might be discouraged from building a passive solar home if he knows his access rights will be limited to the airspace superjacent to an imaginary two-story structure on S's property. Whether Laramie's system does, in the final analysis, conflict with the Act on this issue cannot be adequately answered without first setting out the second section of Laramie's ordinance that varies from the Act's provisions—that allowing for variances.

4. Variances

Laramie's solar ordinance provides that "[a]ny person desiring to erect any solar collector or other structure, or increase the height of any structure, or permit the growth of any new vegetation, or otherwise use his/her property, not in conformance with this ordinance, may apply for a variance from the Solar Board of Review."[136] Presumably it is this section of the Laramie ordinance which the city would point to in attempting to argue that, notwithstanding the previous discussion, the ordinance does in fact encourage the use of solar energy systems. That is, Laramie could argue that its ordinance encourages the use of solar energy in that if N were determined to build his one-story passive solar home, he could apply for a variance because variance are expressly made obtainable for persons "desiring to erect any solar collector or other structure."

131. WYO. STAT. § 34-22-105 (Supp. 1983).
132. WYO. STAT. § 34-22-105(b) (ii) (Supp. 1983).
133. Laramie Ordinance, *supra* note 120, § 4(a).
134. Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892).
135. WYO. STAT. § 34-22-105(a) (Supp. 1983).
136. Laramie Ordinance, *supra* note 120, § 7.

What merit this argument has, however, is probably lost when reference is made to the restrictions imposed upon the granting of variances. The first restriction provides that a variance will not be granted unless the Solar Board of Review finds "[t]hat the strict application of the provisions of this ordinance would result in substantial and unavoidable hardship."[137] S, in the hypothetical, would argue that a variance should not be granted N inasmuch as he need only build a two-story structure in order to obtain unobstructed access to the sun; the economic cost to N, S would argue, is irrelevant since the issue is only whether N might physically be able to avoid hardship. Consequently, N would conclude that the effect of Laramie's solar ordinance is the discouragement of solar energy systems.

Regardless whether the issue is economic or physical hardship, if the result is that the use of solar energy systems is discouraged in Laramie one cannot help but think that it is a result which the drafters of the ordinance were at least aware might occur. Indeed, the overall thrust of the Laramie ordinance, as discussed earlier, is the encouragement of development, apparently for the sake of development, at the expense of potential solar users. Though one might debate the efficacy of such an approach, given the overall purpose behind the Solar Rights Act it is an approach not intended by the Wyoming Legislature.

CONCLUSION

Growing numbers of states in recent years have attempted, through legislation, to provide for access rights to the sun. Though some may attribute this legislative response to the "Jimmy Buffett syndrome," others, more perceptively it would seem, have attributed it to a societal desire to lessen this nation's dependence upon scarce fossil fuels. Assuming this latter reasoning to be the impetus behind solar access legislation, one might find it ironic that the law based on a scarce Western resource—water—should be carried over wholesale and applied to an abundant resource—sunlight—as the Wyoming Legislature has done. The application of water law to solar access rights, however, can be rationalized easily when one considers the fact that sunlight, in a sense, becomes a scarce resource when one person's access to it is blocked by another.

Though this application may easily be rationalized, it is of little importance if the Act cannot withstand a challenge by a disgruntled property owner who claims his property has been "taken" due to another property owner's access rights. Although this comment concludes that the Act works neither an unreasonable regulation of property nor a "taking," as the arguments advanced on behalf of two hypothetical landowners demonstrate the issues are by no means cut-and-dried. Indeed, given the added factor that it is by no means clear how far local governments may go in implementing the Act, a challenge to some local government's solar access scheme would seem inevitable.

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137. *Id.*, § 7(a).