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BOOK REVIEW

LEGAL ISSUES RELATING TO SOLAR ACCESS


Reviewed by Nancy Lee Jones*

Due to diminishing reserves of fossil fuels and the difficulties inherent in dependence on foreign sources of energy, there has been increased interest in alternate energy sources. Solar energy has been viewed as an alternative form of renewable energy which has numerous benefits; however, the widespread use of solar devices may give rise to certain legal difficulties. One of the legal problems which has received the most attention in legal commentary is the issue of solar access. This issue is the subject of the

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1 Some of the benefits seen by advocates of the use of solar energy include the following: solar energy is less likely to pollute the environment; solar energy is virtually inexhaustible and solar energy is not subject to large exploration costs. For a more detailed discussion of the benefits of solar energy see California Senate Committee on Governmental Organization, Solar Energy—Issues and Problems 6-12 (December 8, 1974).

2 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 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
recent book, *Solar Access Law—Protecting Access to Sunlight for Solar Energy Systems* by Gail Boyer Hayes. Ms. Hayes is a lawyer with the Environmental Law Institute and is one of the leading experts in the rapidly developing field of solar law.\(^3\) *Solar Access Law*, her most recent contribution to this field, is a comprehensive and thoughtful explanation and evaluation of the various legal techniques which could be used to protect solar access.

Perhaps one of the most valuable qualities of this work is the clear and logical organization of the material. It begins with an overview of the issue of solar access and the conclusions reached by the author. The subsequent material is divided into six parts: an introduction, a discussion of area-wide protection of solar access, a discussion of lot-by-lot protection of solar access, a discussion of compensatory approaches, a discussion of implementation of solutions and appendices providing more detailed material on the technical aspects of solar energy and state solar access statutes. Some of this material, especially the technical discussions of the use of solar devices, may not be particularly helpful or accessible to every reader. The book is aimed at legislative officials and aides who are attempting to develop ordinances, statutes or other methods of providing for solar access. In addition, lawyers counseling clients with solar access problems would also find the material helpful. The broad range of potential readers has not escaped the notice of the author and the organization of the material, particularly the use of appendices for technical information, enables the reader searching for a specific type of information to easily find its location.

Prior to delving into the details of various legal methods of obtaining solar access, it must first be determined if solar access is necessary. Some commentators have merely assumed that solar access is necessary. The legal issues surrounding this problem are often referred to as the right to access to sunlight and although there have been few cases, the issue has been the subject of numerous law review articles. For example, see, Gergacy, *Solar Energy Law: Easements of Access to Sunlight*, 10 N.M. L. REV. 121 (1979-1980); Moskowitz, *Legal Access to Light: The Solar Energy Imperative*, 9 NAT. RESOURCES J. 177 (1976); Note, *Access to Sunlight: New Mexico's Solar Rights Act*, 19 NAT. RESOURCES J. 957 (1979); Williams, *Solar Access and Property Rights: A Maverick Analysis*, 11 CONN. L. REV. 430 (1979). In addition solar access is the major issue discussed in KRAEMER, *SOLAR LAW* (1978).

access would be a difficulty. For example, one commentator stated that: "(i)f solar heating and cooling is to be widely used, . . . a serious collector shading problem will arise in our urban areas." However, due to a lack of data on the problem, the exact extent of the difficulty cannot be easily determined. Ms. Hayes is aware of this and although she notes that some conflicts concerning solar shading have already occurred and other disputes seem likely to occur, she also indicates that Solar Access Law is based on the assumption that solar access protection is needed. This assumption is a realistic one since even though empirical data on the seriousness of the problem is lacking, the fact that potential solar users may perceive this as a problem may effectively serve to retard the acceptance of solar technology.

The main thrust of Solar Access Law is a discussion and evaluation of various legal techniques which could be used to insure solar access. Numerous legal theories can be used to accomplish this end. For the purposes of the book they are divided into three main types: area-wide protection, lot-by-lot protection and compensatory approaches. In addition to describing the types of legal techniques, such as the use of solar envelopes, Ms. Hayes also discusses the advantages and disadvantages of these types of approaches. The major advantage seen by the techniques involving lot-by-lot protection is that solar access is protected only in situations where it is immediately needed in a particular place and can be tailored specifically to the situation presented by the particular lot. However, lot-by-lot protection also has its disadvantages. Among these are the facts that this approach requires a significant degree of individual effort to secure solar access for a lot, it is difficult to integrate this approach into overall land use planning and tends to protect the individual who is first in time.

Area-wide protection for solar access eliminates some of these problems in that it makes advance planning possible and places little demand on the individual solar user. However, it does lack

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5 Hayes, G.B. SOLAR ACCESS LAW—PROTECTING ACCESS TO SUNLIGHT FOR SOLAR ENERGY SYSTEMS 16 (1979) [hereinafter referred to by p. only].
6 Solar Access Law specifically notes that certain data should be obtained prior to the enactment of solar access legislation. One of the major types of information seen as necessary for an informed decision is the amount of solar access that would be lost if no legal protection was implemented (p. 3).
7 pp. 135-37.
the flexibility of lot-by-lot protection and can require significant amounts of governmental involvement. Another general method of protecting solar access which is discussed is that of compensatory approaches. This approach will most often take the form of private agreements for solar access or perhaps compensation from public sources for a loss of certain land uses due to a neighbor's solar access rights. It is subject to difficulties as well, the most significant one being the lack of funds available for these purposes.

The discussions of the advantages and disadvantages of each of these types of legal techniques for solar access is an especially valuable aspect of Solar Access Law. One of the major conclusions reached by Ms. Hayes is that there is no single ideal method of providing for solar access. Although this conclusion does not provide for simple tidy answers to the difficulties presented by solar access, it is a logical one. The critiquing of the range of legal techniques available is particularly helpful if this conclusion is accepted since it makes possible a careful comparison of the advantages and disadvantages of the various methods in light of the particular situation at hand.

Two other characteristics of Solar Access Law also make it a valuable tool for this type of comparison and therefore a valuable tool for intelligent decision making concerning the type of solar access method which is most appropriate. One is the fact that the book contains detailed examples of statutes and ordinances for the various methods and the other is the thorough treatment of the methods available. The sample ordinances and statutes are quite detailed. In fact the author notes that with respect to the prototype ordinance concerning solar envelopes the ordinance is deliberately more comprehensive than necessary so that the myriad of issues which might be raised can be examined and a determination made concerning whether they need to be addressed for a particular community. The sample forms also include comments on the various sections discussing the rationale for the section and when it would be most appropriately used. Certain sections do not include sample forms; however, when a form is not provided, reference is often made to publications

* pp. 73-75.
* p. 194.
* p. 107.
which have suggested language.\textsuperscript{11}

The discussions of the various types of legal solutions to the solar access problems are comprehensive. Not only are the standard proposals, such as the use of the common law doctrine of ancient lights,\textsuperscript{12} discussed but also less common proposals are advanced. One of the most useful of these proposals is that of recordation. This proposal, which is original with Solar Access Law, basically provides that the existence of solar collectors be recorded in public records and that as a result of this recordation a specified amount of solar access will be protected.\textsuperscript{13} Although recordation is a type of lot-by-lot protection instead of area-wide, the sample ordinance indicates that decisions on recordation are to be made in the context of an area wide solar access plan.\textsuperscript{14} This approach is seen as a way to mitigate the inequities presented when solar access is provided on the basis of the concept of prior in time, prior in right.\textsuperscript{16} The sample ordinance also provides for “overlay zones” so that the areas to be covered by the ordinance could be divided according to their suitability for solar collectors. Another valuable feature of this proposal is the provision allowing the city or county involved to repurchase the rights granted by the recordation if development is permitted which would shade

\textsuperscript{11} For example, in the section on planned unit developments (PUD’s), it is noted that the American Planning Association’s book, Protecting Solar Access for Residential Developments: A Guidebook for Planning Officials (1979), contains language which could be used to modify local PUD ordinances to make them suitable for solar access protection.

\textsuperscript{12} English common law recognizes a right to the use of air and light in the “doctrine of ancient lights.” This doctrine basically states that if a person has enjoyed uninterrupted use of light and air in their rooms for twenty-seven years, an adjoining landowner could not block this light. Attempts have been made to apply this doctrine in American jurisdictions but it has been consistently rejected by modern courts. The leading American case is Fontainebleu Hotel Corp. v. Forty-Five Twenty-Five, Inc., 181 Fla. Supp. 74, 114 So.2d 357 (Dist. Ct. App. 1959). For more detailed discussions of this doctrine see Eisenstadt and Utton, Solar Rights and their Effect on Solar Heating and Cooling, 16 Nat. Resources J. 363, 366-68 (1976); Moskowitz, Legal Access to Light: The Solar Energy Imperative, 9 Nat. Resources J. 177, 185-88 (1976); Note, Securing Solar Energy Rights: Easements, Nuisance, or Zoning?, 3 Colum. J. of Envt’l L. 112, 116-122 (1976).

\textsuperscript{13} p. 145.

\textsuperscript{14} p. 148.

\textsuperscript{16} The prior in time, prior in right concept is seen as providing possible constitutional difficulties since it may lead to having very different restrictions placed on the owners of essentially identical land. A hypothetical situation is described in Solar Access Law which illustrates the potential difficulties (pp. 136-37). However, some commentators have found that this type of approach is the best method for recognition of a right to solar access. See, e.g., D. Goble, Siting Does not Equal Protection: A Note on Solar Access, 2 Solar L. Rep. 25 (1980).
the collector. Although the recordation proposal is unique to Solar Access Law, it is a good example of the thoroughness of the analysis contained in the book.

One of the few areas where more comprehensive discussion would have been helpful is that of the siting of solar energy systems. It has been suggested by one commentator that the establishment of legal standards for the siting of solar collectors would aid in balancing the competing interests of the solar user, neighboring landowners and the public. Although site planning is discussed briefly by Ms. Hayes in her section on traditional zoning and in fact is labeled as promising, further discussion of this issue would be valuable.

Solar Access Law is not an impartial summary of various techniques; it contains definite conclusions and recommendations based on the research. Although this is a valuable approach, the preferences and conclusions of the author should be kept in mind while reading the book and it should be noted that not all of these preferences and conclusions are uncontroversial. For example, the use of already existing legal mechanisms such as the application of nuisance law are not viewed as the best solutions to the problem of solar access. Ms. Hayes appears to prefer the creation of statutes and ordinances specifically tailored to the issue. This conclusion is certainly not unreasonable and is well supported by the text; however, other legal commentators have found that other approaches, such as the judicial recognition of obstruction of sunlight as a private nuisance, may serve to provide adequately for solar access.

Similarly, Ms. Hayes does not favor federal legislation mandating solar access but rather indicates that the better approach is to deal with this problem on the state and local level. She does indicate that federal financial assistance and technical support would be valuable to the states and localities. Other commentators

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17 p. 89.
18 For example, see Comment, Obstruction of Sunlight as a Private Nuisance, 65 CALIF. L. REV. 94 (1977).
19 Legislation has been introduced in the 96th Congress to direct the Secretary of Energy in conjunction with interested states to develop a plan to enable the state to conduct a solar access review in order to identify legal alternatives to assure access to direct sunlight. H.R. 5752, 96th Cong., 1st Sess. (1979), S. 2054, 96th Cong., 2nd Sess. (1979). Neither of these bills have been reported out of committee. Similar legislation was also introduced
have reached different conclusions concerning the desirability of
federal legislation on solar access. For example, one commentator
has examined the various concepts courts could use to provide
solar access and has concluded that these methods are not the
most desirable. Federal legislation was seen as having several
advantages including the fact that since the use of solar energy is
of crucial concern to national security, determinations concerning
its use can best be made on the national level.

Ms. Hayes has produced a valuable contribution to the field of
solar law with the publication of Solar Access Law. Although
there have been numerous publications on the legal aspects of so­
lar energy and many specifically on the right of access to sunlight,
none have been done in such a comprehensive and well organized
manner. The wealth of information in the book and especially the
forms will be useful to persons attempting to resolve solar access
problems. Although the issue of solar access has been seen as one
of the most significant legal issues facing solar use, other issues
may also be of crucial importance and have yet to receive detailed
analysis. Hopefully Ms. Hayes will turn her attention to these
other areas and continue to make significant contributions to the
field of solar law.

in the 95th Congress. See H.R. 12665, 95th Cong., 1st Sess. (1977) and S. 3027, 95th Cong.,

20 Williams, Solar Access and Property Rights: A Maverick Analysis, 11 CONN. L. REV.
430 (1979).

21 Id. at 458. Federal legislation prohibiting state and local laws which permit the con­
struction of buildings or other obstructions which interfere with the effective operation of
solar equipment was introduced in the 95th Congress. See S. 985, 95th Cong., 1st Sess.

22 For example the effect of aesthetic restrictions on the use of solar devices may be­
come a significant problem as more solar devices are installed. See Jones, Aesthetic Re­
striction and the Use of Solar Devices, 8 B.C. ENV. AFF. L. REV. 33 (1979). Similarly the
relationship of regulated utilities to the use of solar devices may create serious legal diffi­
culties. See, e.g., Laitos and Feuerstein, May Regulated Utilities Monopolize the Sun, 56