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Nancy Lee Jones

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# AESTHETIC RESTRICTIONS AND THE USE OF SOLAR DEVICES

*Nancy Lee Jones\**

## I. INTRODUCTION

As the United States seeks to reduce its dependence upon foreign sources of energy and to discover and implement renewable energy resources, the installation of devices which utilize solar technology has generated increased interest. Critical examination of the legal implications of widescale solar development has focused on issues related to the right of access to sunlight.<sup>1</sup> However, other issues are necessarily suggested by the expanded use of sunlight as an energy source.

An issue which is emerging as a potentially serious impediment to the use of solar devices is the effect of legally enforceable restrictions intended to promote an aesthetically pleasing environment upon a property owner's right to use his land.<sup>2</sup> Prohibitions upon

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\* Legislative Attorney for the American Law Division of the Congressional Research Service, Library of Congress. B.A. Georgetown University, 1972; J.D. Georgetown University Law Center, 1975; Member, Virginia Bar. The views expressed herein are solely those of the author and do not necessarily represent the opinions of the Congressional Research Service or the Library of Congress.

<sup>1</sup> For a solar collector to work efficiently, it must have a certain amount of sunlight. This could create difficulties for persons who want to put solar collectors on their buildings in cities or in suburbs where the amount of land surrounding the building is limited, for if the owner of surrounding land builds or lets a tree grow, the solar collector could be shaded. The legal issues surrounding this problem, often referred to as the right to access to sunlight, have been extensively discussed by commentators although there are few actual cases. See, e.g., Beyers, *The Common Law of Solar Access: Insufficient Protection for Users of Solar Energy*, 6 REAL EST. L.J. 320 (1978); Moskowitz, *Legal Access to Light: The Solar Energy Imperative*, 9 NAT. RESOURCES L. 177 (1976); Becker, *Common Law Sun Rights: An Obstacle to Solar Heating and Cooling*, 3 J. OF CONTEMP. L. 19 (1976); Eisenstadt and Utton, *Solar Rights and Their Effect on Solar Heating and Cooling*, 16 NAT. RESOURCES J. 363 (1976).

<sup>2</sup> M. Maidique, *Solar America*, in ENERGY FUTURE: THE REPORT OF THE ENERGY PROJECT AT

various uses of property both traditionally and more recently sanctioned by the law may irreconcilably conflict with an owner's desire to construct a building incorporating solar technology or to install a solar device on an existing structure.<sup>3</sup>

Restrictions for aesthetic purposes are of two general types: those imposed by private agreement in the form of restrictive covenants;<sup>4</sup> and those imposed by zoning statutes or ordinances adopted pursuant to the state's general police power to protect the health, safety and general welfare of the citizenry.<sup>5</sup> Whatever the source, in accomplishing its avowed purpose an aesthetic restriction may not only impede but also render impossible the installation of a practical solar device.

Specific case law addressing the conflict between aesthetic controls and the implementation of novel solar technology is scant. Nevertheless, controversies involving the issue have already arisen in several states.<sup>6</sup> As installation of solar devices in new and existing structures becomes more practical, the conflict between the right of

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THE HARVARD BUSINESS SCHOOL 193-94 (R. Stobaugh & D. Yergin eds. 1979) [hereinafter cited as *ENERGY FUTURE*]. This controversial report states that "[p]owerful institutional barriers . . . impede the acceptance of solar heating." *Id.* at 193. Discussing these institutional, as opposed to economic, barriers, *ENERGY FUTURE* focuses upon building codes:

One of the most formidable [institutional barriers] is building codes. Each American locality has its own code—the result of geography, climate, building materials, and local political forces. Of the over ten thousand municipal building codes, only a handful provide for solar energy. When codes do not include solar energy, powerful disincentives can be created. A New Hampshire man, for example, wanted to install solar hot-water heating. He applied for a building permit to make the necessary modifications in the structure of his house, but an official in the town planner's office told him that solar energy was not in the building code's lexicon. So, after going through all the documents, hearings, and other procedures required to obtain variances from building codes, he decided he did not want solar after all. And even when building codes provide for solar, they can be discouraging. Initially, the planning committee for Coral Gables, Florida, rejected solar roof-top collectors outright. It then reversed its decision, but set such strict controls on aesthetics that costs were substantially increased.

*Id.* at 193-94 (footnotes omitted).

<sup>3</sup> Besides the examples set forth in *ENERGY REPORT*, *supra* note 2, dealing specifically with building codes, other instances of aesthetic controls prohibiting the use of solar technology are readily imaginable. Restrictions upon rooftop structures, structural alterations visible from other locations, or increases in the height of an existing structure might preclude installation of devices designed to collect sunlight. Furthermore, in particular circumstances, physical limitations of structural design or exposure could necessitate the placement of a collecting unit on the ground. In such cases, controls dictating the allowable proximity of structures to boundary lines or adjoining streets would be important.

<sup>4</sup> See text at notes 7-13, *infra*.

<sup>5</sup> See text at notes 32-42, *infra*.

<sup>6</sup> See text at notes 60-83, *infra*.

a community or group of landowners to protect themselves from unwanted structures and an individual's desire to avail himself of the benefits of solar technology will undoubtedly become more acute.

This article will examine this increasingly important issue, focusing upon applicable legal concepts and demonstrating their inadequacy in addressing the conflict between competing interests aroused when aesthetic controls confront a useful technology which responds to national needs. First, prohibitions arising by private agreement will be examined, and a review of existing remedies will suggest the need for a legislative solution. Second, the role of zoning regulation and the difficulties encountered in circumventing specific restrictions will highlight the problems inherent in judicial resolution of this confrontation on a case by case basis. Finally, both practical private and legislative solutions to the controversy will be explored, discussing recently enacted and proposed state legislation.

## II. AESTHETIC RESTRICTIONS IMPOSED BY PRIVATE AGREEMENT

### A. *Nature and Prevalence of Restrictive Covenants*

Restrictive covenants have been characterized as "control over activities (and structures) on land as a result of private agreement."<sup>7</sup> Typically, there are three principal modes through which a restrictive covenant can arise: as a general development scheme drawn up by a developer of a subdivision; as an agreement between landowners; and as a requirement incorporated into conveyancing documents when property is transferred. A covenant may be concerned with such specific uses of land as the permissible height of structures or requisite setbacks<sup>8</sup> from property boundaries. On the other hand, the covenant may be more generally phrased, perhaps requiring the property owner subject to its terms to submit plans of proposed structural alterations or additions to an architectural review board for approval prior to commencement of construction.<sup>9</sup>

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<sup>7</sup> 5 N. WILLIAMS, AMERICAN PLANNING LAW—LAND USE AND THE POLICE POWER § 154.01 (1974). [Hereinafter cited as WILLIAMS.] Restrictive covenants, like other promises respecting the use of land, were originally a type of contract. For a discussion of their historical developments see 6 P. ROHAN, HOME OWNER ASSOCIATIONS AND PLANNED UNITED DEVELOPMENTS LAW AND PRACTICE § 8.01 (1977).

<sup>8</sup> A setback is "[a] distance from a curb, property line, or structure, within which building is prohibited." BLACK'S LAW DICTIONARY 1230 (5th ed. 1979). See text at note 13, *infra*.

<sup>9</sup> For an example, see text at note 70, *infra*.

Regardless of its source or specific content, a restrictive covenant may well impede the prospective solar user in several ways.<sup>10</sup>

Certain technical requirements have been noted as necessary for the legal validity of a restrictive covenant.<sup>11</sup> However, there is some doubt as to judicial willingness to require strict compliance with these requirements.<sup>12</sup> In any event, covenants which tended to restrict the installation of solar devices would most likely fulfill these technical requirements and would therefore not be susceptible to challenge on these grounds.

A form published as an example for a restrictive covenant reveals in several provisions the pitfalls which the prospective solar user subject to its terms may encounter:

No structure shall be moved onto any lot unless it shall conform to and be in harmony with existing structures in the tract. . . . No building, including porches, etc., shall be erected nearer any street or road than the set-back lines shown on the recorded plat . . . . [T]he plans and specifications for the erection or alteration of any building, fence, wall, or other structure must be approved in writing by the grantor . . . . Grantor, in its sole discretion, shall have the right to refuse plans which are not deemed by it as suitable or desirable.<sup>13</sup>

Specifically, the language "conform to and be in harmony with existing structures in the tract" will present problems to the first property owner on the block attempting to install a solar unit. Detailed restrictions as to setback lines could render installation of a solar device impossible in some circumstances. Finally, the absolute discretion vested in the other party to the covenant will subject a property owner bound by its terms to the whim and caprice of another.

While the legitimacy of attempts by individuals to have a voice

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<sup>10</sup> See note 3, *supra*.

<sup>11</sup> WILLIAMS, *supra* note 7, notes the following requirements: notice, a dominant tenement, privity of estate, the obligations must touch and concern the land, and the obligations must be negative. *Id.*, §§ 154.03-.08.

<sup>12</sup> In *Neponsit Property Owners' Ass'n, Inc. v. Emigrant Ind's Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938), the New York Court of Appeals upheld a covenant which violated several of these technical requirements; nevertheless, some courts, even in New York, have continued to require these conditions. See WILLIAMS, *supra* note 7, § 154.09.

<sup>13</sup> 2 E. YOKLEY, *ZONING LAW AND PRACTICE*, § 20-6 (3d ed. 1965). For a form with somewhat similar requirements see 2 JONES *LEGAL FORMS*, Form 33:52 (10th ed. 1962). For sample sections to be included in restrictive covenants including a clause on restrictions on roof construction see 7 *AMERICAN JURISPRUDENCE LEGAL FORMS* §§ 77:61-77-215 (2d ed. 1972).

in the future development of their neighborhood should be initially recognized, where competing interests conflict or covenants become outmoded by changes in circumstances, relief ought to be available to a property owner. The prospective solar owner would wish to avail himself of remedies which the law has provided in circumstances where restrictive covenants strictly applied effect harmful results.

### *B. Overcoming Restrictive Covenants*

When a property owner discovers that existing covenants to which his land is subject preclude the installation of solar devices, he may attempt to avoid the restrictive covenant by several methods. Obviously, if he can secure a release from all parties in interest, the restrictive terms would be ineffective for want of someone to enforce them. However, in the absence of such an agreement, the prospective solar user must choose between proceeding with construction and becoming vulnerable to suit, seeking a judicial declaration holding the covenant invalid, or foregoing solar installation.<sup>14</sup> An often stated proposition concerning covenants is that they are to be construed strictly in favor of the free use of property.<sup>15</sup> In the context of an attempt to circumvent the restrictions of a covenant, this proposition may provide additional support.

Basically, four equitable arguments could be advanced to either avoid or terminate the application of a restrictive covenant to particular property, summarized as follows:

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;
4. the covenant is void as against public policy.

The likelihood of success and availability of any of these arguments will depend in large part upon the facts and procedural posture of the particular case; nevertheless, each can be discussed in terms of general application.

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<sup>14</sup> Regarding the possibility of simply ignoring a restrictive covenant, one commentator has advised that "[t]his course of action is not recommended, since courts have been willing to go to great lengths to enforce a valid covenant." S. KRAEMER, *SOLAR LAW—PRESENT AND FUTURE, WITH PROPOSED FORMS 62* (1978) [hereinafter cited as KRAEMER].

<sup>15</sup> 7 G. THOMPSON, *COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY* § 3160 (1962). See also *Campbell v. Glacier Park Co.*, 381 F. Supp. 1243, 1249 (D. Idaho 1974); *University Hills, Inc. v. Patton*, 427 F.2d 1094, 1099 (6th Cir. 1970).

## 1. Changes in Conditions

The rule pertaining to changes in conditions has been summarized as follows:

Injunctive relief against violation of the obligations arising out of a promise respecting the use of land cannot be secured if conditions have so changed since the making of the promise as to make it impossible [any] longer to secure in a substantial degree the benefits intended to be secured by the performance of the promise.<sup>16</sup>

This rule has been commonly used in situations where a neighborhood loses its residential character but retains its residential covenants. The likelihood of success for the solar user advancing this argument is uncertain. One commentator has stated:

Courts . . . have been extremely wary of granting such relief . . . The potential solar energy user may find it difficult to fit himself in the changed circumstances category. He might argue that diminished energy supplies have fundamentally changed the surrounding area. A proponent of the restrictive covenant would counter that no change in the surrounding area has taken place and that the original purpose of the restriction remains valid.<sup>17</sup>

Thus, the availability of relief predicated upon a change in circumstances is uncertain. However, the original purpose of the restrictive covenant might well have been to prevent the construction of unsightly structures in a particular neighborhood. The use of solar devices due to the changed circumstances of the nation's energy supply situation would not necessarily negate this purpose.

## 2. Relative Hardship

A covenant working a relative hardship on one of the parties subject to its terms may be judicially terminated. The doctrine has been stated as follows: "[i]njunctive relief against violation of the obligation arising out of a promise respecting the use of land will be denied if the harm done by granting the injunction will be dispro-

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<sup>16</sup> RESTATEMENT OF PROPERTY § 564 (1944). A detailed analysis of the termination of restrictive covenants due to a change in circumstances appears in R. POWELL, *THE LAW OF REAL PROPERTY* § 684 (1977).

<sup>17</sup> Zillman & Deeny, *Legal Aspects of Solar Energy Development*, ARIZ. ST. L.J. 25, 38 (1976). See also KRAEMER, *supra* note 14, at 62. "[T]he potential solar energy user may find it difficult to convince a court that a radical change has occurred." *Id.*

portionate to the benefit secured thereby."<sup>18</sup> Forbidding a solar device could be characterized as working a hardship upon the potential solar user by forcing him to choose a more conventional and more costly energy source. The denial of a solar use may, in some opinions, result in an aesthetically more pleasing environment; however, in some cases where specific facts concerning energy costs, the physical appearance of a particular solar device, and the character of the existing neighborhood are alleged and proved, a finding of harm disproportionate to benefit may reasonably follow.

Yet, the doctrine itself is limited to cases involving injunctions and is not applicable to suits for damages:

[r]elief by way of damages operates to shift the harm suffered from the persons who suffered it to the person who caused it. There is in the granting of such relief no such disproportion of benefit and harm as may result from the granting of injunctive relief. Hence damages may be given as an alternative to injunctive relief when, were it not for the disproportionate effect resulting from such relief, it would be proper to give the latter form of relief.<sup>19</sup>

Even if the prospective solar user is able to prevail in a suit seeking injunctive relief, he may still be liable for the payment of damages. Furthermore, the theory that disproportionate effect alone should be grounds for the denial of an injunction has not been widely accepted by the courts and has been criticized by some commentators.<sup>20</sup>

### 3. Laches

The property owner who has commenced work or completed construction on a solar device may find himself subject to suit by other parties to the covenant seeking injunctive relief. In some cases, the defense of laches may be available: "[f]ailure to proceed with reasonable promptness to secure injunctive relief against a violation of the obligation arising out of a promise respecting the use of land has the effect of disabling the one guilty of such neglect from securing such relief."<sup>21</sup>

Necessarily, the doctrine of laches will be available as a defense

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<sup>18</sup> RESTATEMENT OF PROPERTY § 563 (1944).

<sup>19</sup> Id., Comment b.

<sup>20</sup> POWELL, THE LAW OF REAL PROPERTY § 685 (1977).

<sup>21</sup> RESTATEMENT OF PROPERTY § 562 (1944).



only in those limited circumstances where plaintiffs have "sat on their rights" and a substantial length of time has passed. Again, such a defense will not be available in a suit for damages.

#### 4. Public Policy

Perhaps the most promising method for terminating a restrictive covenant which interferes with the use of solar devices is the doctrine that certain covenants are void as against public policy. Public policy has been used by courts to declare contracts void if they are clearly injurious to societal interests.<sup>22</sup> This theory has also been applied to restrictive covenants.<sup>23</sup> Two of the most common types of cases where covenants are held to be void as against public policy are those involving discrimination on the basis of race<sup>24</sup> and those which tend to restrain trade.<sup>25</sup>

A strong argument could be made that using renewable energy sources such as solar is an important national policy. A covenant restricting solar use would be void as violative of this policy. Several federal statutes could be used by the prospective solar energy user to buttress a policy argument.<sup>26</sup> In addition, certain state statutes

<sup>22</sup> RESTATEMENT OF CONTRACTS § 512, Comment e (1932).

<sup>23</sup> WILLIAMS, *supra* note 7, § 154.10.

<sup>24</sup> *See, e.g.*, *Gandolfo v. Hartman*, 49 F. 181 (C.C.S.D. Cal. 1892), where the court held a restrictive covenant prohibiting the sale of the property to a "Chinaman or Chinamen" to be void as against public policy. *See also Shelley v. Kraemer*, 334 U.S. 1 (1947), where the Supreme Court held that private agreements to exclude persons on the basis of race from the use of real estate could not be constitutionally enforced by state courts.

<sup>25</sup> *See, e.g.*, *Shepherd v. Spurgeon*, 365 Mo. 989, 291 S.W.2d 162 (1956), where a covenant prohibiting the use of the land for a business purpose was void since it tended to restrain trade in contravention of public policy. For a detailed discussion of covenants which are void as against public policy, *see* 7 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 3161 (1962).

<sup>26</sup> The Solar Energy Research, Development, and Demonstration Act of 1974, Pub. L. No. 93-473, 88 Stat. 1431, codified in 42 U.S.C. § 5551-566 (1976), explicitly states a national policy to promote solar energy:

Section 5551. Congressional declaration of findings and policy

(a) The Congress hereby finds that—

- (1) the needs of a viable society depend on an ample supply of energy;
- (2) the current imbalance between domestic supply and demand for fuels and energy is likely to persist for some time;
- (3) dependence on nonrenewable energy resources cannot be continued indefinitely, particularly at current rates of consumption;
- (4) it is in the Nation's interest to expedite the long-term development of renewable and nonpolluting energy resources, such as solar energy;
- (5) the various solar energy technologies are today at widely differing stages of

might also be found to contain public policy statements supporting the use of solar energy.<sup>27</sup> Inasmuch as a covenant will rarely, if ever,

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development, with some already near the stage of commercial application and others still requiring basic research;

(6) the early development and export of viable equipment utilizing solar energy, consistent with the established preeminence of the United States in the field of high technology products, can make a valuable contribution to our balance of trade;

(7) the mass production and use of equipment utilizing solar energy will help to eliminate the dependence of the United States upon foreign energy sources and promote the national defense;

(8) to date, the national effort in research, development, and demonstration activities relating to the utilization of solar energy has been extremely limited; therefore

(9) the urgency of the Nation's critical energy shortages and the need to make clean and renewable energy alternatives commercially viable require that the Nation undertake an intensive research, development, and demonstration program with an estimated Federal investment which may reach or exceed \$1,000,000,000.

(b) The Congress declares that it is the policy of the Federal Government to—

(1) pursue a vigorous and viable program of research and resource assesment of solar energy as a major source of energy for our national needs; and

(2) provide for the development and demonstration of practicable means to employ solar energy on a commercial scale.

42 U.S.C. § 5551(a), (b) (1976). Similarly, the Solar Photovoltaic Energy Research, Development, and Demonstration Act of 1978, Pub. L. No. 95-590, 92 Stat. 2513, to be codified in 42 U.S.C. §§ 5581-594, expressed congressional awareness of a diminishing resource base of native fossil fuels and declared:

(b) It is therefore declared to be the policy of the United States and the purpose of this Act to establish during the next decade an aggressive research, development, and demonstration program involving solar photovoltaic energy systems and in the long term to have as an objective the production of electricity from photovoltaic systems cost competitive with utility-generated electricity from conventional sources. Further, it is declared to be the policy of the United States and the purpose of this Act that the objectives of this research, development, and demonstration program are—

(1) to double the production of solar photovoltaic energy systems each year during the decade starting with fiscal year 1979, measured by the peak generating capacity of the systems produced, so as to reach a total annual United States production of solar photovoltaic energy systems of approximately two million peak kilowatts, and a total cumulative production of such systems of approximately four million peak kilowatts by fiscal year 1988;

(2) to reduce the average cost of installed solar photovoltaic energy systems to \$1 per peak watt by fiscal year 1988; and

(3) to stimulate the purchase by private buyers of at least 90 per centum of all solar photovoltaic energy systems produced in the United States during fiscal year 1988.

Id. § 2(b), 92 Stat. 2514-15.

Additionally, other federal laws encourage the conservation of nonrenewable energy resources and the increased use of renewable energy sources. *See, e.g.*, The Energy Conservation Standards for New Buildings Act of 1976, 42 U.S.C. § 6831-40 (1976), and the National Energy Conservation Policy Act, Pub. L. No. 95-619, 92 Stat. 3206 (1978).

<sup>27</sup> *See, e.g.*, The Solar Rights Act of 1978, 1978 CAL. LEGIS. SERV. ch. 1154, pp. 3870-3878. Section 2 of the Act states:

be directed expressly at solar use, the proponent of a policy argument would need only attack the application of a restrictive covenant in his situation and would not be compelled to argue against the validity of particular aesthetic controls in all cases.<sup>28</sup>

### C. Shortcomings of Existing Remedies

Notwithstanding the existence of possible judicial remedies, the prospective solar user subject to a restrictive covenant will face uncertainty when contemplating the purchase and installation of a solar device. Unfortunately if protracted negotiation or litigation appears inevitable, the costs attendant to circumventing or overcoming an aesthetic restriction must be considered in the overall cost of a solar device. A solar device may thus become an impractical alternative economically.<sup>29</sup> Inevitably, the very uncertainty will tend to encourage inertia rather than action.

The available remedies are hardly clear cut doctrines of law, and instead suggest the importance of the particular facts in individual cases. Moreover, even in those circumstances where a property owner is able to prevail in an action seeking injunctive relief, he may find himself liable for the payment of damages.<sup>30</sup> Finally, beyond the specific costs attributable to securing the right to construct a solar unit, the length of time required to garner releases or obtain

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The use of solar energy systems will reduce the state's dependence on nonrenewable fossil fuels, supplement existing energy resources, and decrease the air and water pollution which results from the use of conventional energy resources. It is, therefore, the policy of the state to encourage the use of solar energy systems. . . ."

*Id.* at 3871. The more substantive provisions of the California Act will be discussed in the text of notes 88-98, *infra*.

<sup>28</sup> In one unreported case, *Kraye v. Old Orchard Ass'n*, No. C 209453 (Super. Ct. Cal. Jan. 5, 1979), the court held that a restrictive covenant was "contrary to and in violation of the . . . public policy of the State of California" to the extent that its provisions prohibited the roof top installation of solar collector plates, and as such were invalid and unenforceable. *Id.*, Findings of Fact and Conclusions of Law, at 5. The plaintiffs in *Kraye* phrased their argument as follows:

The present condition of the environment and our natural resources is a matter which directly affects all persons not just those involved in a particular activity or contract which contravenes public welfare. We all need . . . power for our daily lives. The waste [and] needless use of our resources and the corresponding cost increases will result in hardship and burden to all persons.

*Id.*, Plaintiff's Notice of Motion for Summary Judgment at 9. The *Kraye* case is discussed in detail in Section IV, B of this article, *infra*.

<sup>29</sup> See note 2, *supra*.

<sup>30</sup> See text at notes 19-22, *supra*.

judicial sanction could be substantial. When proposed structures are subject to the prior approval of a review board, the period of time may include submission to and denial by the review board, a lengthy wait for trial, and possibly long delays awaiting appeal—all to be pursued with scant precedent or encouraging case law. These types of legal uncertainties are not likely to foster solar use, and forcefully reveal the need for a legislative solution to the problem of aesthetic controls in private agreements which militate against solar use.<sup>31</sup>

### III. AESTHETIC REGULATION BY ZONING

The general concept of regulating land use by zoning has received widespread acceptance since the landmark decision of the Supreme Court in *Village of Euclid v. Ambler Realty Co.*<sup>32</sup> In *Euclid*, the Court approved height restrictions as a valid exercise of the police power.<sup>33</sup> Similarly, in *Gorieb v. Fox*<sup>34</sup> the Court specifically upheld setback restrictions on the same grounds.<sup>35</sup> Although aesthetics are involved to a lesser or greater extent in virtually all decision-making concerning the use of land,<sup>36</sup> zoning restrictions designed solely and specifically for aesthetic control have received less than widespread acceptance.

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<sup>31</sup> See the discussion of proposed and enacted legislation in text at notes 84-102, *infra*.

<sup>32</sup> 272 U.S. 365 (1926).

<sup>33</sup> "There is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits. . . ." *Id.* at 388.

<sup>34</sup> 274 U.S. 603 (1927).

<sup>35</sup> *Id.* at 609-10.

<sup>36</sup> Detailed analysis and consideration of the exact parameters of state power to enact laws designed to impose aesthetic controls is beyond the scope of this article. The purpose here is to introduce the problem of specific zoning restrictions affecting the potential solar user. As one respected commentator has observed:

Attitudes towards aesthetics, property, and a comprehensive plan are frames of reference not always a conscious part of decision-making in zoning. . . . "Aesthetics" is a brooding omnipresence; notions of the three-dimensional urban environment may be the predominant consideration underlying a zoning provision rather than the articulated grounds of health, safety, or morals. The other side of the coin of police power is "property," reflecting the current outcome of the continuing struggles and compromises over the bundle of rights and privileges relating to land, which the law protects at any one point in time. Under the sway of new advocates, courts are discovering that there may be externalities to a local regulation analogous to the economic externalities of industry.

C. HAAR, *LAND USING PLANNING* 392-93 (3rd ed. 1976).

A. *The Power to Zone for Aesthetic Purposes and Its Application to Solar Devices*

Aesthetic controls imposed by zoning statutes and ordinances have been the subject of much controversy. Referred to as "laws enacted for the purpose of beauty . . .,"<sup>37</sup> these controls initially developed as a reaction to the proliferation of billboards but were later expanded to include many other types of land use. Early attempts to impose aesthetic controls by legislation were often overturned as being beyond the scope of the police power.<sup>38</sup> However, some courts have more recently upheld zoning for aesthetic purposes,<sup>39</sup> and there is dicta in at least one Supreme Court opinion which suggests a basis for these decisions.<sup>40</sup>

The Supreme Court case of *Berman v. Parker*<sup>41</sup> involved a challenge to a District of Columbia redevelopment act; the issue presented to the Court was whether eminent domain authority could be used to acquire non-slum property for public purposes. The Court held that eminent domain power could be so used and in an opinion by Justice Douglas broadly defined the public welfare purpose for which private property can be condemned:

The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. . . . If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.<sup>42</sup>

As one commentator has noted: "this language has had a profound effect on the attitude of courts toward land use regulation . . ."<sup>43</sup>

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<sup>37</sup> P. ROHAN, *ZONING AND LAND USE CONTROLS* § 16.01 (1978) [hereinafter cited as ROHAN].

<sup>38</sup> *Id.*, § 16.03.

<sup>39</sup> See, e.g., *State v. Diamond Motors, Inc.*, 50 Haw. 33, 429 P.2d 825 (1967); *People v. Stover*, 12 N.Y. 2d 462, 191 N.E.2d 272, *appeal dismissed* 375 U.S. 42 (1963).

<sup>40</sup> *Berman v. Parker*, 348 U.S. 26 (1954).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 33.

<sup>43</sup> Williams, *Subjectivity, Expression, and Privacy: Problems of Aesthetic Regulation*, 62 MINN. L. REV. 1, 2 (1977). Another commentator has stated "[w]ith ever-increasing frequency, the courts lean more favorably toward a consideration of [a]esthetics as a major factor in the enactment of zoning ordinances under the police power." E. YOKLEY, *ZONING LAW AND PRACTICE* § 4-1 (4TH ED. 1978).

Although courts have demonstrated greater willingness to uphold zoning statutes and ordinances which attempt to control aesthetics, they have reached this result in various ways. On the one hand, some courts have recognized that aesthetic considerations are important, but are simply one of several factors to be reviewed when analyzing the validity of a particular zoning restriction.<sup>44</sup> These courts are thus reluctant to uphold a statute or ordinance solely on aesthetic grounds. This approach, described as the majority view, requires consideration of several different factors in conjunction with aesthetics such as those relating to traditional police power concerns as the health, safety and morals of the community. Aesthetic controls which also address traffic and fire hazards or relate to economic considerations such as increased property values or the promotion of tourism are more likely to survive judicial scrutiny under this view.<sup>45</sup>

Another approach which has been adopted by some courts is the "lowest common denominator" rationale.<sup>46</sup> This theory has been summarized as requiring "no need to concern oneself with the really difficult problems of deciding which styles of architecture are inappropriate and may be excluded from a given area, in order to justify regulation of these few types which are, by common consensus, regarded as particularly ugly. . . ."<sup>47</sup>

Courts in eight other jurisdictions have held that legislation which is based solely on aesthetic grounds is valid.<sup>48</sup> The court decisions upholding aesthetics alone have often relied upon the language of *Berman v. Parker*.<sup>49</sup> One important decision in this area was the case of *People v. Stover*.<sup>50</sup> The defendants in *Stover* had protested high taxes by constructing clotheslines in their front yards and hanging out old clothes and rags.<sup>51</sup> In response, the city enacted an

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<sup>44</sup> Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438, 1440-41 (1973). This article noted that 23 states followed this view: Arkansas, California, Colorado, Connecticut, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Nebraska, North Carolina, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, Vermont, Washington, West Virginia and perhaps Illinois. *Id.* at 1441 n.13.

<sup>45</sup> ROHAN, *supra* note 37, at § 16.04.

<sup>46</sup> WILLIAMS, *supra* note 7, at § 11.15.

<sup>47</sup> *Id.*

<sup>48</sup> ROHAN, *supra* note 37, at § 16.05. These jurisdictions are Florida, Hawaii, Kentucky, Massachusetts, New Jersey, New York, Ohio and Oregon.

<sup>49</sup> 348 U.S. 26 (1954). See text accompanying note 41, *supra*.

<sup>50</sup> 12 N.Y.2d 462, 191 N.E.2d 272, *appeal dismissed* 375 U.S. 42 (1963).

<sup>51</sup> *Id.* at 464, 191 N.E.2d at 273.

ordinance prohibiting the erection and use of clotheslines in front or side yards and enforced this ordinance against the defendants. The court upheld the ordinance and found that legislation to promote aesthetics was a valid use of the police power.<sup>52</sup>

### B. *Overcoming Restrictive Zoning Provisions*

A prospective solar user faced with a zoning provision which is apparently too restrictive to allow for the use of solar devices may approach the problem in two ways: a variance could be sought from the zoning appeals board or the zoning provision could be directly attacked. Usually, the zoning provision would be attacked only after failure to receive the requested variance.<sup>53</sup>

As one commentator has noted: "zoning ordinances are no different from other police power regulations in that they must be reasonable and fair in their application and must bear a substantial relation to the public health, safety and morals. It has been well stated that zoning ordinances must be reasonable and their reasonableness becomes the test of their legality."<sup>54</sup> A zoning restriction must be found to be reasonably calculated to meet its purpose and not to exceed the public need or substantially affect uses which are not part of the problem at which the ordinance is aimed.<sup>55</sup> When a particular zoning ordinance is found to be unreasonable, it is gener-

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<sup>52</sup> *Id.* at 469, 191 N.E.2d at 276. The court, after citing the language of *Berman v. Parker* noted above, see text at note 41 *supra*, went on to state:

Cases may undoubtedly arise . . . in which the legislative body goes too far in the name of aesthetics . . . but the present, quite clearly, is not one of them. The ordinance before us is in large sense regulatory rather than prohibitory. It imposes no undue hardship to any property owner, for it expressly provides for the issuance of a permit for clotheslines in front and side yards in cases where there is practical difficulty or unnecessary hardship in drying clothes elsewhere on the premises. Moreover, the ordinance imposes no arbitrary or capricious standard of beauty or conformity upon the community. It simply proscribes conduct which is unnecessarily offensive to the visual sensibilities of the average person. It is settled that conduct which is similarly offensive to the senses of hearing and smell may be a valid subject of regulation under the police power . . . and we perceive no basis for a different result merely because the sense of sight is involved.

12 N.Y. 2d at 468, 191 N.E.2d at 275-76.

<sup>53</sup> In the *Stover* case, the defendants employed a different approach, first seeking a permit to maintain their clotheslines, and then upon denial, rather than appealing the decision, simply continued their practices. The attack upon the ordinance was a defense in the action brought against the defendants for violating the ordinance. See 12 N.Y. 2d at 464-65, 191 N.E.2d at 273-74.

<sup>54</sup> E. YOKLEY, ZONING LAW AND PRACTICE § 3-11 (4th ed. 1978).

<sup>55</sup> *Id.*, at § 3-14.

ally held to be void.<sup>56</sup>

These general principles have been applied to the implementation of aesthetic controls by zoning but do not resolve specific issues. One writer has thus summarized the dilemma: "[t]he initial stumbling block to principled judicial treatment of aesthetic regulations appears to be the idea that the judgments underlying their application are too 'subjective' to be adequately dealt with by courts."<sup>57</sup> This problem of subjectivity centers on the difficulty of determining what is aesthetic. The vagueness implicit in an area devoid of ascertainable judicial standards has been noted in numerous cases and provides a rationale frequently relied upon by courts which refuse to uphold aesthetic regulations.<sup>58</sup>

A prospective solar user could attempt to attack a restrictive zoning provision by claiming that it is overbroad, that is, that the ordinance in question affects uses such as solar devices which are not part of the problem at which the ordinance is aimed. Obviously, this argument would depend upon the specific wording of the ordinance in dispute and its application in the particular fact situation. However, since the question of what is aesthetic is necessarily subjective, the argument may be of somewhat limited application. The physical appearance of a particular solar device in the context of a neighborhood could reasonably be found to be offensive or ugly.

A major difficulty with attacking restrictive zoning provisions is that such attacks may ultimately rest on the argument that aesthetic regulation itself is invalid. Such an approach is far too drastic; aesthetic regulations are often desirable to create more pleasant, human environments and may serve valid purposes even when applied to solar devices. For example, requiring landscaping around a ground level solar collector or forbidding the construction of a particularly ugly device, such as one created from beer cans, may enhance the community environment. Therefore, a more specific solution to the conflict between aesthetic controls imposed by zoning and the installation of solar devices is needed, one which is tailored to accommodate the conflicting interests involved.<sup>59</sup>

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<sup>56</sup> *Id.* at § 3-11.

<sup>57</sup> Williams, *Subjectivity, Expression, and Privacy: Problems of Aesthetic Regulation*, 62 MINN. L. REV. 1, 5 (1977).

<sup>58</sup> Williams, *supra* note 7, at § 11.04.

<sup>59</sup> See discussion in text at notes 85-100, *infra*.



#### IV. CASES AND CONTROVERSIES WHERE AESTHETIC RESTRICTIONS AND SOLAR DEVICES HAVE CONFLICTED

Since solar devices have just recently begun to proliferate, there have been few situations where controversies have arisen between aesthetic restrictions and the use of solar devices. These controversies have involved aesthetic restrictions contained both in zoning ordinances and restrictive covenants. Since these controversies may help to indicate the future of the problem and its solution, they will be examined in some detail; first the controversies involving zoning ordinances will be discussed and then those involving restrictive covenants.

##### A. Zoning Ordinances

The only reported case which was found involving the conflict between solar devices and zoning ordinances is *D'Aurio v. Board of Zoning Appeals*.<sup>60</sup> In *D'Aurio* the plaintiffs sought to annul the determination of the board of zoning appeals which denied their application for an area zoning variance for the installation of a solar heating unit. The zoning ordinance required that each front yard have a minimum depth of fifty feet and be free of structures. The plaintiffs occupied a corner lot and "[a]lthough there appears to be sufficient space at the rear of the lot for the installation of a solar heating unit . . . , the unit apparently would not be most effective there."<sup>61</sup> In attempting to overturn the denial of a variance, the plaintiffs argued as follows:

the determination under attack denies the petitioners the right to choose an energy source; . . . it denies them the right to make a normal improvement permitted under the use provisions of the zoning ordinance; . . . it is contrary to State and Federal energy policy; . . . it represents the application of an incorrect test for variance; . . . it ignores the possibility of granting a variance upon a condition for landscaping; and . . . it "represents an unconscionable, selfish and reactionary position against energy conservation."<sup>62</sup>

The New York court did not find these arguments persuasive and noted that "[a] request for an area variance involves a determina-

<sup>60</sup> 92 Misc.2d 898, 401 N.Y.S. 2d 425 (Sup. Ct. 1978).

<sup>61</sup> Id. at 899, 401 N.Y.S.2d at 425.

<sup>62</sup> Id., 401 N.Y.S.2d at 426.

tion as to whether practical difficulties will result from strict compliance with the zoning ordinance and the decision of the local zoning board in this regard should be sustained where there is a rational basis for its decision."<sup>63</sup> In addition the court noted that the existence of a self-created hardship did not entitle a property owner to a variance; the plaintiffs had not demonstrated practical difficulties or significant economic injury; nor that the board had acted arbitrarily, unreasonably, irrationally, or in a manner indicative of bad faith.<sup>64</sup>

The court in *D'Aurio* did not appear to be receptive to plaintiff's arguments supporting the use of solar devices; thus, even if the plaintiffs had advanced other arguments, it is unlikely that they would have been successful.<sup>65</sup> However, if there had been an applicable statute such as that in Minnesota which allows the inability to use a solar device to be considered a hardship for the purpose of granting a variance,<sup>66</sup> a different decision may well have been reached.

Another situation has arisen where potential solar users have run afoul of a zoning ordinance. A homeowner in Arlington, Virginia built a solar collector in his front yard, 28 feet from the centerline of the street. County regulations require that structures be placed fifty feet from street centerlines, and the board of zoning appeals refused a variance for the collector. Instead, the board required that the collector be moved to the front porch, 45 feet from the centerline. Although the homeowner indicated that this placement of the collector would reduce its effectiveness by 30 to 50 percent, the board stated that it did not feel this move would create problems.<sup>67</sup> This controversy has not been brought to court, but it does reveal the inevitable conflict between restrictive ordinances and solar devices.<sup>68</sup>

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<sup>63</sup> Id.

<sup>64</sup> Id.

<sup>65</sup> For example, the plaintiffs could have attacked the ordinance restrictions as aesthetic requirements and thus too vague. However, this argument would probably not have been successful since New York is one of the jurisdictions which had held that legislation based solely on aesthetic grounds is valid. See note 48, *supra*. Furthermore, the ordinance in question could be defended as having a substantial relationship to public health and safety.

<sup>66</sup> MINN. STAT. ANN. § 394.27(7) (West Supp. 1978). This statute is discussed in detail in the text at notes 100-101, *infra*.

<sup>67</sup> Verdon, *Arlington Officials Order Eclipse of Solar Collector*, Washington Post, May 3, 1978, at B-1, B-2.

<sup>68</sup> Another example of this conflict arose in Coral Gables, Florida, where a ban had been

### B. Restrictive Covenants

One unreported case, *Kraye v. Old Orchard Ass'n*,<sup>69</sup> has dealt specifically with the problems posed for prospective solar users by aesthetic restrictions in covenants. The plaintiff in *Kraye* owned property subject to a restrictive covenant which stated in relevant part:

In addition to the Architectural Control provided pursuant to Article VIII hereof, appliances or installation upon roofs of structures shall not be permitted unless they are installed in such manner that they are not visible from neighboring property or adjacent streets.

No building, fence, wall, or other structure or landscaping shall be commenced, erected or maintained upon the Properties, nor shall any exterior addition to or change or alteration therein or change in the exterior appearance thereof or change in landscaping be made until the plans and specifications showing the nature, kind, shape, height, materials, color and location of the same shall have been submitted to and approved in writing as to harmony of external design and location in relation to surrounding structures and topography by the board or by an architectural committee composed by three (3) or more representatives appointed as provided in the By-Laws of the ASSOCIATION.<sup>70</sup>

The plaintiffs wanted to install a solar water heater and collector plates on their property and the installation of these devices could only be accomplished by placing the collector plates on the roof. Prior to filing their court action, the plaintiffs requested the architectural committee of the Old Orchard Association to approve the installation of a solar water heater and collector. This request was denied.<sup>71</sup>

The plaintiffs contended that this denial should be overturned since the denial was in violation of public policy and (1) deprived the plaintiffs of the right to benefit from state statutes which provided for tax benefits for the installation of solar heating systems, (2) deprived the plaintiffs of their property rights to receive air, light, or heat from or over on their land, (3) violated the public

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imposed on solar hot water heaters as aesthetic. See cited material from ENERGY FUTURE, in note 2, *supra*. See also, Hill, *Thicket of Restrictions Impeding the Use of Solar Devices*, N.Y. Times, July 4, 1978, at A-4.

<sup>69</sup> No. C 209453 (Super. Ct. Cal. Jan. 5, 1979).

<sup>70</sup> *Id.* Stipulation of Facts 3-4.

<sup>71</sup> *Id.* at 2-3.

policy that promotes the installation and use of solar heating and collection facilities, (4) the restrictive covenant in question was arbitrary and ambiguous, and (5) due to changed conditions the covenants violated public policy.<sup>72</sup> The public policy arguments were buttressed in the plaintiff's brief by a citation of sections of the California Public Resources Code relating to energy conservation and development.<sup>73</sup> Other California statutes supporting this public policy argument were also discussed in the amicus brief of the California Energy Resources Conservation and Development Commission.<sup>74</sup>

The defendants disputed the plaintiff's contentions and argued that the provisions of the covenant were valid and enforceable and therefore required the denial of the plaintiff's request for approval of the solar devices. The defendants further noted in their brief that the fact that the plaintiff's solar devices would be neither unsightly nor a nuisance was irrelevant.<sup>75</sup> The restrictive covenant "does not allow pretty or neighborly installations; if they are visible, they are banned."<sup>76</sup> With regard to the argument concerning the public policy in support of solar energy, the defendants countered that there was no clear California policy in favor of solar energy and that even if such a policy existed, the court should not invalidate the covenant on this ground.<sup>77</sup>

The California Superior Court issued a final judgment in *Kraye* on January 5, 1979.<sup>78</sup> The court found that the covenants in question were "invalid and unenforceable" "to the extent that they prohibit the roof top installation of solar collector plates."<sup>79</sup> While the terse judgment issued contained no discussion of the rationale for the decision, it can be surmised that the public policy arguments in

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<sup>72</sup> *Id.* Plaintiff's Notice of Motion for Summary Judgment at 3.

<sup>73</sup> *Id.* at 10-12. The briefs in *Kraye* were filed early in 1978 and therefore did not include arguments based on California's recently enacted statute, The Solar Rights Bill of 1978, 1978 CAL. LEGIS. SERV. ch. 1154, pp. 3870-78, which addresses aesthetic restrictions and restrictive covenants. See discussion in text at notes 88-98, *infra*.

<sup>74</sup> *Kraye v. Old Orchard Ass'n*, *supra* note 69, Memorandum of Points and Authorities of Amicus Curiae in Support of Plaintiff's Motion for Summary Judgment at 10-14.

<sup>75</sup> *Id.* Defendant's Notice of Motion for Summary Judgment: Points and Authorities in Support Thereof at 10-18.

<sup>76</sup> *Id.* at 10.

<sup>77</sup> *Id.* at 13-15.

<sup>78</sup> *Kraye v. Old Orchard Ass'n*, No. C 209453 (Super. Ct. Cal. Jan. 5, 1979), Findings of Fact and Conclusions of Law.

<sup>79</sup> *Id.* at 5.

favor of the solar devices were convincing.<sup>80</sup>

A dispute in Maryland concerning the application of restrictive covenants may also give rise to a court decision.<sup>81</sup> A homeowner in Gaithersburg has been blocked from placing solar collectors on his roof by architectural review officials. These officials were quoted as having judged the collectors not to be aesthetically pleasing. The officials had also noted that other collectors in the area had been approved but not when they were in the front of the house as the collectors in question would be.<sup>82</sup> This controversy is particularly interesting because the property owner had obtained a federal grant for the installation of a solar energy system.<sup>83</sup>

#### V. NON-JUDICIAL SOLUTIONS TO AESTHETIC RESTRICTIONS AFFECTING SOLAR DEVICES

The solutions available to a solar user who is or may be faced with aesthetic restrictions are not limited to the judicial arguments which have been discussed in the preceding sections. Covenants can be created which would specifically provide for solar devices and the aesthetic standards applicable to them. In addition, legislation could attempt to change restrictive covenants and zoning ordinances containing aesthetic restrictions which may currently be interpreted to interfere with the use of solar devices.

##### A. *Covenants Providing for Solar Devices*

Covenants which provide specifically for solar devices could eliminate many of the difficulties associated with aesthetic restrictions in covenants. Many of these difficulties have occurred simply because the covenant involved was drafted before solar technology was feasible and contains broad restrictions which may have an unfavorable impact on solar installation. Difficulties could still exist if the covenant contains a broad grant of authority to an architectural

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<sup>80</sup> The court listed among its Conclusions of Law the following:

That the actions of the Architectural Committee of the Old Orchard Association I in refusing to grant permission to Plaintiffs to install solar collector plates on the roof of Plaintiff's residence is contrary to and violates the public policy of the State of California to encourage the use of solar energy systems.

*Id.*

<sup>81</sup> *Zon, Aesthetics Issues Puts Cloud over Solar Unit*, *The Wash. Star*, July 12, 1978, at A-1, A-4.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

control committee, for even if the covenant were drafted with solar technologies in mind, the committee would not necessarily have to consider solar devices an acceptable architectural addition. However, this difficulty could probably be remedied by a careful drafting of the language granting this authority to the commission.

Even if this problem were successfully resolved, there are substantial limitations to creating covenants which specifically provide for solar devices and the aesthetic standards applicable to them. Covenants are most easily created when a new tract of land is open for development and this method of resolving the difficulties attendant to aesthetic restrictions affecting solar devices would be of little use to more established neighborhoods.<sup>84</sup>

### B. Legislative Remedies

Aesthetic restrictions in both restrictive covenants and zoning ordinances that could be interpreted to apply to solar devices may be changed by legislation. There are two main forms this legislation could take: first, statutes or ordinances prohibiting aesthetic restrictions in covenants which might serve to restrict or prohibit the use of solar devices; and second, statutes limiting municipal authority to enact zoning ordinances which interfere with the use of solar devices.<sup>85</sup> Obviously, a single statute could contain provisions which would prohibit aesthetic restrictions in both covenants and ordinances.

In addition to these two types of legislation, other less comprehensive statutes might also serve to alleviate some of the difficulties associated with aesthetic restrictions and solar devices. For example, a statute strongly expressing a public policy in favor of the use

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<sup>84</sup> One commentator has expressed a general dissatisfaction with covenants as "inappropriate to general commercial or industrial development, although perhaps helpful in shopping malls as industrial parks under common single ownership." KRAEMER, *supra* note 14, at 61. These limitations were discussed in the context of solar covenants to prohibit the shading of surrounding property and thus to protect access to sunlight; however, they would also be applicable to the creation of solar covenants with aesthetic standards.

A more general problem to be faced in connection with modification of restrictive covenants to encompass a solar future is the reluctance and skepticism which often greet a novel approach in law. Since the Anglo-American system of law rests largely on the use of precedent, the suggested new use of covenants may be less than enthusiastically embraced by members of the conveyancing bar.

<sup>85</sup> See, e.g., The Solar Rights Act of 1978, Section 2, 1978 CAL. LEGIS. SERV. ch. 1154, pp. 3870, 3871.

<sup>86</sup> See discussion in text and notes at notes 21-27, *supra*.

of solar devices might encourage some courts to negate aesthetic restrictions in covenants and ordinances which would restrict this policy.<sup>86</sup> Another type of statute which might provide assistance to a potential solar user in certain circumstances is one which limits the length of time a restrictive covenant is enforceable.<sup>87</sup> However, both of these types of statutes would be of limited usefulness. The first depends largely on judicial willingness to read into a general policy statement a prohibition of certain specific restrictions which were unmentioned by the statute and the second would require lengthy periods of time to become effective.

California has recently enacted a fairly comprehensive statute concerning restrictions in covenants and ordinances which would adversely effect solar devices.<sup>88</sup> More specifically, the California statute would make any covenant which would restrict or prohibit a solar energy system void and would preclude the enactment of ordinances restricting or prohibiting a solar system.<sup>89</sup>

The California legislature found that it was the policy of the state to "encourage the use of solar energy systems"<sup>90</sup> and further stated that the purpose of the act was "to promote and encourage the widespread use of solar energy systems and to protect and facilitate adequate access to the sunlight which is necessary to operate solar energy systems."<sup>91</sup> The section of this Act specifically discussing covenants states:

Any covenant, restriction, or condition contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale of, or any interest in, real property which effectively prohibits or restricts the installation or use of a solar energy system is void and unenforceable.

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<sup>87</sup> See, e.g., MINN. STAT. ANN. § 500.20 (West 1947) which states in part:

[a]ll covenants, conditions, or restrictions hereafter created by any other means, by which the title or use of real property is affected, shall cease to be valid and operative 30 years after the date of the deed, or other instrument . . . creating them; and after such period of time they may be wholly disregarded.

*Id.*

<sup>88</sup> The Solar Rights Act of 1978, 1978 CAL. LEGIS. SERV. ch. 1154, pp. 3870-78, presently codified in various sections of the California Code. See CAL. CIV. CODE §§ 714, 801, 801.5 (West Supp. 1979); CAL. GOV'T CODE §§ 6580.5, 66473.1, 66475.3 (West Supp. 1979); CAL. HEALTH & SAFETY CODE § 17959.1 (West Supp. 1979); and CAL. REV. & TAX CODE § 17052.5 (West Supp. 1979).

<sup>89</sup> CAL. CIV. CODE § 714 (West Supp. 1979).

<sup>90</sup> The Solar Rights Act of 1978, Section 2, 1978 CAL. LEGIS. SERV. ch. 1154, pp. 3870, 3871.

<sup>91</sup> *Id.*

This section shall not apply to provisions which impose reasonable restrictions on solar energy systems. However, it is the policy of the state to promote and encourage the use of solar energy systems and to remove obstacles thereto. Accordingly, reasonable restrictions on a solar energy system are those restrictions which do not significantly increase the cost of the system or significantly decrease its efficiency, or which allow for an alternative system of comparable cost and efficiency.<sup>92</sup>

The section of the California Act precluding the enactment of ordinances restricting or prohibiting solar systems states in part:

The legislative body of any city or county shall not enact an ordinance which has the effect of prohibiting or of unreasonably restricting the use of solar energy systems other than for the preservation or protection of the public health or safety. This prohibition shall be applicable to charter cities since the promotion of the use of nonfossil fuel sources of energy, such as solar energy and energy conservation measures, is a matter of statewide concern.<sup>93</sup>

This section also includes a provision that it shall not apply to ordinances which impose reasonable restrictions on solar energy systems.<sup>94</sup> The language of this provision is virtually identical to the provision allowing reasonable restrictions on solar energy systems in covenants.<sup>95</sup> Both the section on covenants and the section on ordinances provide that the term "solar energy system" shall be defined as follows:

"solar energy system" means either of the following: (1) Any solar collector or other solar energy device whose primary purpose is to provide for the collection, storage, and distribution of solar energy for space heating or cooling, or for water heating; or  
(2) Any structural design feature of a building, whose primary purpose is to provide for the collection, storage, and distribution of solar energy for space heating or cooling, or for water heating.<sup>96</sup>

These California provisions would appear to be applicable to aesthetic restrictions contained in covenants or in prospective ordinances although they do not specifically discuss aesthetic restrictions. The language used is quite broad and contains only the limi-

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<sup>92</sup> CAL. CIV. CODE § 714 (West Supp. 1979).

<sup>93</sup> CAL. GOV'T CODE § 65850.5 (West Supp. 1979).

<sup>94</sup> Id.

<sup>95</sup> Compare CAL. CIV. CODE § 714 (West Supp. 1979) with CAL. GOV'T CODE § 65850.5.

<sup>96</sup> CAL. CIV. CODE § 801.5(a)(1), (2) (West Supp. 1979).



tation that "reasonable restrictions"<sup>97</sup> are to be allowed. The term reasonable restriction is defined narrowly to mean restrictions which do not significantly increase the cost of the solar system or allow for an alternative system of comparable cost and efficiency.<sup>98</sup> This definition of reasonable restriction could be interpreted to disallow certain aesthetic prohibitions on solar collectors. For example, a collector built from scrap material such as beer cans may be much less expensive than other comparable systems and the statutory language of the California statute could be interpreted to prohibit any limitation on this type of solar device. Although solar devices should be encouraged and aesthetic restrictions should not be so inflexible that few if any solar devices can meet their requirements, neither should all aesthetic restrictions be negated. Perhaps the best approach would be a balancing of the values presented by aesthetics and the use of solar devices.

A recent Minnesota statute also contains language which could be interpreted to offer some solution for the difficulties presented when aesthetic restrictions conflict with the use of solar devices.<sup>99</sup> The Minnesota statute provides for the creation of a board of adjustment which has as one of its duties the authority to order the issuance of variances.<sup>100</sup> A recent amendment to this statute specifically provides that "[t]he board of adjustment may consider the inability to use solar energy systems a 'hardship' in the granting of variances."<sup>101</sup> A prospective solar energy user in Minnesota may be able to obtain a variance to aesthetic or other requirements in ordinances by relying upon this statute. However, the statute does not deal directly with aesthetic restrictions and only provides that the inability to use solar devices be considered.

There are few difficulties with a legislature limiting the power of municipalities to enact ordinances which restrict solar devices, or in providing that the inability to use solar energy systems is to be considered a hardship in the granting of variances. Similarly, there

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<sup>97</sup> CAL. CIV. CODE § 714 (West Supp. 1979).

<sup>98</sup> "[R]easonable restrictions on a solar energy system are those restrictions which do not significantly increase the cost of the system or significantly decrease its efficiency, or which allow for an alternative system of comparable cost and efficiency." *Id.*

<sup>99</sup> MINN. STAT. ANN. § 394.27(7) (West Supp. 1978).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* Somewhat similarly, the Minnesota provisions concerning variances for subdivisions provide "[u]nusual hardship includes, but is not limited to, inadequate access to direct sunlight for solar energy systems." MINN. STAT. ANN. § 462.358(6) (West Supp. 1978).

would appear to be few difficulties with a legislature enacting or amending its own statutes so that they would not restrict solar devices or in providing for prospective limitations on restrictive covenants. However, a zoning statute or ordinance which attempts to limit restrictive covenants retrospectively involves difficult legal issues.<sup>102</sup>

Finally, it should be noted that a municipality might negate restrictive covenants through its eminent domain authority. However, this solution may not be practical, since compensation might be

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<sup>102</sup> The restrictions on land use given by covenants or zoning are separate legal restrictions, distinguished by one commentator as follows: "[z]oning laws are enacted under the police power in the interest of the public health, safety and welfare; they have no concern whatever with building or use restrictions contained in instruments of title and which are created merely by private contracts." E. YOKLEY, *ZONING LAW AND PRACTICE* § 20-2 (3rd ed. 1965) (footnote omitted). Generally, the legal theory which applies when both a restrictive covenant and zoning ordinance cover the same subject is that the more restrictive provision applies. WILLIAMS, *supra* note 7, at § 154.12. "[I]t is well settled that zoning ordinances cannot override, annul, abrogate or relieve land from building restrictions, or covenants placed thereon." E. YOKLEY, *ZONING LAW AND PRACTICE* § 20-3 (3d ed. 1965) (footnote omitted). This legal doctrine could create difficulty if applied to zoning ordinances in statutes attempting to restrict covenants which would prohibit solar devices since the covenant would be the most restrictive provision.

However, one writer has suggested that "the mere presence of a less restrictive zoning ordinance tends to show that the property in question is better adapted for uses other than the restricted use required by the covenant." Note, *Legal and Policy Conflicts Between Deed Covenants and Subsequently Enacted Zoning Ordinances*, 24 *VAND. L. REV.* 1031, 1033 (1971).

Furthermore, the validity of more general statutes which impair covenants already in existence has been questioned. One review of California's Solar Rights Act of 1978 noted potential conflict with the provisions of the United States and California Constitutions prohibiting laws impairing the obligation of existing contracts:

[Under U.S. Const. art. I, § 10 and Cal. Const. art. I, § 9] [t]he power of the legislature to frustrate contractual obligations can be sustained only if the impairment is both reasonable and necessary to serve an important purpose claimed by the state . . . . In addition, the United States Supreme Court has recently indicated that the extent of impairment of the contractual relationship determines the showing of necessity required in order to sustain the impairment [see *Allied Structural Steel Co. v. Spannaus*, 98 S. Ct. 2716, 2723 (1978)] and has noted that "[m]inimal alteration of contractual obligations may end the inquiry at its first stage" [*Id.*].

The legislature has expressly declared that solar energy is a renewable, nonpolluting energy source, the use of which will reduce California's dependence on nonrenewable fossil fuels and decrease air and water pollution that result from the employment of conventional energy sources . . . . Therefore, application [of the Act] to void existing covenants, restrictions, or conditions may be valid if the courts consider the development of solar energy necessary for the public welfare and the impairment of contractual obligations minimal . . . .

*Review of Selected 1978 California Legislation*, 10 *PAC. L. REV.* 247, 480-81 (1979) (citations omitted).

required and the cost in relation to the value of termination would be higher than most municipalities could afford to pay.<sup>103</sup>

## VI. CONCLUSION

The regulation of aesthetics by restrictive covenants and zoning could have a profound, even if unplanned, effect on the use of solar devices. Hopefully, many of these problems could be solved by a realistic application of covenants and ordinances to these solar devices. Unfortunately, in some cases a judicial determination may be the only solution acceptable to both parties. A court decision would not necessarily be favorable to the potential solar user since the applicable legal doctrines do not adequately cover the new solar technology. This was seen in the examination of methods of overturning restrictive covenants and zoning provisions. Perhaps the best approach to the resolution of these difficulties is the enactment of state legislation clarifying the rights of solar users, although this legislation would have to be carefully drafted. The present statutes on the subject fail to specifically discuss aesthetics and may be interpreted so broadly as to allow any solar devices, regardless of aesthetic offensiveness. A balancing between the two worthwhile goals of using solar devices and maintaining an aesthetically pleasing community is a more practical approach which is urgently needed in our crowded and energy depleted environment.

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<sup>103</sup> The issues involved in a taking under eminent domain are extremely complex and necessarily beyond the scope of this article. For a discussion of these issues *see generally* A. BOSSELMAN, D. CALLUS, and J. BANTA, *THE TAKING ISSUE* (C.E.Q. 1973). *See also* Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).