SOLAR ACCESS RIGHTS

American energy policies have changed drastically since the 1973 OPEC oil embargo.[1] The cheap energy lifestyle no longer prevails as Americans search for alternative energy sources.[2] Solar energy, in both its active and passive forms,[3] presents a partial solution to meet ever-increasing energy needs.[4]

Active solar use, which employs mechanical collecting devices, has grown slowly in the United States because of the high initial capital investment.[5] In contrast, passive systems take advantage of natural

1. COMMITTEE OF NUCLEAR AND ALTERNATIVE ENERGY SYSTEMS, ENERGY IN TRANSITION: 1985-2010 1-6 (1980) [hereinafter cited as ENERGY IN TRANSITION]. *See also Our Energy Predicament*, NATIONAL GEOGRAPHIC 2-4 (Special Report on Energy), Feb. 1981) [hereinafter cited as NATIONAL GEOGRAPHIC].

2. See ENERGY IN TRANSITION, *supra* note 1, at 14-48 for a detailed discussion of domestic fossil fuel potential, nuclear fuel and the renewable resources of solar, geothermal, and controlled thermonuclear fissions. *See also* Williams, *Public Policy Issues Relating to Industrial Cogeneration*, in AMERICAN ENERGY CHOICES BEFORE THE YEAR 2000 at 15 (E. Bergman, H. Bethe & B. Marshak eds. 1978).

3. Solar energy has long been used in its passive state. Passive use takes advantage of natural radiation without mechanical equipment. This use occurs every day in buildings with south-facing windows. Sunlight streams in and warms the room. Currently structures are specifically designed to capture and retain solar energy. *See* S. KRAEMER, SOLAR LAW 18-21 (1978).

Active solar systems employ mechanical collecting devices, usually glass panels placed on southern rooftop surfaces, to collect and hold solar heat. The captured heat is both channeled to interior heating units and stored for use during periods of inadequate light exposure. *Id.* at 12-17.

Both active and passive systems require back-up heating units to function when the solar systems operate at very low efficiency rates: early morning hours, overcast daylight hours, and of course, night time.

4. *See* ENERGY IN TRANSITION, *supra* note 1 at 381; S. KRAEMER, SOLAR LAW 8 (1978); W. THOMAS, A. MILLER & R. ROBBINS, OVERCOMING LEGAL UNCERTAINTIES ABOUT USE OF SOLAR ENERGY SYSTEMS 2 (1978). For examples of various types of solar uses, see Daneke, *Solar Futures: A Perspective on Energy Planning*, in ENERGY AND ENVIRONMENTAL ISSUES 140 (M. Steinman ed. 1979).

5. Bethe, *Primary and Alternative Sources of Energy*, in AMERICAN ENERGY CHOICES, *supra* note 2, at 4-11. The author begins from the premise that solar energy is economically impractical in those areas that need it the most: cities north of 40 degrees latitude. *See also* Maidique, *Solar America*, in ENERGY FUTURE at 192 (Report of the Energy Project at the Harvard Business School, R. Stobaugh & D. Yergin, eds. 1979). This report estimated these average costs for an active system designed for

radiation without special equipment.[6] For example, a building's design may increase solar exposure by means of additional south-facing windows. An active system usually includes rooftop collecting panels and storage facilities.[7]

There is a hidden deterent to the growth of solar energy use which mitigates the nearly cost-free operation of both active and passive systems[8]—the unavailability of a common law right to sunlight.[9] In the absence of some statutorily inferred right, courts cannot protect this "free" fuel supply.

State legislatures currently provide several methods to assure solar access: easements, restrictive covenants, and zoning.[10] Legal com-

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a single family home: $1,600 to $2,400 for a solar hot water system; $5,000 to $13,000 for combined space and water heating units. *Id.* at 191.

6. See note 3 *supra*.

7. *Id.*

8. Maintenance costs for an active solar system are estimated at two percent of the system's initial costs. Bethe, *supra* note 5, at 6.

9. See notes 23-25 and accompanying text *infra* for a discussion of the American repudiation of the ancient lights doctrine.

10. Forty-seven states have at least one form of solar legislation; the Kentucky, Pennsylvania, and West Virginia legislatures have yet to act on solar energy use. Forty-five states provide for tax incentives to property owners to encourage solar energy use. See note 15 *infra* for a discussion of solar tax legislation. Twenty-three states provide for solar easements: CAL. GOV'T CODE § 66475.3 (Deering Supp. 1981); COLO. REV. STAT. § 38-32.5-102 (Supp. 1980); FLA. STAT. ANN. § 704.07 (West Supp. 1981); GA. CODE ANN. § 85-1411-14 (1981); IDAHO CODE § 55-615 (1980); ILL. REV. STAT. ch. 96½, § 7303 (The Comprehensive Solar Energy Act of 1977, P.A. 80-430) (Supp. 1981); IND. CODE § 32-5.2.5-1 (Supp. 1981); KAN. STAT. ANN. § 58-3801 (Supp. 1980); MD. REAL PROP. CODE ANN. § 2-118 (Supp. 1980); MINN. STAT. § 500.30 (Supp. 1981); MOS. REV. STAT. § 442.012 (Supp. 1980); MONT. REV. CODES ANN. § 70-17-301 (1979); NEB. REV. STAT. § 66:909 (Supp. 1981); N.Y. REAL PROP. LAW § 335-b (McKinney Supp. 1980); N.D. CENT. CODE § 47-05-01 (Supp. 1979); OHIO REV. CODE ANN. ¶ 5301.63 (Page Supp. 1980); OR. REV. STAT. § 105-895 (1979); TENN. CODE ANN. § 64-9-202 (Supp. 1980); UTAH CODE ANN. § 57-13-1 (Supp. 1979); VA. CODE § 55-353 (Supp. 1980); WASH. REV. CODE § 64.04.140 (Supp. 1981).

Eleven states have enacted solar zoning statutes: ARIZ. REV. STAT. ANN. § 9.462.01 (Supp. 1980); COLO. REV. STAT. § 31-23-307 (Supp. 1980); CONN. GEN. STAT. § 8-25 (1981); ME. REV. STAT. ANN. tit. 30, § 4961 (Supp. 1980); MINN. STAT. § 462.357 (Supp. 1981); NEB. REV. STAT. § 66:913 (Supp. 1980); N.M. STAT. ANN. § 47-3-4 (Supp. 1981); OR. REV. STAT. § 215.110 (1979); TENN. CODE ANN. § 64-9-202 (Supp. 1981); VT. STAT. ANN. tit. 24, § 4407(13) (Supp. 1981); WASH. REV. CODE § 35.63.080 (Supp. 1981).

Seven states discuss the uses of restrictive covenants as applied to solar rights. *See* note 44 *infra*.

See Table I *infra* for examples of how many states provide for a combination of

mentators tend to advocate solar zoning as the ultimate solution.[11] Curiously, the states have not acted on the suggestions. Only three states rely exclusively upon solar zoning.[12] Even though legislative intent is difficult to determine at the state level, it is possible to speculate on the rationale behind the states' adoptions of other types of solar legislation.[13] The most common approach, adopted by forty-six states, is a tax incentive statute, often with no accompanying access

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access protection. For example, Colorado provides for solar easements, zoning, and restrictive covenants. Maryland pairs zoning with restrictive covenant protection, whereas California couples easements with restrictive covenants.

New Mexico also bases its solar rights acts upon the doctrine of prior appropriation which is analogous to water rights use in the western states. N.M. STAT. ANN. § 47-3-3 (Supp. 1981). The concept of prior appropriation is based on allowing maximum use by the party first to make a beneficial use. J. SAX, WATER LAW, PLANNING AND POLICY 2-3 (1968). One commentator is skeptical about the constitutionality of the New Mexico statutes. S. KRAEMER, *supra* note 3, at 20 (Supp. 1981). For a more detailed discussion of this doctrine, see Note, *The Allocation of Sunlight: Solar Rights and the Prior Appropriation Doctrine*, 47 U. COLO. L. REV. 421 (1976).

Wyoming's recently enacted solar use legislation provides for local governmental regulation of solar access through a permit system, which by its terms appears very similar to zoning provisions. WYO. STAT. § 34-22-105 (Supp. 1981). However, permits are issued initially for only five year terms. *Id.*

For the most up-to-date compilation of state solar statutes, see National Heating and Cooling Information Center, *Solar Legislation* (periodically updated).

11. Berryhill & Parcell, *Guaranteeing Solar Access in Virginia*, 13 U. RICH. L. REV. 423 (1979); Eisenstadt & Utton, *Solar Rights and their Effect on Solar Heating and Cooling*, 16 NAT. RESOURCES J. 363 (1976); Reitze, *Solar Rights Zoning: Seeking New Law in Old Concepts*, 1976 WASH. U.L.Q. 375 (1976); Zillman & Deeny, *Legal Aspects of Solar Energy Development*, 1976 ARIZ. ST. L.J. 25; Note, *Securing Solar Energy Rights: Easements, Nuisance or Zoning?* 3 COLUM. J. ENVT'L L. 112 (1976); Note, *Assuring Legal Access to Solar Energy: An Overview with Proposed Legislation for the State of Nebraska*, 12 CREIGHTON L. REV. 567; Note, *Protecting Solar Access: Preventing a Potential Problem*, 7 GOLDEN GATE L. REV. 765 (1977). *Contra*, Moskowitz, *Legal Access to Light: The Solar Imperative*, 9 NAT. RESOURCES LAW., 177 (1976); Williams, *The Dawning of Solar Law*, 29 BAYLOR L. REV. 1013 (1977); Note, *Solar Rights and Restrictive Covenants: A Microeconomic Analysis*, 7 FORDHAM URB. L.J. 283 (1979); Note, *Solar Rights, Guaranteeing a Place in the Sun*, 57 ORE. L. REV. 94 (1977).

12. Connecticut, Maine, and Vermont. *See* note 10 *supra*. Note that the Vermont statute does not specifically refer to solar zoning, but is phrased in terms of zoning to "encourage protection and access of renewable energy resources." VT. STAT. ANN. tit. 24, § 4407(13) (Supp. 1981). The term "renewable energy resource" apparently is not defined by statute.

13. See 2 A. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION (C. Sands, 4th ed. 1973) for a general guide to determining legislative intent. Legislative histories were not available for use in this article. The theories expressed were developed exclusively by the author and were drawn from the extralegislative materials cited.

provisions.[14] This may indicate a general unawareness of the lack of common law access rights. Subsequently, many states augmented their tax incentive statutes to provide for access protection.[15] Perhaps this movement was spurred by demands of inadequately protected solar homeowners who suddenly found themselves with expensive equipment and no sunlight. Since twenty-three of the states enacted solar easement statutes,[16] one might conclude that local lawmakers consider that easements fully protect solar rights. Nevertheless, easements alone cannot assure solar access. The lack of a trend towards zoning remains unexplained, especially in view of commentators' strong support.[17]

I. HISTORY OF THE RIGHT-TO-LIGHT

The right-to-light dilemma occurred because of the inapplicability of the English doctrine of ancient lights to the United States. The doctrine evolved in the seventeenth century[18] to protect one's right to receive light across neighboring property. This doctrine entitled the receiving landowner, who met the prescribed period of uninterrupted use, a perpetual right to the reasonable use of sunlight.[19] The main

14. Of the 47 states that have enacted at least one form of solar legislation, only Missouri and Wyoming fail to include some form of tax incentive. For a detailed examination of state solar tax incentives, see Minan & Lawrence, *State Tax Incentives to Promote the Use of Solar Energy*, 56 TEX. L. REV. 835 (1978)

15. See Table I *infra*.

16. See note 10 *supra*.

17. See note 11 *supra*.

18. The rule was first stated in Aldred's Case, 77 Eng. Rep. (K.B. 1610).

19. *Id.* Myers v. Gemmel, 10 Barb. 537 (N.Y. Sup. Ct. 1851) gives a credible account of incidents that lead to the development of the doctrine. The court states that after the great London fire of 1666, the city was rebuilt with very narrow streets. As a matter of practical necessity, a presumption was raised from long uninterrupted use to protect access of light from sides and rears of buildings. *Id.* at 541. *See also* R. KERR, ON ANCIENT LIGHTS (London 1865). The author concludes that the doctrine of ancient lights creates a legal fiction because it presumes a grant from the servient landowner to the dominant (receiving) landowner from the mere fact of uninterrupted receipt of light for the statutory period.

The prescriptive period was first set at "time immemorial," but was gradually reduced to 20 years in 1832. For a discussion of the changes in the prescriptive period see Moskowitz, *supra* note 11, at 185. The author advocates returning to the doctrine of ancient lights as a partial solution to the present lack of common law protection of solar access. *See* note 81-83 and accompanying text *infra*. *See also* Prescription Act, 1832, 2 & 3 Will. 4, ch. 71, § 7 (1832) for the language of the first codified ancient lights statute. The Right to Light Act of 1959 is the current statutory provision that

disadvantage of the ancient lights doctrine is the lack of a "reasonable" use standard.[20] The English courts have been unable to develop a majority test, and it remains unclear whether an active solar collecting device would require more than a "reasonable" use of sunlight under the current English decisions.[21]

American courts originally accepted the ancient lights doctrine,[22] but between 1835[23] and 1939[24] every state rejected it as unsuited to a developing country because it inhibited economically sound land use practices.[25] These decisions effectively erased all common-law protection of sunlight access because, due to the earth's curvature, rotation, and path of orbit, nearly all light received in the United States is received at an angle over adjacent property.[26] In view of this failure

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incorporates the 20-year standard. The Right to Light Act, 1959, 7 & 8 Eliz. 2, ch. 56. *See also* Greene, *Securing Rights of Light*, 112 NEW L.J. 744 (1962).

20. *E.g.*, Colls v. Home & Colonial Stores, Ltd., [1904] A.C. 179, 185 (reasonable use is only for sufficient light and not for all light); Charles Semon & Co. v. Bradford Corp., [1922] 2 Ch. 737, 749 (court dismissed complaint where the worst lighted parts of the building received twice as much light at which ordinary people would complain about); Ough v. King, [1968] 3 All E.R. 859, 861 (court used the test of an inspection by the court as a hypothetical observer to determine the adequacy and reasonable use of light). *See also* note 21 *infra*. *See generally*, R. KERR, *supra* note 19.

21. For commentary on the English tests, see Wilkinson, *Let There Be More Light*, 118 NEW L.J. 7 (1968). The author discusses the common law standards, *see* note 20 *supra*, and analyzes the basic tests. The four tests currently recognized are: the grumble line, the 45 degree rule, the 50-50 test, and the hypothetical observer standard. The author concludes that these tests provide little guidance because of the lack of objective standards.

22. Story v. Odin, 12 Mass. 157 (1815) was the first American case brought under the ancient lights theory. The court concluded that it was unnecessary for the plaintiff to allege that his house was "ancient," but that he was entitled to prove an ancient right to the light and air easement. *Id.* at 159.

23. Parker v. Foote, 19 Wend. 309 (N.Y. Sup. Ct. 1838) lead the way in the states' rejection of the ancient light doctrine. For a list of the first case in each jurisdiction to reject the doctrine, see Moskowitz, *supra* note 11, at 188-89 n.60.

24. Lynch v. Hill, 24 Del. Ch. 86, 6 A.2d 614 (1939) is the last in the series of cases that rejected the ancient lights theory.

25. "[T]he old general rule [of ancient lights] . . . is not suitable to the conditions of a new growing and populous country, which contains many large cities and towns, where buildings are often necessarily erected on small lots." *Id.* at 95, 6 A.2d at 618. The Delaware court merely echoed the earlier courts' rationale, *e.g.*, Parker v. Foote, 19 Wend. at 317.

26. The latitude of the United States prevents direct sunlight from falling upon property at a vertical angle. Nearly all land is shaded during some daylight hours for most of the year. Hawaii is the only possible exception. Berryhill & Parcell, *Guaran-*

of judicial protection, the states turned to three private law concepts to protect solar property rights.

II. COMMON LAW SOLUTIONS

Easements are the most popular form of solar access protection. An easement is a privately negotiated right between landowners to protect certain uses and to benefit particular structures or parcels of land.[27] Easements, however, may be difficult to obtain in densely populated areas where negotiation necessarily involves several parties. In addition, easements may not be negotiated until after light blockage occurs. The solar homeowner must then either abandon the use of his equipment or pay a relatively expensive easement price to induce his neighbor to physically alter his property. This lack of foresight leads to poor bargaining conditions. Moreover, easements are purely voluntary and unwilling neighbors cannot be compelled to cooperate.[28]

Restrictive covenants produce easement-like results on a somewhat larger scale. A restrictive covenant is a recorded contractual agreement that limits the use of land and may prohibit specific uses.[29] Such agreements are also described as reciprocal negative easements.[30] This concept is most useful in subdivision developments where each lot buyer must agree to the covenant as a purchase condition.[31] Generally the original promise binds any subsequent taker

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teeing Solar Access in Virginia, 13 U. RICH. L. REV. 423 431 (1979). *See generally*, G. HAYES, SOLAR ACCESS LAW 16-17 (Environ. Law Inst. ed. 1979).

27. 5 R. POWELL, THE LAW OF REAL PROPERTY, ¶ 405 (1977 ed.). For a discussion of the history of light and air easements, see C. GALE, A TREATISE ON THE LAW OF EASEMENTS (10th ed. W. Byrne 1925); R. KERR, *supra* note 19; R. TYLER, A. TREATISE ON LAW OF BOUNDARIES AND FENCES (1874) (includes a chapter on the law of window lights).

The parties to an easement may fix any price to that right, but leasing and reciprocal agreements are permissible. G. HAYES, *supra* note 26, at 197. Although no data is available on the cost of solar easements, price is considered as the main deterrent to the widespread use of easements. *Id. See* S. KRAEMER, *supra* note 3, at 42.

28. *See generally*, G. HAYES, *supra* note 26, at 197; S. KRAEMER, *supra* note 3, at 42-43.

29. 5 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 154.02 (3d ed. 1975).

30. *Id. See, e.g.*, Weinstein v. Swartz, 3 N.J. 80, 86, 68 A.2d 865, 867 (1949) (universal character of restrictive covenant is dependent upon reciprocal or mutual burdens shared by each lot owner).

31. 5 N. WILLIAMS, *supra* note 29, § 154.01. *Accord*, G. HAYES, *supra* note 26, at 195.

with notice.[32] Many courts, however, impose technical requirements in order to bind later takers, for example: notice, presence of a dominant tenement, privity of estate, a promise that "touches and concerns" the land, and a solely negative obligation.[33] The uncertainty of a covenant's binding effect may seriously undermine its effectiveness in solar access law. Moreover, any term which imposes an affirmative obligation (such as to trim vegetation), may be stricken down by courts under the general rule that affirmative requirements render restrictive covenants void.[34]

Nuisance law presents the greatest potential to protect solar property rights, but no state has acted to resolve the vast complexity of nuisance principles as applied to solar access. For example, it is unclear whether solar access rights would be best protected under public or private law, especially in cases of intentional blockage of air and light.[35] Recent cases indicate a continued judicial reluctance to grant private nuisance relief absent actual ill-will or malice.[36] The economic consequences, as in *Fountainebleu v. Forty-five Twenty-five*,[37]

32. 5 N. WILLIAMS, *supra* note 29, § 154.02.

33. *Id.* § 154.03.

34. There is no sound basis for distinguishing between a prohibition of certain uses of land and the requirement of an affirmative action in modern society. *Id.* § 154.08. *See, e.g.*, City of New York v. Turnpike Dev. Corp., 36 Misc. 2d 704, 233 N.Y.S.2d 887 (1962), where the Supreme Court said that even though the agreement in question constituted an affirmative duty, the distinction between negative and affirmative agreements was immaterial.

35. A public nuisance is one that interferes with the community's interest, comfort, or convenience, and must not be limited to the inconvenience of just a few individuals. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). To be framed as a public nuisance action, blockage of sunlight must be declared contrary to public health and general welfare by the state legislatures.

See S. KRAEMER, *supra* note 3, at 117-22 for a discussion of the possible constitutional barriers to declaring shadows as public nuisances; see G. HAYES, *supra* note 26, at 174-79 for a more detailed comparison of private and public nuisance law and a discussion of the inapplicability of trespass law to solar access questions.

36. *E.g.*, Sundowner, Inc. v. King, 95 Idaho 367, 509 P.2d 785 (1973) (court held that the existence of an apparent "spite fence" or wall was not sufficient to support a private nuisance action unless actual ill-will could be shown). For a more detailed discussion of modern nuisance law and light access questions, see Note, *Obstruction of Sunlight as a Private Nuisance*, 65 CALIF. L. REV. 94 (1977).

One commentator sees the *Sundowner* case as affording little aid to solar access law because of the practical difficulty in establishing actual malice. Kraemer, *Solar Rights*, 3 COLO. LAW. 665, 666 (1974).

37. 114 So. 2d 357 (Fla. Dist. Ct. App. 1959). The parties were adjacent luxury hotels in Miami Beach, Florida. The Eden Roc hotel sought to enjoin construction of a high-rise addition to the Fountainebleu by alleging the defendant purposely

can be staggering. In that case, the court refused to prevent a resort hotel owner from building a multi-story addition which would shade an adjacent hotel's pool area during the afternoon hours.[38]

III. PUBLIC LAW SOLUTIONS

Solar easements are the most common method of protecting the right to sunlight in the United States, with twenty-three legislatures having adopted this form.[39] The states' provisions are fairly uniform in setting standards and definitions for solar easements and their contents.[40]

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planned to shade the Eden Roc pool area during the afternoon hours. Eden Roc also claimed an implied easement of light and air. The trial court temporarily enjoined the construction, basing its decision solely on nuisance law. The Fontainebleu had no right to use its property to injure others according to the trial judge. The district court of appeals reversed, stating that there is no legal right to the free flow of light and air; therefore, no cause of action for damages or injunctive relief under nuisance law will stand. The court emphasized that the Fountainebleu could use its property in *any* manner regardless of injury to other parties. *Id.* at 359.

38. *Id.* at 360.

39. *See* note 10 *supra* and Table I *infra*. Thirteen states rely solely on easements to protect solar access rights.

40. The Colorado provisions are typical:

(1) "Solar Easement" means the right of receiving sunlight across real property for any solar energy device. Such a right may be stated in any deed, will, or other instrument executed by or on behalf of any owner of land sky space.

(2) "Solar energy device" means a solar collector or other device or a structural design feature of a structure which provides for the collection of sunlight and which comprises part of a system for the conversion of the sun's radiant energy into thermal, chemical, mechanical, or electrical energy.

. . . .

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 conveyancing and instrument recording requirements as other easements, except that a solar easement shall not be acquired by prescription.

. . . .

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

(a) A description of the vertical and horizontal angles, expressed in degrees together with any pertinent hourly, diurnal, or seasonal variations thereof, and measured from the site of the solar energy device, within which the solar easement extends over the real property subject to the solar easement, or any other description which defines the three dimensional space or the place and time of day in which an obstruction to direct sunlight is prohibited or limited;

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

(c) Any provisions for compensation of the owner of the property benefitting

Several states have cast solar easements in the more narrow scope of "solar skyspace" easements.[41] Solar skyspace is that area of the atmosphere between the solar collector and the sun which must remain unobstructed during certain daylight hours to allow maximum collection.[42] These easements impose minimum restrictions on the burdened land. A tree or structure that does not cast a shadow during specified daylight hours will not violate the easement. Under a general solar easement, an obstruction that shades the collector during any daylight hour would technically violate the easement.[43]

State legislatures have addressed restrictive covenants in a slightly different manner. Seven states statutorily prohibit the use of restrictive covenants that bar the use of solar collecting devices.[44] It is unclear whether these statutes would also void covenants that prohibit unsightly rooftop additions in the form of solar collectors.[45]

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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;

(d) The restrictions placed upon vegetation, structures and other objects which would impair or obstruct the passage of sunlight through the easement. COLO. REV. STAT. §§ 38-32.5-100.3 to -102 (Supp. 1980).

41. *E.g.*, ILL. ANN. STAT. ch. 96½ § 7303(f) (The Comprehensive Solar Energy Act of 1977, P.A. 80-430) (Smith-Hurd 1979); UTAH CODE ANN. § 57-13-1(4) (Supp. 1981).

42. "Solar Skyspace means the space between a solar energy collector and the sun which must remain unobstructed such that on any given clear day of the year, not more than 10 percent of the collectible insolation shall be blocked." UTAH CODE ANN. § 57-13-1(4) (Supp. 1981).

43. S. KRAEMER, *supra* note 3, at 33-42.

44. ARIZ. REV. STAT. ANN. § 9-461.05 (Supp. 1981); CAL. GOV'T CODE § 65850.5 (Deering Supp. 1981); COLO. REV. STAT. § 38-30-168 (Supp. 1980); FLA. STAT. ANN. § 163.04 (West Supp. 1982); ME. REV. STAT. ANN. tit. 30, § 4956 (Supp. 1981); MD. REAL PROP. CODE ANN. § 2-119 (1981); OR. REV. STAT. § 105.880 (1979).

45. For example, the Colorado statute provides an important caveat: "[T]his section shall not apply to aesthetic provisions which impose reasonable restrictions on solar energy devices and which do not significantly increase the cost of the device." COL. REV. STAT. § 38-30-168(2) (Supp. 1980). This provision will require substantial judicial interpretation of the terms "reasonable" and "significantly increase of cost." *But cf.*, Kraye v. Old Orchard Ass'n., No. C 209453 (Super. Ct. L.A. Co., Sept. 13, 1978) (interpreting the California statute) discussed in 7 FORDHAM URB. L.J., *supra* note 11, at 289-98. The plaintiff challenged a restrictive covenant that barred rooftop additions, and thus included solar collecting plates. The court granted relief based upon the California statute that bars enforcement of covenants that prohibit solar devices.

In the absence of specific state action, private regulation of aesthetic conditions by using restrictive covenants has found court approval. In Kirkley v. Seipelt, 212 Md.

Zoning is the traditional public law land use tool[46] that regulates development by classifying property according to its suitability for certain uses.[47] Twelve states have enabling legislation that allows local governments to zone for solar access.[48] Solar zoning appears to

127, 128 A.2d 430 (1957), the Maryland Court of Appeals upheld a restrictive covenant that barred permanent awnings. The court held that since the covenant was designed to secure a better neighborhood with aesthetic surroundings, it was not void for indefiniteness. *Id.* at 132-33, 128 A.2d at 433.

See also Winslette v. Keeler, 220 Ga. 100, 137 S.E.2d 288 (1964) where the court held that a covenant to uphold the subdivision's high standards is not harmful to the public welfare. *Id.* at 101, 137 S.E.2d at 289.

46. Zoning was first used in 1916 in New York City to compensate for the private sector's failure to develop the community to meet public needs. For the history of the early New York ordinances and a synopsis of the changes of that city's zoning laws, see Note, *Securing Solar Rights: Easements, Nuisance or Zoning?* 3 COLUM. J. ENVT'L L. 112, 140-52 (1976).

47. 101A C.J.S. *Zoning* § 2 (1979). Zoning regulates land use to conform with a complete, long-term plan, but the term zoning is not synonomous with planning. Perhaps Justice Keating issued the most eloguent definition of zoning:

> Zoning is not just an expansion of the common law of nuisance. It seeks to achieve much more than the removal of obnoxious gases and unsightly uses. Underlying the entire concept of zoning is the assumption that zoning can be a vital tool for maintaining a civilized form of existence only if we employ the insights and the learning of the philosopher, the city planner, the economist, the sociologist, the public health expert and all the other professions concerned with urban problems.

Udell v. Haas, 21 N.Y.2d 463, 469, 235 N.E.2d 897, 900, 288 N.Y.S.2d 888, 893 (1968).

48. *See* note 10 *supra* and Table I *infra*. Local governments have no inherent authority to zone property. Each state must delegate the use of its police power to local governments before local zoning ordinance is valid. Of course, the municipality may only act in the manner prescribed by the enabling legislation. The police power has traditionally been applied to the protection of the public health, safety, morality, peace, and orderliness of a community, but it is not limited to these categories. Berman v. Parker, 348 U.S. 26, 32 (1954), cited with approval in Village of Belle Terre v. Boraas, 416 U.S. 1, 5-6 (1974).

Zoning itself is a constitutional delegation of the state's police power under Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). The court held that for the ordinance to be declared unconstitutional it must be clearly arbitrary and ambiguous, and bear no substantial relationship to the public health, safety, morals, and general welfare. *Id.* at 395.

Note also that there must be a substantial relationship between the ordinance and the purposes for which it was enacted. Nectow v. City of Cambridge, 277 U.S. 183 (1928). The municipality may only exercise such power as has been delegated to it, and then only to the extent and manner of that delegation. Lutz v. City of Longview, 83 Wash. 2d 566, 520 P.2d 1374 (1974). If the ordinance does not have a substantial relationship to the statutory purpose, it is an arbitrary exercise of the police power and therefore is void. DeSena v. Gulde, 24 A.D.2d 165, 171, 265 N.Y.S.2d 239, 246 (1965).

afford superior protection to solar rights because the local board can tailor it to the needs of the entire community. Also, zoning ends the need for a privately negotiated agreement and provides a comprehensive standard to encompass residential, business, and industrial needs.[49] Nevertheless, zoning's inherent political and constitutional problems may hinder its application to solar access.

Zoning is widely criticized for limitations inherent in the local political process;[50] specifically the presence of unknowledgeable local officials who disregard the advice of nonlocal planners.[51] Given the newness of solar technology and its slow growth,[52] many zoning boards may lack detailed solar data. Professional city planners should provide the technical expertise, but when they are board employees, planners are subject to political pressures and may acquiesce to their employer's self-serving demands.[53]

The zoning process may also lack sufficient public input at the hearing stage because "small-interest"[54] community members rarely participate.[55] This issue is especially troublesome in solar zoning proposals because those homeowners who do participate may be unable to present accurate, technical data.

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49. *See* notes 27 & 28 and accompanying text *supra*.

50. *See, e.g.*, R. LINOWES & D. ALLENSWORTH, THE POLITICS OF LAND USE 59-66 (1973) (neighborhoods organize to protect single family areas from unwanted uses, and often pressure public officials, who, in an effort to retain their elected position, make compatible zoning decisions); B. SIEGAN, LAND USE WITHOUT ZONING 3 (1972) (Zoning is custom designed to frustrate its own noble goals because decisions are entrusted to local, unqualified elected officials).

51. *See generally*, R. LINOWES & D. ALLENSWORTH, *supra* note 50, at 58-80; D. MOSKOWITZ, EXCLUSIONARY ZONING LITIGATION (1977) 5-11;B. SIEGAN, *supra* note 50, at 3-21.

52. Residential use of active solar energy systems was first advocated in 1970. Tybout & Lof, *Solar House Heating*, 10 NAT. RESOURCES J. 268 (1970). Nevertheless, Americans have only begun to investigate the potential of solar energy use, and it is uncertain whether former President Carter's goal of two and one half million solar homes by 1985 will be met. National Energy Program, 13 WEEKLY COMP. PRES. DOC. 566-67 (Apr. 20, 1977).

53. See B. SIEGAN, *supra* note 50 at 3-9 for a general discussion of the zoning procedure.

54. R. LINOWES & D. ALLENSWORTH, *supra* note 50, at 64-65; B. SIEGAN, *supra* note 50, at 9-11, 142-44. Both authorities agree that zoning is "rigged" and that due to the elective process, powerful interest groups control public officials.

55. B. SIEGAN, *supra* note 50, at 9. *Contra*, R. LINOWES & D. ALLENSWORTH, *supra* note 50, at 66-67 (the powerful interest group is actually comprised of suburban homeowners, who, as a group, tend to dominate metropolitan zoning boards. This group's goal is to preserve their existing neighborhoods).

Commentators criticize local officials for their general willingness to accomodate influential applicants.[56] Where an existing ordinance benefits principally a weak political group—solar homeowners—a more powerful group could cause the board to restrict or rescind solar access rights.[57] Uncertainty over the continued existence of access ordinances may discourage investment in solar equipment in municipalities with a history of frequent rezoning.

Commentators also accuse local zoning boards of delaying community growth instead of fostering planned development.[58] Such boards address the solar access problem only when a controversy arises on an ad hoc basis. This "wait and see"[59] attitude is unlikely to provide comprehensive, well-reasoned, solar use protection.

Constitutional challenges can pose another problem in solar zon-

56. *E.g.*, D. MOSKOWITZ, *supra* note 50, at 7. In theory, the identity of individual developers is irrelevant to the application of zoning laws because zoning is a land use tool. In reality, zoning does not function as a planning mechanism, but is used to restrict the development of land and place it in a holding use. As a result, most development results from rezoning, or "changing the rules" so that a particular applicant may complete a project. *Id.* at 9-10.

57. Zoning, as a land use tool, is specifically recognized to provide for an area's future growth. *See, e.g.*, Wilbur v. City of Newton, 302 Mass. 38, 44, 18 N.E.2d 365, 368 (1938) (zoning must change with society and it is proper to take future developments into consideration); Bzovi v. City of Livonia, 350 Mich. 489, 496, 87 N.W.2d 110, 113 (1957) (the mere use of the term "zoning" automatically implies some consideration of the future); Schmidt v. Board of Adj. of Newark, 9 N.J. 405, 409, 88 A.2d 607, 611 (1952) (the police power must include a vast reservoir of governing powers as to be equal to the obligation to govern). Therefore, today's new development, solar access, could easily be supplanted with tomorrow's perceived needs.

58. R. LINOWES & D. ALLENSWORTH, *supra* note 50, at 67-69 (many zoning officials interviewed by the authors said that their ideal zoning plans would include no new residents); D. MOSKOWITZ, *supra* note 50, at 7 (zoning is used to retard community growth by excluding prospective residents). *See* Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971) (city purposely restricted sewer and water capacity to retard development; court found racially discriminatory motives for these and other zoning actions that were contrary to the planning expert's recommendations); Golden v. Town Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), *cert. denied*, 409 U.S. 1003 (1972) (court upheld an amendment to zoning ordinances for strict subdivision growth control because of the strong presumption of validity accorded to zoning acts and the lack of contrary evidence).

59. *E.g.*, Fritts v. City of Ashland, 348 S.W.2d 712 (Ky. Ct. App. 1961) (most zoning boards simply wait until a property owner asks for a variance; then they rezone to defeat the true zoning purpose—planning); Eves v. Zoning Bd. of Adjustment, 401 Pa. 211, 164 A.2d 7 (1960) (officials make decisions on a case by case basis and shift their focus "from planned land use to individual solicitation").

ing.[60] Procedural due process challenges would not arise so long as the local ordinance is drafted in accordance with the enabling legislation,[61] since it is unlikely that a solar ordinance could deprive property owners of all reasonable uses.[62] Moreover, equal protection claims[63] appear at first inapplicable to solar zoning ordinances since

60. Constitutional issues concerning zoning are usually dealt with in state courts, notwithstanding the need for uniform resolution of these important federal questions. D. MOSKOWITZ, *supra* note 51, at 6, 85-88. The author concludes that the United States Supreme Court's reluctance to hear zoning cases has prevented the lower federal courts from resolving constitutional questions. By refusing to give legal guidance to the district courts, the Supreme Court has effectively relegated most zoning cases to state courts. The Supreme Court is also faulted for deciding zoning cases on very narrow grounds and thus evading the constitutional issues. For example, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) was decided on narrow police power grounds, and Warth v. Seldin, 422 U.S. 490 (1975) was decided on the standing question alone. D. MOSKOWITZ, *supra* note 51, at 88.

61. Due process claims under a zoning ordinance usually involve the substantive issue that it deprives the property owner of his property without due process of law. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1925). Nevertheless, procedural due process claims are appropriate to challenge the ordinance as improperly enacted. *See generally*, Cunningham, *Land Use Controls—the State and Local Programs*, 50 IOWA L. REV. 367 (1965)). Generally, these challenges allege that the ordinance involves an improper purpose, an unauthorized manner of achieving the purpose, burdensome restrictions that deprive the owner of all reasonable use, or that the ordinance is arbitrary in relation to its purpose.

62. These four considerations are often lumped together in a charge that the ordinance is "unreasonable." This challenge invokes a two-pronged test that: (1) there is no reasonable government interest in the zoning plan, or (2) the ordinance is unreasonable because it is arbitrary and unfounded under legitimate land use practices. Kropf v. City of Sterling Heights, 391 Mich. 139, 158, 215 N.W.2d 179, 186-87 (1974).

The reasonableness test must be viewed in light of existing community problems and the physical characteristics of the locality. J.D. Constr. Co. v. Board of Adjustment, 119 N.J. Super. 140, 290 A.2d 452 (1972). Reasonableness must be measured by present conditions and not on future suppositions. Gust v. Township of Canton, 342 Mich. 436, 442, 70 N.W.2d 772, 774 (1955). For classic examples of unreasonable restrictions on property, see 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING, § 4.03 (4th ed. 1975).

63. Equal protection claims contend that the zoning ordinance discriminates against a group or class when there is no reason for different treatment, and thus denies that class equal protection under the laws. Such claims are difficult to establish in zoning cases because, since no two land tracts are identical, the plaintiff bears a heavy burden to prove the properties are enough alike to require equal treatment. The traditional equal protection test requires that all legislation bear a reasonable relationship to a legitimate governmental function and that the classification be reasonable and not arbitrary. Most statutes are presumed valid except when the class is based on suspect criterion, involves fundamental interests, or the conduct in question has the effect of furthering a pattern of discrimination. In these cases, courts require a compelling state interest in order to uphold the statute. Suspect criteria include race,

similarly situated property owners are equally treated.[64]

Nevertheless, due process and equal protection claims will arise when solar zoning implements an improper purpose, such as discrimination in favor of single family residences, which discourages the growth of other uses.[65] Moreover, by prescribing minimum lot sizes and maximum building height requirements,[66] a solar ordinance could effectively prevent construction of any multi-story or low income housing units, thereby inhibiting the influx of less affluent residents into the area.[67]

Despite this potential for abuse, the Supreme Court would probably find solar zoning constitutional on grounds similar to those in

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national origin, alienage, and illegitimacy. Fundamental interests include voting, the right of association, privacy and procreation, access to courts, and possibly the right to travel and the right to decent housing. For more detailed treatment of equal protection claims and litigation, see D. MOSKOWITZ, *supra* note 50, at 97-100.

64. The wide scope of the police power's protection of public health, safety, and general welfare should easily encompass solar energy rights.

65. R. LINOWES & D. ALLENSWORTH, *supra* note 50, at 71-72; D. MOSKOWITZ, *supra* note 50, at 10.

66. Large lots are more expensive, but larger lots effectively prevent shadows from obstructing collecting devices by providing a bigger buffer around the collector site. By limiting building heights, and thereby shadow length, the large lot-maximum heights requirements do provide a simple method of solar access protection. This combination of requirements is mostly likely to be employed by zoning boards who seek to preserve residential neighborhoods.

Lot size requirements are arbitrary exercises of the police power if the size requirement bears no rationale relationship to public health and safety. Aronson v. Town of Sharon, 346 Mass. 598, 195 N.E.2d 341 (1964). The question remains whether solar access presents a sufficient health reason to uphold a large lot requirements. The answer will depend upon the willingness of courts to examine motives behind such ordinances.

Fiscal zoning may also include the goal of preserving neighborhood schools. Presumably, multistory residential buildings house families who contribute less to the tax revenues than single family residents, but whose children create a greater burden of the existing school systems. Since the public schools are financed in a large part by property taxes, single family home owners bear a disproportionate burden in the education of children who live in multi-family dwellings. *See* R. BABCOCK, THE ZONING GAME 127-28 (1940 ed.); 1 A. RATHKOPF, *supra* note 62, at § 4.03.

67. If solar energy use is considered advantageous by developers of multi-family units because of the federal and state tax and loan incentives, a zoning board could deter such developments by limiting solar access. The tax incentives are important in encouraging solar use: A California builder recently received $312,000 in solar tax credits on a 95 unit solar apartment complex. That sum represented more than the builder's anticipated profits on the project. NATIONAL GEOGRAPHIC, *supra* note 1, at 47, 49.

Agins v. City of Tiburon.[68] There the Court unanimously held that "open space" zoning was a proper government function and did not deprive landowners of reasonable use of their property.[69] The city ordinance involved in *Agins* specified large lot sizes to prevent intensive residential development that would ultimately destroy the scenic view overlooking San Francisco Bay.[70] The court found that the ordinance was within a legitimate government interest in discouraging "premature and unnecessary conversion of open land space to urban areas."[71] In essence, solar zoning can be viewed as simply a species of open space zoning[72] since the availability of light is directly facilitated by limiting intense urban development.[73]

Solar zoning raises some novel issues that inhere in any zoning plan. Solar zoning ordinances can conflict with other local ordinances which prohibit unsightly rooftop additions. If the zoning board fails to address the conflict, offended landowners will demand the removal of collecting devices.[74] This conflict will provide addi-

68. 447 U.S. 255 (1980).

69. *Id.* at 259.

70. *Id.* at 258.

71. *Id.* at 261. For further analysis of this case, see Note, *Municipal Open Space Ordinance Not a "Taking" of Property: Agins v. City of Tiburon*, 13 CONN. L. REV. 167 (1980).

72. See Kusler, *Open Space Zoning: Valid Regulation or Invalid Taking?*, 57 MINN. L. REV. 1 (1972) for a thorough discussion of the economic consequences of the different types of open space zoning.

The open space concept encompasses several types of protected uses and therefore the *Agins* decision should apply by analogy to agricultural, coastal, floodplains, and wetlands land uses. *E.g.*, Louthan v. King County, 94 Wash. 2d 422, 617 P.2d 977 (1980) (farmland use); People v. Superior Court, 91 Cal. 3d 95, 598 P.2d 844, 154 Cal. Reptr. 54 (1979) (coastal use); Krahl v. Nine Mile Creek Watershed District, — Minn. —, 283 N.W.2d 538 (1979) (flood plain uses).

Solar zoning fits into the open space zoning rationale because both infringe upon property rights and restrict land use to further community goals by preserving resources. Arguably, sunlight access requires greater protection because of its very limited availability each day.

73. The need for sunlight protection as a fuel source is analogous to the need to preserve farmland for food supplies. While aparently no court has considered solar access in the context of the open space cases, it may be argued that same protection should be accorded to solar rights. Sunlight is a finite resource that may be used to provide an essential commodity—heat. Farmland, in comparison, also is a limited resource which also produces essential foodstuffs. Both sunlight's and farmland's productivity are threatened by urbanization because intensive development reduces the availability of the supply of each resource.

74. Generally, a municipality may zone for aesthetic objectives, but aesthetic purposes alone are an insufficient basis for an ordinance. See 1 A. RATHKOPF, *supra* note

tional uncertainty for solar homeowners, especially those who pioneer in the use of unusual devices such as collector panels located on front lawns.[75]

Solar zoning could be the source of an additional tax assessment for the homeowner, because real property is traditionally taxed according to its use and value.[76] Airspace easements are usually taxed to the owner of the underlying property on the theory that the airspace immediately above one's land remains a separate, valuable part of the property value.[77] The assessment of zoned airspace would have to fall on the beneficiary of the easement to be equitable. This adds an additional cost to the already high initial price of solar energy. A zoning board could deter all solar use by setting a prohibitive tax rate on zoned airspace.[78]

As illustrated, neither private nor public law offers a total solution to the solar access problem. Nevertheless, until government fashions new modes of solar access protection, existing property and land use concepts must be integrated to assure adequate solar access to those willing to assume the investment risks.[79]

62, at § 14.01. On the other hand, the Supreme Court has recognized that beautification is properly within the scope of the police power. "It is within the power of the legislature that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." Berman v. Parker, 348 U.S. 26, 32-33 (1954). This dictum was reiterated in Village of Belle Terre v. Boraas: "It [police power] is ample to lay out zones where family values, youth values and the blessing of quiet, seclusions and clean air make the area a sanctuary for people." 416 U.S. 1, 5-6 (1974). These two decisions may provide a basis for continued zoning for aesthetic purposes.

75. *E.g.*, D'Aurio v. Board of Zoning Appeals, 401 N.Y.S.2d 425, 92 Misc. 2d 898 (1978). The plaintiff sought a zoning variance to permit installation of a solar collecting unit on his front lawn. The ordinance required a minimum 50 feet setback for all structures. The court held that the plaintiff did not demonstrate economic injury or practical difficulty, but at the most only established personal inconvenience.

76. Property classified for different types of uses, such as residential, agricultural, or commercial, is taxed according to that use. *See* G. HILLMAN, RESHAPING STATE AND LOCAL TAX STRUCTURES 20-25 (1973).

77. *See generally* Note, *Taxation of Easement in Airspace*, 33 MD. L. REV. 159 (1973) which discusses the leading case, Macht v. Department of Assessments, 266 Md. 609, 296 A.2d 162 (1972). The *Macht* court held that airspace could be valued for assessment purposes.

78. *See generally* G. HILLMAN, *supra* note 76, at 39-45. High rates of taxation are generally used to deter certain activities or to control the supply of the articles.

79. This is not a novel concept; legal commentators have advocated combining existing concepts and completely reworking the legal principles to afford more precise solar access rights. *See, e.g.*, S. KRAEMER, *supra* note 3, at 229. *See generally*, Ellick-

IV. CONCLUSION

Easements are most successful in rural and low population areas where the bargaining process involves few parties. Since easements are currently the most popular form of solar protection, this concept will continue to dominate in sunlight protection statutes.[80]

One commentator suggests that a revised application of the "ancient lights" doctrine may solve the access problem by allowing a negative prescriptive easement for the reasonable use of light.[81] Arguably, the reason for the doctrine's rejection (slowing of urban growth) is outweighed by the need for alternative energy sources. A narrowly drawn solar access easement providing for unimpeded light flow to collecting panels would avoid much of the current British problem of defining "reasonable" use.[82]

An updated ancient lights theory could provide a more flexible prescriptive period to afford maximum protection to existing solar homeowners and still encourage initial adoption of solar use.[83] For example, the prescriptive period might be shortened to five or ten years, depending on a homeowner's present use of solar energy. A homeowner who had previously installed solar equipment or designed a passive structure would be entitled to the shorter prescriptive period in order to protect his investment. Therefore, anyone with a solar system in place who had enjoyed unimpeded access to sunlight for five years automatically would be awarded a prescriptive easement. A homeowner without a solar collecting system who had received uninterrupted light for the longer prescriptive period could gain an easement by installing solar devices. Of course, this simpli-

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son, *Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 730; M. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW (1977).

80. Easements are a well-known, readily accepted way to protect a use in another's property, and a solar easement does not create any new conceptual theories. Instead, a solar easement merely applies a recognized property tool to a very old use. *See generally*, S. KRAEMER, *supra* note 3 at 36-42.

81. Moskowitz, *supra* note 11, at 183-84. *See* notes and accompanying text, *supra*. The doctrine of ancient lights was rejected because it might serve to inhibit land development in the United States. *See* notes and accompanying text, *supra*. Reasonable use must include passive and active uses of insolation to prevent denial of access to structures specifically designed to capture natural radiation. Passive use must be carefully and comprehensively defined to prevent litigation.

82. *See* note 20 and accompanying text, *supra*.

83. Moskowitz, *supra* note 11, at 203-04.

fied example does not fully address the complexities of such a novel approach, but only serves to identify how solar easements and the doctrine of ancient light could work together to provide more comprehensive solar access protection.[84]

In newly developing areas, positive restrictive covenants may provide the most useful, low cost solution.[85] State legislatures must be encouraged to void those negative restrictive covenants that ban solar collecting devices on aesthetic grounds.[86]

Nuisance law offers the greatest common law potential for assuring comprehensive solar access, and interference with an established solar use should be recognized as a valid cause of action. If the courts allow such a claim, property owners will block sunlight only at the risk of incurring a law suit. One commentator suggests that the burdened landowners will perceive alternative uses as more economically efficient than the costs of litigation.[87] Therefore, private parties will develop their properties more efficiently than the local government through zoning.

The ultimate expansion of nuisance law would lead to a declaration of solar obstructions as public nuisances. It is unlikely that light blockage will create a statutory nuisance at this time since the limited use of solar devices presents no incentive for legislatures to act.[88] Nevertheless, as energy needs increase, the right to receive sunlight may be perceived as a fundamental property right deserving constitutional and statutory protection.

These common law solar access solutions do not completely displace solar zoning. Zoning remains the only feasible method to assure access in congested urban areas. Many of the zoning abuses are typical of "small town" zoning boards. Perhaps the experience and professional attitudes of urban zoning commissions will curb the potential abuses in solar zoning. In theory, zoning is the ultimate land

84. For more detailed analysis of the "modern lights" concept, see 9 NAT. RESOURCES LAW, *supra* note 11, at 184-201.

85. *See* notes 31-33 and accompanying text *supra*.

86. In addition, qualifying provisions similar to those in the Colorado Statute, *supra* note 45, must be carefully and precisely defined.

87. *See* Ellickson *supra* note 79, at 701. The author concludes that the private landowners can resolve land use disputes among themselves more quickly and less expensively than an administrative agency that is buried in bureaucratic inefficiencies.

88. *See* notes 35, 36 and accompanying text *supra*.

use tool and, with an informed zoning board, it could well provide adequate access to sunlight.

Sally J. McKee

TABLE 1

State	Tax Incentive	Basement	Zoning	Res. Cov.	Tax-Year Stat.	Year-Land Use Stat.
Alabama	X				1977	
Alaska	X				1977	
Arizona	X		X	X	1979	1979
Arkansas	X				1980	
California	X	X		X	1976	1978
Colorado	X	X	X	X	1979	1979
Connecticut	X		X		1976	1978
Delaware	X				1978	
Florida	X	X		X	1979	1978
Georgia	X	X			1976	1978
Hawaii	X				1976	
Idaho	X	X			1976	1978
Illinois	X	X			1975	1977
Indiana	X	X			1974	1980
Iowa	X				1979	
Kansas	X	X			1976	1977
Louisiana	X				1978	
Maine	X		X	X	1977	1979
Maryland	X	X		X	1975	1977
Massachusetts	X				1978	
Michigan	X				1976	
Minnesota	X	X	X		1978	1978
Mississippi	X				1979	
Missouri		X				1980
Montana	X	X			1975	1979
Nebraska	X	X	X		1980	1979
Nevada	X	X			1977	1979
New Hampshire	X				1977	
New Jersey	X	X			1977	1978
New Mexico	X		X		1975	1977
New York	X	X			1977	1979
North Carolina	X				1977	
North Dakota	X	X			1975	1977
Ohio	X	X			1979	1979
Oklahoma	X				1980	
Oregon	X	X	X	X	1977	1979
Rhode Island	X				1980	
South Carolina	X				1980	
South Dakota	X					1978
Tennessee	X	X	X		1978	1979
Texas	X				1975	
Utah	X	X			1980	1979
Vermont	X		X		1976	1980
Virginia	X	X			1977	1978
Washington	X	X	X		1980	1979
Wisconsin	X				1979	
Wyoming	X	(permit system)				