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## Access to the Sun: A Legal Survey

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# Access to the Sun

## A Legal Survey

By Lawrence D. Engle

There is, in the United States and many other industrialized countries, a large scale use of energy representing a unique event in the Earth's history. The present century has demonstrated the most rapid technological development in history, and with it a monumental consumption of fuel. In the last thirty years the United States has used more minerals and resources than the whole world used in history.

We are frustrated over the continuing "energy crisis" and search for the answers to a manageable problem. As a result of our efforts to minimize our dependence upon foreign energy sources and maximize our discovery and implementation of renewable energy resources, we have become increasingly interested in the utilization of solar energy technologies. The advent of solar energy raises a multitude of legal issues related to the right of access to sunlight.

The most important requirement of a solar energy system is the certainty of access to direct solar radiation. The effectiveness of the system is directly dependent upon a continuous supply of direct sunlight. We will see that virtually all attempts to assure solar access inherently conflict with the interests of a legal system of land use and ownership that has traditionally ignored the sun.

### Ancient Lights—Prescriptive Easement

The English doctrine of Ancient Lights is characterized as a prescriptive negative easement. An easement is the right of use over the property of another. The prescriptive easement was created if a landowner had continuously received and used sunlight from across his neighbor's land for a certain period of time, usually 20 years. The property interest thus created was the right to the use, enjoyment of and access to the sunlight.

The American courts rejected the English doctrine in Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So. 2d. 357, Fla. App. (1959). That case involved two luxury beachfront hotels in Miami Beach, the Fontainebleau and the Eden Roc. The Eden Roc sought to enjoin the owners of the Fontainebleau from continuing with the construction of a fourteen story addition to their hotel. The Eden Roc owners claimed that, when completed, the added structure would completely shadow the Eden Roc's swimming pool and lounge area. The Eden Roc claimed the right to the uninterrupted use and enjoyment of the sunlight based on the doctrine of Ancient Lights.

In dismissing the argument, the court said:

"No American decision has been cited, and independent research has revealed none, in which it has been held that — in the absence of some

contractual or statutory obligation -- a landowner has a legal right to the free flow of light and air across the adjoining land of his neighbor."

The Florida District Court of Appeals added:

"If...public policy demands that a landowner...refrain from constructing a building upon his premises that will cast a shadow on the adjoining premises, an amendment of (the city's) comprehensive planning and zoning ordinance, applicable to the public as a whole, is the means by which such purpose should be achieved.

### Present Legal Concepts

According to American principles in the absence of easement there is no legal right to the unobstructed use of light and air passing from the adjoining land. Since there is no lawful right in this country to the free flow of light and air across your neighbor's property, there is no cause of action even when injury, economic or otherwise, results from the loss of air and light.

The injury incurred by the Eden Roc Hotel was an economic injury due to a loss of profitable tourism and the additional expense of a new pool area. The Fontainebleau case clarifies the precedent established by earlier cases, that an easement by prescription or any other right to the use of sunlight would be synonymous with having outright ownership of that light.

The very nature and properties of light and air are such that they do not flow in definite channels such as water, but rather, they are characteristically diffused. As suggested by the court in Keats v. Hugo, 115 Mass. 204, 215 (1874), the actual enjoyment of "light by the owner of the house is upon his land only" and is not dependent on the "tangible or visible use of the adjoining lands." If an adjoining landowner constructs an obstruction to light, he has not actually encroached upon his neighbor's rights.

It is, however, possible to acquire the rights to sunlight as it passes over your neighbor's property by easement. We have dealt briefly with the prescriptive easement which was the major characteristic of the English doctrine of Ancient Lights. Since certainty is the dominant requirement for protecting access to sunlight, the extensive time period involved, after which a prescriptive easement would be established, is a major obstacle to the use of prescriptive easements as a viable and practical means of assuring access to direct sunlight.

### Land Use Controls

Express easements, created by grant, covenant, reservation, or some other consensual agreement, are presently the most reliable method of insuring uninterrupted access to sunlight. The agreement traditionally specifies angles, height limitations, and setback requirements of both buildings and vegetation. The express agreement may be between individual landowners, may be stipulated by deed in the transfer of property, or in the general development plan of the land developer. However created, the express easement establishes a vested interest in real property and secures legal rights and remedies to the free flow of light and air from adjoining land.

There are, however, drawbacks to these direct agreements. It has been held that easements for light and air are property rights which have an assessable monetary value and can be bought, sold, conveyed, leased and taxed. Although direct agreements provide a flexible method of fulfilling the direct sunlight requirements of individual solar energy systems, the added cost of purchasing the easement and the possibility of tax liability may certainly limit their usefulness.

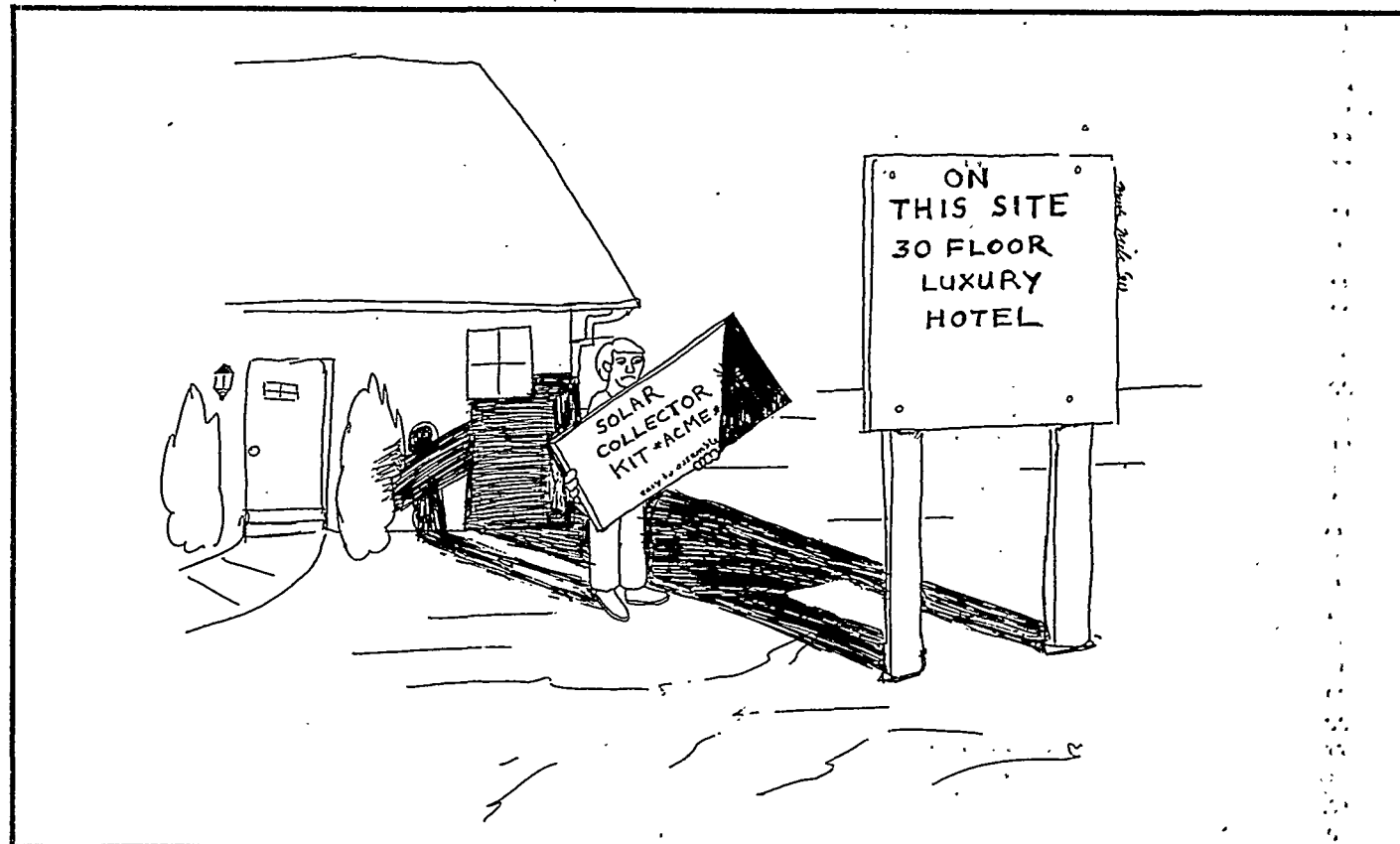
If solar energy is to reach a significant level of use it will be necessary for legislatures, at all levels of government, to declare policy and

promulgate regulations that encourage the domestic use of solar energy.

In 1974, Congress declared that it was the policy of the federal government to "pursue a vigorous and viable program" to assess and develop "solar energy as a major source of energy for our national needs." (Solar Energy Research, Development, and Demonstration Act of 1974) Congress, however, is limited in its authority to enforce federal land use policy upon state governments. It is therefore imperative that state legislatures and local planning boards encourage and account for the viability of solar energy.

Significant legislation and regulation of access to sunlight has been derived from and written into a variety of building codes and zoning regulations. In The Village of Euclid v. Ambler Realty Co., 272 US 365 (1926), the United States Supreme Court held that zoning was within the police powers of the state. The police power of the state is the power to enact legislation to protect the health, safety, and general welfare of its citizens. (See: California Solar Rights Act of 1978, Cal. Civ. Code §714; New Mexico Solar Rights Act of 1978, N.M. §§ 47-3-1 to 47-3-5, 1978).

While it is the power of the state to legislate, the states generally have delegated the power to enact land use regulation to the localities.



The authority granted to the local governments include the regulation of height, density, and setback requirements for buildings and other structures, along with the location and use of those buildings and structures, for the purpose of providing adequate light and air. Since regulation of land-use is generally delegated to the localities, solar exposure needs can easily be modified and adapted to local needs, use and density requirements, as well as to local geography and climate.

Land-use controls could prove to be a most efficient and effective method of allocating solar rights if they are designed with a comprehensive, holistic attitude.

Regulating land use, as a means of securing unobstructed access to sunlight is not without limitations. The first obstacle is that land use controls for solar access are not practical in well established and dynamic urban areas. A new "solar attitude" will naturally conflict with long-implemented procedures which have traditionally ignored the sun. Established zoning procedures may already be too restrictive and therefore not conducive to implementation of solar energy systems. It is not uncommon for restrictive covenants and statutes to require that new buildings "conform to and be in harmony with existing structures in the tract." (Jones, Restriction of Solar Devices, Environmental Affairs, Vol. 8:33, p. 30, 1979)

Prospective solar energy system owners should be familiar with legal remedies in their quest to circumvent and mitigate the potentially adverse effects of restrictive covenants. The prospective owners have several options available in overcoming the restrictive provision. First, (s)he may apply to the zoning appeals board for a variance. A variance is an authorization to a property owner to depart from literal requirements of zoning.

Nancy Lee Jones, in the Environmental Affairs Journal, suggested the following arguments that may be used to avoid or terminate the application of a restrictive covenant or regulation: (1) there has been a major change in the neighborhood; (2) the covenant works a general hardship upon the landowner; (3) the person or organization seeking to enforce the covenant has failed to proceed with reasonable promptness; and (4) that the covenant or regulation is void as against public policy, i.e., it is injurious to the interests of the society in developing a renewable energy source and that it is adverse to national energy policy.

As a second option, the zoning provision can be directly attacked, on constitutional, as well as common-law grounds. The Fourteenth and Fifth Amendments to the Constitution place three basic requirements on the power of a government to zone:

- 1) the statute, in compliance with the Due Process Clause of the 14th Amendment, must bear a rational relationship to the police power of the state;

- 2) the statute must not be so arbitrary, capricious and discriminatory that its restrictions pose a denial of the Equal Protection requirements of the 14th Amendment; and

- 3) the statute must not so devalue the land as to constitute a taking without just compensation in violation of the Eminent Domain power of the 5th Amendment.

Courts have consistently affirmed the decisions of boards of zoning appeals but, in doing so, have established guidelines for their determinations. Thus, applicant must demonstrate practical difficulties or significant economic injury. Moreover, the hardship can not be self-created, and the applicant must prove more than personal inconvenience. Finally, the applicant must show that the zoning appeals board acted in a manner that was in some way arbitrary, capricious, irrational or indicative of bad faith.

A further limitation of lands use controls is that they do not fulfill the most urgent requirement of certainty. Zoning ordinances are not binding contractual agreements by the government but, rather, are legislative acts which may be modified by government. As a result of their tenuous authority, zoning regulations can be readily amended or appealed by government. It is also important to realize that a zoning regulation does not create a vested interest in an individual property owner.

### Tax Incentives

State legislatures have also taken steps to mitigate the economic hardships of installing solar energy systems. Dale Goble noted, in the Oregon Law Review, that at least 25 states offer some form of tax incentives for solar energy systems. Five of the most common programs include: (1) a depreciation allowance for the cost of the solar device; (2) the application of a lower rate of taxation to the value of the collector; (3) a property tax exemption for at least part of the purchase and installation cost; (4) an income tax allowance for part of the systems cost; and (5) an exemption from sales tax.

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In our effort to develop a legal framework for the domestic use of solar energy, we must consider and analyze all legislative and judicial options. There is no "perfect" plan that is custom fit to satisfy the idiosyncracies of individual solar energy systems. Rather, we must be aware of the flexibility of the legal system and develop those options as best suited for the local use and density requirements as well as its geography and climate. It is essential that legislatures review and modify existing policy and legislation so that it will efficiently account for the allocation of solar energy resources. ●