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AN INTEGRATED APPROACH TO SOLAR ACCESS

While interest and investment in solar energy has burgeoned in recent years, the need to guarantee solar consumers adequate access to direct sunlight remains a nagging problem. In Prah v. Maretta, the Wisconsin Supreme Court rejected the traditionally narrow common law view of access to sunlight and entertained a private nuisance suit for solar obstruction. This Note supports the Prah decision and urges other courts to apply its reasonable use analysis to solar access disputes. It concludes, however, that nuisance law cannot alone satisfy the solar access imperative. The Note, therefore, proposes an integrated approach that incorporates nuisance law, a solar easement statute, and popular land use controls.

INTRODUCTION

IN THE FACE of diminishing natural energy resources, development of alternative sources, such as solar energy, is of paramount importance.¹ The viability of solar energy as an alternative resource depends, however, upon adequate access to direct sunlight.² The magnitude of this problem is difficult to gauge—only three reported cases involve solar access disputes,³ and recently

1. See ENERGY FUTURE: REPORT OF THE ENERGY PROJECT AT THE HARVARD BUSINESS SCHOOL 183-215 (R. Stobaugh & D. Yergin ed. 1979) [hereinafter cited as ENERGY FUTURE].

2. There is a plethora of legal literature on the solar access issue. See S. KRAEMER, SOLAR LAW 78-83 (Supp. 1984) (collecting citations to solar law books and articles).

3. *Sher v. Leiderman*, No. P40832 (Cal. Super. Ct. Oct. 8, 1982) (order overruling demurrer); *Siu v. McCully-Citron Co.*, No. 56405 (Hawaii Cir. Ct. 1979) (reported in *Solar Access Right Denied by Hawaii Court*, 1 SOLAR L. REP. 542 (1979)); *Prah v. Maretta*, 108 Wis. 2d 223, 321 N.W.2d 182 (1982).

In *Sher*, plaintiff has contended that a row of trees on defendant's property which shade plaintiff's passive solar collecting system are both a public and a private nuisance. S. KRAEMER, *supra* note 2, at 25, 29 (Supp. 1984). Plaintiff based the public nuisance claim on the California Solar Shade Control Act, *id.* at 25, which declares that trees and shrubs casting a shadow on a solar collector are a public nuisance, see CAL. PUB. RES. CODE §§ 25980-25986 (West Supp. 1984). Plaintiff also has alleged that defendant's failure to control the trees' height is a private nuisance as defined by California law. S. KRAEMER, *supra* note 2, at 29 (Supp. 1984); see CAL. CIV. CODE § 3479 (West 1970) ("Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . is a nuisance."). A trial date has been set for June 19, 1984.

Siu involved a claim by a solar energy user against the builder of a proposed highrise apartment building. Plaintiff sought both damages and injunctive relief, alleging express and implied easements of sunlight and negligent and reckless interference with plaintiff's enjoyment of her property. The court granted defendant's motion for summary judgment because the area was zoned for highrise buildings. *Solar Access Right Denied by Hawaii Court*, 1 SOLAR L. REP. 542, 542-43 (1979).

enacted solar access legislation has yet to be tested in litigation.⁴ The solar access problem still merits consideration for two reasons: in many instances obstruction threatens solar access,⁵ and lack of legally protected solar access may deter investment in solar energy.⁶

Unfortunately, the common law affords little or no protection to a landowner's interest in access to sunlight.⁷ Courts have historically shown great reluctance to interfere with land use on the basis of something "so impalpable and fleeting as air and light."⁸ Recently, however, in *Prah v. Maretti*,⁹ the Wisconsin Supreme Court allowed a private nuisance action for solar access obstruction.¹⁰ This landmark case provides an opportunity for fresh consideration of a private nuisance approach to solar access¹¹ in the context of the recent surge in solar access legislation. Comparative

4. *But see* *Sher v. Leiderman*, No. P40832 (Cal. Super. Ct. Oct. 8, 1982) (order overruling demurrer) (claim under California public nuisance statute).

5. Miller, *Legal Obstacles to Decentralized Solar Energy Technologies*, 1 SOLAR L. REP. 595, 600 (1979). In addition, it is impossible to determine how many disputes reach settlement without being reported.

6. "Even a few instances of shading, if well publicized, could have a depressing effect on the market." *Id.* at 601. "Without legal protection, a rational potential solar buyer will think twice before committing capital to an energy source that depends on a neighbor's whims—or on the growth of his trees, or on the construction of a high-rise apartment house where the neighbor used to live." ENERGY FUTURE, *supra* note 1, at 195 (emphasis added).

7. *See infra* notes 23–40 and accompanying text.

8. *Keiper v. Klein*, 51 Ind. 316, 323 (1875).

9. 108 Wis. 2d 223, 321 N.W.2d 182 (1982).

10. *Id.* at 240, 321 N.W.2d at 190. Discussion of a public nuisance approach to solar access is beyond the scope of this Note. *See generally* G. HAYES, SOLAR ACCESS LAW 171–72, 175–77 (1979) (legislative implementation of public nuisance approach may be viable if applied only to vegetation, but in the end "invites more problems than it solves"); S. KRAEMER, *supra* note 2, at 117–28 (1978) (supporting statutory public nuisance approach to control shading by vegetation because of its directness and simplicity).

11. Many solar access commentators had analyzed the private nuisance theory before *Prah*. *See* G. HAYES, *supra* note 10, at 170–77 (disadvantages of private nuisance approach outweigh advantages); S. KRAEMER, *supra* note 2, at 129–40 (1978) (proposing private nuisance statute applicable to vegetation only); Becker, *Common Law Sun Rights: An Obstacle to Solar Heating and Cooling?*, 3 J. CONTEMP. L. 19, 26–31 (1976) (applying *Restatement (Second) of Torts* analysis to solar access); Eisenstadt, *Access to Solar Energy: The Problem and its Current Status*, 22 NAT. RESOURCES J. 21, 29–31 (1982) (legislature, not judiciary, is appropriate forum for resolving solar access issues); Note, *Obtaining Access to Solar Energy: Nuisance, Water Rights, and Zoning Administration*, 45 BROOKLYN L. REV. 357, 364–67 (1979) (economic analysis of private nuisance approach to solar access) [hereinafter cited as Note, *Obtaining Access*]; Comment, *Obstruction of Sunlight as a Private Nuisance*, 65 CAL. L. REV. 94 (1977) (past policies denying solar access no longer applicable) [hereinafter cited as Comment, *Private Nuisance*]; Comment, *Securing Solar Energy Rights: Easements, Nuisance or Zoning?*, 3 COLUM. J. ENVTL. L. 112, 134–39 (1976) (zoning as alternative to private nuisance actions) [hereinafter cited as Comment, *Securing Energy Rights*]; Comment, *Solar Rights: Guaranteeing a Place in the Sun*, 57 OR. L. REV.

analysis of nuisance law and prevailing legislative strategies reveals that no single methodology can alone resolve the solar access problem—rather, an integrated approach is mandated.

This Note first analyzes the common law view of access to sunlight¹² as background for discussion of *Prah v. Maretti*.¹³ Next, it supports the private nuisance approach adopted in *Prah* by analogizing to judicial resolution of surface water disputes.¹⁴ Issues raised by implementation of the nuisance approach are then examined.¹⁵ This Note concludes that although private nuisance is a viable approach to solar access, a comprehensive strategy is needed. The Note proposes combining a private right of action for nuisance with an easement statute and land use controls.¹⁶

94, 124-26 (1978) (private nuisance inherently flexible) [hereinafter cited as Comment, *Guaranteeing a Place*].

A number of commentaries on the *Prah* decision have recently been published. See Recent Development, *Casting a Shadow On a Solar Collector—A Cause of Action Recognized; An Alternative Framework Suggested*: *Prah v. Maretti*, 68 CORNELL L. REV. 941 (1983) (proposing land use framework focusing on blameworthiness and efficiency as substitute for *Restatement (Second) of Torts* analysis adopted in *Prah*) [hereinafter cited as Recent Development, *Casting a Shadow*]; Comment, *Wisconsin Supreme Court Sees the Light: Nuisance Remedy Granted for Obstruction of Solar Access*, 11 ECOLOGY L.Q. 47 (1983) (analyzing *Prah* and concluding that private nuisance law may be useful supplement to solar access legislation); Comment, *A New Place Under the Sun: Prah v. Maretti and Common Law Solar Access Remedies*, 3 N. ILL. U.L. REV. 187 (1982) (focusing on Illinois law and concluding that sufficient precedent exists to support adopting *Prah* analysis); Note, *Prah v. Maretti: Deficiencies of a Nuisance Law Cause of Action for Obstruction of Solar Access*, 78 NW. U.L. REV. 861 (1983) (supporting *Prah* court's conclusion that strict common law view of right to sunlight is no longer justified, but urging legislative solution to solar access problem) [hereinafter cited as Note, *Nuisance Deficiencies*]; Comment, *Wisconsin Recognizes the Power of the Sun: Prah v. Maretti and the Solar Access Act*, 1983 WIS. L. REV. 1263 (providing economic support for *Prah*, concluding that nuisance law coupled with Wisconsin solar access legislation is fair and efficient solution to problem) [hereinafter cited as Comment, *Power of the Sun*]; 16 J. MAR. L. REV. 435 (1983) (*Prah* court correct in recognizing need for solar access protection, but legislation is preferable); 48 MO. L. REV. 769 (1983) (courts should follow *Prah's* lead because prior law unsupported and private nuisance easily extended to solar access area); 4 U. BRIDGEPORT L. REV. 153 (1982) (applauding *Prah* for its recognition of sun's value as alternative energy resource); 52 U. CIN. L. REV. 208 (1983) (decision of Wisconsin Supreme Court justified, but problems with private nuisance law make it unsuited to solving solar access problem); 29 WAYNE L. REV. 1449 (1983) (neither nuisance law nor solar legislation is adequate; comprehensive approach required).

12. See *infra* notes 23-40 and accompanying text.

13. See *infra* notes 41-66 and accompanying text.

14. See *infra* notes 68-110 and accompanying text.

15. See *infra* notes 116-65 and accompanying text.

16. See *infra* notes 169-218 and accompanying text.

I. *PRAH V. MARETTI*: RECOGNITION OF A PRIVATE NUISANCE CAUSE OF ACTION FOR OBSTRUCTION OF SOLAR ACCESS

Beginning with the rejection of the English doctrine of "ancient lights,"¹⁷ courts in this country have consistently disallowed claims asserting a legal right to the unobstructed flow of sunlight across adjoining property.¹⁸ Courts declining to recognize a private nuisance cause of action for obstruction of sunlight have assumed that no legal right is implicated.¹⁹ A judgment that a landowner's interest in access to sunlight is per se inferior to his neighbor's interest in land development underlies this assumption.²⁰ A narrow exception has been recognized when the structure blocking the sunlight is erected solely out of spite.²¹ This exception does not, however, embrace the finding of a legal right

17. The English common law recognizes prescriptive easements to light under the doctrine of ancient lights. Under this doctrine, a landowner can acquire a negative easement by uninterrupted use of the light flowing across his neighbor's property for a period of 27 years. The right does not include sunlight, but only embraces light for illumination or aesthetic enjoyment. To prevail in an action for infringement of the right, the plaintiff must show a "substantial deprivation" of light. See Becker, *supra* note 11, at 23; Moskowitz, *Legal Access to Light: The Solar Energy Imperative*, 9 NAT. RESOURCES LAW. 177, 185-88 (1976); Comment, *Securing Energy Rights*, *supra* note 11, at 116-19.

Some American courts originally adopted ancient lights. See, e.g., Clawson v. Primrose, 4 Del. Ch. 643 (1873); Robeson v. Pittenger, 2 N.J. Eq. 57 (1838). However, the doctrine has now been uniformly rejected. For a comprehensive review of the cases, see Moskowitz, *supra*, at 188-89 n.60. The leading case, Parker v. Foote, 19 Wend. 309 (N.Y. Sup. Ct. 1838), sets forth three justifications for the rejection. First, and most importantly, courts feared that ancient lights would impede land development at a time when this country was highly undeveloped. *Id.* at 318. Second, it was thought impossible to have adverse use of light. *Id.* at 316-17. Third, courts were concerned that acceptance of ancient lights might lead to erection of useless structures to cut off the prescriptive period. *Id.* at 318.

18. Most courts in this country do not recognize implied easements to light and air primarily due to a bias in favor of land development. See, e.g., Morrisson v. Marquardt, 24 Iowa 35 (1867); Mullen v. Stricker, 19 Ohio St. 135 (1869); Haverstick v. Sipe, 33 Pa. 368 (1859). *But see*, e.g., Robinson v. Clapp, 65 Conn. 365, 32 A. 939 (1895); S.A. Lynch Corp. v. Stone, 211 Ga. 516, 87 S.E.2d 57 (1955).

The courts have, however, consistently honored *express* easements to light and air. See, e.g., Bryan v. Grosse, 155 Cal. 132, 99 P. 499 (1909); Keating v. Springer, 146 Ill. 481, 34 N.E. 805 (1893); Homewood Realty Corp. v. Safe Deposit & Trust Co., 160 Md. 457, 154 A. 58 (1931); Ladd v. Boston, 151 Mass. 585, 24 N.E. 858 (1890).

19. See *infra* notes 24 & 34-37 and accompanying text.

20. See *infra* notes 24 & 40 and accompanying text. According to the *Prah* court, this judgment is based on three policy considerations: the right of a landowner to use his property as he pleases, the minimal value of sunlight, and unimpeded land development. See *infra* notes 49-51 and accompanying text; see also Comment, *Private Nuisance*, *supra* note 11, at 105-12. Per se rules of nuisance liability are often overruled as social conditions change. See *infra* note 40.

21. See *infra* notes 27-33 and accompanying text.

to sunlight—it reflects judicial condemnation of spiteful actions.²²

A. *The State of the Law Before Prah v. Maretti*

Historically, many courts did not recognize a nuisance action for the erection of spite fences.²³ Some held that a nuisance action would not lie absent a legal right to sunlight.²⁴ Others reasoned that a landowner's motive for erecting a structure on his own property is irrelevant; a bad motive does not render an otherwise lawful act unlawful.²⁵ Some courts sought further to justify denial of a nuisance action by distinguishing light and air obstruction from other nuisances. It was thought that a nuisance had to involve physical invasion of property.²⁶

Recognition of a nuisance action for spite fences appears to be emerging as the dominant view.²⁷ Courts recognizing such actions generally utilize one of three approaches to liability. The majority view is that liability attaches only if the fence serves no useful purpose.²⁸ Erecting a structure solely for spite is not considered a

22. See *infra* notes 29–30 and accompanying text.

23. See, e.g., *Giller v. West*, 162 Ind. 17, 69 N.E. 548 (1904); *Mahan v. Brown*, 13 Wend. 261 (N.Y. Sup. Ct. 1835); *Letts v. Kessler*, 54 Ohio St. 73, 42 N.E. 765 (1896); *Metzger v. Hochrein*, 107 Wis. 267, 83 N.W. 308 (1900). A spite fence is a structure “which is of no beneficial use or pleasure to the owner but was erected and is maintained by him . . . with the malicious motive of injuring another by shutting out his light, air and view.” 1 AM. JUR. 2D *Adjoining Landowners* § 106 (1962).

24. See, e.g., *Giller*, 162 Ind. at 21, 69 N.E. at 549; *Mahan*, 13 Wend. at 264. The courts fail to explain why there is no right to light. Their stance is apparently based on a belief that, because sunlight is of little commercial value and land development is of great value, a landowner's interest in access to sunlight does not deserve legal protection. Comment, *Private Nuisance*, *supra* note 11, at 105.

25. See, e.g., *Letts*, 54 Ohio St. at 81–82, 42 N.E. at 766; *Metzger*, 107 Wis. at 270–71, 83 N.W. at 309–10. The problem with this view is that motive is frequently used as a factor in determining the legality of conduct. Comment, *Private Nuisance*, *supra* note 11, at 99 n.36.

Some courts have gone so far as to hold that motive is irrelevant and that spite fences blocking sunlight do not invade a legal right. See, e.g., *Giller*, 162 Ind. at 21, 69 N.E. at 549; *Mahan*, 13 Wend. at 264.

26. See, e.g., *Letts*, 54 Ohio St. at 82–83, 42 N.E. at 766–67; *Musumeci v. Leonardo*, 77 R.I. 255, 261, 75 A.2d 175, 178 (1950). This view is erroneous, since many nuisances do not involve the physical invasion of property. See *infra* notes 124–25 and accompanying text.

27. See, e.g., *Griffin v. Northridge*, 67 Cal. App. 2d 69, 153 P.2d 800 (1944); *Hornsby v. Smith*, 191 Ga. 491, 13 S.E.2d 20 (1941); *Sundowner, Inc. v. King*, 95 Idaho 367, 509 P.2d 785 (1973); *Burke v. Smith*, 69 Mich. 380, 37 N.W. 838 (1888); *Bush v. Mockett*, 95 Neb. 552, 145 N.W. 1001 (1914); *Barger v. Barringer*, 151 N.C. 433, 66 S.E. 439 (1909); *Schork v. Epperson*, 74 Wyo. 286, 287 P.2d 467 (1955); *Erickson v. Hudson*, 70 Wyo. 317, 249 P.2d 523 (1952). A handful of courts continue to deny a nuisance cause of action for spite fences. See *Taliaferro v. Salyer*, 162 Cal. App. 2d 685, 328 P.2d 799 (1958); *Musumeci*, 77 R.I. 255, 75 A.2d 175; *Harrison v. Langlinais*, 312 S.W.2d 286 (Tex. Civ. App. 1958).

28. See, e.g., *Hornsby*, 191 Ga. 491, 13 S.E.2d 20; *Sundowner*, 95 Idaho 367, 509 P.2d

lawful use of property.²⁹ A few cases in this majority support the existence of a legal right to sunlight.³⁰ Another approach imposes liability if spite is the dominant purpose, or if the structure's useful purpose is clearly incidental.³¹ Finally, some courts employ a balancing analysis, weighing the harm caused by the spite fence against the fence's utility.³² Nuisance liability flows if the harm outweighs the utility.³³

Prior to *Prah*, courts were unwilling to expand the scope of nuisance protection beyond spite fences to cover obstruction of sunlight. In the leading case, *Fountainbleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*,³⁴ the court rejected a nuisance cause of action, employing a two-step rationale. First, the court concluded that nuisance law permits a landowner to put his property to any use that does not deprive his neighbor of a legal right.³⁵ Then, the court found no legal right to sunlight, citing and rejecting the ancient lights doctrine.³⁶ It therefore concluded that there can be no

785; *Burke*, 69 Mich. 380, 37 N.W. 838; *Bush*, 95 Neb. 552, 145 N.W. 1001; *Barger*, 151 N.C. 433, 66 S.E. 439.

29. See *Hornsby*, 191 Ga. 491, 13 S.E.2d 20; *Burke*, 69 Mich. 380, 37 N.W. 838; *Barger*, 151 N.C. 433, 66 S.E. 439.

30. One court stated:

The air and light no matter from which direction they come are God-given, and are essential to the life, comfort, and happiness of everyone. Under the rules of law, they may be properly and justifiably interfered with to a limited extent in order to secure benefits to others; but any departure from this limitation upon such interference that benefitted no one, and is done solely from malice, is an invasion of the right to light and air

Hornsby, 191 Ga. at 500, 13 S.E.2d at 25; see also *Burke*, 69 Mich. at 389, 37 N.W. at 842 ("The right to breathe the air, and to enjoy the sunshine is a natural one."); *Barger*, 151 N.C. at 437, 66 S.E. at 440-41 ("Light and air are as much a necessity as water and all are the common heritage of mankind.").

31. See *Griffin*, 67 Cal. App. 2d 69, 153 P.2d 800.

32. See *Schork*, 74 Wyo. 286, 287 P.2d 467. In *Schork*, the court adopted the *Restatement (Second) of Torts* approach to spite fence liability. If spite is the sole purpose the structure constitutes a nuisance per se. RESTATEMENT (SECOND) OF TORTS § 829 (1979). If spite is not the sole purpose the court balances the utility of defendant's conduct against the harm to plaintiff. See *id.* § 826 comment e. This approach is supported, at least in dictum, by several other courts. See, e.g., *Bush*, 95 Neb. at 556, 145 N.W. at 1002; *Erickson*, 70 Wyo. at 341, 249 P.2d at 532.

33. This approach offers support for *Prah*, in which the court adopted the same balancing analysis, albeit in a situation not involving spite. See *infra* notes 41-43 and accompanying text; cf. Comment, *Private Nuisance*, *supra* note 11, at 102 (balancing analysis adopted in *Schork* is encouraging, but court unlikely to apply it to situations not involving malice).

34. 114 So. 2d 357 (Fla. Dist. Ct. App. 1959); see also *Venuto v. Owens-Corning Fiberglass Corp.*, 22 Cal. App. 3d 116, 99 Cal. Rptr. 350 (1971); *Wolf v. Forcum*, 130 Ind. App. 10, 161 N.E.2d 175 (1959).

35. 114 So. 2d at 359.

36. *Id.*

nuisance action for obstructing sunlight.³⁷

The flaw in this reasoning is twofold. First, the ancient lights doctrine is a legal anachronism having no bearing on the viability of a nuisance action for sunlight obstruction. The doctrine was simply a nonexclusive means of acquiring a negative easement to sunlight.³⁸ More importantly, the *Fountainbleau* court's premise, that there is no legal right to sunlight, should have been its conclusion.³⁹ The court offered no policy reasons for barring landowners from protecting their access to sunlight through nuisance actions.⁴⁰ In *Prah v. Maretti*, the court did engage in a policy analysis, concluding that per se exclusion from nuisance coverage of a landowner's interest in access to sunlight is unjustified.

B. *Prah v. Maretti*

In *Prah*, the Supreme Court of Wisconsin held that a solar energy user has stated a claim upon which relief can be granted by alleging that his neighbor's construction of a home will obstruct his access to sunlight.⁴¹ The court recognized a private nuisance cause action under the reasonable use doctrine of the *Restatement (Second) of Torts*.⁴² The court did not, however, reach a decision

37. *Id.*

38. Comment, *Securing Energy Rights*, *supra* note 11, at 136.

39. See Comment, *Private Nuisance*, *supra* note 11, at 99; Comment, *Guaranteeing a Place*, *supra* note 11, at 125 n.126; see also G. HAYES, *supra* note 10, at 172 n.13.

40. The drafters of the *Restatement (Second) of Torts*, commenting on per se exclusions from the nuisance balance, provided: "These judicial crystallizations, however, should not obscure the fact that in every case the question is one of reasonableness. They are constantly re-examined in the light of changing community conditions and views." RESTATEMENT (SECOND) OF TORTS § 826 comment e (1979). Describing the flexibility of nuisance law, one commentator has noted: "Automobiles when they first appeared were nuisances to horse travel; as cars began to swamp horse-drawn vehicles in number, horses were properly perceived as the nuisance." Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 731 (1973).

Two additional rationales have been proffered by courts limiting a nuisance action for obstruction of sunlight. First, some courts exhibit a strong bias in favor of property ownership. As one court stated, "The 'ability' of appellants to 'maintain' their dwelling is not a legal right which was violated or invaded by the lawful use of the appellees of their own premises in erecting a building thereon which did not reach appellants' property in a physical sense." *Wolf v. Forcum*, 130 Ind. App. 10, 16, 161 N.E.2d 175, 178 (1959). Second, courts seem to be motivated by a largely unarticulated view that obstruction of sunlight differs from other nuisances. This view, set forth in early cases denying a nuisance cause of action for spite fences, was not questioned in subsequent cases upholding such a cause of action. See *supra* note 26 and accompanying text.

41. 108 Wis. 2d at 240, 321 N.W.2d at 191. For an excellent discussion of the *Prah* facts, see Recent Development, *Casting a Shadow*, *supra* note 11, at 948-49.

42. 108 Wis. 2d at 240, 321 N.W.2d at 191. Under the reasonable use doctrine, invasion of a person's use or enjoyment of land is a private nuisance if unreasonable. The

on the merits of plaintiff's claim.⁴³

Justice Abrahamson, writing for the majority, first reviewed the limited common law view of access to sunlight.⁴⁴ She observed that the doctrine of ancient lights had been unanimously rejected in this country as inconsistent with the need for rapid land development.⁴⁵ Only in two narrow instances does the common law protect a landowner's interest in access to sunlight: actions based on express easements to sunlight,⁴⁶ and nuisance actions for malicious obstruction of sunlight (i.e., spite fences).⁴⁷

Acknowledging the reluctance of early courts to protect a landowner's access to sunlight, Justice Abrahamson identified three traditional justifications for that stance.⁴⁸ Most prominent was the undisputed right of every landowner to use his property as he pleased, so long as he caused no physical harm to his neighbor.⁴⁹ In addition, sunlight was valued only for the illumination or aesthetic enjoyment it provided—not as an energy resource—and its loss was given little, if any, weight by society.⁵⁰ Finally, the traditional view reflected a strong interest in unim-

unreasonableness of the invasion is determined by balancing the utility of the actor's conduct against the gravity of the harm inflicted. RESTATEMENT (SECOND) OF TORTS §§ 821D-831 (1979). For a thorough discussion of the application of the reasonable use rule to solar access disputes, see *infra* notes 121-65 and accompanying text.

43. 108 Wis. 2d at 242-43, 321 N.W.2d at 192. The case was remanded to the trial court for such a determination. *Id.* The parties settled on January 17, 1984, the day the case had been set for trial. The trial court issued the following order, prohibiting the parties from disclosing the terms of the settlement:

The parties to this lawsuit have been involved in this matter for over three years and . . . have settled their differences to their mutual satisfaction. It is agreed that the lawsuit is dismissed upon its merits

This matter has been a substantial burden on each of these parties and has greatly divided the neighborhood in which they live and their respective families. In the interest of putting this dispute behind them and in an effort to achieve harmony in the neighborhood the parties have agreed not to comment on the resolution of the dispute.

The court has encouraged the parties in their resolution of this lawsuit and therefore orders that neither party comment further on this matter.

Letter from John F. Maloney to Shawn Lyden (Mar. 22, 1984) (enclosing statement by the court upon settlement) (on file with the *Case Western Reserve Law Review*).

44. 108 Wis. 2d at 233-35, 321 N.W.2d at 188-89.

45. *Id.* at 233-34, 321 N.W.2d at 188; see *supra* note 17.

46. 108 Wis. 2d at 233, 321 N.W.2d at 188; see *supra* note 18.

47. 108 Wis. 2d at 234-35, 321 N.W.2d at 188-89; see *supra* notes 27-33 and accompanying text.

48. 108 Wis. 2d at 235, 321 N.W.2d at 189.

49. *Id.* (citing *Metzger v. Hochrein*, 107 Wis. 267, 83 N.W. 308 (1900), in which Supreme Court of Wisconsin refused to recognize nuisance action for maintenance of spite fence); see also *supra* notes 25 & 40 and accompanying text.

50. 108 Wis. 2d at 235, 321 N.W.2d at 189. Because sunlight was little valued and land development was greatly valued, courts failed to find a right to sunlight. See *supra* note 24.

peded land development.⁵¹

The *Prah* court examined these policies, concluding that “[t]hey reflect factual circumstances and social priorities that are now obsolete.”⁵² The “sovereignty” of the landowner has lost considerable vitality in the last hundred years, as government has increasingly regulated land use for the public welfare.⁵³ Also, access to sunlight now has greater economic significance⁵⁴ both to the individual investor in solar energy, and to society which has an interest in developing alternative energy resources.⁵⁵ Finally, unimpeded land development is no longer inherently desirable.⁵⁶ Thus, asserting that “[c]ourts should not implement obsolete policies that have lost their vigor over the course of the years,”⁵⁷ Justice Abrahamson concluded that “[t]he law of private nuisance is better suited to resolve landowners’ disputes about property development in the 1980’s than is a rigid rule which does not recognize a landowner’s interest in access to sunlight.”⁵⁸ The *Prah* court adopted the reasonable use doctrine to resolve solar access disputes because it has the flexibility to protect both a landowner’s interest in developing his land and his neighbor’s interest in access to sunlight.⁵⁹

Justice Callow, the lone dissenter, raised many of the standard arguments against recognizing a private nuisance action for obstruction of solar access. He initially disputed the obsolescence of the three traditional policy justifications cited by the majority.⁶⁰

51. 108 Wis. 2d at 235, 321 N.W.2d at 189. Cases rejecting the ancient lights doctrine best illustrate this view. See, e.g., *Keiper v. Klein*, 51 Ind. 316 (1875); *Pierre v. Fernald*, 26 Me. 436 (1847); *Cherry v. Stein*, 11 Md. 1 (1858); *Parker v. Foote*, 19 Wend. 309 (N.Y. Sup. Ct. 1838).

52. 108 Wis. 2d at 236, 321 N.W.2d at 189.

53. *Id.* (relying on two zoning cases, *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), and *Just v. Marinette*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972)).

54. 108 Wis. 2d at 236, 321 N.W.2d at 189.

55. *Id.* To support this assertion, the court referred to federal and state legislation encouraging solar energy use. *Id.* at n.11.

56. *Id.* at 237, 321 N.W.2d at 190.

57. *Id.*

58. *Id.* The court then briefly discussed *State v. Deetz*, 66 Wis. 2d 1, 224 N.W.2d 407 (1974), in which it had rejected the common enemy rule and adopted the reasonable use rule to resolve surface water disputes. The majority relied upon *Deetz* to support its holding, reading it “as an endorsement of the application of common law nuisance to situations involving the conflicting interests of landowners and as rejecting *per se* exclusions to the nuisance law reasonable use doctrine.” *Id.* For a complete discussion of the law of surface waters and its similarities to solar access law, see *infra* notes 68–115 and accompanying text.

59. 108 Wis. 2d at 239–40, 321 N.W.2d at 191.

60. *Id.* at 244–48, 321 N.W.2d at 193–95. The dissent argued rather sardonically in a

Even if those policies were obsolete, he added, it was for the legislature, not the judiciary, to so determine.⁶¹ Justice Callow asserted that the cause of action recognized by the majority will thwart the policy of encouraging peaceful compromise between neighbors.⁶² He contended, moreover, that obstruction of solar

footnote that instead of the obstruction, solar collectors may themselves constitute the nuisance. *Id.* at 248 n.3, 321 N.W.2d at 195 n.3. This would certainly be true, stated Justice Callow, if collector glare temporarily blinded automobile drivers, reflected excessive heat into adjacent buildings, or otherwise annoyed neighbors. *Id.* Although this point has some merit, proper precautions in building and installing the collectors should minimize the risk of legal action. S. KRAEMER, *supra* note 2, at 139 (1978).

61. 108 Wis. 2d at 248, 321 N.W.2d at 195. As the dissent correctly pointed out, the Wisconsin legislature has addressed the solar access issue. However, contrary to the arguments of Justice Callow, the legislation is very narrowly drawn and therefore was not likely intended to preempt judicial activity. The statute referred to by the *Prah* dissent enables municipalities to adopt solar access permit ordinances. WIS. STAT. ANN. § 66.032 (West Supp. 1983). Under such legislation, a current or prospective solar energy user may apply to a local government agency for a solar access permit. *Id.* § 66.032(3)(a). After notice is given to the applicant's neighbors, *id.* § 66.032(3)(b), the agency may conduct a hearing, *id.* § 66.032(4), and must grant a permit if it determines: (1) that the granting of the permit will not "unreasonably interfere with the orderly land development plans of the municipality"; (2) that no person has shown that he has applied for a building permit for, spent \$500 on the planning or designing of, or substantially undertaken planning or construction of a structure that would interfere with the applicant's solar access; and (3) that the benefits to the applicant and the public will exceed the burdens, *id.* § 66.032(5)(a). If granted, the permit must be recorded. *Id.* § 66.032(6). The remedy for an "impermissible interference" is damages, including court costs and reasonable attorney fees, unless the interference is caused by vegetation, in which case an injunction may be sought. *Id.* § 66.032(7).

Another statute allows a solar energy user to seek compensation for any obstruction of solar access by a structure outside a neighbor's "building envelope," as defined by the zoning requirements in effect when the solar unit is installed. WIS. STAT. ANN. § 700.41(1) (West Supp. 1983). A "building envelope" is a "3-dimensional area on a lot on which building is permitted, as defined by the existing ground level and by any applicable height restriction, setback requirement, side yard requirement or rear yard requirement." *Id.* § 700.41(2)(a).

Wisconsin also has passed other solar access legislation. *See* WIS. STAT. ANN. §§ 59.97(1), 62.23(7)(c) (West Supp. 1983) (county zoning agencies and municipalities may consider solar access in carrying out zoning authority); *id.* § 66.031 (municipal governments may enact ordinances providing for trimming of vegetation obstructing solar access); *id.* § 700.35 (solar access easements).

For a thorough analysis of the permit and building envelope statutes and their relationship to the private nuisance remedy, see Comment, *Power of the Sun*, *supra* note 11, at 1289-97. The author concludes that "nuisance law is very flexible and will probably be used to fill in any gaps left in the legislation . . . [I]t is the complementary and cumulative aspects of the [legislation] and nuisance law which is [sic] striking." *Id.* at 1297; *see also* Recent Development, *Casting a Shadow*, *supra* note 11, at 952 n.69 ("Nuisance law is well suited to handle the cases that slip between the permit scheme and restrictive covenants."). This Note, although agreeing with the basic premise that nuisance law is a useful complement to legislation, proposes integration of nuisance law with more widely accepted legislative approaches—namely, express easements, zoning, and subdivision regulation. *See infra* notes 169-218 and accompanying text.

62. 108 Wis. 2d at 246 n.2, 321 N.W.2d at 193 n.2. This concern can be met if the

access is not an "invasion" of the use or enjoyment of land as that term is used in the *Restatement (Second) of Torts*.⁶³ "Invasion" is synonymous with "the incoming or spread of something hurtful,"⁶⁴ such as noise or noxious odors. Justice Callow argued further that new construction threatening obstruction of solar access will usually be in compliance with applicable zoning laws and building codes. This compliance would prevent the courts from declaring the construction a private nuisance.⁶⁵ Finally, he asserted that a private nuisance action is unsupportable because a landowner using a solar energy system is putting his property to an unusually sensitive use.⁶⁶

In examining *Prah*, Justice Callow's critique of the court's policy analysis must be given serious consideration.⁶⁷ After all, with

private nuisance approach is supplemented by a solar access easement statute. See *infra* notes 184-91 and accompanying text.

63. 108 Wis. 2d at 250-51, 321 N.W.2d at 196.

64. *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1188 (P. Gove ed. 1966)). This definition is contrary to nuisance law. See *infra* notes 124-26 and accompanying text.

65. 108 Wis. 2d at 253-54, 321 N.W.2d at 196-97. The defendant in *Prah* had received approval for his proposed construction from the local architectural control committee and the city planning commission. *Id.* at 226, 321 N.W.2d at 185. Under the modern view, compliance with zoning laws does not prevent an activity from being declared a nuisance. It is simply another factor in determining the utility of the actor's conduct. See *infra* notes 152-53 and accompanying text.

66. 108 Wis. 2d at 251-53, 321 N.W.2d at 196-97. Although unusually sensitive uses are generally not entitled to protection in a nuisance action, it is debatable whether a court would deem a solar energy system an unusually sensitive use. See *infra* notes 132-37 and accompanying text.

Justice Callow also contended that the majority's holding "thwarts the very foundation of property law"—the need for apprising prospective purchasers of any limitations on their use of property. 108 Wis. 2d at 254, 321 N.W.2d at 198. According to the dissent, defendant had no notice of plaintiff's use of solar collectors. *Id.* This argument is simply contrary to the facts of the case. See Recent Development, *Casting a Shadow*, *supra* note 11, at 952-53 n.72. Further, had there been no notice plaintiff likely would have lost on the merits, since the requirement of an intentional invasion would not have been satisfied. See *infra* note 138.

67. See 108 Wis. 2d at 244-48, 321 N.W.2d at 193-95. The policies of land development and landowner freedom are addressed *infra* notes 76-77 & 98-103 and accompanying text. Regarding the increased significance of sunlight as an energy source, the dissent stated: "Solar energy for home heating is at this time sparingly used and of questionable economic value because solar collectors are not mass produced, and consequently, they are very costly. Their limited efficiency may explain the lack of production." 108 Wis. 2d at 247, 321 N.W.2d at 194. Justice Callow's remarks betray fundamental misconceptions of solar energy development and use. Before investment in solar energy can become widespread, such misconceptions must be dispelled. First, solar energy use for home heating is already substantial and steadily increasing. In 1981, for example, there were 300,000 active solar water and heating systems in place in this country, compared with only 20,000 in 1974. S. KRAEMER, *supra* note 2, at 75 (Supp. 1984). Approximately 10,000 new buildings

little or no supporting precedent, the court was brushing aside a formidable body of contrary authority largely based on its perceptions of a change in the policies bearing on solar access. However, a review of the analogous body of law governing surface water disputes reveals that the *Prah* court's analysis and conclusion are justifiable.

C. *Analogy to Surface Water Disputes*

1. *The Law of Surface Waters*

Three principal liability rules govern interference with the natural flow of surface waters.⁶⁸ The civil law rule, effectively a

used passive solar design in 1980 and that number is doubling each year. Bezdek, Wendling, Bennington & Chew, *National Goals for Solar Energy: Economic and Social Implications*, 22 NAT. RESOURCES J. 338, 352 (1982). Further, reasonable estimates indicate that solar could provide between one-fifth and one-fourth of America's energy needs by the year 2000. ENERGY FUTURE, *supra* note 1, at 183. Second, although the initial investment in solar energy may be considered high, it is "clear that solar energy is far more 'economic' than conventionally assumed." *Id.* at 193. The average cost of a professionally installed combined active solar space heating and hot water system is \$15,000, while a kit or owner-built system can cost as little as \$2000. Passive heating systems range in price from \$5000 to \$10,000. Conservation & Renewable Energy Inquiry & Referral Serv., *Renewable Energy: An Overview* (February, 1982) (on file with the *Case Western Reserve Law Review*). The prospect of investing in solar is made much more attractive when one considers that many states grant sales and income tax exemptions, as well as income tax credits. See S. KRAEMER, *supra* note 2, at 55-57 (Supp. 1984) (listing solar tax incentive measures by state). The federal government and some states have also passed legislation designed to facilitate the availability of financing for the purchase of solar systems. See *id.* at 58-62. Of course, one must also consider the substantial fuel savings which can result from investing in solar technology. The plaintiff in *Prah*, for example, had saved \$600 per year in fuel costs. Brief for United States of America as Amicus Curiae at 10 n.7. Finally, the solar industry in this country is booming. In 1981, 3500 solar manufacturers were operating, compared with only 50 in 1974. Moreover, the industry is growing at an annual rate of 37%. S. KRAEMER, *supra* note 2, at 75 (Supp. 1984).

68. Surface water is "water from rain, melting snow, springs or seepage, or detached from subsiding floods, that lies or flows on the surface of the earth but does not form a part of a watercourse or lake." RESTATEMENT (SECOND) OF TORTS § 846 (1979). Controversies involving the use of surface water also arise, although not as frequently as disputes concerning interference with its flow. See *id.* comment b. The common law rule, codified in some state statutes and the *Restatement*, is that a landowner has absolute ownership of the surface water on his land. See Davis, *The Law of Diffused Surface Water in Eastern Riparian States*, 6 CONN. L. REV. 227, 229 & n.4 (1973) (stating rule and collecting surface water use cases by state); Maloney & Plager, *Diffused Surface Water: Scourge or Bounty?*, 8 NAT. RESOURCES J. 72, 107-11 (1968) (discussing common law rule and statutory developments); RESTATEMENT (SECOND) OF TORTS § 864 (1979) ("possessor of land is not subject to liability for a use of surface water on his land that interferes with another person's use of the water, unless the use is made for the primary purpose of causing the harm"). The leading article on the subject of surface water, however, presents the argument that the cases universally involve a beneficial use of surface water. The authors contend that by inference this supports application of the reasonable use rule to situations involving the use

rule of strict liability, imposes liability for any alteration of the natural flow of surface waters which interferes with another's interest in the use and enjoyment of land.⁶⁹ Under this rule, adjoining parcels of land are "subject to a natural servitude for the natural flow of surface water across" them.⁷⁰ Thus, the owner of the lower land cannot obstruct the flow of surface water from the upper land without incurring liability to that land's owner.⁷¹ Similarly, the owner of the upper land is liable for increasing or diverting the flow of surface water onto the lower land.⁷² The rationale for adoption of the civil law rule was that enforcing the natural laws of drainage is the least harmful and most peaceful way to resolve surface water disputes.⁷³ A few courts continue to adhere to the pure civil law rule.⁷⁴

The common enemy rule, the polar opposite of the civil law rule, provides that landowners have an absolute legal right to interfere with the natural flow of surface water, regardless of the harm to adjoining land.⁷⁵ Courts have asserted two principal justifications for adopting the common enemy rule: the right of a

of surface water as well as those involving interference with its flow. Kinyon & McClure, *Interferences with Surface Waters*, 24 MINN. L. REV. 891, 914-15 (1940).

69. Kinyon & McClure, *supra* note 68, at 893. See generally Long & Long, *Surface Waters and the Civil Law Rule*, 23 EMORY L.J. 1015 (1974) (providing comprehensive analysis of civil law rule, concluding that rule does not inhibit land development and that modifications of rule produce fair and predictable results).

70. Kinyon & McClure, *supra* note 68, at 893-94.

71. *Id.* at 894.

72. *Id.*

73. *Id.* at 895. According to Kinyon and McClure, this is "[t]he real reason for the rule," although courts stated that they were relying on the maxim *aqua currit et debet currere, ut currere solebat*, *id.* at 894-95, which translates "[w]ater runs, and ought to run, as it has used to run," BLACK'S LAW DICTIONARY 95 (5th ed. 1979).

74. See, e.g., *Gill v. First Christian Church, Inc.*, 216 Ga. 454, 117 S.E.2d 164 (1960); *Mississippi State Highway Comm'n v. Engell*, 251 Miss. 855, 171 So. 2d 860 (1965).

Most courts utilizing the civil law rule have modified it. The modifications generally recognize that strict application of the rule may seriously impede land development and improvement. Note, *The Application of Surface Water Rules in Urban Areas*, 42 Mo. L. Rev. 76, 79-81 (1977). The first modification, the "urban-rural" modification, continues to apply the civil law rule in rural areas, but applies either the common enemy or reasonable use rule in urban areas. *Id.* at 79-80; see, e.g., *Dekle v. Vann*, 279 Ala. 153, 182 So. 2d 885 (1966) (adopting common enemy rule for urban areas); *Mulder v. Tague*, 85 S.D. 544, 186 N.W.2d 884 (1971) (adopting reasonable use rule for urban areas). A second modification is the "reasonable use" modification which superimposes a reasonableness test on the civil law rule. See, e.g., *Keys v. Romley*, 64 Cal. 2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966). The third modification, the "good husbandry" modification, provides that the owner of the upper land can accelerate the flow of surface water as required by good husbandry. No liability is incurred to the owner of the lower land so long as the water is not diverted from its natural path. See, e.g., *Garbarino v. Van Cleave*, 214 Or. 554, 330 P.2d 28 (1958).

75. Kinyon & McClure, *supra* note 68, at 898.

landowner to do as he pleases on his own land⁷⁶ and the inherent desirability of land development and improvement.⁷⁷ A handful of modern courts apply the pure common enemy rule.⁷⁸

The reasonable use rule "occupies the middle ground" between the civil law and common enemy rules.⁷⁹ In jurisdictions adhering to this rule, landowners are not totally prohibited from interfering with the natural flow of surface water, nor are they granted a license to interfere with surface water drainage without regard for their neighbor's interests.⁸⁰ Any reasonable use of land is permissible, even if it alters the flow of surface water and damages adjoining land.⁸¹ Reasonableness is a question of fact, determined in each case "in accordance with general principles of fairness and common sense."⁸²

Courts have adopted the reasonable use rule in recognition of the significant disadvantages of the other rules. The civil law rule, although it generates predictable results,⁸³ may seriously impede land development and improvement.⁸⁴ The common enemy rule also ensures predictable results,⁸⁵ minimizes litigation, and en-

76. *Id.*; see *Grant v. Allen*, 41 Conn. 156, 160 (1874); *Goodale v. Tuttle*, 29 N.Y. 459, 466-67 (1864).

77. *Kinyon & McClure*, *supra* note 68, at 898-99; see *Niringer v. Norwood*, 72 Ala. 277, 280 (1882); *Barkley v. Wilcox*, 86 N.Y. 140, 148 (1881). A third justification for the common enemy rule is that it was the rule under English common law. *Kinyon & McClure*, *supra* note 68, at 899.

78. See, e.g., *Cloverleaf Farms, Inc. v. Surratt*, 169 Ind. App. 554, 349 N.E.2d 731 (1976); *Johnson v. Whitten*, 384 A.2d 698 (Maine 1978); *Sanco Sales, Inc. v. Massachusetts Bay Transp. Auth.*, 356 Mass. 725, 252 N.E.2d 214 (1969); *Tillinger v. Frisbee*, 138 Mont. 60, 353 P.2d 645 (1960).

Most courts originally adhering to the common enemy rule have modified it because strict application of the rule invites unreasonable behavior. The "collection and discharge" modification provides that a landowner may not collect large quantities of surface water and discharge it onto adjoining land. Note, *supra* note 74, at 87; see, e.g., *Miller v. Darby*, 336 Mass. 243, 143 N.E.2d 816 (1957). The "due care" modification permits a landowner to interfere with the natural flow of surface water so long as he does so with due care, reasonable care, or without negligence. Note, *supra* note 74, at 88; see, e.g., *Nichol v. Yocum*, 173 Neb. 298, 113 N.W.2d 195 (1962).

79. *Maloney & Plager*, *supra* note 68, at 79-80.

80. *Kinyon & McClure*, *supra* note 68, at 904.

81. *Id.*

82. *Id.* at 904-05; see *infra* note 90.

83. *Butler v. Bruno*, 115 R.I. 264, 269, 275, 341 A.2d 735, 738, 741 (1975). The numerous exceptions to the civil law rule result in uncertainty and reduce the rule's predictability. *Pendergrast v. Aiken*, 293 N.C. 201, 215, 236 S.E.2d 787, 796 (1977); *Butler*, 115 R.I. at 274-75, 341 A.2d at 741.

84. See, e.g., *Pendergrast*, 293 N.C. at 208, 236 S.E.2d at 791; *McGlashan v. Spade Rockledge Terrace Condo Dev. Corp.*, 62 Ohio St. 2d 55, 56, 402 N.E.2d 1196, 1198 (1980); *Butler*, 115 R.I. at 269, 341 A.2d at 738.

85. *Butler*, 115 R.I. at 268, 274, 341 A.2d at 737, 741. As with the civil law rule, the

courages the development and improvement of land.⁸⁶ However, it encourages self-help and creates bitter conflicts between adjoining landowners.⁸⁷ Both rules have been further criticized for framing surface water issues in terms of rigid property law concepts.⁸⁸ Use of property law terminology only results in confusion and inconsistency because, although the rules began as strict property law theories, they have been consistently modified by tort concepts to alleviate harsh results.⁸⁹

The most significant advantage of the reasonable use rule is flexibility—reasonableness is determined after consideration of the totality of circumstances in a given case.⁹⁰ Moreover, unlike

numerous modifications of the common enemy rule produce uncertainty and decrease predictability. *Id.* at 274-75, 341 A.2d at 741.

86. *Id.* at 268, 341 A.2d at 737.

87. *See, e.g., id.* at 268, 341 A.2d at 738. "[L]andowners are encouraged to engage in contests of hydraulic engineering in which might makes right, and breach of peace is inevitable." *Id.* (quoting Maloney & Plager, *supra* note 66, at 78); *see also* Rounds v. Hoelscher, 428 N.E.2d 1308, 1311 (Ind. Ct. App. 1981); *Pendergrast*, 293 N.C. at 207, 236 S.E.2d at 791.

88. *See, e.g., Rounds*, 428 N.E.2d at 1311-12; *Pendergrast*, 293 N.C. at 215, 236 S.E.2d at 795; *McGlashan*, 62 Ohio St. 2d at 59, 402 N.E.2d at 1199; *Butler*, 115 R.I. at 269-70, 341 A.2d at 738. As the *Butler* court aptly stated:

Both the common-enemy and the civil-law rules are encrusted with the verbiage that is usually associated with the law of real property. When they are used, one hears such terms as easements, the dominant estate, the servient estate, and servitudes, and the classicist has the opportunity to try his hand at translating such ponderous Latin phrases as *cujus est solum, ejus usque ad coelum et ad infernos* or *aqua currit, et debet currere ut currere solebat*.

115 R.I. at 269-70, 341 A.2d at 738.

89. *See, e.g., Pendergrast*, 293 N.C. at 215-16, 236 S.E.2d at 795-96; *Butler*, 115 R.I. at 271, 341 A.2d at 739.

90. *See, e.g., Rounds*, 428 N.E.2d at 1311-12; *Armstrong v. Francis Corp.*, 20 N.J. 320, 330, 120 A.2d 4, 10 (1956); *Pendergrast*, 293 N.C. at 216-17, 236 S.E.2d at 796-97; *Butler*, 115 R.I. at 275, 341 A.2d at 741. Faced with the argument that certainty should be favored over flexibility, the *Butler* court responded: "[A] desire for certainty of liability should not and must not serve as a judicial pardon for the unreasonable conduct which has been manifested by any landowner in our modern society." 115 R.I. at 275, 341 A.2d at 741.

A number of courts have articulated the factors they will consider under the reasonable use test. *See, e.g., Rounds*, 428 N.E.2d at 1315 (improvements as cause in fact of injury, nature and importance of improvements, relative value of harm compared to improvements, foreseeability of injury, extent of interference with flow of water, availability of mutual solutions to drainage problems, and negligence or willful misconduct by party seeking to control surface water); *Butler*, 115 R.I. at 273-74, 341 A.2d at 740 (reasonable necessity for drainage, reasonable care in avoiding damage, benefit to land drained compared with harm, and reasonableness of means of diverting water). Other courts have explicitly adopted the reasonable use doctrine of the *Restatement (Second) of Torts*. *See, e.g., McGlashan*, 62 Ohio St. 2d at 59-60, 402 N.E.2d at 1200; *State v. Deetz*, 66 Wis. 2d 1, 16-18, 224 N.W.2d 407, 415-16 (1974). For a discussion of this test, *see infra* notes 138-54 and accompanying text. Since the *Restatement* is basically a codification and clarification of the common law, the results should be the same.

the civil law rule, the reasonable use rule is not a serious impediment to land improvement and development.⁹¹ By forcing landowners to consider the true costs to the community before developing their land, the rule also discourages the type of unreasonable behavior condoned by the common enemy rule.⁹² Finally, the reasonable use rule correctly treats interference with surface water drainage as a matter of tort liability, focusing on "practical and concrete problems . . . rather than on the limitations and qualifications of a categorical 'right' or 'servitude' presupposedly assumed and ill-defined."⁹³ An increasing number of courts are rejecting the common enemy and civil law rules in favor of the reasonable use rule.⁹⁴

2. *Analogy to Solar Access*

Like obstruction of sunlight, interference with the flow of surface waters is a source of litigation between adjoining landowners. Moreover, both sunlight and surface water flow naturally across property lines,⁹⁵ and, when the natural path of either is altered,

91. See, e.g., *Armstrong*, 20 N.J. at 330, 120 A.2d at 10; *Butler*, 115 R.I. at 274, 341 A.2d at 741.

92. *Butler*, 115 R.I. at 274, 341 A.2d at 741. The reasonable use doctrine, unlike the common enemy rule, produces "a more equitable allocation of the costs of . . . improvements, for the owner improving his land must take into consideration the true cost of such development to the community." *Id.*

93. Kinyon & McClure, *supra* note 68, at 939; see, e.g., *Rounds*, 428 N.E.2d at 1309-10; *McGlashan*, 62 Ohio St. 2d at 59-60, 402 N.E.2d at 1199-1200.

94. In 1940, when Kinyon and McClure published their article urging courts to adopt the reasonable use rule, only Minnesota and New Hampshire had done so. See *Sheehan v. Flynn*, 59 Minn. 436, 61 N.W. 462 (1894); *Swett v. Cutts*, 50 N.H. 439 (1870). Since then, approximately 11 states have explicitly adopted the rule. See *Weinberg v. Northern Alaska Dev. Corp.*, 384 P.2d 450 (Alaska 1960); *Page Motor Co. v. Baker*, 438 A.2d 739 (Conn. 1980); *Weldin Farms, Inc. v. Glassman*, 414 A.2d 500 (Del. 1980); *Rodrigues v. State*, 52 Hawaii 156, 472 P.2d 509 (1970); *Armstrong*, 20 N.J. 320, 120 A.2d 4; *Pendergrast*, 293 N.C. 201, 236 S.E.2d 787; *Jones v. Boeing Co.*, 153 N.W.2d 897 (N.D. 1967); *McGlashan*, 62 Ohio St. 2d 55, 402 N.E.2d 1196; *Butler*, 115 R.I. 264, 341 A.2d 735; *Sanford v. University of Utah*, 26 Utah 2d 285, 488 P.2d 741 (1971); *Deetz*, 66 Wis. 2d 1, 224 N.W.2d 407. In addition, numerous states have effectively accepted the reasonable use rule by drastic modification of the other rules. See, e.g., *Keys v. Romley*, 64 Cal. 2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966) (reasonable use modification of civil law rule).

95. Brief for the United States of America as Amicus Curiae at 10 n.7, *Prah*; see Comment, *Private Nuisance*, *supra* note 11, at 104 ("Light and air are similar to water—freeflowing elements that no one person can possess."); cf. Note, *Obtaining Access*, *supra* note 11, at 368 ("Streams of light may be analogized to surface watercourses insofar as rights to both attach to the flow and not the corpus."). But see S. KRAEMER, *supra* note 2, at 156 (1978) (unlike water, "[s]unlight is an energy form that strikes similiary located surfaces approximately equally" and "is not channelized and is regularly reflected and absorbed").

the interests asserted by adjoining landowners are the same.⁹⁶

The surface water rules and their policy rationales are mirrored in the views and policies regarding access to sunlight. For example, the common enemy rule and its justifications have their counterpart in the narrow common law view of access to sunlight and its justifications. Both the common enemy rule and the common law view regarding access to sunlight are based on the denial of a legal "right" to the unobstructed flow of surface water or sunlight.⁹⁷ Further, one of the principal policy justifications for the common enemy rule—the need for unimpeded land development⁹⁸—has also been asserted to support the narrow common law view of access to sunlight.⁹⁹ Likewise, the other rationale for the common enemy rule—the cherished right of a landowner to use his land as he pleases¹⁰⁰—has been used to justify a narrow view of liability for obstructing sunlight.¹⁰¹ The *Prah* majority asserted that these policies "reflect factual circumstances and social priorities that are now obsolete"¹⁰² and that "[r]ecognition of a nuisance claim for unreasonable obstruction of access to sunlight will not prevent land development or unduly hinder the use of adjoining land."¹⁰³ Courts discarding the common enemy rule in favor of the reasonable use rule in surface water suits concur with and support these assertions.¹⁰⁴

96. On the one hand, a landowner is asserting his interest in developing or improving his property. On the other hand, the adjoining landowner is asserting his interest in the unobstructed flow of sunlight or surface water across the other's land. Admittedly, this comparison between the competing interests is not flawless. For example, commentators have pointed out that solar access disputes actually involve a conflict between an interest in the *use* (not the flow) of sunlight and an interest in the use of land. See S. KRAEMER, *supra* note 2, at 157; Comment, *Private Nuisance*, *supra* note 11, at 105. The analogy urged in this Note is, however, at least as apt as one between solar access conflicts and disputes involving competing interests in the use of water. See, e.g., Note, *Obtaining Access*, *supra* note 11, at 368-78 (surface watercourses); 16 J. MAR. L. REV. 435, 445-46 (subterranean percolating waters).

97. See *supra* notes 24 & 75 and accompanying text.

98. See *supra* note 77 and accompanying text.

99. See *supra* notes 17-20 & 51 and accompanying text.

100. See *supra* note 76 and accompanying text.

101. See *supra* notes 20 & 49 and accompanying text.

102. 108 Wis. 2d at 236, 321 N.W.2d at 189.

103. *Id.* at 240, 321 N.W.2d at 191.

104. Assessing the modern significance of land development, the New Jersey Supreme Court stated:

It is, of course, true that society has a great interest that land shall be developed for the greater good. It is therefore properly a consideration in these cases whether the utility of the possessor's use of his land outweighs the gravity of the harm which results from his alteration of the flow of surface waters. But while today's mass home building projects . . . are assuredly in the social good, no

In sharp contrast to the common enemy rule, the civil law rule recognizes a property "right" in the natural flow of surface water across adjoining parcels of land.¹⁰⁵ Analogously, New Mexico¹⁰⁶ and Wyoming¹⁰⁷ have enacted solar access legislation which provides for the acquisition of a "solar right," a property right to sunlight.¹⁰⁸

The same reasons for adopting the reasonable use rule to resolve surface water disputes support its application to solar access conflicts. Like the common enemy rule,¹⁰⁹ the common law governing access to sunlight may produce certain results, minimize litigation, and facilitate development and improvement of land. Nevertheless, it ignores the burgeoning interest in solar energy,¹¹⁰ threatens to chill investment in solar,¹¹¹ and may even encourage unreasonable conduct.¹¹² On the other hand, a pure "solar rights"

reason suggests itself why, in justice, the economic costs incident to the expulsion of surface waters . . . should be borne in every case by adjoining landowners rather than by those who engage in such projects for profit.

Armstrong v. Francis Corp., 20 N.J. 320, 330, 120 A.2d 4, 10 (1956). Similarly, with respect to the policy of unrestrained landowner freedom, the Wisconsin Supreme Court argued:

It is not a timeless rule of property. Rather, it is one that apparently served the temporary purposes of society well in the days of burgeoning national expansion of the mid-nineteenth and early-twentieth centuries. The concept that an owner of real property can, in all cases, do as he pleases with his property is no longer in harmony with the realities of our society.

State v. Deetz, 66 Wis. 2d 1, 14-15, 224 N.W.2d 407, 414 (1974).

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

106. N.M. STAT. ANN. §§ 47-3-1 to -12 (1978 & Supp. 1983).

107. WYO. STAT. §§ 34-22-101 to -106 (Supp. 1983).

108. The New Mexico statute provides that "the right to use the natural resource of solar energy is a property right, the exercise of which is to be encouraged and regulated by the laws of this state. Such property right shall be known as a solar right." N.M. STAT. ANN. § 47-3-4(A) (1978). A "solar right" is "a right to an unobstructed line-of-sight path from a solar collector to the sun, which permits radiation from the sun to impinge directly on the solar collector." *Id.* § 47-3-3(B). The Wyoming statute contains similar language. See WYO. STAT. § 34-22-102(a)(ii) (Supp. 1983). Both statutes borrow the concepts of "beneficial use" and "prior appropriation" from western water law to measure solar rights and resolve disputes. See N.M. STAT. ANN. § 47-3-4(B) (1978); WYO. STAT. § 34-22-103(b) (Supp. 1983). For a complete discussion of the New Mexico statute, see Eisenstadt, *supra* note 11, at 35-38.

109. See *supra* text accompanying notes 85-86.

110. See *supra* note 67.

111. See *supra* note 6 and accompanying text. This would at least be so in states with no solar access legislation. Chilling could also be a problem in jurisdictions with legislation if, in a widely publicized case such as *Prah*, the legislation does not provide a remedy and a common law action is unavailable. Cf. Comment, *Power of Sun*, *supra* note 11, at 1293-95 (had Wisconsin legislation been effective when *Prah* dispute arose, it would not have afforded remedy).

112. See *Prah*, 108 Wis. 2d at 239 n.13, 321 N.W.2d at 191 n.13 ("recognition of a *per se* exception to private nuisance law may invite unreasonable behavior").

approach, while offering certain results like the civil law rule,¹¹³ may seriously impede land development and improvement.¹¹⁴ The reasonable use doctrine is the ideal compromise between diametric rules providing either for no "right" or for an absolute "right" to the unobstructed flow of surface water or sunlight. The *Prah* court recognized as much, echoing the advantages of the reasonable use rule expressed by courts applying the rule to surface water disputes.¹¹⁵

Although the reasonable use rule of nuisance law has much to recommend it, applying the rule to the merits of a solar access case is problematic, as pointed out by the *Prah* dissent. Moreover, a nuisance solution to solar access has certain disadvantages which can only be overcome by adoption of an integrated approach.

II. IMPLEMENTATION OF A PRIVATE NUISANCE APPROACH TO SOLAR ACCESS

Application of the *Restatement (Second) of Torts's* reasonable use doctrine to solar access disputes raises a number of significant issues. They include: (1) whether obstruction of solar access is an "invasion" of a solar energy consumer's interest in the use and enjoyment of his land;¹¹⁶ (2) whether solar energy systems are hypersensitive uses of property;¹¹⁷ (3) the relative weight of the various factors to be used in determining the reasonableness of solar access blockage;¹¹⁸ and (4) the choice of relief—injunctive or monetary.¹¹⁹

113. See *supra* note 83 and accompanying text.

114. See, e.g., Eisenstadt, *supra* note 11, at 38 (New Mexico act "apparently grants solar right that is valid from sunup to sundown" which could unduly burden adjoining land); Note, *Access to Sunlight: New Mexico's Solar Rights Act*, 19 NAT. RESOURCES J. 957, 959-60 (1979) (statute seems to create absolute right; raises problems of unconstitutional taking and inefficient land use). The New Mexico legislature apparently attempted to meet this criticism by amending the statute in 1983 to allow local governments to regulate solar rights by various land use tools. See N.M. STAT. ANN. § 47-3-11(A) (Supp. 1983). Absent local regulation, certain restrictions on the claiming of the solar right are to apply. See *id.* The Wyoming statute contains similar provisions. See WYO. STAT. §§ 34-22-104, -105(b) (Supp. 1983).

115. See 108 Wis. 2d at 239-40, 321 N.W.2d at 191.

116. See *infra* notes 120-26 and accompanying text.

117. See *infra* notes 132-37 and accompanying text.

118. See *infra* notes 138-54 and accompanying text.

119. See *infra* notes 155-62 and accompanying text. This section of the Note considers only solar obstruction by structures, as opposed to vegetation, because these cases will be the most difficult from the perspective of aggrieved solar consumers.

A. *Definition of Private Nuisance*

The *Restatement* defines private nuisance as "a nontrespassory invasion of another's interest in the private use and enjoyment of land."¹²⁰ The *Prah* dissent argued that obstruction of sunlight does not satisfy the definition's "invasion" requirement.¹²¹ When first faced with nuisance claims for sunlight obstruction, courts took this same position, indicating that a prerequisite to maintenance of a nuisance action was the *physical* invasion of land.¹²² They argued that, unlike the release of smoke, noxious odors, water, or dust, cutting off access to sunlight is the mere withholding of a benefit. As one court put it, "[a] man may be compelled to keep his gas, smoke, odors and noise at home, but he cannot be compelled to send his light and air abroad."¹²³

This view belies the true scope of nuisance protection. "Invasion" is not limited to *physical* invasion—nuisances are often found when an activity results in discomfort, annoyance, or disturbance of a landowner's peace of mind.¹²⁴ Examples include junked automobiles, houses of prostitution, funeral homes, and stored explosives.¹²⁵ Therefore, obstruction of solar access cannot be excluded from the *Restatement's* definition of private nuisance.¹²⁶

B. *Significant Harm*

"There is liability for a nuisance only to those to whom it

120. RESTATEMENT (SECOND) OF TORTS § 821D (1979) (emphasis added); see also W. PROSSER, HANDBOOK OF THE LAW OF TORTS 591 (4th ed. 1971) ("[A] private nuisance is an interference with the use and enjoyment of land.").

121. See 108 Wis. 2d at 250-51, 321 N.W.2d at 196; *supra* notes 63-64 and accompanying text.

122. See cases cited *supra* note 26.

123. *Letts v. Kessler*, 54 Ohio St. 73, 82, 42 N.E. 765, 767 (1896) (citing *Mullen v. Stricker*, 19 Ohio St. 139 (1869)).

124. See W. PROSSER, *supra* note 120, at 592-93; RESTATEMENT (SECOND) OF TORTS app. § 821D (1982).

125. See, e.g., *Cumberland Torpedo Co. v. Gaines*, 201 Ky. 88, 255 S.W. 1046 (1923) (stored explosives); *Crawford v. Tyrell*, 128 N.Y. 341, 28 N.E. 514 (1891) (house of prostitution); *Jordan v. Nesmith*, 132 Okla. 226, 269 P. 1096 (1928) (funeral home); *Foley v. Harris*, 223 Va. 20, 286 S.E.2d 186 (1982) (junked automobiles).

126. See Recent Development, *Casting A Shadow*, *supra* note 11, at 954-55 (*Restatement* nuisance protection extends beyond physically invasive conduct); Comment, *Power of the Sun*, *supra* note 11, at 1276-79 (courts have applied nuisance rules to nonphysical invasions "for practical reasons"). Even assuming that a physical invasion is required, it is arguable that obstruction of sunlight is such an invasion if one considers the shadows falling on property rather than the withholding of sunlight. S. KRAEMER, *supra* note 2, at 134 (1978).

causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose."¹²⁷ The requirement that the harm be "significant" should pose few difficulties for plaintiffs in solar access nuisance actions; the requirement that the property be used for "a normal purpose" is more troublesome.

The significant harm requirement contemplates "a real and appreciable interference with the plaintiff's use or enjoyment of his land."¹²⁸ Obstruction of solar access results in economic harm from loss of investment in the solar equipment, reduced efficiency of the system, and higher alternative fuel bills.¹²⁹ Physical damage may also occur in colder climates if shading causes the solar collectors to freeze.¹³⁰ In either case, obstruction of solar access produces much more than a "slight inconvenience or petty annoyance."¹³¹

A critical hurdle for solar access nuisance plaintiffs will be the hypersensitive use question.¹³² The leading cases on this issue involve reflection of light on drive-in theater screens.¹³³ The courts have denied nuisance relief because reflected light does not harm

127. RESTATEMENT (SECOND) OF TORTS § 821F (1979).

128. *Id.* comment c. In actions for damages, significant harm must have in fact been suffered. *Id.* comment b. Injunctive relief, however, may be obtained against future harm if the harm "would be significant if it occurred." *Id.*

129. S. KRAEMER, *supra* note 2, at 137 (1978); *see also* Becker, *supra* note 11, at 28-29 (substantial harm to individual from loss of investment and to community because solar helps save fossil fuel and lowers pollution levels from power plants); Comment, *Private Nuisance*, *supra* note 11, at 116 (economic loss from higher fuel bills and loss of solar investment is significant harm). The plaintiff in *Prah*, for example, invested \$18,000 in his solar system which saved him \$600 per year in fuel bills. Brief for United States of America as Amicus Curiae at 5, 10 n.7. Expert testimony indicated that the threatened shading would have resulted in a 5-10% loss of operating efficiency. 16 J. MAR. L. REV. 435, 436 n.8 (citing Brief for Appellant at A-27). This relatively low figure is probably based on the fact that only defendant's chimney would cause shading. *See id.* n.7 (citing Brief for Appellant at A-26). In future cases, the degree of shading will likely be greater and thus the harm more significant.

130. The plaintiff in *Prah* introduced evidence showing that the shading would cause his solar collectors to freeze during the winter, resulting in damage to them and his home. Brief for United States as Amicus Curiae at 6-7. Such a situation would undoubtedly satisfy the significant harm requirement. *See* RESTATEMENT (SECOND) OF TORTS § 821F comment d (1979) ("When an invasion involves a detrimental change in the physical condition of land, there is seldom any doubt as to the significant character of the invasion.").

131. *See* RESTATEMENT (SECOND) OF TORTS § 821F comment c (1979).

132. *See* G. HAYES, *supra* note 10, at 172-73; Comment, *Private Nuisance*, *supra* note 11, at 116 n.136; Comment, *Securing Energy Rights*, *supra* note 11, at 136-39; Comment, *Nuisance Deficiencies*, *supra* note 11, at 873-79.

133. *See, e.g.*, *Belmar Drive-In Theater Co. v. Illinois State Highway Comm'n*, 34 Ill. 2d 544, 216 N.E.2d 788 (1966); *Amphitheaters, Inc. v. Portland Meadows*, 184 Or. 336, 198 P.2d 847 (1948).

those in the community who commit their property to a normal use.¹³⁴ Courts should not, however, extend this view to solar access cases. The importance of society's interest in developing the solar energy alternative mandates such a conclusion.¹³⁵ Solar investment would certainly be chilled by judicial declarations that solar systems are *abnormal* uses of property. Further, because solar energy use is already substantial and steadily increasing, it is in fact a normal use of property.¹³⁶ Finally, several cases support the proposition that sensitive use does not bar nuisance protection, but rather is only a factor in the balancing equation.¹³⁷

C. Reasonableness

Nuisance liability attaches under the *Restatement* upon a finding that the invasion of another's interest in the use and enjoyment of his land is intentional and unreasonable.¹³⁸ An intentional invasion is unreasonable if the gravity of the harm outweighs the utility of the actor's conduct.¹³⁹ As in most nuisance suits, reasonableness will likely be the pivotal issue in solar access cases.

134. *Belmar*, 34 Ill. 2d at 548-49, 216 N.E.2d at 791-92; *Amphitheaters*, 184 Or. at 349-52, 198 P.2d at 852-54. According to the *Prah* dissenter, solar access disputes fit under the rule of the drive-in theater cases. 108 Wis. 2d at 252 n.6, 321 N.W.2d at 197 n.6 (citing RESTATEMENT (SECOND) OF TORTS § 821F comment d, illustration 2 (1979)).

135. G. HAYES, *supra* note 10, at 173; Comment, *Private Nuisance*, *supra* note 11, at 116 n.136; Comment, *Nuisance Deficiencies*, *supra* note 11, at 879. The *Amphitheaters* court specifically stated that public policy, although not relevant in the case before it, is germane to the hypersensitivity question. 184 Or. at 361-62, 198 P.2d at 857-58.

136. See data discussed *supra* note 67. Gail Hayes has also pointed out that solar use is less likely to be considered abnormal in sparsely populated areas than in metropolitan regions. G. HAYES, *supra* note 11, at 173; see RESTATEMENT (SECOND) OF TORTS § 821F comment e (1979) (location, character, and habits of community relevant to normal use issue).

137. See, e.g., *Gronn v. Rogers Constr., Inc.*, 221 Or. 226, 350 P.2d 1086 (1960).

138. RESTATEMENT (SECOND) OF TORTS § 822(a) (1979). An invasion is intentional if the actor "acts for the purpose of causing it" or "knows that it is resulting or is substantially certain to result." *Id.* § 825. The purpose or knowledge requirement should pose no serious problem for plaintiffs in solar obstruction suits. In many cases, potential shading will have been obvious during the planning stages of construction and knowledge may thereby be inferred. Comment, *Private Nuisance*, *supra* note 11, at 116. In others, the solar user will have notified his neighbor of the problem, imparting actual knowledge. Becker, *supra* note 11, at 29. In *Prah*, for example, there may have been both constructive and actual knowledge, as plaintiff's solar collectors were visible and defendant had been expressly notified of shading problems prior to commencing construction. See Recent Development, *Casting a Shadow*, *supra* note 11, at 952-53 n.72.

139. RESTATEMENT (SECOND) OF TORTS § 826(a) (1979). Although this test must be satisfied when injunctive relief is sought, a lesser showing may justify a damage award. See *id.* comment f; *infra* note 155.

1. Gravity of Harm

Assessment of the gravity of harm requires consideration of the character and extent of the harm, the social value of the type of use or enjoyment invaded, the suitability of that use or enjoyment to the particular locality, and the burden on the injured party to avoid the harm.¹⁴⁰ The character of the harm from solar obstruction will be economic loss and possibly tangible property damage. The strongest cases will involve property damage.¹⁴¹ The extent of harm depends upon the degree and duration of the invasion.¹⁴² Economic harm in solar access cases will almost invariably be substantial,¹⁴³ and physical damage may also be extensive.¹⁴⁴ The duration of the interference from shading will be "recurrent,"¹⁴⁵ as interference would likely occur every sunny day but not continuously throughout the day.

The social value¹⁴⁶ of solar energy use is great—the growing body of state and federal legislation encouraging solar development makes this clear.¹⁴⁷ This factor should thus be given considerable weight by courts. Solar energy systems are entirely suitable to residential or rural areas where they are unlikely to conflict with prevailing land use patterns. Conversely, they are far less suitable to highly developed or urban areas. The ability of a solar energy user to avoid the harm and the cost of such avoidance will largely depend upon the particular facts of a case.¹⁴⁸

140. RESTATEMENT (SECOND) OF TORTS § 827 (1979). This list of factors is not exhaustive. *Id.* comment b.

141. *See id.* comment d.

142. *Id.* comment c.

143. *See supra* note 129 and accompanying text.

144. Had the solar collectors in *Prah* frozen, they not only would have cracked, but also caused water damage to the home's interior because they were built into the roof. Recent Development, *Casting a Shadow*, *supra* note 11, at 949 n.47 (quoting Brief for Appellant at A-27 to -28).

145. The *Restatement* classifies interferences as "momentary, temporary, recurrent or continuous." RESTATEMENT (SECOND) OF TORTS § 827 comment c (1979).

146. Social value of a use "depends upon the extent to which that type of use advances or protects the general public good." *Id.* comment f.

147. *See S. KRAEMER, supra* note 2, at 46-62 (Supp. 1984) (collecting federal and state legislation providing financial incentives for solar development); *infra* notes 171-79 & 202-14 (state solar access legislation).

148. Even if a solar energy system can be moved to avoid shading, the burden and cost of doing so would likely be excessive. Courts may consider, however, whether the solar user could have minimized the possibility of shading when he originally installed his system. *See Prah*, 108 Wis. 2d at 242, 321 N.W.2d at 192 (although lower court concluded that plaintiff could have avoided harm by better locating home, factor not conclusive); *id.* at 256 n.8, 321 N.W.2d at 199 n.8 (Callow, J., dissenting) ("Mr. Prah could have avoided

2. *Utility of Conduct*

The utility of the actor's conduct depends upon the social value of the primary purpose of the conduct, the suitability of the conduct to the particular locality, and the impracticability of preventing or avoiding the invasion.¹⁴⁹ In solar access nuisance suits, the primary purpose of defendants' conduct will be land development. Although land development retains social value,¹⁵⁰ that value has been steadily declining since the late nineteenth and early twentieth centuries.¹⁵¹ The importance assigned land development in a given case will depend upon the nature of the structure—a highrise apartment or office building are socially more valuable than an individual residence.

The suitability of a use of land to a particular locality will hinge to some extent on local zoning laws. Although the target structures in actions for solar blockage will likely be in compliance with local zoning ordinances,¹⁵² this will not necessarily provide nuisance immunity. Rather, under the modern view espoused by the *Prah* majority, such compliance is merely one factor in determining the utility of an actor's conduct.¹⁵³ The practicability of avoiding the shading of solar collectors will largely depend on the facts of each case.¹⁵⁴

3. *Choice of Relief*

Of the two forms of relief available under the *Restatement*, injunctions and monetary damages,¹⁵⁵ injunctive relief is the most

this litigation by building his own home in the center of his lot . . . and/or by purchasing the adjoining lot").

149. RESTATEMENT (SECOND) OF TORTS § 828 (1979).

150. Conduct "has social value if the general public good is in some way advanced or protected by the encouragement and achievement of [its] purpose." *Id.* comment e.

151. See *Prah*, 108 Wis. 2d at 237, 321 N.W.2d at 190.

152. G. HAYES, *supra* note 10, at 173.

153. 108 Wis. 2d at 242, 321 N.W.2d at 192; see, e.g., N. WILLIAMS, AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER § 153.11 at 238-39 (1975); Beuscher & Morrison, *Judicial Zoning Through Recent Nuisance Cases*, 1955 WIS. L. REV. 440, 453-55; Note, *Zoning Ordinances and Common Law Nuisance*, 16 SYRACUSE L. REV. 860, 866 (1965).

154. In *Prah*, for instance, the evidence indicated that defendant could have avoided the shading merely by relocating his chimney. Recent Development, *Castling a Shadow*, *supra* note 11, at 969 n.166 (citing Brief for Appellant at A-26, -29).

155. In addition to a finding of unreasonableness, the *Restatement* requires a further inquiry to determine the appropriateness of injunctive relief. This inquiry involves a comparative appraisal of the following factors: (1) the nature of the interest to be protected, (2) the relative adequacy of noninjunctive relief, (3) laches, (4) the unclean hands doctrine, (5) the relative hardship to defendant if an injunction is granted and to plaintiff if it is denied

desirable remedy for solar access obstruction.¹⁵⁶ The motivations for solar energy investment—conserving fossil fuels, avoiding pollution, and acquiring the ability to control one's own energy source—would not be protected by a damage remedy.¹⁵⁷ Moreover, relegating plaintiffs to damages might deter new solar investment.

Conflicts between residential landowners over shading by a proposed structure will present strong cases for injunctive relief.¹⁵⁸ On the one hand, plaintiff will be threatened with significant economic harm and possibly property damage as a result of interference with a use which will have great social value and will be suitable to the locality. On the other hand, defendant's interest in residential land development will have comparatively less social value, and although his conduct also will be suitable to the locality, he probably will be able to avoid the shading without undue expense or hardship.¹⁵⁹ When shading is actual rather than threatened, damages should be awarded.¹⁶⁰

("balancing of equities"), (6) the interests of third parties and the public, and (7) the practicability of framing and enforcing the order or judgement. RESTATEMENT (SECOND) OF TORTS § 936(1) (1979); see *id.* §§ 937-951 (elaborating on these factors). In most solar access disputes, only the relative adequacy of noninjunctive relief will be left unresolved by the reasonableness analysis. Recent Development, *Casting a Shadow*, *supra* note 11, at 964 n.134. This factor can only help plaintiff's request for injunctive relief, given the inadequacy of a damage award to protect his interests. See *infra* text accompanying note 157.

Damages may be awarded under the *Restatement* in two situations even if the utility of defendant's conduct is found to outweigh the gravity of the harm. First, damages may be awarded when "the harm caused by the conduct is serious and the financial burden of compensating for this and similar harms would not make the continuation of the conduct not feasible." RESTATEMENT (SECOND) OF TORTS § 826(b) (1979). Second, a damage award is proper when "the harm resulting from the invasion is severe and greater than the other should be required to bear without compensation." *Id.* § 829A.

156. See, e.g., S. KRAEMER, *supra* note 2, at 138 (1978); Becker, *supra* note 11, at 30.
157. Becker, *supra* note 11, at 30.

158. This fact pattern probably represents the typical solar access dispute. Cf. Recent Development, *Casting a Shadow*, *supra* note 11, at 962-63 n.127 (*Prah* illustrates what may be a typical solar access case—conflict between similarly situated "reasonable suburbanites"). In such cases, the diligent solar user will have conducted an inquiry to determine the likelihood of shading by the proposed structure during its planning stages, as did plaintiff in *Prah*. Thus, when a potential problem is discovered, assuming that negotiations are not fruitful, suit could be filed before construction is commenced or at an early stage in the process.

159. It should be relatively easy and inexpensive for defendant to alter his construction plans to eliminate the potential for shading. In this situation, the *Restatement* would declare defendant's conduct unreasonable so long as the threatened harm would be significant. See RESTATEMENT (SECOND) OF TORTS § 830 (1979).

160. This is possible in two situations. The first is when the solar user fails to discover the shading problem until it acutally materializes. Injunctive relief will typically be inappropriate in this situation because of the potential hardship to defendant, who could be

Suits to enjoin construction of highrise office or apartment buildings in highly developed or urban areas will likely be unsuccessful.¹⁶¹ Plaintiff will be threatened with substantial harm, but his use, albeit valuable, will not be suitable to the locality and he will have been able to avoid the problem by not siting his solar system in an area where shading is inevitable. Defendant, in contrast, will have a purpose of at least equal social value, his use will be suitable to the locality, and it will be impracticable for him to avoid the shading. A court should award damages in this situation once the structure is built and shading results.¹⁶²

D. *Disadvantages of A Nuisance Action*

Ultimately, while most problems in applying a nuisance analysis to solar access conflicts are surmountable, a number of general deficiencies remain. One undesirable consequence of allowing a nuisance action for solar obstruction is the spawning of litigation between neighbors.¹⁶³ This may discourage peaceful compromise¹⁶⁴ and, as *Prah* poignantly illustrates, may sharply divide the litigants' families and erode neighborhood harmony.¹⁶⁵ Litigation is also costly and timeconsuming both to the parties and the court

forced to alter drastically or demolish his home. Instead, defendant's conduct would be deemed unreasonable and damages awarded so long as the harm is significant and the financial burden on defendant would not be unreasonable. *See id.* § 826(b) & comment f.

The second scenario is when the solar user has knowingly sited his solar system in the shade of a preexisting structure. A damage remedy in this case would require consideration of the doctrine of "coming to the nuisance." Although application of the doctrine is not a complete bar to recovery, it is an additional factor courts will have to consider in determining whether the solar obstruction is an actionable nuisance. *See id.* § 840D. In each of the foregoing situations, courts must also evaluate and factor into the damage equation the importance of ensuring that loss of solar investment does not go uncompensated and that potential investment is not deterred.

161. A number of recent solar access disputes illustrate this sort of conflict. *See* *Siu v. McCully-Citron Co.*, No. 56405 (Hawaii Cir. Ct. 1979) (proposed nine-story moderate income apartment building which would shade residence's solar collectors) (reported in *Solar Access Right Denied By Hawaii Court*, 1 SOLAR L. REP. 542 (1979)); *Solar Access Leads to Stamford Dispute*, 3 SOLAR L. REP. 745-46 (1982) (proposed highrise apartment complex in Stamford, Conn. which would shade residence's active and passive solar collection areas).

162. This case and other possible permutations involving actual shading in highly developed or urban areas will be governed by the same considerations applicable to similar cases in residential areas. *See supra* note 160. A damage award is more likely in the former category of cases since the defendant's financial resources will probably be substantial and thus no unreasonable financial burden would be imposed.

163. S. KRAEMER, *supra* note 2, at 138 (1978).

164. *See Prah*, 108 Wis. 2d at 246 n.2, 321 N.W.2d at 193 n.2 (Callow, J., dissenting).

165. *See supra* note 43.

system.¹⁶⁶ The prospect of acquiring access to sunlight only through an expensive, protracted court action may chill solar investment. This problem will only be exacerbated by the complexity and uncertainty inherent in nuisance law.¹⁶⁷ Finally, nuisance law is only capable of protecting solar access for sited solar systems, not potential sites.¹⁶⁸

These disadvantages indicate that a nuisance approach to solar access is not a panacea. However, because nuisance law is flexible and solar access legislation cannot possibly solve every dispute, a nuisance approach has considerable appeal. This Note therefore proposes an integrated scheme utilizing both nuisance law and widely accepted legislative approaches.

III. AN INTEGRATED APPROACH TO SOLAR ACCESS: EASEMENTS, NUISANCE, AND LAND USE CONTROLS

A private nuisance action, combined with a solar access easement statute and land use planning legislation, is the ideal approach to solar access. In formulating this approach, protecting access for sited solar systems is distinguished from protecting access for potential sites.¹⁶⁹

A. Sited Solar Systems: Solar Easements and Private Nuisance

1. Solar Easements

Although the common law has consistently honored express easements to sunlight,¹⁷⁰ twenty-six states have enacted solar access easement statutes.¹⁷¹ This legislation can inform the public of

166. The *Prah* litigation, for example, began in 1979 and was not concluded until the settlement in January, 1984. *Id.* One can only imagine the cost to the parties and the Wisconsin judicial system.

167. G. HAYES, *supra* note 11, at 174. "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.'" W. PROSSER, *supra* note 120, at 571.

168. Eisenstadt, *supra* note 11, at 30.

169. This distinction is fully articulated in only two solar access articles. See Eisenstadt, *supra* note 11, at 23; Goble, *Siting≠Protection: A Note on Solar Access*, 2 SOLAR L. REP. 25, 26 (1980).

170. See *supra* note 18.

171. CAL. CIV. CODE § 801.5 (West 1982); COLO. REV. STAT. §§ 38-32.5-100.3 to -103 (1982); FLA. STAT. ANN. § 704.07 (West Supp. 1983); GA. CODE ANN. §§ 85-1411 to -1414 (Supp. 1982); IDAHO CODE § 55-615 (1979); ILL. ANN. STAT. ch. 96 1/2, § 7303(e)-(f) (Smith-Hurd 1979); IND. CODE ANN. §§ 32-5-2.5-1 to -3 (West Supp. 1983); IOWA CODE ANN. § 564A.7 (West Supp. 1983); KAN. STAT. ANN. §§ 58-3801 to -3802 (Supp. 1982); ME. REV. STAT. ANN. tit. 33, §§ 1401-1402 (Supp. 1983); MD. REAL PROP. CODE ANN. § 2-118 (1981); MINN. STAT. ANN. § 500.30 (West Supp. 1984); MO. ANN. STAT. § 442.012

the availability of solar easements and encourage their use, notify landowners that private agreements are binding, and reduce the complexity of drafting and simplify the implementation of solar easements.¹⁷²

The Colorado statute¹⁷³ typifies state solar access easement legislation. The statute initially provides that solar easements must be in writing and are subject to the same conveyancing and recording requirements as other easements.¹⁷⁴ It goes on to require that the instrument creating the easement describe:

[T]he vertical and horizontal angles, expressed in degrees, together with any pertinent . . . 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 . . . the three-dimensional space or the place and time of day in which an obstruction to direct sunlight is prohibited or limited.¹⁷⁵

The instrument also must delineate the terms and conditions under which the easement may be granted or terminated.¹⁷⁶ Further, the parties must provide for compensation of the solar user in the event of shading, and of the owner of the burdened property for maintaining the easement.¹⁷⁷ Finally, the instrument creating the easement must describe any restrictions on vegetation or structures which would potentially obstruct the passage of sun-

(Vernon 1984); MONT. CODE ANN. §§ 70-17-301 to -302 (1983); NEB. REV. STAT. §§ 66-909 to -912 (1981); NEV. REV. STAT. §§ 111.370-.380 (1979); N.Y. REAL PROP. LAW § 335-b (McKinney Supp. 1983); N.D. CENT. CODE §§ 47-05-01.1 to -01.2 (1978); OHIO REV. CODE ANN. § 5301.63 (Page 1981); OR. REV. STAT. §§ 105.885-.895 (1981); R.I. GEN. LAWS §§ 34-40-1 to -2 (Supp. 1983); TENN. CODE ANN. §§ 66-9-201 to -206 (1982 & Supp. 1983); UTAH CODE ANN. §§ 57-13-1 to -2 (Supp. 1983); VA. CODE §§ 55-352 to -354 (1981); WASH. REV. CODE ANN. §§ 64.04.140-.170 (Supp. 1983); WIS. STAT. ANN. § 700.35 (West Supp. 1983).

172. G. HAYES, *supra* note 10, at 198.

173. COLO. REV. STAT. §§ 38-32.5-100.3 to -103 (1982). Colorado was the first state to pass a solar easement statute. Eisenstadt, *supra* note 11, at 24 n.19.

174. COLO. REV. STAT. § 38-32.5-101 (1982).

175. *Id.* § 38-32.5-102(a). While many statutes conform to the Colorado model, some limit the permissible description to the vertical and horizontal angles that define the easement. *See, e.g.*, IND. CODE ANN. § 32-5-2.5-3(1) (West. Supp. 1983); N.Y. REAL PROP. LAW § 335-b(2)(a) (McKinney Supp. 1983); VA. CODE ANN. § 55-354(1) (1981). Others only require a description of the three-dimensional space protected by the easement. *See, e.g.*, ILL. ANN. STAT. ch. 96 1/2, § 7303(e)(1) (Smith-Hurd 1979); NEV. REV. STAT. § 111.370(4)(c) (1979). For excellent discussions of methods of describing the space in a solar access easement, see Knowles, *The Solar Envelope*, 2 SOLAR L. REP. 263 (1980); Riordan & Hiller, *Describing the Solar Space in a Solar Easement*, 2 SOLAR L. REP. 299 (1980).

176. COLO. REV. STAT. § 38-32.5-102(b) (1982).

177. *Id.* § 38-32.5-102(c).

light through the easement.¹⁷⁸ Injunctive relief is available to enforce solar easements as well as "other legal remedies."¹⁷⁹

The primary advantage of an express easement approach to solar access is that it involves a simple transaction between private parties.¹⁸⁰ A significant disadvantage is that the transaction is *voluntary*—nothing prevents a landowner from refusing to negotiate or grant a solar easement.¹⁸¹ Moreover, even a cooperative landowner may charge the solar user an exorbitant price for the easement.¹⁸² Finally, solar access easements are only capable of protecting access for sited solar systems.¹⁸³

2. *Protecting Access for Sited Solar Systems*

A solar easement statute coupled with a private nuisance action is an ideal means of ensuring solar access for sited solar systems. Under this approach, a solar user would first negotiate with adjoining landowners who eventually might interfere with his access to sunlight.¹⁸⁴ A private nuisance action will serve as a pow-

178. *Id.* § 38-32.5-102(d).

179. *Id.* § 38-32.5-103. Some statutes, while requiring a provision for compensation of the solar user when sunlight is obstructed, fail to mention injunctive relief. *See, e.g.*, N.Y. REAL PROP. LAW § 335-b (McKinney Supp. 1983); N.D. CENT. CODE §§ 47-05-01.1 to -01.2 (1978); TENN. CODE ANN. §§ 66-9-201 to -206 (1982 & Supp. 1983). Other statutes completely fail to address the question of remedies. *See, e.g.*, IND. CODE ANN. §§ 32-5-2.5-1 to -3 (West Supp. 1983); ME. REV. STAT. ANN. tit. 33, §§ 1401-1402 (Supp. 1983); MONT. CODE ANN. § 70-17-301 to -302 (1983).

Washington's easement statute has unique provisions governing remedies for solar blockage. *See* WASH. REV. CODE ANN. § 64.04.170 (Supp. 1983). In an action for interference with a solar easement, assuming that the instrument is silent regarding the appropriate remedies, courts may choose among a number of remedies. Actual damages, "measured by increased charges for supplemental energy, the capital cost of the solar energy system, and/or the cost of additional equipment necessary to supply sufficient energy," may be awarded. *Id.* § 64.04.170(1). Such damages are to be measured from the time the interference began until the actual or expected date of its cessation. *Id.* § 64.04.170(1)(a). A lump sum representing "the present value of the damages from the time the interference began until the normally expected end of the useful life of the equipment" may be awarded if the interference is not expected to cease. *Id.* § 64.04.170(1)(b). A court may also award "reasonable and necessary attorney's fees" and an injunction if it so chooses. *Id.* § 64.04.170(2)-(3).

180. Eisenstadt, *supra* note 11, at 25. Solar easements "involve no public expenditures, red tape, or permission." G. HAYES, *supra* note 10, at 197.

181. G. HAYES, *supra* note 10, at 197; Eisenstadt, *supra* note 11, at 25.

182. *See* G. HAYES, *supra* note 10, at 197; Eisenstadt, *supra* note 11, at 25. Solar easements also may entail undesirable tax consequences. Eisenstadt, *supra* note 11, at 25; *see* Macht v. Department of Assessments, 266 Md. 602, 296 A.2d 162 (1972) (landowner realized increase in property tax base equal to value of easement of light and air).

183. Eisenstadt, *supra* note 11, at 25.

184. One commentator has argued that "[a]lthough it may be easier to negotiate easements before conflicts arise, few collector owners might do so." G. HAYES, *supra* note 10,

erful bargaining tool¹⁸⁵—the threat of a lawsuit should encourage good faith negotiations concerning solar easements and increase the likelihood of a peaceful, low-cost resolution.¹⁸⁶ As a last resort, if an easement cannot be obtained and solar obstruction appears imminent or actually occurs, the solar user would file a nuisance suit.¹⁸⁷

The suggested approach to protecting access for sited collectors will be simple to implement since many states currently have solar easement statutes.¹⁸⁸ All that is needed is for courts to follow the lead of the Wisconsin Supreme Court and recognize a nuisance action for solar obstruction when given the opportunity. The combination of an easement statute and a nuisance action also will provide a level of certainty of access protection sufficient to prevent the chilling of solar investment.¹⁸⁹ Solar easements, if properly drafted and supported by adequate statutory remedies,¹⁹⁰ are capable of ensuring maximal solar access protection. Nuisance law, although offering less certainty,¹⁹¹ has the virtue of flexibility.

at 197. This problem will likely become less significant, however, as current and potential solar users grow aware of the solar access imperative and the availability of solar easements.

185. Cf. Comment, *Power of the Sun*, *supra* note 11, at 1289 (“Perhaps the threat of legal action will even the imbalance in bargaining power between the solar access seeker and the potential obstructor.”).

186. The availability of a nuisance action should act as a moderating influence on the price of solar easements. In addition, voluntary compromise should help avoid harm to neighborly relations and the high costs associated with nuisance litigation. See *supra* notes 163–66 and accompanying text.

187. Professor Ellickson has stressed the need for nuisance law as a supplement to consensual means of dispute resolution: “[T]he wish of landowners to show good manners to their neighbors, essentially a consensual system, operates to limit the incidence of nuisances. Although these voluntary mechanisms should be strengthened, more coercive devices to discourage unneighborly behavior are also needed.” Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 779–80 (1973).

188. See *supra* note 171 and accompanying text.

189. State land use enabling legislation is not chosen as the means of protecting access for sited systems precisely because of its lack of certainty. Since such legislation *authorizes* but does not *require* solar access protection, there is a distinct possibility that localities will fail to act. See *infra* notes 200–01 and accompanying text. In addition, the land use control methods currently authorized—zoning and subdivision regulations—will provide uncertain access protection even if adopted by local governments. See *infra* notes 210–11 & 217 and accompanying text.

190. The comprehensive list of remedies in the Washington easement statute would be ideal. See *supra* note 179.

191. See *supra* note 167 and accompanying text.

B. *Potential Solar System Sites: Land Use Controls*

Land use planning, traditionally a function of local government, refers to "the physical development of the community according to a master plan based on careful and comprehensive surveys and studies of present conditions and future expectations."¹⁹² Local governments acquire the power to regulate land use from the state, where the police power ultimately resides, through the state constitution, a home rule grant, or, more typically, an enabling act.¹⁹³ State enabling acts commonly require that local land use regulations be in accordance with a comprehensive plan.¹⁹⁴ The acts usually set forth the purposes of land use planning and the various tools available to implement the comprehensive plan.¹⁹⁵ Common land use controls include zoning ordinances, subdivision regulations, and building and construction codes.¹⁹⁶

Delegating responsibility for protecting solar access to the local level entails both advantages and disadvantages. An advantage is that local governments have traditionally regulated land use, and thus have administration and enforcement mechanisms in place.¹⁹⁷ Local governments also have superior knowledge of important considerations such as prevailing land use patterns, the needs of the community, topography, and the height and bulk of buildings.¹⁹⁸ Moreover, local officials are directly accountable to the people who will be affected by solar access regulations and will best be able to strike a proper balance between access protection and land development.¹⁹⁹ The overriding disadvantage of local control is that since existing state legislation authorizes but does not require solar access protection, economic and political influences may persuade local governments not to act.²⁰⁰ Even if

192. S. KRAEMER, *supra* note 2, at 73 (1978).

193. *Id.* at 75 (citing W. THOMAS, A. MILLER & R. ROBBINS, *OVERCOMING LEGAL BARRIERS TO THE USE OF SOLAR ENERGY SYSTEMS* 83 (1977)).

194. 1 N. WILLIAMS, *AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER* § 18.05 (1974).

195. *Id.* §§ 18.04, 18.07.

196. R. YEARWOOD, *LAND SUBDIVISION REGULATION* 15 (1971).

197. G. HAYES, *supra* note 10, at 217.

198. *Id.* at 218; Eisenstadt, *supra* note 11, at 39-40.

199. G. HAYES, *supra* note 10, at 218.

200. Local governments often exhibit a strong bias in favor of land development and the tax revenues that it produces. *Id.* Further, because planners are accountable to the community at large, they might be easily discouraged from protecting solar access by pressures from individuals and developers. "It's the political climate, not the weather, that will govern the future of solar energy." ENERGY FUTURE, *supra* note 1, at 212.

inclined to act, local governments may lack the necessary funding and expertise to implement solar access controls.²⁰¹

1. *Current Solar Land Use Controls*

Arizona²⁰² and Minnesota²⁰³ require local governments to include a solar access element in their comprehensive plans, while some states make such action permissive.²⁰⁴ A number of states enable localities to protect solar access by land use control methods. The two most common methods authorized are zoning and subdivision regulation.

a. *Solar Zoning.* Twelve states expressly authorize local governments to zone for solar access.²⁰⁵ Solar access zoning typically would involve establishing an airspace over a landowner's property that he could not occupy.²⁰⁶ Commentators have proposed various methods of defining the airspace.²⁰⁷

The principal advantage of solar access zoning is flexibility—zoning ordinances are easily altered and may be tailored to meet the needs of communities with divergent land use patterns.²⁰⁸ Solar access zoning would also spread the burden of access protection over an entire community, rather than placing it

201. G. HAYES, *supra* note 10, at 218. Federal and/or state assistance could alleviate this concern. *Id.*

202. ARIZ. REV. STAT. ANN. § 9-461.05(C)(1) (Supp. 1983).

203. MINN. STAT. ANN. § 462.39(3) (West Supp. 1984) (regional development commissions); *id.* § 473.859(2) (local governmental units in metropolitan areas). *But see id.* § 473.05(1) (plans of planning commissions for metropolitan areas *may* contain solar access element).

204. NEB. REV. STAT. § 66-913 (1981); UTAH CODE ANN. § 17-27-4 (Supp. 1983); WASH. REV. CODE § 35.63.090 (Supp. 1983).

205. ARIZ. REV. STAT. ANN. § 9-462.01(A)(3) (Supp. 1983); COLO. REV. STAT. § 31-23-301 (Supp. 1982); CONN. GEN. STAT. ANN. § 8-2 (West Supp. 1983); ME. REV. STAT. ANN. tit. 30, § 4961(1) (Supp. 1983); MINN. STAT. ANN. §§ 394.25(2), 462.357(1) (West Supp. 1984); NEB. REV. STAT. § 66-913 (1981); N.Y. GEN. CITY LAW § 20(24) (McKinney Supp. 1983); N.Y. TOWN LAW § 263 (McKinney Supp. 1983); N.Y. VILLAGE LAW § 7-704 (McKinney Supp. 1983); OR. REV. STAT. §§ 215.044, 227.190 (1981); TENN. CODE ANN. §§ 13-7-101, -210 (1980); UTAH CODE ANN. § 17-27-11 (Supp. 1983); VT. STAT. ANN. tit. 24, § 4407(13) (Supp. 1983); WASH. REV. CODE ANN. § 35.63.080 (Supp. 1983). Solar zoning is probably permissible, even absent express authority, under the standard "adequate light and air" provisions of state zoning enabling acts. Eisenstadt, *supra* note 11, at 40.

206. S. KRAEMER, *supra* note 2, at 79 (1978).

207. *See, e.g., id.* at 112-16 (solar access overlay zoning); Osofsky, *Solar Building Envelopes: A Zoning Approach for Protecting Residential Solar Access*, 15 URB. LAW. 637 (1983) (solar envelope zoning).

208. Eisenstadt, *supra* note 11, at 47.

on the individual solar user.²⁰⁹ The primary drawback of solar zoning is the uncertainty stemming from the ease by which zoning ordinances are changed and the abuse of variance procedures.²¹⁰ The existence of nonconforming uses also may present problems in developed areas.²¹¹

b. *Solar Subdivision Regulation.* "Subdivision regulation is the control by a public authority of the platting and conversion of raw land into building lots."²¹² Municipalities typically require real estate developers to meet certain standards and requirements in exchange for permission to record the plat and sell the lots.²¹³ Seven states currently authorize local governments to protect solar access through subdivision regulation.²¹⁴

Subdivision regulation as a means of ensuring solar access would be simple to implement and its cost would be absorbed by the purchasers of lots in a subdivision, rather than the local government.²¹⁵ Subdivision regulation would also promote uniform access protection and thus would facilitate administration.²¹⁶ Like solar zoning, the major problem with solar subdivision regulation is uncertainty. Once a subdivision has been completed and

209. *Id.* at 47-48. The individual solar user also would not experience any cost or delay due to access problems when he first installs his system. *Id.* at 47.

210. *Id.* at 48. Solar investment may be deterred by such uncertain protection. See G. HAYES, *supra* note 10, at 75. Several states have addressed the concern that existing zoning ordinances could prevent or restrict installation of solar systems. They have provided that a potential solar user may obtain a variance if a zoning ordinance prevents the installation of his solar system or causes him undue hardship. MINN. STAT. ANN. §§ 394.27(7), 462.357(6) (West Supp. 1984); NEB. REV. STAT. § 66-914 (1981).

211. Eisenstadt, *supra* note 11, at 48. This will only be a problem, however, until the use expires. *Id.*

212. R. YEARWOOD, *supra* note 196, at 20.

213. *Id.*

214. CAL. GOV'T CODE § 66475.3 (West 1983); CONN. GEN. STAT. ANN. § 8-25(b) (West Supp. 1983); ME. REV. STAT. ANN. tit. 30, § 4956(3-A) (Supp. 1983); MINN. STAT. ANN. § 462.358(2)(a) (West Supp. 1984); OR. REV. STAT. § 92.044(1)(a)(C) (1981); UTAH CODE ANN. § 17-27-11.5 (Supp. 1983); VT. STAT. ANN. tit. 24, § 4407(13) (Supp. 1983). Local governments may, for example, require that subdivision plans contain restrictive covenants, height restrictions, side yard and setback requirements, and "other forms of land use controls" to protect solar access. ME. REV. STAT. ANN. tit. 30, § 4956(3-A) (Supp. 1983). Some state statutes authorize localities to disapprove a subdivision plan that contains, or declare void and unenforceable, covenants, restrictions, or conditions in deeds or other instruments affecting the transfer of land which restrict or prohibit installation of a solar energy system. CAL. CIV. CODE § 714 (West 1982); COLO. REV. STAT. § 38-30-168 (1982); FLA. STAT. ANN. § 163.04 (West Supp. 1983); MD. REAL PROP. CODE ANN. § 2-119 (1981); OR. REV. STAT. § 105.880 (1981); UTAH CODE ANN. § 17-27-11.6 (Supp. 1983).

215. G. HAYES, *supra* note 10, at 129.

216. Eisenstadt, *supra* note 11, at 29.

sold, the regulations no longer apply and landowners are free to obstruct solar access.²¹⁷ In addition, the application of subdivision regulation is, as a practical matter, limited to undeveloped areas.²¹⁸

2. *Protecting Access for Potential Solar System Sites*

Land use controls are the most desirable method of protecting solar access for potential solar system locations. Based on the unique needs and desires of the community, local governments can choose whether or not to plan for solar access. A combination of solar zoning and subdivision regulation should be adopted. Because these methods have already received considerable acceptance in state legislatures, the proposed approach would be relatively simple to implement in many states. Solar zoning should be used to plan for access protection in developed areas and subdivision regulation should be used in undeveloped areas.

IV. CONCLUSION

Although the common law currently fails to safeguard adequately a landowner's interest in access to sunlight, the ability of the common law to change with the needs of society is one of its strongest attributes. As the *Prah* court recognized, expanding investment in solar energy and the correlative problem of protecting solar access mandate a change in the common law of nuisance. While state legislatures also have addressed the solar access issue, legislative action cannot and must not serve as an excuse for judicial inaction. No single approach is a cure-all—a comprehensive strategy that combines nuisance law, a solar easement statute, and land use controls is the most effective and realistic approach to the solar access conundrum.

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217. G. HAYES, *supra* note 10, at 129. This problem could be eliminated if restrictive covenants are a component of the subdivision regulations. *See id.*

218. *See id.*