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Don't Take My Sunshine Away: Right-to-Light and Solar Energy in the Twenty-First Century

Tawny L. Alvarez*

Introduction

In 1977, in response to the Arab oil embargo and the United States' increasing dependency on foreign oil, President Jimmy Carter installed solar heating panels on the roof of the West Wing.¹ In 1980, when President Ronald Regan took office, he removed the panels, and the White House would not use solar energy again until August 2002, when President George W. Bush had 167 solar energy panels installed to help heat the presidential pool and spa.²

As gas prices rise in the early twenty-first century, United States citizens have again begun to question the country's dependency on foreign oil. In the 1970s, home and business owners questioned the investment risks of solar energy—their hesitation persists today. One of the most pressing concerns: the frugality and functional sense of investing in a solar energy system when many people have no guaranteed ability to secure adequate access to sunlight. Research has shown that “[h]arnessing the energy of the sun directly appears to be the

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1. Brian Faler, *White House Turns Up Heat With Solar Energy at Spa*, The Washington Post, Feb. 3, 2003, at A21.

2. *Id.*

best method to avoid further depletion of our fossil fuel reserves because solar energy is available in practically limitless quantities.”³

As the United States struggles to decrease its dependence on non-renewable energy sources, state legislators—through the use of comprehensive solar access statutes—have an opportunity to help offset the country’s burden by granting property owners the necessary security to ensure access to sunlight. But as neighbors continue to battle over unimpeded access to the sky, it may be up to the courts to determine the future of solar energy’s viability as an alternative energy source capable of contributing to the fight to offset waning dependence on petroleum resources.

This note will recount the history of property owners’ right-to-light, analyze current solar energy statutes, examine right-to-light case law in the United States and study the effects that easements and the Fifth Amendment’s “takings clause” and police power have on solar energy use.

I. The Science

An understanding of what solar energy is and how it functions is helpful in understanding solar energy easement laws. Underpinning the process is the “photovoltaic effect,” a physical phenomenon exhibited when a portion of light energy strikes certain material and is converted directly into electrical energy.⁴ Raw solar energy reaches the earth’s atmosphere in electromagnetic radiation at a rate of 170 trillion kilowatts.⁵ Of this energy, one-fourth dissipates and is reflected back into space; however, the overall quantity of solar energy that reaches the United States still amounts to more than 700 times the country’s current combined energy demand.⁶

3. J. Otto Grunow, *Wisconsin Recognizes the Power of the Sun: Prah v. Maretti and the Solar Access Act*, 1983 WIS. L. REV. 1263, 1263 n.3 (1983) (citing George O.G. Lof, *Solar Energy: An Infinite Source of Clean Energy* in ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, THE ENERGY CRISIS: REALITY OR MYTH (Nov. 1973)).

4. 27A AM. JUR. 2D *Energy and Power Sources* § 11 (2006).

5. Grunow, *supra* note 3, at 1263.

6. *Id.*

The use of solar energy requires solar energy generating systems to receive unobstructed sunlight. Therefore, any potential interference from development of nearby land could devastate a solar energy user's system.⁷ Because of the devastating effect that the blockage of sunlight may have on solar energy users, many states have enacted statutes that govern landowners' rights to sunlight access.⁸ In addition, the right to sunlight access is being increasingly considered in zoning rules and regulations.⁹

Landowners' rights to direct and indirect sunlight and whether time, season and day restrictions will be included in the easement are conditions that must be considered when enacting such statutes.¹⁰ These elements help increase the efficiency of the statutes while restricting the effect of easements on neighboring landowners.¹¹ Some state statutes include requirements that a sufficient description of the airspace be included when creating the easement, including the area's dimensions, vertical and horizontal angles.¹² One of the largest problems with these requirements is that a solar easement is impossible for landowners to see.¹³ The easement describes an aspect of the property that is physically difficult to measure. Taking this difficulty into consideration, it is important to remember that the more precisely the solar easement is described the less airspace of the servient tenant is affected.¹⁴ Thus, the more precisely the bounds of the airspace are defined, the less effect it will have on servient tenants and the more likely a solar energy user will be in obtaining an easement over the property.

7. Jay M. Zitter, Annotation, *Solar Energy: Landowner's Rights Against Interference With Sunlight Desired for Purposes of Solar Energy*, 29 A.L.R. 4th 349 (1984).

8. *Id.*

9. *Id.*

10. See John William Gergacz, *Legal Aspects of Solar Energy: Statutory Approaches for Access to Sunlight*, 10 B.C. ENVTL. AFF. L. REV. 1, 10-11 (1982) [hereinafter Gergacz, *Legal Aspects*].

11. See *id.*

12. *Id.*

13. *Id.*

14. *Id.*

II. The History

Historically, access to sunlight and solar energy has been achieved, or not achieved, based on a number of different doctrines. “The maxim *Cujus est solum ejus est usque ad coelum et ad inferos*, meaning, essentially, ‘The owner of the soil owns also to the sky and to the depths’ was followed in legal systems as early as the thirteenth century.”¹⁵ This was the earliest principle of land ownership, and at the time, a property owner owned everything within his property boundaries, from the center of the earth and into the sky.¹⁶

The doctrine of *ancient lights* underpinned subsequent ownership rights. The English doctrine of *ancient lights* provided landowners with the legal right to obtain continued long-term enjoyment of sunlight.¹⁷ Although the doctrine has since been rejected, a few states during the nineteenth century, and Delaware until 1939, guaranteed landowners access to sunlight through recognition of prescriptive easements under this English doctrine.¹⁸ While the doctrine of *ancient lights* is no longer an appropriate cause of action to address access to sunlight, current solar energy users may have a number of additional causes of action available to them.

III. Easements

One way in which landowners can guarantee access to sunlight is through an easement. To obtain the legal right to access light and air over an adjoining piece of land, the adjoining landowner must grant an express easement over his or her property.¹⁹ In most cases, an implied easement is not assumed.²⁰ “An easement is a beneficial right which one landowner, the ‘dominant tenant,’ has on or over the real property of a neighbor, the ‘servient tenant.’”²¹ Four negative easements are tradi-

15. Janice Yeary, *Energy: Encouraging the Use of Solar Energy-A Needs Assessment for Oklahoma*, 36 OKLA. L. REV. 136, 140 (1983) (citing A.G. Thompson, *Commentaries on the Modern Law of Real Property*, § 235 (1980)).

16. *See id.*

17. *Id.*

18. Gergacz, *Legal Aspects*, *supra* note 10, at 6.

19. *See* 2 C.J.S. *Adjoining Landowners* § 75 (2006).

20. *Id.*

21. Gergacz, *Legal Aspects supra* note 10, at 5.

tionally recognized at common law: “[T]hose created to protect the flow of air, light, artificial streams of water, and to ensure the subjacent and lateral support of buildings or land”²²

For a solar energy program to be successful a property owner’s solar collectors must have access to unobstructed sunlight.²³ The need for unobstructed access often burdens neighboring properties with restrictions.²⁴ The adjoining landowner on the servient property can grant the neighbor an express solar easement, which allows the solar energy user to receive unobstructed sunlight to operate his or her unit.²⁵ This grant however, encumbers the subsequent servient property and limits the property’s use.²⁶ In many cases, the use of an express easement, absent statutory language, is a landowner’s only guarantee for access to sunlight.

In the absence of an express easement, some property owners argue that they possess a negative easement over neighboring property. Negative easements cannot be acquired by prescription, making it unlikely that courts will recognize prescriptive easements for solar access. Prescriptive easements have been defined as the “process of acquiring an easement . . . by continuous use, rather than by asking the owner of the property. ‘Prescription’ applies to easements as ‘adverse possession’ applies to real property.”²⁷ In fact, some states explicitly prohibit prescriptive solar easements.²⁸

Even though express solar easements could be granted at common law, many states have enacted statutes that facilitate the creation of solar easements.²⁹ Such statutes do not ex-

22. 2 C.J.S *Adjoining Landowners* § 75 (2006) (citing *United States v. Blackman*, 613 S.E.2d 442 (Va. 2005)).

23. See Gergacz, *Legal Aspects*, *supra* note 10, at 2.

24. John William Gergacz, *Solar Energy Law: Easements of Access to Sunlight*, 10 N.M. L. REV. 121, 132-33 (1979-1980) [hereinafter Gergacz, *Solar Energy Law*].

25. See *id.*

26. *Id.*

27. GILBERT LAW SUMMARIES POCKET SIZE LAW DICTIONARY 254 (1997).

28. See, e.g., KY. REV. STAT. ANN. § 381.200(2) (2007); MO. ANN. STAT. § 442.012 (2007).

29. See COLO. REV. STAT. §§ 38-32.5-100.3 to -103 (2007); FLA. STAT. ANN. § 704.07 (2007); GA. CODE ANN. §§ 44-9-20 to -23 (2007); KY. REV. STAT. ANN. § 381.200(2) (2007); MONT. CODE ANN. §§ 70-17-301 to -302 (2007); OHIO REV. CODE ANN. § 5301.63 (2007); TENN. CODE ANN. §§ 66-9-201 to -206 (2007); VA. CODE ANN. §§ 55-352 to -354 (2007); WIS. STAT. ANN § 700.35 (2007).

pressly establish easements over adjoining land, but instead recognize the validity of private solar easement arrangements between landowners.³⁰ Although an express solar easement agreement between landowners should be recognized if properly recorded, statutes that recognize the validity of private solar easement arrangements provide additional protection for solar energy users.³¹

A. *Express Easements*

Any landowner may obtain an express easement to light through a covenant, grant or agreement with adjoining landowners. Remedies available to solar energy users, should the adjoining landowner break this agreement, include damages for the blocked sunlight needed to operate the solar energy unit and an injunction to enjoin the offending interference.³² Such remedies are often included in the easement itself through a liquidated-damages clause.³³ A liquidated-damages clause guarantees that the servient tenant is not forever burdened with the undesirable easement, and instead can pay damages to the solar energy user for loss of the easement.³⁴ However, the negotiation required between adjoining landowners is one of the most difficult requirements in securing an easement over neighboring land.³⁵ Many adjoining landowners will not agree to serve as a servient tenant, afraid of the effect the easement may have on the price and desirability of their property.

Sui v. McCully Citron Co.,³⁶ which was decided in favor of the defendant on a summary judgment motion, is beneficial in understanding the difficulty of obtaining express solar-access easements.³⁷ In *Sui*, the solar energy user installed four solar collectors on her home that were used to operate a solar-heated water system.³⁸ On an adjoining parcel of land, the defendant

30. *See supra* note 29.

31. *See supra* note 29.

32. Zitter, *supra* note 7.

33. Gergacz, *Legal Aspects*, *supra* note 10, at 11.

34. *Id.* at 12.

35. *Id.* at 13.

36. No. 56405 Civ. (Haw. 1979) *reprinted in Solar Access Denied by Hawaii Court*, 1 SOLAR L. REP. 542 (1979).

37. *Id.* at *2.

38. *Id.*

began to construct a nine-story building, which, when completed, would shade the plaintiff's solar energy collectors.³⁹ The homeowner brought an action to prevent construction of the apartment building, claiming she had a right to sunlight—as the new building would decrease the efficiency of her solar-heated water system by approximately seventy percent.⁴⁰ The court granted the defendant's motion for summary judgment because the plaintiff did not have an express solar-access easement over the defendant's land, and the area was zoned to allow high-rise buildings.⁴¹ The court implied in its opinion that had the plaintiff acquired a legal right to unobstructed sunlight, through a solar easement or some other grant, the motion for summary judgment would have been denied.⁴² *Sui* and other cases that have ended with similar decisions each provide proof of the importance of affording solar energy users some form of solar-access protection.⁴³

B. *Implied or Prescriptive Easements*

If a landowner fails to reserve an express easement over adjoining land, it is unlikely that he or she will be able to claim that an implied or prescriptive easement has been created. A prescriptive easement may be created by a dominant tenant through a long-continued enjoyment or use over the servient tenant's land, even in the absence of a conveying instrument.⁴⁴ The enjoyment and use of the property must be under the knowledge and acquiescence of the servient tenant and must also be exercised by a claim of right that is adverse to the servient tenant's interests.⁴⁵ In order to establish a *prima facie* case in a private nuisance cause of action, arising from an adjoining landowner's interference with an implied easement of light, the plaintiff has the burden to prove that the servitude was created and made appurtenant to the estate reserved by implication.⁴⁶

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *See id.*

44. *Id.* at 6.

45. *Id.*

46. *See Lipsky v. Heller*, 85 N.E. 453, 461 (Mass. 1908).

In *Wolford v. Thomas*,⁴⁷ the California Court of Appeals affirmed the trial court's granting of summary judgment, holding that in the absence of an express grant or covenant, a landowner enjoys no easement for light or air over adjoining land.⁴⁸ In addition, the court stated, "[t]he use of light and air from adjoining premises cannot be adverse, since there is no invasion of the adjoining proprietor's rights of which he can complain."⁴⁹ California is not the only state to reject the idea of prescriptive easements. Courts in the District of Columbia, Ohio and Pennsylvania have held that parties may not obtain prescriptive easements for access to light or air.⁵⁰

One of the leading cases to hold that there is no implied easement to light and air is *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*⁵¹ The plaintiff owned the Eden Roc Hotel and sought to enjoin defendant Fontainebleau Hotel Corp., a neighboring landowner, from building a fourteen-story addition which would interfere with the light and air on the beach in front of the Eden Roc.⁵² The plaintiff alleged that for more than twenty years there was an easement "impliedly granted by virtue of the acts of the plaintiff's predecessors in title."⁵³ The Florida Court of Appeals stated that in the absence of a contractual or statutory obligation, a property owner has no legal right to the free flow of air and light across neighboring land.⁵⁴ Without a legal right to neighboring airspace, or an express agreement with neighboring landowners, property owners have no claim to the airspace above neighboring land, or the free-flow of light across that property, and the airspace appropriately belongs to the neighboring landowner. *Fontainebleau* and *Wolford* are two examples that suggest that a solar energy user's right to a prescriptive easement over neighboring land is

47. 235 Cal. Rptr. 422 (Ct. App. 1987).

48. *Id.* at 428.

49. *Id.* (quoting *Katcher v. Home Sav. & Loan Ass'n*, 53 Cal. Rptr. 923 (Ct. App. 1966)).

50. See *Hefazi v. Stiglitz*, 862 A.2d 901 (D.C. 2004); *Cash v. Cincinnati Bd. of Zoning Appeals*, 690 N.E.2d 593 (Ohio Ct. App. 1996); *Koresko v. Farley*, 844 A.2d 607 (Pa. Cmmw. Ct. 2004).

51. 114 So. 2d 357, 359 (Fla. Dist. Ct. App. 1959).

52. *Id.* at 358.

53. *Id.*

54. *Id.* at 359.

a very weak cause of action, and one which many courts have not accepted.

IV. Nuisance Actions

In the absence of an easement cause of action, some landowners may possess a private nuisance cause of action. The cause of action may be based on unreasonable obstruction of access to sunlight due to interference with a landowner's use of sunlight for solar energy.⁵⁵ To determine if an adjoining landowner's use of his or her property obstructs the plaintiff's sunlight and creates a private nuisance, the court must determine whether the conduct obstructing the solar access is reasonable in regards to all of the surrounding circumstances. These circumstances take into consideration the needs of the adjoining landowner and the degree of discomfort and injury the plaintiff sustains.⁵⁶ In most cases, a nuisance cause of action only works if the neighbor is acting maliciously. In addition to considering the needs and injury to landowners, the court in *Preh v. Maretti*⁵⁷ also held that social priorities may be taken into account when determining what constitutes a private nuisance.⁵⁸

In determining whether an action constitutes a nuisance, "courts will generally weigh the gravity of the harm to the plaintiff against the utility of the defendant's activity."⁵⁹ Plaintiff's will often argue that the social utility of employing solar energy systems outweighs the conflicting airspace use, and that a court should protect the solar energy user by enjoining the solar interference.⁶⁰ This argument does not often work "since a nuisance may not be found where the complained-of use of land was a large and extensive one or where the finding of a nuisance would stifle land development."⁶¹ The courts, in essence, argue that if they held that a blockage of solar energy constituted a nuisance, land development would be stifled and eco-

55. 2 C.J.S. *Adjoining Landowners* § 75 (2007) (citing *Prah v. Maretti*, 321 N.W.2d 182 (Wis. 1982)).

56. *See McClosky v. Martin*, 56 So. 2d 916, 918 (Fla. 1951).

57. 321 N.W.2d 182 (Wis. 1982)

58. *Id.* This case will be discussed in further detail later in this note.

59. *Zitter*, *supra* note 7, ¶ 6.

60. *Id.*

61. *Id.*

nomically viable property would not be used to its greatest potential.⁶² Although this argument makes sense, the airspace that most solar energy users require from neighboring landowners can be greatly diminished with proper planning. Proper placement of the solar energy panels, at the most efficient angles, can often decrease the airspace required over neighboring property. By decreasing the encumbered airspace, land development will not be stifled. And, in most instances, the property will still retain its economic potential.

Owners of a solar home in Los Gatos, California experienced the difficulty of advancing a nuisance cause of action.⁶³ Without an easement over adjoining land, the owners found that they had no claim against Santa Clara County for allowing trees on county property to interfere with and block their access to sunlight, resulting in failure of their solar energy systems.⁶⁴

Some jurisdictions, in addition to the ability to wield a private nuisance cause of action, may provide a means of protecting solar energy users' access to sunlight through the use of permits.⁶⁵ These permits, however, do not necessarily establish a new property right regarding solar access.⁶⁶ Although permits may grant a property owner solar access, the inability to properly record a granted permit often leaves solar energy users without remedy.⁶⁷ Without a statute permitting otherwise, an easement or a private nuisance cause of action, landowners historically have lacked legal recourse against adjoining landowners who disturb their access to sunlight.

V. Statutory and Case Law Right-to-Light

Many courts have upheld the right of private parties to create easements protecting access to sunlight; in addition, several states have also enacted statutory provisions that specifically authorize the creation of solar energy access easements.

62. *See id.*

63. *Zipperer v. County of Santa Clara*, 35 Cal. Rptr. 3d 487, 489 (Ct. App. 2005).

64. *Id.*

65. *See Arndt v. City of Boulder*, 895 P.2d 1092 (Colo. Ct. App. 1994); *O'Neill v. Brown*, 609 N.E.2d 835 (Ill. App. Ct. 1993).

66. *See id.*

67. *See Arndt*, 895 P.2d at 1094.

A. Statutes

The primary way that landowners now protect their solar energy access is through statutes. Most current solar access statutes regulate permit standards or the form that easements must take and the descriptions that must be included in the conveying instrument.⁶⁸

Wisconsin Statutes and Annotations section 66.0403, "Solar and wind access permits," authorizes municipal permits for solar energy systems.⁶⁹ In creating the "Solar and wind access permits" statute, the Wisconsin legislature expressed concern regarding diminishing non-renewable energy resources.⁷⁰ To encourage the use of renewable energy, Wisconsin used language that guaranteed citizens the right to:

negotiate and establish renewable energy resource easements, by clarifying the authority of, and encouraging, local governments to employ existing land use powers for protecting access rights to the wind and sun, by creating a procedure for issuance of solar access permits to owners and builders of active and passive solar energy systems and by encouraging local governments to grant special exceptions and variances for renewable energy resource systems.⁷¹

The statute allows municipalities to adopt any ordinances they deem necessary to grant permits and allows an owner who has installed or intends to install an energy system to apply for a permit.⁷² After the application is completed, the applicant must notify the owners of any property that may be affected by the permit.⁷³ The applicant is required to stipulate that if the permit is granted, the adjoining landowner's right to develop his or her property and plant vegetation may be affected, and that the affected landowner has a right to request a hearing on

68. Gergacz, *Legal Aspects*, *supra* note 10, at 8-9.

69. WIS. STAT. § 66.0403 (2006).

70. *State ex rel. Numrich v. City of Mequon Bd. of Zoning Appeals*, 626 N.W.2d 366, 371 (Wis. Ct. App. 2001) (citing Laws of 1981, ch. 354, § 1. n.3 ¶ (2)(b)).

71. *Id.* (citing Laws of 1981, ch. 354, § 1. n.3 ¶ (2)(b)).

72. *Id.* at 370 (citing WIS. STAT. § 66.032 (2006)). Wisconsin Statute section 66.032 has since been changed to Wisconsin Statute section 66.0403.

73. *Id.*

the permit.⁷⁴ The ordinance goes on to provide that the municipality shall grant the permit if:

(1) the energy system will not unreasonably interfere with the orderly land use and development plans of the municipality, (2) no person who has present plans to build a structure that would impermissibly interfere with the energy system has expended more than \$500 or otherwise made substantial progress toward planning or constructing such a structure, and (3) the benefits to the applicant and the public will exceed any burdens.⁷⁵

Once the permit has been granted, the ordinance requires the solar energy user to record the restrictions.⁷⁶ It also provides for adequate remedies for the solar energy user if a restricted property owner uses his or her property in a way that is contrary to the permit, including damages, costs, injunctive relief and attorneys' fees.⁷⁷ Wisconsin has taken a proactive step in helping to provide solar energy users with a statutory right to sunlight and solar energy access—one in which other states may want to consider mimicking.

New Mexico has also created statutory provisions to help protect solar energy users. New Mexico's Solar Rights Act creates "a legal right to unobstructed sunlight based not upon agreements between adjoining landowners, but upon the first beneficial use of the sunlight for solar power."⁷⁸ Under the New Mexico Act, once a solar right is established through erection of a solar energy system, the landowner gains a permanent right to receive unobstructed sunlight for that system.⁷⁹ New Mexico's statute has gone further than many other state statutes and recognizes a homeowner's right to solar access when his or her use of heating or cooling operates through a passive solar energy system.⁸⁰ "A passive solar energy system is one in which the building itself acts as a solar energy collector: the design and location of windows; drapes; and thickness of walls act to heat or cool the building."⁸¹ This right to natural access of solar

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 371.

78. Gergacz, *Legal Aspects*, *supra* note 10, at 13.

79. *Id.* at 14.

80. *Id.*

81. *Id.*

energy becomes a property right that the landowner is entitled to.⁸² The landowner subsequently does not obtain ownership in the sunlight itself, but instead obtains a right to use the air-space above neighboring lands through which sunlight travels.⁸³

Scholars have argued that the New Mexico statute is too broad and operates in some respects as a “taking” of the adjoining landowner’s property.⁸⁴ An article by John William Gergacz argued that “[i]n focusing solely on the needs of the solar energy user, the New Mexico Act ignores the property rights of adjoining landowners in a manner which may violate the fifth amendment to the United States Constitution.”⁸⁵ Gergacz went on to point out that the government has the unquestionable right to regulate land use through the use of police power; however, he questioned how much regulation could be permitted before a taking occurred, and just compensation was necessary.⁸⁶ In order for just compensation to be necessary, the creation of the solar easement must diminish the servient property owner’s land value to such an extent that compensation is required.⁸⁷ The questions surrounding solar energy use and the Fifth Amendment takings clause will be discussed at length later in this note.

In addition to Wisconsin and New Mexico, Colorado has also created statutory protections for solar energy users.⁸⁸ Colorado Revised Statutes section 30-28-111 gives county planning commissions in all counties, the right to create zoning ordinances or regulations in order to protect access to sunlight for solar energy devices.⁸⁹ In addition to Colorado, many other states also have solar energy statutes that provide property owners with a right to obtain solar easements.⁹⁰ Some states’

82. *Id.* at 15.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *See* COLO. REV. STAT. § 30-28-111(1) (2006).

89. *Id.*

90. ALASKA STAT. § 34.15.145 (2006); ARIZ. REV. STAT. ANN. § 33-439 (2006); CAL. CIV. CODE § 801.5 (2007); COLO. REV. STAT. § 38-32.5-100.3 (2007); FLA. STAT. ANN. § 704.07 (2007); GA. CODE ANN. § 44-9-20 (2007); IDAHO CODE § 55-615 (2007); 30 ILL. COMP. STAT. 725/1.2 (2007); IND. CODE § 32-32-4-1 (2007); IOWA

statutes also specifically authorize state government entities to consider solar access as a public purpose and thus become the subject of zoning regulations.⁹¹ This categorization will be discussed in depth within the police powers section of this note.

B. Case Law

California has taken numerous steps to protect property owners' right to sunlight. After California created the California Solar Shade Control Act there was some discussion regarding whether local governments still maintained the right to create local solar and shade ordinances. The court in *Kucera v. Lizza*⁹² found that the California Solar Shade Control Act did not signal an occupation of the exclusion of all local governmental regulation effecting views and light.⁹³ Instead, the court found that the Solar Shade Control Act only protected active or passive solar energy systems against obstructions created by trees and foliage that had grown or was later planted.⁹⁴ The court also found that local ordinances restricting both tree planting and tree growth were not preempted by the California Solar Shade Act, and that general law governing solar easements did not implicitly preempt view and sunlight regulation.⁹⁵

In *Sher v. Leiderman*,⁹⁶ also a California case, the court found that the blockage of light to a neighboring property did not constitute an actionable nuisance, regardless of the poten-

CODE ANN. § 564A.1 (2007); KAN. STAT. ANN. § 58-3801 (2007); KY. REV. STAT. ANN. § 381.200(2) (2007); 33 ME. REV. STAT. ANN. CH. 28, § 1401 (2007); MASS. GEN. LAWS ANN. CH. 187, § 1A (2007); MINN. STAT. ANN. § 500.30 (2007); MO. ANN. STAT. § 442.012 (2007); MONT. CODE ANN. § 70-17-301 (2007); NEB. REV. STAT. § 66-909 (2007); NEV. REV. STAT. § 111.370 (2007); N.H. REV. STAT. ANN. § 477:49 (2006); N.J. STAT. ANN. § 46:3-24 (2007); N.M. STAT. ANN. §§ 47-3-1 (2006); N.Y. REAL PROP. LAW § 335-b (2006); N.D. CENT. CODE § 47-05-01.1 (2006); OHIO REV. CODE ANN. § 5301.63 (2007); OR. REV. STAT. § 105.885 (2007); R.I. GEN. LAWS § 34-40-1 (2006); TENN. CODE ANN. § 66-9-201 (2007); UTAH CODE ANN. § 57-13-1 (2007); VA. CODE §§ 55-352 (2006); V.I. CODE ANN. TIT. 28, § 1006 (2006); WASH. REV. CODE ANN. § 64.04.140 (2007); WIS. STAT. ANN. § 700.35 (2007); WYO. STAT. § 34-22-106 (2007).

91. See, e.g., ARIZ. REV. STAT. ANN. § 9-461.05(C)(1)(d) (2006).

92. 69 Cal. Rptr. 2d 582 (Ct. App. 1997).

93. *Id.* at 592.

94. *Id.*

95. *Id.*

96. 226 Cal. Rptr. 698 (Ct. App. 1986).

tial impact on the injured property or persons.⁹⁷ The court held that there was no cause of action under the Solar Shade Control Act when passive devices were used by the plaintiffs to collect solar heat, and no “solar collectors,” as defined in the statute, were present.⁹⁸

In *Arndt v. City of Boulder*,⁹⁹ a Colorado court found that—under Colorado’s solar access statute—a beneficiary of a solar-access permit has the right to enforce his or her permit against other property owners.¹⁰⁰ The permit can be enforced if the beneficiary has recorded the permit so that a comprehensive title search of the property record would reveal the existence of a permit recorded against the lot.¹⁰¹

In *O’Neill v. Brown*,¹⁰² an Illinois court held that a plaintiff was not entitled to an injunction because the Illinois Comprehensive Solar Energy Act of 1977 was not intended to create a new property right in solar access.¹⁰³ The underlying purposes of the Act were six-fold. The Act was created to “define solar energy systems, demonstrate solar energy feasibility, apply incentives for using solar energy, educate the public on solar feasibility, study solar energy application and coordinate governmental programs affecting solar energy.”¹⁰⁴ The court found that all six purposes indicated legislative intent to initiate the development of solar energy use through education, research and incentive programs.¹⁰⁵ “In rejecting the existence of a right to solar access, courts have generally noted that ‘easements of light and air over adjacent premises are not favored because such devices inhibit the growth and the use of the land.’”¹⁰⁶ The court clearly found that the establishment of the

97. *Id.*

98. *Id.*

99. 895 P.2d 1092 (Colo. Ct. App. 1994).

100. *Id.*

101. *Id.*

102. 609 N.E.2d 835 (Ill. Ct. App. 1993).

103. *Id.*

104. *Id.* (citing ILL. REV. STAT. 1989, Ch. 96 ½, ¶ 7302(e) (2006)).

105. *Id.*

106. *Id.* at 839 (citing Melvin A. Bedree, *An Owner of a Solarheated Residence Has a Cause of Action Under Wisconsin Private Nuisance Law for an Unreasonable Obstruction of His Access to Sunlight by an Adjoining Landowner’s Home*, 52 U. CIN. L. REV. 208, 211 (1984)).

Solar Energy Act did not create any additional solar access rights.

For the most part, these cases reveal the importance of having properly worded and well established statutes that protect solar energy user's access to the sun. In addition, this case law suggests a number of public purposes that the statutes were designed to facilitate.

One of the more influential cases regarding solar energy easements, *Prah v. Maretti*,¹⁰⁷ provides an argument that there may be a legal right to access sunlight for solar energy use under a private nuisance cause of action.¹⁰⁸ In *Prah v. Maretti*, the owner of a solar-heated residence sued to enjoin a neighbor's proposed construction of a residence that would interfere with the plaintiff's access to unobstructed sunlight.¹⁰⁹ The Wisconsin Supreme Court held that the unreasonable obstruction of access to sunlight might constitute a private nuisance and reversed and remanded the case for further discussion on the issue.¹¹⁰ The issue in *Prah* was whether the owner of a solar-heated residence stated a valid cause of action, upon which relief could be granted, when the owner asserted that his neighbor's proposed building construction would interfere with his unobstructed access to sunlight.¹¹¹ The neighbor's proposed construction conformed to existing deed restrictions and local zoning statutes; however, it would interfere with the solar energy user's unobstructed access to sunlight across the property.¹¹²

Three main policy concerns were discussed in the body of the opinion. The first concerned the right of landowners to use property as they wished—within the limit that they did not cause physical damage to a neighbor.¹¹³ The second concern pertained to the determination of whether the sun was being valued for aesthetic enjoyment or for illumination.¹¹⁴ And third, the interest society placed on not restricting or impeding land

107. 321 N.W.2d 182 (Wis. 1982).

108. *Id.*

109. *Id.* at 184.

110. *Id.* at 192.

111. *Id.* at 184.

112. *Id.* at 185.

113. *Id.* at 189.

114. *Id.*

development.¹¹⁵ The court determined that these three policies were no longer fully accepted or applicable, pointing out that society had increasingly regulated the use of land by landowners for the protection of the general welfare of citizens.¹¹⁶ In addition, the court determined that sunlight may be needed not for aesthetic reasons, but as some source of energy, and that the need for easy and rapid development of property is not as great today as it once was.¹¹⁷ Thus, *Prah v. Maretti* serves as solid case law regarding the necessity of solar energy users' access to sunlight.

VI. Solar Energy Easements and the Takings Clause

Questions have arisen as to whether some solar energy easement statutes go too far and serve as a taking under the Fifth Amendment when landowners are prohibited from using their land in certain ways without agreement or just compensation.¹¹⁸ The Fifth Amendment states, "nor shall private property be taken for public use, without just compensation."¹¹⁹ The question becomes whether the partial taking of airspace above a landowner's property is a constitutional taking.

A. *The Fifth Amendment Takings Clause*

Eminent domain is the right of the government to assert control over or "take" private property for public use without the property owner's consent.¹²⁰ Although the government may take the property without consent, the government is required to pay the landowner just compensation.¹²¹ The Fifth Amendment is made applicable to the states through the Fourteenth Amendment.¹²² For the government to exercise eminent domain power, the taking cannot involve a purely private taking of another person's property or the public taking of private property for private use.¹²³ Two aspects of the takings clause

115. *Id.*

116. *Id.* at 191.

117. *Id.* at 190.

118. Gergacz, *Legal Aspects*, *supra* note 10, at 15.

119. U.S. CONST. amend. V.

120. Gergacz, *Legal Aspects*, *supra* note 10, at 32.

121. *Id.*

122. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 231 (1984).

123. Gergacz, *Legal Aspects*, *supra* note 10, at 32.

have been described as “perfectly clear.”¹²⁴ First, “the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation.”¹²⁵ Second, “it is equally clear that a State may transfer property from one private party to another if future ‘use by the public’ is the purpose of the taking.”¹²⁶

Some scholars have already questioned whether a state’s solar energy laws border on a taking: “[e]ven though no precise definition exists of when a regulation becomes an unconstitutional taking, the New Mexico statute probably crosses the line into the unconstitutional arena.”¹²⁷

In addition, California’s Solar Shade Control Act has also been questioned.¹²⁸ John William Gergacz has identified two aspects of the Solar Shade Control Act that may constitute a taking.¹²⁹ “First, the Act may involve a ‘taking’ of a neighbor’s airspace without just compensation. Second, [if a] ‘taking’ is involved and the Act is deemed to be a mere regulation of land use, it may still exceed the state’s police power upon which land use regulation is based.”¹³⁰

B. *Do Statutes Protecting Solar Energy Users Constitute A Taking?*

Four categories of takings were set out by the Supreme Court in 2005 in *Lingle v. Chevron U.S.A., Inc.*¹³¹ The court divided takings into four categories and found that for a plaintiff to claim that an uncompensated taking of private property has occurred, he or she must proceed “by alleging a ‘physical’ taking, a *Lucas*-type ‘total regulatory taking,’ a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*.”¹³² A solar energy easement statute does not

124. *Kelo v. City of New London*, 545 U.S. 469, 477 (2005).

125. *Id.*

126. *Id.*

127. Gergacz, *Legal Aspects*, *supra* note 10, at 17. New Mexico’s Solar Rights Act creates “a legal right to unobstructed sunlight based not upon agreements between adjoining landowners, but upon the first beneficial use of the sunlight for solar power.” *Id.* at 13.

128. *Id.* at 21.

129. *Id.*

130. *Id.*

131. 544 U.S. 528 (2005).

132. *Id.* at 548.

create a “total regulatory taking” and therefore is not a *Lucas*-type taking; it is not a land-use exaction, and thus does not violate the *Nollan* and *Dolan* standards; and it does not create a physical taking.¹³³ Therefore, in the case of a solar energy easement statute, a plaintiff would advance a *Penn Central* argument.¹³⁴

In analyzing whether a taking has occurred the *Penn Central Transp. Co. v. New York City* balancing test should be used.¹³⁵ When determining whether a taking has occurred a court balances: (1) the burden placed on the property owner, (2) the nature of the government action and benefit, and (3) the property owner’s investment-backed expectations.¹³⁶ In all cases, this analysis will be fact specific, making it difficult to determine whether a statute that grants solar energy users an easement over adjoining property will constitute a taking.

In *Penn Central* the Court stated that:

“Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.¹³⁷

With solar energy statutes, solar energy users are not obtaining easements over all of the adjoining property owner’s land, but instead are obtaining property rights to a segment of the airspace above neighboring land. In each situation, the determination of whether a taking has occurred will be fact specific; the court will review how much of the plaintiff’s property is being effected by the statute, the extent of the solar energy use and its benefit, and the plaintiff’s investment-backed expectation.¹³⁸ “The question [of takings] is one of balancing the public need for the regulation with the harm caused to the affected

133. *See id.*

134. *See id.*

135. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978).

136. *Id.*

137. *Id.* at 130.

138. *Id.* at 123.

landowner.”¹³⁹ “Whether the use of the easement to provide sunlight access for an individual solar energy collector is a constitutional ‘public use’ presents a vexing problem.”¹⁴⁰

If courts do determine that comprehensive solar access statutes operate as a taking then compensation by the state to the servient landowner for his or her lost property rights is required under the Fifth Amendment; however, if it is considered proper police power regulation of land use, it is permitted without payment of compensation to the affected landowner.¹⁴¹

VII. Solar Energy and Police Power

Should a plaintiff’s takings claim fail, he or she will likely fail in arguing any additional claim. A claim that the statutory regulations are *ultra vires* will likely fail, as courts in California have held that a state’s police-power provides it with the right to create solar easements. The California Court of Appeals in *Kucera v. Lizza*¹⁴² discussed this issue.

The issue in *Kucera* was whether it was within the town of Tiburon’s police powers to preserve views and sunlight by regulating tree growth.¹⁴³ The court determined that safety considerations were peripheral to the ordinance, but that the aesthetic considerations were more important and that “aesthetic conditions have long been held to be valid exercises of the city’s traditional police power, and do not amount to a taking merely because they might incidentally restrict a use, diminish the value, or impose a cost in connection with the property.”¹⁴⁴

In this case, the ordinance in question was not pre-empted by state law governing easements appurtenant for sunlight, for solar energy systems, and for light and air.¹⁴⁵ The court determined that it was within Tiburon’s police power to preserve views and sunlight through regulation of tree growth.¹⁴⁶ The court stated that in order to judge the validity of a land use

139. Gergacz, *Legal Aspects*, *supra* note 10, at 17.

140. *Id.* at 32.

141. *See id.* at 22.

142. 69 Cal. Rptr. 2d 582 (Ct. App. 1997).

143. *Id.* at 585.

144. *Id.* at 589 (quoting *Ehrlich v. City of Culver City*, 911 P.2d 429, 450 (Cal. 1996)).

145. *Id.* at 591.

146. *Id.*

ordinance that is thought to exceed municipal authority under a police power claim, one must determine “whether [the ordinance] has a real or substantial relation to the public health, safety, morals or general welfare.”¹⁴⁷ Conversely, the court found that an ordinance would be unconstitutional if its provisions were clearly arbitrary or unreasonable and had no substantial relation to the general welfare or public health of the community.¹⁴⁸ Although this case did not involve the use of solar energy systems, the court’s holding that it was within the city’s police power to preserve sunlight would provide strong support for a solar energy user.

The court determined that the incidental goal of this ordinance was to preserve the light and views, while promoting and increasing safety was the primary goal.¹⁴⁹ “The preservation of sunlight has been recognized for nearly 40 years as a valid police power purpose supporting height limitations. ‘In the exercise of the police power a local government can impose restrictions . . . for the purpose of securing adequate sunlight to promote public health in general.’”¹⁵⁰ One could assume that courts in other states may also hold that solar easement statutes achieve a valid public purpose, and therefore have a substantial relation to the public’s general welfare.

Some state statutes specifically provide language that supports the idea that access to solar energy and the use of solar energy systems relate to the public’s general welfare. The Tennessee Code regarding municipal zoning provides in part:

For the purpose of promoting the public health, safety, morals, convenience, order, prosperity and general welfare, the board of aldermen, board of commissioners or other chief legislative body of any municipality by whatever title designated (and hereinafter designated as “chief legislative body”), is empowered, in accordance with the conditions and the procedure specified in this part and part 3 of this chapter, to regulate the location, height, bulk, number of stories and size of buildings and Protection and encouragement of access to sunlight for solar energy systems may

147. *Id.* at 594.

148. *Id.*

149. *Id.*

150. *Id.* at 596.

be considered in promulgating zoning regulations pursuant to this section.¹⁵¹

Tennessee's municipal zoning statute clearly states that the purpose of the statute is to promote "public health, safety, morals, convenience, order, prosperity, and general welfare."¹⁵² The Tennessee legislature is stating that access to sunlight for solar energy systems should be considered when creating zoning regulations, which clearly can be viewed as a promotion of public health, safety, morals, convenience, order, prosperity and general welfare.¹⁵³ All of these goals are valid public purposes if the city or state government has a comprehensive plan that includes how the use of solar energy will help them to achieve these goals. The language of the Tennessee statute supports the idea that if the legislative intent of the statute was to allow access to sunlight for solar energy systems, it is then within the regulatory power of the municipality.

In addition, a Washington statute provides for restrictions on buildings and use of land; it states that local councils or boards "may encourage and protect access to direct sunlight for solar energy systems" when done "in such measure as is deemed reasonably necessary or requisite in the interest of health, safety, morals and the general welfare."¹⁵⁴ Although the Washington statute, unlike the Tennessee statute, does not specifically use the term public, the language of the two statutes is similar in that they both focus on the promotion of health, safety, morals, and general welfare while encouraging access to sunlight and solar energy.¹⁵⁵

Although the Washington and Tennessee statutes use language that identifies solar access as achieving a public purpose, states that do not have such statutes have a strong argument when justifying similar restrictions as a valid exercise of state police power. Analysis of the United States' energy crisis provides increasing support for the proposition that the use of alternative renewable forms of energy fulfills a large public purpose.

151. TENN. CODE ANN. § 13-7-201(a)(1) (2006).

152. *Id.*

153. *Id.*

154. WASH. REV. CODE § 35.63.080 (2006).

155. *See id.*; TENN. CODE ANN. § 13-7-201 (2006).

It has been estimated that the United States' oil consumption over the next twenty years, will increase by over six million barrels per day.¹⁵⁶ At the same time, if the United States' oil producers follow their historic production pattern, production of oil will decline by 1.5 million barrels per day.¹⁵⁷ These figures indicate that the United States' oil demand and oil producers will have to increase by a combined 7.5 million barrels per day; if this does not occur by 2020, it is estimated that the United States' oil production will supply less than thirty percent of its oil needs.¹⁵⁸

Lack of oil is not the only problem that the United States is expected to face in the future: natural gas consumption in the United States is also expected to grow by more than fifty percent over the next twenty years.¹⁵⁹ While consumption is expected to increase by over fifty percent, production is expected to increase by only fourteen percent.¹⁶⁰ Considering the projected shortfall in natural gas and oil production over the next twenty years, the use of renewable energy sources would likely provide one of the most efficient and environmentally friendly alternatives to current non-renewable energy sources.

Shortfalls in production and increases in consumption of oil and gas production are not the only factors to be weighed when considering the importance of renewable energy sources. The future of the environment may also play a roll in determining the importance of providing property owners with guaranteed access to sunlight. After the *Climate Change 2007* report was issued, the *New York Times* reported:

In a bleak and powerful assessment of the future of the planet, the leading international network of climate change scientists has concluded for the first time that global warming is 'unequivocal'

156. National Energy Policy, *Report of the National Energy Policy Development Group*, Overview, p.X (2000) (citing Sandi National Laboratories and U.S. Department of Energy, Energy Information Administration).

157. *Id.* (citing Sandi National Laboratories and U.S. Department of Energy, Energy Information Administration).

158. *Id.*

159. *Id.* (citing Sandi National Laboratories and U.S. Department of Energy, Energy Information Administration).

160. *Id.*

and that human activity is the main driver, 'very likely' causing most of the rise in temperatures since 1950.¹⁶¹

This assessment went on to state that the United Nations Intergovernmental Panel on Climate Change was more than ninety percent confident "that carbon dioxide and other heat-trapping greenhouse gases from human activities have been the main causes of warming since 1950."¹⁶²

Many state governments have already begun to take steps to reduce the greenhouse gases emitted within their states.¹⁶³ Other states have created a renewable portfolio standard requiring state electric-service providers to ensure that a certain percentage of electricity is offered from renewable sources, including wind, biomass and solar power.¹⁶⁴ By providing property owners with the ability to heat their homes, or even a portion of their homes with solar energy, the state will reduce the reliance that citizens have on electric service providers, and with hope, will thus decrease the greenhouse gases emitted by electric-source providers.¹⁶⁵

VIII. The Future

The role that solar energy plays in the United States will not decrease in the future. In August 2006, California Governor Arnold Schwarzenegger signed into law California's Million Solar Roofs bill.¹⁶⁶ The measure represents the most comprehensive solar energy program in the United States.¹⁶⁷ The Million Solar Roofs Initiative should save California over \$6 billion net of incentives through plans to install 3,000 megawatts of solar

161. Elisabeth Rosenthal & Andrew C. Revkin, *Panel Issues Bleak Report on Climate Change*, N.Y. TIMES, Feb. 2, 2007.

162. *Id.*

163. Scott Allen & Beth Daley, *Patrick to OK Fees for Power Plants*, BOSTON GLOBE, Jan. 18 2007, at B1.

164. The Center for Clean Air Policy, *Recommendations to Governor Pataki for Reducing New York State Greenhouse Gas Emissions*, ES 7 (2003), available at www.ccap.org/pdf/04-2003_NYGHG_Recommendations.pdf.

165. *See id.*

166. (OTC BB: SOEN) *Applauds Million Solar Roofs Bill in California*, MARKET WIRE, Aug. 30, 2006, available at http://www.redorbit.com/news/business/638459/otc_bb_soen_applauds_million_solar_roofs_bill_in_california/index.html.

167. *Id.*

electric power on roofs in California by 2016.¹⁶⁸ In addition, on April 26, 2006, H.R. 5206, the Securing America's Energy Independence Act of 2006, was introduced to the U.S. House of Representatives.¹⁶⁹ The Act intends "to amend the Internal Revenue Code of 1986 to extend the investment tax credit with respect to solar energy property"¹⁷⁰ Maryland also has also proposed legislative initiatives to protect solar energy users in its state.¹⁷¹ State delegate Sue Hecht's bill "clarifies the rights of residential solar users" in Maryland, and will "prevent homeowners associations from banning solar panels and other solar energy devices."¹⁷² In addition to preventing solar energy bans, the bill helps to "set up the framework for homeowners to enter easements to protect their access to sunlight."¹⁷³

The United States may also be able to learn a few things from its neighbor to the north. In Ontario Canada, a joint venture between SkyPower Corp. and SunEdison Canada announced the planned development of "First Light, North America's largest solar photovoltaic energy park to date, located on approximately 300 acres of land"¹⁷⁴ The park is anticipated to be complete by the end of 2009.¹⁷⁵ The power created by the energy park is estimated to be able to create sufficient power for "more than 2,000 homes annually."¹⁷⁶

Each of these legislative and social reforms provide additional support of the increasing role that solar energy plays, and

168. *California to Save Over \$6 Billion From Million Solar Roofs Initiative According to New Akeena Solar White Paper*, MARKET WIRE, Aug. 24, 2005, available at http://findarticles.com/p/articles/mi_pwwi/is_200508/ai_n14941697.

169. Securing America's Energy Independence Act of 2006, H.R. 5206, 109th Cong. (2006).

170. *Id.*

171. Meg Bernhard, *Delegate Hecht's Solar Power Bill Passes in State House*, THE FREDERICK NEWS-POST (Maryland), Mar. 14, 2008. The bill is awaiting approval from the state Senate, however was approved by the House of Delegates by a vote of 138-0.

172. *Id.*

173. *Id.* "Under the bill, homeowners buying solar panels would be able to approach their neighbors and ask if they would consider entering into an agreement. The agreement would specify that the neighbors would not block sunlight falling on the panels at a certain angle during specific hours of the day." *Id.*

174. Press Release, SunEdison, Groundbreaking of North America's Largest Solar Photovoltaic Energy Park (Apr. 21, 2008), available at <http://www.renewableenergyworld.com/rea/partner/story?id=52243>.

175. *Id.*

176. *Id.*

will continue to play, in the United States energy market. As governments work to increase the affordability of solar energy, it is important to also develop security measures to guarantee that property owners can obtain access to the sunlight needed to operate their solar energy systems.

Conclusion

United States' solar energy laws and right-to-light statutes have shifted over time, and are in flux today. The country's use and dependency on solar energy varies in the face of the paradigm of oil prices and availability. Should the need for alternative energy continue to grow as expected, a property owner's ability to obtain guaranteed right-to-light will become paramount.

Right-to-light through express easements, prescription easements, nuisance causes of actions and statutory guarantees have each provided property owners with varying degrees of success. Additionally, the effect of a Fifth Amendment takings argument and a state's police power to regulate access to light has weaved itself into the solar energy debate.

For now, the responsibility of shepherding the complicated balance between securing efficient and conscientious power sources, maintaining neighborhood peace and respecting municipal zoning rules may ultimately fall to local governments. If such institutions were to intervene by creating and upholding comprehensive solar access statutes, then solar energy uses could face an immediate future in which they could rest assured that no one would take their sunshine away.