Fordham Urban Law Journal

Volume 7 | Number 2 Article 3

1979

Solar Rights and Restrictive Covenants: A Microeconomic Analysis

Arto Becker

COMMENTS

SOLAR RIGHTS AND RESTRICTIVE COVENANTS: A MICROECONOMIC ANALYSIS

I. Introduction

The conflict between an individual preference to freely use one's own property and a collective agreement which circumscribes that freedom is as significant as the issue of access to sunlight,[1] an issue which has thus far received greater attention.[2] Private agreements between landowners, designed to enhance the general quality of the neighborhood, may impede the use of solar devices and affect devel-

---

1. A homeowner who installs a solar energy system has no recourse when a neighbor builds a structure which blocks out the sunlight. As a general proposition, property owners do not have a right to receive the sunlight which beams across the property of another. The right to receive sunlight is restricted to the light falling perpendicularly on one's land. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 13, at 69-73 (4th ed. 1971). There is a narrow exception to the rule that one has an unrestricted right to the sunlight falling directly over land. This is the situation where shadows are cast by aircraft. *See* United States v. Causby, 328 U.S. 256 (1946). In *Causby*, the Supreme Court rejected the ancient doctrine that a landowner owned an unrestricted right to all the airspace above the land. *See* notes 90-93 *infra* and accompanying text.

2. To insure access to sunlight, scholars have suggested the use of established legal principles as well as the creation of new statutory rights. *See* 1977 ENVIRONMENTAL LAW INSTITUTE, SOLAR ACCESS AND LAND USE: STATE OF THE LAW; Becker, *Common Law Sun Rights: An Obstacle to Solar Heating and Cooling*, 3 J. OF CONTEMP. L. 19 (1976); Eisenstadt & Utton, *Solar Rights and their Effect on Solar Heating and Cooling*, 16 NAT. RESOURCE J. 363 (1976); Moskowitz, *Legal Access to Light: The Solar Energy Imperative*, 9 NAT. RESOURCE LAW. 177 (1976); White, *The Allocation of Sunlight: Solar Rights and the Prior Appropriation Doctrine*, 47 UNIV. COLO. L. REV. 421 (1976); Zillman & Deeney, *Legal Aspects of Solar Energy Development*, 1976 ARIZ. ST. L.J. 25 (1976); Comment, *Solar Rights: Guaranteeing A Place in the Sun*, 57 ORE. L. REV. 94 (1977). The solutions offered include: reviving the "Doctrine of Ancient Lights," which provides for an easement to light by prescription; construing the casting of shadows on a neighbor's land as a public nuisance; allowing homeowners to contract with neighbors for an express easement to sunlight; applying by analogy, the law of water rights utilizing the reasonable use or prior appropriation formula; provide for the free transfer of development rights; and, easing certain zoning restrictions which limit the use of solar energy systems or prevent southern exposure of roof tops. Because many of these solutions pose greater problems than they solve, solar advocates have focused their efforts on state legislatures to enact new laws to protect solar access. These efforts have proved successful in several states. COLO. REV. STAT. § 38-32.5-101 (1974); MD. REAL PROP. CODE ANN. § 2-218(b)(7) (Cum. Supp. 1978); N.D. CENT. CODE § 47-05-01.1 (1978); OR. REV. STAT. § 215.055 (1978). The problem of solar access may not be as acute as it theoretically appears; the complete absence of litigation in this area suggests that neighbors may be more amiable than the problem presumes. One writer has suggested, "if a duty not to obstruct the access to light exists, a [parabolic] reflector . . . could conceivably be annexed to the otherwise obstructing building and thereby perpetuate the access to light." Moskowitz, *supra* at 192.

opment of solar energy.[3] This Comment will evaluate the enforceability of restrictive covenants in light of the claim that solar energy should be exploited as a means toward ameliorating the present energy crisis. This analysis will be based upon an economic model of property rights formulated by Professors Ellickson,[4] Coase,[5] Calabresi and Melamed.[6] Although courts rarely explicitly employ economic criteria in their evaluation of land-use conflicts, the effort to promote an efficient allocation of resources pervades property law, as it does other legal doctrines.[7]

II. The Economic Model of Land-Use Planning

Economists generally believe that if the economic market remains free of imperfections and intervention by the government, private transactions will allocate resources optimally.[8] Under theoretically ideal competition,[9]

> where all prices end up equal to marginal costs, where all factor-prices end up equal to values of marginal products and all total costs are minimized, where the genuine desires and well-being of individuals are all represented by their marginal utilities as expressed in their dollar-voting—then the resulting equilibrium has the efficiency property that you cannot make any one man better off without hurting some other man.

Essentially, a planner could not design a solution different from the laissez-faire one which could improve the welfare of all.

Land development markets, however, do not always reflect these

---

3. ENVIRONMENTAL LAW INSTITUTE, LEGAL BARRIERS TO SOLAR HEATING AND COOLING OF BUILDINGS at iii-iv (1977) (U.S. Dep't of Commerce Nat'l Tech. Info. Serv.). Public land use restrictions, in addition to technological, political, social and economic factors, impede greater use of solar energy. For a thorough discussion of these issues, see *id.*; S. FELDMAN & B. ANDERSON, THE PUBLIC UTILITY AND SOLAR ENERGY INTERFACE: AN ASSESSMENT OF POLICY OPTIONS (1976); C. FIELD & S. RIVKIN, THE BUILDING CODE BURDEN (1975); Thomas, *Solar Energy and the Law*, 82 CASE & COMMENT 3 (1978).

4. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973) [hereinafter cited as Ellickson].

5. Coase, *The Problem of Social Cost*, 3 J. OF L. & ECON. 1 (1960).

6. Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) [hereinafter cited as Calabresi].

7. For a general discussion of the utility of economic analysis in many areas of the law, see B. ACKERMAN, ECONOMIC FOUNDATIONS OF PROPERTY LAW (1975); R. POSNER, ECONOMIC 2d. §§ 288-311 (1965).

8. Ellickson, *supra* note 4, at 683. Professor Ellickson hastens to add that due to an initial uneven distribution of resources, efficiency many not necessarily result in an equitable allocation of resources. *Id.*

9. P. SAMUELSON, ECONOMICS 632 (9th ed. 1973).

"perfect" properties. The private action of landowners often entails "externalities" or "spillovers."[10] A landowner's action will have an impact on non-consenting outsiders because he only considers the private costs of his action, ignoring the social costs. Whether the externality is of a positive or negative nature, there is a suboptimal allocation of land-use resources. Welfare economists have urged that externalities be "internalized" by bringing social costs in line with private costs.[11] Thus, a landowner who causes negative externalities should be forced to pay for the damage caused by his activity. Conversely, the landowner who causes positive externalities should be subsidized by those who receive the benefit of the activity.

The three most common land-use control systems designed to internalize externalities are zoning, covenants and nuisance law. According to Professor Ellickson, three factors must be considered in deciding which of the systems to employ: nuisance costs, prevention costs and administrative costs. He refers to "nuisance costs" as externalities which decrease the value of neighboring property; "prevention costs" as non-administrative expenses made by either the nuisance-maker or the injured neighbor to reduce the level of nuisance activity; and "administrative costs" as the public and private costs of arranging laws and agreements, policing those agreements and executing preventive measures to enforce the agreements.[12] Ellickson argues that the most efficient system is that one which minimizes the sum of nuisance, prevention and administrative costs.[13]

III. Covenants

A covenant is a promise to do or refrain from doing a certain

10. Professor Ellickson defines externalities as "impacts on nonconsenting outsiders." Ellickson, *supra* note 4, at 684. A conventional economist would define externalities as the difference between private and social cost. P. SAMUELSON, *supra* note 9, at 477. Soot spewing out of a coke plant causing damage to neighboring landowners is often cited as a classic example of negative externalities. *See, e.g.*, Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970); Bove v. Donner-Hanna Coke Corp., 236 A.D. 37 258 N.Y.S. 229 (4th Dep't 1932).

11. Ellickson, *supra* note 4, at 683. "Internalization is said to be accomplished through devices that force a nuisance maker to bear the true costs of his activity. . . . These [devices] range from those that are compatible with the continuance of the private markets to those that seek to supplant the market mechanism altogether. . . ." *Id.* at 684.

12. *Id.* at 688-89.

13. *Id.* at 690.

activity relating to the use of land.[14] The terms of the covenant are decided upon by the parties, with the government providing a judicial system for the enforcement of these privately negotiated agreements. Successors in interest to the contracting parties are bound by the covenant at law when (1) the contracting parties intended for their successors to be bound, (2) the covenant "touches and concerns" the land, (3) "privity of estate" existed between the contracting parties, and (4) the successors in interest had notice of the restriction.[15]

If the covenant fulfills the requirements at law or equity, it may be enforced by the owner of the benefited land against the owner of the burdened land. A covenant entered into between a developer of a neighborhood plan and purchasers, however, presents peculiar problems of enforceability. Where a developer constructs a tract of land and proceeds to sell off the lots to separate grantees, a covenant in the deed could be enforced by the grantor/developer but, without specific proof in the deed that subsequent purchasers will also be bound by the same covenant or that prior grantees may enforce the restriction against subsequent grantees, there may be no means to insure that the covenants will be enforced.[16]

To protect prior grantees' expectations, the law will imply reciprocal negative servitudes. Immediately upon the developer's representation to purchasers that subsequent purchasers will be bound by similar restrictions in the use of their land, an implied reciprocal

---

14. A covenant has two sides: a burden side and a benefit side. *See* 5 R. POWELL, THE LAW OF REAL PROPERTY § 671, at 144 (1977); AMERICAN LAW OF PROPERTY § 9.1, at 337 (A. Casner, ed. 1952); Annot., *Covenants, Conditions and Restrictions*, 20 AM. JUR. 2d § 292, at 856 (1965).

15. A suit in equity does not require proof of "privity" between the contracting parties. The distinction between a suit at law and one in equity is principally the remedy sought for breach of the covenant. At law, money damages are recoverable; in equity, only injunctive relief or specific performance may be granted. 5 R. POWELL, THE LAW OF REAL PROPERTY §§ 672-75 (1977); AMERICAN LAW OF PROPERTY §§ 9.9-9.20 (A. Casner, ed. 1952); Annot., *Covenants, Conditions and Restrictions*, 20 AM. JUR. 2d §§ 312-319 (1965).

16. Where the initial grantees covenant with the grantor who neglects to insert identical covenants into the deeds of subsequent grantees, the former is bound by restriction whereas subsequent purchasers are not bound. A similiar inequity results where subsequent grantees attempt to enforce the covenant against the initial grantees. The subsequent grantees would have to show that they were third party beneficiaries to the contract between the grantor and the initial grantees. In most instances, subsequent grantees are not made third party beneficiaries. 5 R. POWELL, THE LAW OF REAL PROPERTY §§ 680-81 (1977); AMERICAN LAW OF PROPERTY § 9.33 (A. Casner, ed. 1952); Annot., *Convenants, Conditions and Restrictions*, 20 AM. JUR. 2d. §§ 288-311 (1965).

servitude against the developer's remaining land arises. Purchasers may then enforce the restriction against any and all other purchasers, not by enforcing the agreement made between themselves and the developer, but by enforcing the servitude created by implication at the time of the conveyance to the initial purchaser.[17] All purchasers are bound by the covenant and all have a reciprocal right to enforce the covenant against other purchasers in the neighborhood. This kind of covenant arises only when a plan of development exists at the time of the sale[18] and when subsequent grantees have notice of the plan.[19]

A covenant imposed by a developer binding all landowners within a neighborhood is a potentially efficient device for internalizing nuisance costs and for allocating land-use resources. Unlike zoning[20]

17. Sanborn v. McClean, 233 Mich. 227, 206 N.W. 496 (1925).

18. A neighborhood plan may be proven by evidence of a plat of the subdivision which is filed for record, reference to which is then made in conveyance of the separate lots (King v. Kugler, 197 Cal. App. 2d 651, 17 Cal. Rptr. 504 (1961)); by publication of the restricted nature of the subdivision in advance of any sale (Feigen v. Green Harbour Beach Club, Inc. 204 N.Y.S.2d 381 (Sup. Ct. Nassau Co. 1960)); or by proof that the developer inserted similar covenants in a substantial number of deeds in the lots sold prior to the lot sold to subsequent grantees (Sanborn v. McClean, 233 Mich. 227, 206 N.W. 496 (1925)). Some courts refuse to imply reciprocal negative servitudes where no reference to a general plan is made in the deed of a party against whom enforcement is sought. Werner v. Graham, 181 Cal. 174, 183 P. 945 (1919); *accord*, Riley v. Bear Creek Planning Comm'n, 17 Cal. 3d 500, 551 P.2d 1213, 131 Cal. Rptr. 381 (1976).

19. Notice may be actual; by record (Northwest Civ. Ass'n v. Sheldon, 317 Mich. 416, 27 N.W.2d 36 (1947)); or by inquiry (Sanborn v. McClean, 233 Mich. 227, 206 N.W. 496 (1925)). Inquiry notice requires a purchaser to survey the surrounding neighborhood and to notice whether it has been built in accordance with a general plan. Sanborn v. McClean, 233 Mich. at 232-33, 206 N.W. at 498.

20. Zoning is a land use control system which limits the class of activities permitted in an area, sets architectural standards for the buildings within the zoned area and is mandatory in application. Compliance with these requirements inevitably entails high prevention and administrative costs. Therefore, to be an efficient control system, zoning must greatly reduce nuisance costs. It has been argued, however, that zoning does not guarantee a greater reduction in nuisance costs than would reliance on the private market. Professor Ellickson maintains that natural market forces cause similar land users to be attracted to the same areas, which is the major objective of zoning.

Ellickson, *supra* note 4, at 692-97. The inefficiency which can result in the application of a zoning ordinance, particularly in restricting the use of solar energy, is illustrated in D'Aurio v. Board of Zoning App., 92 Misc. 2d 898, 401 N.Y.S.2d 425 (Sup. Ct. 1978). In this case, plaintiff challenged a Board order denying his application for an area zoning variance for the purpose of installing a solar energy system to their home. By placing the unit in front of the home, plaintiff would violate a zoning ordinance that each front yard have a minimum depth of fifty feet and be free of any structures. The court affirmed the Board order because it found that the plaintiff did not show practical difficulties or significant economic injury. "At most, they have shown personal convenience" as justification for the variance. *Id.* at

and nuisance law,[21] only minimal prevention and administrative costs are necessary to internalize relatively small nuisance costs.[22] Externalities are eliminated at the outset by inserting the covenant into all of the deeds. Land-use resources are maximized because the reduction in future nuisance costs to each party will exceed the sum of the prevention and administrative costs each agrees to bear. Harmful externalities which do not entail great nuisance costs may thus be internalized cheaply and efficiently. Those covenants inserted into the deeds will impose standards which increase the land value of the lots, a benefit to the landowners and the developer alike. However, where the conditions of the neighborhood change

899, 401 N.Y.S.2d at 426. This case does not comport with the analysis offered in the economic model. The court did not discuss, nor was proof offered to show, whether the placement of the collectors in the front-yard entailed high nuisance costs for neighboring landowners. Assuming, arguendo, that the collector did entail harmful externalities, the court's order enjoining the use of the system, according to Professor Calabresi, is not the most efficient means to internalize these externalities. Professor Calabresi argues that a system of general deterrence in which the nuisance maker pays a monetary penalty calculated to equal the damage done to his neighbor's land, is a more efficient internalization device than the injunctive remedy traditionally granted in a zoning action. The nuisance maker would either pay damages or forego installation of the system; a rational decision maker will choose the more efficient alternative. Calabresi, *supra* note 6, at 1094. *See* note 23 *infra* and accompanying text. The application of the zoning ordinance and the traditional means which courts use to enforce the ordinance often entail higher prevention costs (the potential savings to a solar energy user) than the reduction in nuisance costs achieved. An analysis comporting with the model would account for these competing interests and would fashion a remedy which minimized total costs.

21. Professor Ellickson considers nuisance law as potentially the most efficient and equitable land use control system. The laissez-faire distribution of property rights is altered by placing "the risk of loss from external harms on the landowner carrying out the damaging activity. . . . [A] party compelled to bear a nuisance cost can be expected to adopt all preventive measures he perceives as efficient. A measure will appear efficient to a party if its prevention costs and administrative costs of carrying it out ae less than the reduction in nuisance costs achieved." Ellickson, *supra* note 4, at 724. This conclusion is essentially the rationale for Professor Calabresi's general deterrant remedy and is based on Coase's path-breaking article. *See* note 5 *supra*. Nuisance law remains an inefficient land use control system because it is burdened with high administrative and prevention costs. The administrative costs of a nuisance action include the great burden of proof plaintiff bears in the lawsuit as well as high legal fees necessary to prosecute an action. These costs may be so high as to deter those burdened with harmful externalities from bringing suit. The prevention costs imposed with the issuance of the injunction, the traditional remedy in nuisance suits, may lead the court to deny relief to a plaintiff and thereby allow the nuisance to continue. Professor Ellickson recommends a reformulation of nuisance law to lower administrative costs and supports Professor Calabresi's proposal for a remedy of general deterrence. Until these recommendations are accepted, however, nuisance law remains an inefficient control system. Ellickson, *supra* note 4, at 761-79.

22. *See* note 44 *infra* and accompanying text.

or the purpose of the covenant is expanded byond the parties' intent, enforcement of the covenant will not produce an optimal allocation of land use resources.

This Comment will use the economic model outlined above[23] to analyze the competing interests presented in the first, and thus far only, reported case which considers the issue of whether a restrictive covenant barring the installation of appliances on roof tops includes within its prohibition the installation of solar collectors.[24]

IV. *Kraye v. Old Orchard Association*

In *Kraye v. Old Orchard Association,*[25] plaintiff wished to install a solar water heating system on his home and, in connection with the installation, to place upon the roof "collector plates."[26] Defendant community association, charged with the responsibility of enforcing the covenant, claimed that the installation of such collector plates violated certain covenants, conditions and restrictions in the plaintiff's deed.[27] These covenants prohibited the placing of installations or appliances on house roofs, if visible from neighboring property or adjacent street, absent approval of the neighborhood association.[28]

Plaintiff brought an action for declaratory relief contending that the covenant was void and unenforceable for three reasons: (1) the covenant was designed to protect aesthetic values and such covenants are invalid as a matter of law; (2) assuming the covenant's

---

23. *See* notes 9-15 *supra* and accompanying text.

24. Kraye v. Old Orchard Ass'n, No. C 209453 (Super. Ct. L.A. Co. Sept. 13, 1978).

25. *Id.*

26. Brief for Plaintiff at 3, Kraye v. Old Orchard Ass'n, No. C 209453 (Super. Ct. L.A. Co. Sept. 13, 1978).

27. Brief for Defendants at 2, Kraye v. Old Orchard Ass'n No. C 209453 (Super. Ct. L.A. Co. Sept. 13, 1978). Article X, Section 12 of the plaintiff's deed states: "In addition to the architectural control provided pursuant to Article VII hereof applicances or installations upon the roofs of structures shall not be permitted unless they are installed in such a manner that they are not visible from neighboring property or adjacent streets." Article VII states,

> "No building, fence, wall or other structures or landscaping shall be commenced, erected or maintained upon the Properties, nor shall any exterior addition to or change or alteration therein or change in the exterior appearance thereof or change in the landscaping be made until the plans and specifications showing the nature, kind, shape, height, materials, color and location of the same shall have been submitted to and approved in writing as to harmony of external design and location in relation to surrounding structures and topography by the Board or by an architectural committee composed by three (3) or more representatives appointed in the By-laws of the association." *Id.*

28. *Id.*

validity, it may not be enforced to bar installation of the solar energy system because this was not the intent of the parties when the covenant was agreed upon; and 3) whatever the intent of the parties at the time the covenant was agreed upon, conditions have changed so much since the restriction was adopted that it was no longer useful and economical to enforce the restriction.[29] The court granted plaintiff's motion for summary judgment based not on any of these claims but, rather, on recent statutory authority which bars enforcement of a covenant which would effectively impede the use of solar energy.[30]

A. Regulation of Aesthetic Blight

In *Kraye,* plaintiff argued that California should not enforce "restraints on the free use of land which have no other support than aesthetic considerations."[31] This proposition is not in accord with the great weight of modern authority. Originally, the difficulty in defining a standard for aesthetic values made the courts reluctant to accept aesthetics as an acceptable goal of regulation, whether by the state or between private parties. Professor Williams writes that beauty is as difficult for lawyers to determine as it is for the philosophers who have long discussed the problem.[32] More recently, however, with the increasing concern for the various aspects of the environment, the courts have supported the effort to provide for some protection for an attractive environment. A wide variety of controls directed against whatever is regarded as ugly have been approved. A standard which measures the burden of aesthetic blight as equal to the reduction in market value of neighboring land solves the problem of the irrational decision-maker.[33] In no other area of planning law has the change in judicial attitude been so great.[34]

By the 1920's, almost every state faced challenges to public regu-

29. Brief for Plaintiff at 3, Kraye v. Old Orchard Ass'n No. C 209453 (Super. Ct. L.A. Co. Sept. 13, 1978). For the purpose of this Comment, it will be assumed that the covenant may not be attacked as void for vagueness, that the defendants have standing to sue and that the association's judgment was reasonable. These issues are often raised in cases attacking the validity of a covenant. *See* Hannula v. Hacienda Homes, 34 Cal. 2d 442, 211 P.2d 302 (1949); Annot., 40. A.L.R. 3d 864 (1970).

30. Kraye v. Old Orchard Ass'n, No. C 209453 (Super. Ct. L.A. Co. Sept. 13, 1978).

31. Supplemental Brief for Plaintiff at 3, Kraye v. Old Orchard Ass'n., No. C 209453 (Super. Ct. L.A. Co. Sept. 13, 1978).

32. N. WILLIAMS, AMERICAN LAND PLANNING LAW § 11.02, at 244 (1974).

33. *See* note 94 *infra* and accompanying text.

34. N. WILLIAMS, AMERICAN LAND PLANNING LAW § 11.02, at 345 (1974).

lations which restricted land-use on aesthetic grounds.[35] Some state courts were receptive to aesthetic values as a goal of state regulation while others were not.[36] However, by the time zoning was fully established in the 1930's most courts either accepted aesthetics as a valid ground for state regulation or, at least, recognized aesthetics as one of several supporting factors.[37] In *Perlmutter v. Greene,* Judge Pound of the New York Court of Appeals provided strong support for state regulation of aesthetic blight. "Beauty may not be queen, but she is not an outcast beyond the pale of protection or respect. She may at least shelter herself under the wing of safety, morality, or decency."[39]

Private regulation of aesthetics, through enforcement of restrictive covenants, has also been upheld. Indeed, it is a logical proposition that if the strong hand of the state may regulate aesthetic values, private parties are free to make arrangements among themselves which protect the aesthetic quality of their neighborhood. A typical case upholding such a covenant is *Kirkley v. Seipelt.*[40] In this case appellants sued to enjoin the installation of hard-surfaced permanent awnings and porch covers on the windows of neighboring homes subject to a restrictive covenant barring such installation without the grantor's consent.[41] The Maryland Court of Appeals

35. A few courts had faced the issue earlier. *See* Passaic v. Patterson Bill Posting, Advertising and Sign Co. 72 N.J.L. 285, 62 A. 267 (1905) (invalidated regulation); Varney & Green v. Williams, 155 Cal. 318, 100 P. 867 (1909) (upheld regulation).

36. *See generally* N. WILLIAMS, AMERICAN LAND PLANNING LAW, ch. 11 (1974).

37. *Id.* § 11.11 and cases cited therein.

38. 259 N.Y. 327, 182 N.E. 5 (1932).

39. *Id.* at 332, 182 N.E. at 6. The complete acceptance of aesthetics as a goal of state regulation is generally thought to have been influenced by favorable dictum in Berman v. Parker, 348 U.S. 26 (1954). In this case the owner of a department store challenged the government's use of the eminent domain power to take his property as part of a redevelopment project in the area. Writing for the majority, Mr. Justice Douglas stated, "[p]ublic safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it. . . . It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Id.* at 32-33. The strong trend towards increased respect for aesthetic regulation through the use of the state's police power has continued unabated in the mid-1970s. N. WILLIAMS, AMERICAN LAND PLANNING LAW § 11.11 (Supp. 1978).

40. 212 Md. 127, 128 A.2d 430 (1957).

41. *Id.* at 132-33, 128 A.2d at 433-34. The covenant stated: "No building shall be erected, placed or altered on any building plot in this subdivision until the external design and location thereof have been approved, in writing, by the Rodgers Forge Realty Corp., its

rejected appellee's contention that the covenant was unreasonable and indefinite. Relying on a case decided by it some years earlier,[42] the court held that a covenant designed to secure a better class of buildings, with attractive surroundings, was in all respects legal.[43]

Covenants among homeowners are an efficient device to internalize the harmful externalities of aesthetic blight. A promise inserted into all of the deeds in a neighborhood not to add unsightly structures to the home will give all homeowners a benefit which might otherwise be too costly to guarantee by individual nuisance suits. Homeowners may freely choose to be bound by those restrictions which they consider beneficial to their property, unlike the burden of zoning ordinances which are often imposed by government without a homeowner's consent. A covenant carefully drafted will entail lower administrative costs than will compliance with zoning ordinances or the maintainance of a nuisance action.[44] Land values of the property in the area will increase with only a minimum loss of flexibility to the homeowner.[45]

Ironically, the elimination of aesthetics as a benefit enforceable in reciprocal negative covenants is a two-edge sword. Whereas plaintiff in Kraye might have the right to install a solar system if this benefit was limited, environmentalists would lose a valuable tool for protecting our natural resources in other situations. Those sincerely interested in protecting the environment should hesitate

---

successors, or assigns." *Id.* at 132, 128 A.2d at 433.

42. Peabody Heights Co. v. Willson, 82 Md. 186, 32 A. 386 (1895).

43. 212 Md. at 132-33, 128 A.2d at 433; *accord,* Winslette v. Keeler, 220 Ga. 100, 137 S.E.2d 288 (1964). In this case, a restrictive covenant which required the grantee to submit building plans to the grantor for approval to insure that such plans were in "conformity and harmony of external design and general quality with the existing standards of the neighborhood" was not vague or indefinite and, therefore, enforceable. The court held that "the grantor here saw fit to impose restrictions for his own protection and for the protection of other property owners in the neighborhood, and it cannot be said that the covenant imposed is against public policy, as a covenant to maintain the high quality of a subdivision is not harmful to the public welfare." *Id.* at 101, 137 S.E.2d at 289.

44. Prevention and administrative costs are low because the promise is inserted into the deed at the outset and each party pays a minimal fee to support a community group which polices compliance with the covenant. Ellickson, *supra* note 4, at 714.

45. It should not be implied that the association, in *Kraye,* proved that the solar energy system was offensive to the aesthetic standards set by the covenant. Solar systems need not be ugly to be functional. *Professional Builder's Report on Solar Energy in* 1976 PROFESSIONAL BUILDER 101 (1976). Whether the defendant-association exercised proper judgment in finding that the system violated the covenant is an issue beyond the scope of this Comment. *See* Hannula v. Hacienda Homes, 34 Cal. 2d 442, 211 P.2d 302 (1949).

before relinquishing a valuable and efficient device for promoting aesthetics and all other environmental values.

B. The Covenant's Purpose

The second issue presented by plaintiff in *Kraye* is that the covenant was not intended to bar installation of a solar energy system. A covenant is simply a contract of a special nature. The general rule of construction of a contract is to gather the intention of the parties from the writing and by considering the surrounding circumstances as the parties are presumed to have considered.[46]

Professor Ellickson makes the same point but with a different perspective. The purpose of a covenant, according to Ellickson's model, is to raise land values. Only those covenants which reduce nuisance costs more than the loss in flexibility and administrative costs will be inserted into a deed. The enforcement of a covenant which would entail higher prevention and administrative costs than the corresponding reduction in nuisance costs is not value-maximizing. The assumption is that parties who dealt with each other fairly and at arm's length could only have intended to agree on an efficient and economical arrangement. The search for intent is therefore a search for those nuisance costs which may be internalized without high prevention and administrative costs.[47]

The covenant restriction in Kraye's deed was entered into in July, 1967. The agreement forbids any "installation on the roof" or "exterior change or addition" on the house without the approval of the architectural committee.[48] On its face, the restriction appears sufficiently broad to preclude the installation of the solar collectors. However, the willingness of the courts to look beyond the express language of the covenant to ascertain its purpose reflects judicial acceptance of the rule formulated by Ellickson, if not his reasoning.[49] When enforcement of the covenant would entail higher prevention and administrative costs than the corresponding reduction in nuisance costs, a result which the parties do not intend,[50] the courts will find that the covenant was not designed to restrict the

46. Clark v. Devoe, 124 N.Y. 120, 124, 26 N.E. 275, 276 (1891).

47. Ellickson, *supra* note 4, at 713-14.

48. Brief for Defendants at 2, Kraye v. Old Orchard Ass'n, No. C 209453 (Super. Ct. L.A. Co. Sept. 13, 1978).

49. *See, e.g.*, Whitehurst v. Burgess, 130 Va. 572, 107 S.E. 630 (1921); Holliday v. Sphar, 262 Ky. 45, 89 S.W.2d 327 (1935).

50. *See* note 47 *supra* and accompanying text.

particular nuisance activity at issue. Although this economic analysis may lead to the same result as the traditional reasoning used by the courts,[51] it focuses more clearly on the nature and purpose of the agreement.

Several cases illustrate the courts' interest in first considering the purpose of the covenant and then determining its scope in relation to the purpose. In *Granger v. Boulls,*[52] the defendant promised not to erect any building "to be used or occupied for any purpose other than private residence or dwelling . . . ."[53] The court held that although this covenant barred the erection of farm buildings, such as a chicken house, it did not operate to bar the use of the land in support of livestock.[54] *Berger v. State*[55] is in accord. In this case a covenant in defendant's deed prohibited the erection of any building except a dwelling house and limited the use of the land to private residential purposes.[56] The State of New Jersey sought to use a building subject to the restriction to house several multi-handicapped, pre-school children and two foster parents. The court held that the restriction barring the erection of any building except a dwelling house was not violated by multi-family occupancy. The court found that the covenant regulated only the type of structure which could be built, not the purpose for which the structure could be used.[57] In addition, the covenant limiting the use of land to private residential use did not restrict the use of the land to one families comprised exclusively of related members.

> "There is simply nothing to suggest that the relationship of the persons within a dwelling was of any concern to the common grantor. Rather, it is reasonable to conclude that its predominant interest was to preserve a family style of living, that is, a style characterized by fairly stable, rather than transient relationships, a single household headed by adults who both control and guide such children as may reside with them."[58]

---

51. The courts usually recite the general rule of construction for covenants: that unclear restrictions are to be construed against the grantor and in favor of the free use of land. 5 R. POWELL, THE LAW OF REAL PROPERTY § 673 (1977). This property rule is equivalent to the rule of Hadley v. Baxendale, 9 EX. 341 (1854), that contract liability is limited to the consequences contemplated by the parties.

52. 21 Wash. 2d 597, 152 P.2d 1325 (1944).

53. *Id.*

54. *Id.* at 600, 152 P.2d at 326-27.

55. 71 N.J. 206, 364 A.2d 993 (1976).

56. *Id.* at 213 n.1, 364 A.2d at 996 n.1.

57. *Id.* at 214, 364 A.2d at 997.

58. *Id.* at 216-17, 364 A.2d at 998.

The court found that the defendant's use of the house was of this nature and therefore did not violate the covenant.

In *Granger* and *Berger* the prevention and administrative costs necessary to eliminate the nuisance activity were probably higher than the corresponding reduction in nuisance costs achieved.[59] The use of the land for supporting livestock in *Granger* and for housing handicapped children in *Berger* brought greater economic and social benefits to the surrounding community than any benefits which would have been achieved by enjoining those activities. Therefore, the covenant was not enforced.[60]

A similar result is found in *Ashland-Boyd County City-County Health Department v. Riggs.*[61] In this case a covenant prohibiting the use of a "business house of any kind"[62] was held not to bar the use of a building subject to the restriction as an office, laboratory and clinic by the County Board of Health. The court held that "[i]f such use had been foreseen, the parties might have included it within the exclusions. But a restrictive covenant cannot be extended or enlarged by construction or implication to accomplish a purpose that may have been included had future developments been foreseen."[63] In terms of the model, the court's holding can be explained by the fact that the benefits which inured to the community by the Board of Health's activities were greater than any benefits which could result from closing down the office.[64]

---

59. The failure of the courts to discuss adequately the relevant cost factors makes it impossible to reach a definite conclusion in this area.

60. *Accord,* Easterbrook v. Hebrew Ladies' Orphan Soc'y, 85 Conn. 289, 82 A. 561 (1912). In this case, the covenant at issue barred the use of the premises for a trade or business. The court held that the use of a home for orphans and the aged for charitable purposes was not a business. "The word 'business' in its ordinary and common use among men, is employed to designate human efforts which have for their end living or reward. It is not commonly used as a descriptive of charitable . . . agencies." *Id.* at 299, 82 A. at 565. Again, the harmful externalities which would be eliminated by enforcement of the covenant would probably entail higher prevention costs represented by the loss of defendants activities to the wider community.

61. 252 S.W.2d 922 (Ky. 1952).

62. *Id.* at 924.

63. *Id.* at 925.

64. *Accord,* Leavitt v. Davis, 153 Me. 279, 136 A.2d 535 (1957). A covenant not to erect or maintain a building or structure of any character as to interrupt or interfere with the view over the defendant's parcel was held not to be violated by defendant's use of the land for parking cars, notwithstanding the fact that such use blocked plaintiff's view. The court reasoned that "[t]he vehicles are not buildings, nor do they have the characteristic permanency [of buildings] . . . ." *Id.* at 283, 136 A.2d at 537. This apparantly narrow construction

Ellickson's model offers a perspective for understanding these cases with greater clarity than the code words and phrases employed by the court when breaking open a covenant. The reluctance, at times, for the courts to enforce a covenant may be traced to the traditional remedy granted when a covenant is found to violate an injunction enjoining the activity.[65] The injunctive remedy often entails high prevention costs which exceed the reduction in nuisance costs it achieves. The utility of the nuisance-maker activity may be more beneficial to the community than the benefits achieved by forcing the nuisance-maker to cease the activity. However, by not enjoining the activity, as in the cases discussed above, externalities are not internalized; they remain where they lie. As with nuisance suits, courts are applying a balancing test—the social utility of the actor's conduct compared to the total harm caused—in determining whether the covenant has been violated. This rationale promotes the free use of land, but at the expense of failing to internalize externalities generated by the landowner's activity. This may be a better result than enjoining the activity altogether, but it is not an efficient solution. A better approach would limit the use of the balancing test to the determination of the proper remedy. Whether the covenant has been violated or not would be determined prior to, and regardless of whether injunctive relief is a proper device to internalize the nuisance costs entailed by the violation of the covenant.

This approach was followed in *Boomer v. Atlantic Cement Company*.[66] In this case, the New York Court of Appeals found that defendant's operation of a cement plant constituted a nuisance. The court refused to grant an injunction, the traditional remedy granted where a nuisance is proved, rejecting a doctrine which had been consistently affirmed.[67] The court recognized that there was no tech-

---

may be explained in terms of the model sketched above. The covenant had been agreed upon sixty years prior to the lawsuit. The court most likely found that the benefits to the homeowner of a seaview were much less than the corresponding benefits to the community of a developed area. The harsh consequences of the injunctive remedy forced the court to deny enforcement of the covenant. *See* note 65 *infra* and accompanying text.

65. Injunctive relief is the most common remedy granted by the courts for damage to land. The unique characteristics of land is said to require this remedy. *See* N.Y. REAL PROP. ACTS. LAW § 871 (McKinney 1963); RESTATEMENT OF TORTS § 944, comment a (1939); Lucy Webb Hayes Nat'l Training School v. Geoghegan, 281 F. Supp. 116 (D.D.C. 1967); Decker v. Goddard, 233 A.D. 139, 251 N.Y.S. 440 (1931).

66. 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

67. *Id.* at 223, 257 N.E.2d at 872, 309 N.Y.S.2d at 315.

nological means to abate the nuisance and that forcing the plant to close would cause great economic damage to the surrounding community.[68] Instead, the court awarded plaintiff permanent damages,[69] allowing the defendant to choose between continuing the activity while paying damages to landowners burdened by the plant, and ceasing operations. A rational decision maker will choose the alternative which is more economically advantageous to him. This decision, in turn, will effect the most efficient allocation of land use resources.[70]

Although *Boomer* was a nuisance case, its reasoning is persuasive for a wide variety of land use conflicts.[71] Whereas a court may find, under the facts of *Kraye,* that the covenant has been violated, damages could be awarded to the defendants as a more efficient means of internalizing the harmful externalities caused by the solar energy system. This proposal will be fully explored below.[72]

C. The Doctrine of Changed Conditions

Plaintiff, in *Kraye,* argued that the equitable doctrine of changed conditions should operate to bar enforcement of the covenant.[73] According to the model, a covenant is designed to promote an efficient allocation of land use resources.[74] The construction of a covenant is therefore limited to restricting those activities which entail higher nuisance costs than the prevention and administrative costs incurred by enjoining the activity. Consequently, where the conditions of a neighborhood change so that the contracting parties' intent may no longer be realized by enforcing the covenant, because enforcement would entail higher costs than any corresponding benefits thereby achieved, a court of equity will not enforce the agreement. Professor Ellickson states: "When a common covenant

68. *Id.* at 223-24, 257 N.E.2d at 872, 309 N.Y.S.2d at 872. The court said that "[t]he total damage to the plaintiff's property is . . . relatively small in comparison with the value of the defendant's operation and with the consequences of the injunction which plaintiffs seek." *Id.* at 223, 257 N.E.2d at 872, 309 N.Y.S.2d at 315.

69. Permanent damages equals the total value of the landowner's realty. Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

70. *See* note 21 *supra* and accompanying text.

71. Professor Calabresi's preference for a damage remedy extends to all land use conflict situations. Calabresi, *supra* note 6, at 1128.

72. *See* note 94 *infra* and accompanying text.

73. Brief for Plaintiff at 3, Kraye v. Old Orchard Assoc., No. C 209453 (Super. Ct. L.A. Co. Sept. 13, 1978).

74. *See* notes 20-24 *supra* and accompanying text.

scheme governs many parcels, high administrative costs may prevent landowners from organizing to terminate the scheme even though the prevention costs of the scheme exceed its reduction in nuisance costs. Courts have attempted to solve this problem by terminating those covenants where neighborhood conditions have changed."[75] The doctrine of changed conditions implicitly recognizes that the parties' intent may no longer be furthered in light of intervening factors outside the parties control. To enforce the covenant would only confer a windfall on neighboring landowners.

Kraye's argument, that changed conditions render the agreement unenforceable, requires a conceptual leap from the usual interests of the courts in this area. Generally, the courts must decide whether the change makes it impossible to effect the purposes of the covenant. Normally, the change considered is the growth of the neighborhood in a manner not anticipated by the parties. The focus is on the continued usefulness and value of the covenant.[76] Kraye argued that a change in the availability of conventional energy resources necessitated non enforcement of the covenant.[77] This argument goes further than the great majority of the cases and is rooted in a policy which places the entire burden of the energy crisis on the neighboring landowners. Although there is precedent for Kraye argument,[78] an efficient solution would apportion the burden of the solar energy system among those who receive its benefits: the public, beyond the

75. Ellickson, *supra* note 4, at 716-17.

76. Trustees of Columbia College v. Thatcher, 87 N.Y. 311 (1182). Many cases and textwriters have focused their attention on the proximity of the change to the restricted area. One author has stated that "[s]ome degree of physical change in the neighborhood is essential to the existence of this defense. . . . [C]hanges outside the limits of the tract, even though they do impinge on the border lots, do not justify any relaxation of enforcement of the premises within the tract, so long as such enforcement remains beneficial to most of the property in the tract." 5 R. POWELL, THE LAW OF REAL PROPERTY § 684, at 228.10-229 (1977). A second writer is more equivocal. "Changes . . . sufficient to negative a restrictive covenant many occur either within or without the restricted area, although courts give greater weight to changes within the restricted area." Annot., 53 A.L.R.3d 492, 495 (1973). *See* cases cited therein. A third text states that the doctrine of changed conditions applies where the area surrounding the restricted subdivision has been changed so that the building scheme for the tract has been frustrated, whereas the doctrine of abandonment applies where the change occurs within the subdivision. AMERICAN LAW OF PROPERTY § 9.39 (A. Casner, ed. 1952). Cases may be found where changes outside the restricted tract were held to negative the purpose of the covenant, thereby barring enforcement of the restriction. *See, e.g.*, Jewitt v. Albin, 90 Cal. App. 535, 266 P.2d 329 (1928); McClure v. Leaycraft, 183 N.Y. 36, 75 N.E. 961 (1905).

77. Brief for Plaintiff at 5, Kraye v. Old Orchard Ass'n, No. C 209453 (Super. Ct. L.A. Co. Sept. 13, 1978).

78. *See* notes 84-93 *infra* and accompanying text.

neighborhood.[79] If the solar collectors are truly ugly and reduce the market value of defendant's land, this claim should not be rejected by solar advocates simply because it impedes the full development of solar energy. An efficient allocation of land-use resources requires a thorough consideration of, and resolution to, the competing interests involved.

The cases in this area are in conflict.[80] In *Drexel State Bank v. O'Donnel*[81] a covenant not to erect apartment houses was at issue. An apartment house had already been built on the block subject to the restriction. The court upheld the restriction despite the prior violation because it found that it still benefited the properties of the objecting owner.[82] Other cases reflect a greater concern in promoting an efficient allocation of resources than preserving particular benefits to certain neighboring landowners. For instance, one court,[83] in construing a covenant not to build within fourteen feet of the street, refused to preserve a restriction which wasted valuable space without significant benefit to anyone.[84]

Neither case offers a clear perspective with which to analyze the competing interests involved in these land use conflicts. Instead of discussing precisely what benefits and burdens would result from enforcing the covenant, the courts unfortunately rely on traditional property terms as if they were a talisman. In addition, the injunction, the sole remedy offered by the courts in these cases, provides no flexibility and thereby stifles efficiency. *O'Donnel,* by enforcing the agreement imposes higher prevention costs than the reduction in nuisance costs achieved. The area was losing its residential char-

79. *See* note 95 *infra* and accompanying text.

80. It is suggested that the absence of a single illuminating perspective, which the model offers, facilitates this inconsistency.

81. 344 Ill. 173, 176 N.E. 348 (1931).

82. *Id.* at 183, 176 N.E. at 352. The benefits cited by the court included light and air, protection against the additional noise which would invariably result from the erection of more apartment houses and the maintainance of the objecting owner's property value. *Id.*; *accord*, Kiernan v. Snowden, 123 N.Y.S.2d 895 (Sup. Ct. 1953).

83. La Rue v. Weiser, 378 Pa. 438, 106 A.2d 447 (1954).

84. The court said: "It being a general policy of the law that land shall not be burdened with permanent or long-continued restrictions which have ceased to be of any advantage, equity will not, prohibit or retard improvements simply to enforce the literal observance of a condition or covenant. Nor will equity grant injunctive relief if the enforcement of a restriction would make the land unfit or unprofitable for use and development, or result in far greater hardship to the servient than a benefit to the dominant tenement." *Id.* at 443, 106 A.2d at 450; *accord*, Hirsh v. Hancock, 173 Cal. App. 2d 745, 343 P.2d 959 (1959).

acter. For better or worse, the land was more useful for urban housing. *La Rue,* by not enforcing the covenant avoided imposing high prevention costs on the nuisance-maker but at the expense of externalities which were not internalized. A damage remedy, as discussed above, would promote efficiency by forcing the nuisance-maker to bear the true cost of his activity; private costs will be brought into line with social costs.

In addition to the *Boomer* case discussed above, two other cases, where outdated common law principles were rejected in favor of other alternatives, illustrate that some courts are interested in promoting efficiency in land use conflicts. In *Melms v. Pabst Brewing Company*[85] plaintiff, owner of a reversionary interest in the estate, brought an action against the life tenants for waste. A large brick private residence, built in 1864 at a cost of $20,000, was on the land. During Pabst's tenancy the general character of the real estate in the neighborhood changed so rapidly that it became valueless for the purpose of residential property.[86] Factories, railway tracks and brewing buildings had been built in the surrounding area so that the building on the estate became isolated, standing twenty to thirty feet above street level. The house was of no practical value and would not generate enough rent to pay the taxes and insurance on it. Defendant removed the house and graded the property to street level. Plaintiff claimed that these acts constituted waste.[87]

At common law any change in the estate by one with less than an estate in fee simple was actionable as waste.[88] Ameliorating waste was actionable, even though the change enhanced the value of the land, since it destroyed the identity of the property. In a system without recorded deeds, title was evidenced by the physical character of the land.[89] However, since this premise no longer exists and its only result was a tendency to promote inefficiency in the allocation of land use resources, it was rejected by the *Melms* court. The court held that "a complete change of conditions . . . resulting from causes which none could control" could not be ignored. The tenant need not "stand by and preserve the useless dwelling house, so that

85. 104 Wis. 7, 79 N.W. 738 (1899).
86. *Id.* at 13, 79 N.W. at 740.
87. *Id.* at 8, 79 N.W. at 738.
88. *Id.* at 10, 79 N.W. at 739.
89. 5 R. POWELL, THE LAW OF REAL PROPERTY § 640, at 20 (1977).

he may at some future time turn it over to the reversioner, equally useless."[90]

The second compelling analogy is from the case *United States v. Causby*.[91] In this case, government airplanes, using an airport near the appellee's farm flew directly over appellee's land and disturbed his family so much that they were unable to live peacefully and to support their livestock business. Causby invoked the ancient doctrine, "*cujus est solum ejus est usque ad coelum*" ("*whose is the soil, his is to the sky or high heavens.*").[92] The Supreme Court forcefully declared that this doctrine had no place in the modern world. "To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim."[93] Appellee's property right was limited to the immediate space above the land which is necessary to its use and development.[94] In the face of a new technological development which entailed great positive externalities for many people the common law had to yield.

V. A Proposal

As the discussion above illustrates, some courts could find that the covenant at issue in *Kraye* is unenforceable either because it was not the intent of the parties to include solar collectors within its prohibition or because conditions have changed which bar the continued effectiveness of the covenant. Such reasoning would foster the growth of solar energy. Unfortunately, it also places the entire burden of the energy crisis upon the neighboring landowners. A more efficient solution should recognize that the exploitation of solar energy will benefit those outside the particular neighborhood. In short, although harmful externalities of the collector are confined to the neighborhood, the positive externalities generated through the use of solar energy system will inure to those outside the neigh-

90. 104 Wis. at 13, 79 N.W. at 740. The modern New York law reflects this principle. N.Y. REAL PROP. ACTS. LAW § 803 (McKinney 1963).

91. 328 U.S. 256 (1946).

92. *Id.* at 260-61.

93. *Id.* at 261.

94. This property right was effectively taken by the government's continued operations above plaintiff's land. The government was therefore required to compensate the landowner for the taking. *Id.* at 267.

borhood. An efficient solution should seek to internalize both kinds of externalities.

The benefit of the solar energy system to the user may be measured by the costs saved by replacing, to some extent, conventional energy resources; the burden to the neighbors may be measured by the drop in market value to their land. If a court determines that the language and intent of the covenant is violated, which, in *Kraye,* is probable, the more important issue of the appropriate remedy must be addressed. Professor Calabresi argues that the damage remedy is more efficient than the injunctive remedy. If the nuisance-maker should find that the costs of the damage award are less than the savings accrued by continuing the activity, he will pay the defendants. On the other hand, if the costs saved by use of the solar energy system do not equal or exceed the damage award, the nuisance-maker will cease his activity. Harmful externalities of the collectors are thereby internalized efficiently.[95]

This solution is satisfactory if we assume that the land use conflict involved—the desire on the part of one landowner to exploit an alternative energy resource versus the interests of neighboring landowners to protect their land values—is a local problem. In fact, the problem is nation-wide. The entire populous benefits from those who use solar energy by lessening our dependence on expensive and limited conventional energy resources.

Positive externalities should be subsidized by those who benefit from them; in this case, the public. State and federal governments are subsidizing the solar energy use with a tax credits on the sale of solar energy systems and by not taxing the increase in property value which results from the installation of a solar collector system.[96] The subsidy should be designed to equal the damage caused

95. Professor Calabresi offers two further reasons for awarding damages instead of injunctive relief. First, market valuation of the property right may be unavailable or too expensive compared to a collective valuation. Second, it allows the court to accomplish a measure of redistribution that otherwise could only be achieved with a loss of efficiency. Calabresi, *supra* note 6, at 1107. The Superior Court of California, County of Los Angeles granted plaintiff's motion for summary judgment based on section 714 of the California Civil Code. Kraye v. Old Orchard Ass'n, No. C 209453 (Sup. Ct. L.A. Co. Sept. 13, 1978) (citing CAL. CIVIL CODE § 714 (West Cum. Supp. 1979). This statute bars the enforcement of any restriction which would effectively prohibit or restrict the installation or use of a solar energy system. Whether this statute constitutes a taking by the government was not addressed by the court.

96. Many states have enacted sales and property tax credits designed to foster solar energy use. *See, e.g.,* CAL. REV. & TAX CODE § 17052.5 (West Cum. Supp. 1979), CONN. GEN. STAT. § 12-412(dd) (Cum. Supp. 1978), MICH. COMP. LAWS § 211.7h (Cum. Supp. 1978-79).

by the localized harmful externalities. In this way, the nuisance-maker's damage payments would actually be paid by the larger community receiving the benefits of the nuisance-maker's activity.

To the extent that these two payments are not perfectly balanced it may be efficient for the burden to remain where it falls. This is the conclusion of Professor Michelman's study[97] on the changes of wealth caused by government "taking" of property and its analysis is applicable here. Michelman asserts that it is not unfair for an individual to bear a loss where he should understand that, in the long run, failure to compensate people in his situation will be in the best interests of those similarly situated.[98] Professor Ellickson summarizes Michelman's test for noncompensation as the confluence of three factors: 1) the efficiency of the land use which causes the loss is transparently obvious; 2) the administrative costs of the compensation are high; and 3) the losses suffered are small and widespread. "In such a situation, the injured individual will want the public program to continue and can see that his interests as a taxpayer may be best served in the long run if the government does not spend large sums in arranging to make trivial payments."[99]

The proposal offered above fits Michelman's paradigm case for noncompensability. Solar energy offers an attractive solution to the energy crisis and the difference between the damage award and the subsidy should be small.

VI. Conclusion

If solar energy is to be developed, as our national and local leaders have urged,[100] outdated common law principles should not be used to stifle its growth.[101] Such an approach need not sacrifice equity.[102]

The federal government has recently enacted a tax credit on the personal income tax returns of those who install solar energy and other energy-saving devices. I.R.C. § 44c (Revenue Act of 1978). For a compilation of legislation concerning solar energy see 4 National League of Cities, *Energy Report to the States* 1 (1978).

97. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

98. *Id.* at 1258.

99. Ellickson, *supra* note 4, at 701.

100. President Carter's Energy Message to the Nation, N.Y. Times, April 21, 1977 at 1, col. 8.

101. The writers cited in this Comment are unanimous in proposing new legal formulas to solve land use conflicts more efficiently. Professor Horwitz has shown that the reformulation of outdated legal principles to meet present needs is a common law tradition. M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW (1977).

Surely this nation's legal system is capable of protecting both the expectations of property owners and fostering a rational solution to the energy dilemma. The *Kraye* case, and others like it in the future,[103] should be approached from the microeconomic perspective offered by those writers cited in this Comment. This approach recognizes the importance of preserving the limited natural resources the earth possesses.

Arto Becker

---

102. Professor Ellickson maintains that new approaches would, in fact, be more equitable. Ellickson, *supra* note 4, at 730.

103. The likelihood that the nation's energy crisis will not abate and increasing interest in solar energy among individuals and government officials leads one to believe that more cases like *Kraye* will soon come before the courts.