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LEGAL ASPECTS OF SOLAR ENERGY: STATUTORY APPROACHES FOR ACCESS TO SUNLIGHT

John William Gergacz*

I. INTRODUCTION

We live in an age of uncertainty and challenge. Although every generation throughout history may have been able to make a similar claim, today's problem profoundly affects our way of life. The problem is energy. The abundance and low price of the fuels upon which modern society relies is no longer certain. Because of this uncertainty, we must either develop alternative energy resources or face fundamental changes in the way we live.

In the past few years solar energy has been gaining acceptance as an alternative (or supplement) to traditional energy sources. In San Diego, California new subdivisions must be equipped with solar hot water heaters. A review of the yellow pages in a telephone directory

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1. It has been suggested that all sources of energy are in some way derived from the sun or are "solar energy." Wilhelm, Solar Energy, the Ultimate Powerhouse, 149 NAT'L GEOG., Mar. 1976, at 381. For example: wind is created as a result of sunlight warming the air. Heat from sunlight is also central to the rain cycle which is necessary for all life on earth. In addition, coal, oil, wood, and gas were derived from animal and plant residue. The animals and plants were fed directly or indirectly by sunlight. Id. The term "solar energy" in this paper will be limited to energy created through direct collection of sunlight which is then transformed into usable energy like electricity. More expansive definitions of solar energy exist. They include, in addition to direct collection and transformation of sunlight into electricity, such energy sources as wind power, hydroelectric power, and biomass. Time, July 2, 1979, at 114; Commoner, Reflections on the Solar Transition, NEW YORKER, Apr. 23, 1979, at 53.

2. See Corbett and Hayden, Local Action for a Solar Future, 2 SOLAR L. REP. 953 (1981). The authors discuss local activities to promote and utilize solar energy in California. The Solar Law Reporter, published six times per year, has a current developments section in each issue which reports on local solar energy use.
shows that heating contractors frequently include solar energy systems as alternatives to traditional oil or gas heating units. Drive through your own community. If it is like Lawrence, Kansas you will see homes and businesses fitted with solar energy collectors. New buildings will often have been constructed for their energy efficiency—utilizing the natural power of the sun to decrease reliance on expensive fossil fuels. Farmers are using solar collector systems to dry their grain. Home buyers and businessmen are concerned with energy costs. Systems which utilize the sun as an energy source can be expected to continue to make inroads into the areas of building design and energy use.

A solar energy collector without sunlight is useless; solar energy users require unobstructed access to sunlight. Therefore, it is imperative for the solar energy user to secure the legal right to unobstructed sunlight necessary for his solar-powered system. Two recent cases illustrate the difficulty of obtaining solar access. In *Sui v. McCully-Citron Co.*, a homeowner had four solar collectors atop her house which were used to operate a solar water heating system. The defendant began to construct a nine-story apartment building which, when complete, would shade the plaintiff’s solar collectors. As a result, the homeowner-plaintiff estimated that the effectiveness of the solar-heated hot water system would be decreased by 70 percent. The homeowner brought an action to prevent construction of the apartment building, contending that she had a right to the sunlight. The court granted summary judgment for the defendant since the plaintiff did not have an easement to guarantee solar access, and the area was zoned to permit high-rise apartment buildings. Although the underlying issue of the plaintiff’s right to sunlight was not directly addressed, it was implicit in the court’s decision that, had the plaintiff had a right to unobstructed sunlight, summary judgment would have been denied. In a similar situation, a Wisconsin circuit court recently held in *Prah v. Maretti* that a solar

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4. 1 SOLAR L. REP. at 542.

5. See infra discussion of easements, text and notes at notes 14-33.

6. 1 SOLAR L. REP. at 543.

7. See Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So.2d 357 (Fla. 1959) (denial of injunction to prevent construction of hotel addition which would block solar access to swimming and bathing facilities).

8. No. 80-CV-2399 (Cir. Ct. Wis., Nov. 13, 1980), reported in 2 SOLAR L. REP. 1013 (1981). Prah constructed a home with a solar heating system. The properties to the north and south of Prah’s home were vacant. Therefore, sunlight could, without obstruction, strike the solar col-
using homeowner does not have a right to enjoin a neighbor from building a residence on his property which would obstruct the sunlight from the solar energy user’s solar collector. The Hawaii and Wisconsin cases clearly demonstrate the risk awaiting a solar energy user who does not legally protect his access to sunlight.

The impact of these cases will be to limit use of solar energy to those who control the property surrounding the location of their solar collectors. If we were to eliminate the legally protected right of a farmer to own the grain he harvests, few farmers would continue to invest capital and labor in their fields. Similarly, if we do not establish a legal right of access to sunlight, we cannot expect potential solar energy users to invest in energy systems which depend upon the whim of surrounding property owners for fuel.

lectors which were installed on Prah’s roof. Subsequently, Maretti began to construct a home on vacant land adjacent to Prah’s residence. Completion of the home would result in a shading of Prah’s solar collectors during the cold Wisconsin winters. The shading would reduce the system’s efficiency. In addition, there was a possibility of damage through freezing to the solar energy system and to Prah’s home itself. The parties attempted unsuccessfully to negotiate a settlement concerning the location of Maretti’s home.

Prah filed suit contending that he had a “solar right” to an unobstructed path from his solar collector to the sun. He based his right on the fact that he was first to use it, and he had notified Maretti of the nature of his solar energy system and its sunlight requirements. Maretti sought to enjoin Maretti’s construction on three grounds. First, Maretti’s construction would be an unlawful encroachment upon Prah’s use of his property. Second, Maretti’s proposed residence would be a private nuisance. Third, the court should recognize a solar easement benefiting the first user of solar energy. The court rejected Prah’s claims.

A decision contrary to Prah, Fontainebleau, and Sui was reached by the Housing and Redevelopment Authority (HRA) of St. Paul, Minnesota. Control Data Corporation owned buildings on either side of a vacant, city owned lot. Control Data had solar collector panels on the two buildings which it was using to collect cost-benefit data on solar energy use in the St. Paul, Minnesota metropolitan area. L. K. Mahal and Associates, a development firm, sought to build a nine-story apartment building on the vacant, city owned lot between the Control Data buildings. This required rezoning the lot for residential use. HRA gave tentative approval. Control Data vigorously objected. It contended that the nine-story building would shade the solar collector during part of the day thereby harming the data collection experiment. Additionally, Control Data contended that it had invested in the solar energy project in reliance on assertions by the city that a one and one-half story building would probably be built on the site. The important issue raised by Control Data involved whether rezoning for new development should be allowed when the development will shade solar collectors on existing buildings. No solar access statute or ordinance existed at the time, and Control Data did not have a right to unobstructed sunlight necessary for its solar collectors. However, HRA agreed with Control Data and decided to reject the proposed nine-story development. HRA was impressed by the importance placed upon the project by Control Data and the adverse impact any shading would have on the solar energy data collection. The parties agreed that the decision was not a precedent for solar access rights because of Control Data’s special circumstances. Yet, it is interesting to note that the HRA did protect Control Data’s access rights even in the absence of a legal right to unobstructed sunlight.

9. 2 SOLAR L. REP. at 1017.
This economic fact has prompted a number of state legislatures to enact solar energy legislation seeking to provide the legal means for the solar energy user to protect his access to sunlight. This article will examine several approaches for protecting that access. First, common law access to sunlight and the movement to codify the common law as it applies to solar energy will be discussed. This is the most common method of protecting access, but is rather ineffective since it envisions protection of solar access on a lot-by-lot basis through private agreements between solar energy users and surrounding landowners. Second, two statutes which use land-use control methods to protect solar access will be examined. These statutes are innovative, but so restrict the property rights of landowners adjoining a solar collector that they raise serious constitutional questions as well as questions involving their practical implementation. A final statutory approach for access to sunlight involves an administrative procedure to allocate solar access rights. This plan falls between the extremes of the first two types of statutes and is an attempt to balance the needs of the solar energy user with the burdens any access protection plan will place on adjoining landowners.

II. COMMON LAW: ACCESS TO SUNLIGHT

Several commentators have considered the issue of common law access rights to sunlight for a solar energy collector. The issue of access to sunlight is an old one. In the past, it typically arose when one homeowner complained because a neighbor had erected a structure in such a way as to block the sunlight from entering his windows. These early cases concerned sunlight used for illumination rather than as an energy-producing fuel. However, the legal access

11. Some solar rights statutes provide zoning and land-use planning authority to local governments to assure sunlight access for solar collectors. A discussion of those statutes is beyond the scope of this article. The statutes analyzed herein regulate solar access protection on a case-by-case basis. The zoning statutes protect solar access on a community-wide or other group-oriented basis.


issue would be the same in either situation: securing the right to unobstructed airspace over a neighbor’s property. The common law device creating a third party’s rights to use another’s property is an easement.14

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.”15 A common example of an easement is a pathway which connects the dominant tenant’s property and a lake. This pathway crosses the land of the servient tenant. The dominant tenant has the legal right to use that pathway at his discretion. The servient tenant may not obstruct the pathway or otherwise interfere with the dominant tenant’s use of it. This pathway easement is described as an affirmative easement. It permits the dominant tenant to go upon or otherwise use the property of the servient tenant. Other examples of affirmative easements are ditches, watercourses, and roadways.16

Easements for sunlight are described as negative easements. Negative easements also benefit the dominant tenant, but they do not permit him to go upon or otherwise use the servient tenant’s property. The easement merely prohibits the servient tenant from using his property in a way which would restrict the benefit the easement conferred on the dominant tenant.17 A solar access easement is a negative easement which prohibits the servient tenant from obstructing the sunlight flowing through a defined section of airspace above his property. The dominant tenant (or solar energy user) would have no right to go upon or otherwise use the property of the servient tenant except as a corridor for sunlight en route to the dominant tenant’s property.18

An express easement is created by a deed or other writing in which the servient tenant conveys the easement to the dominant tenant.19 Courts have consistently upheld the creation of express negative easements.20

14. In addition to the doctrine of express, implied, and prescriptive negative easements as a common law method of securing access to sunlight, common law covenants, and nuisance have also been discussed by a few solar access rights commentators. See supra note 12.
15. BLACK’S LAW DICTIONARY 559 (rev. 4th ed. 1968).
17. Id.
20. E.g., Homewood Realty Corp. v. Safe Deposit and Trust Co., 160 Md. 457, 154 A. 58
Occasionally, the courts’ interpretation of the terms in the instrument of conveyance modified the amount of unobstructed sunlight received by the easement owners.\(^{21}\) Such construction was due to vague language in the instrument. This suggests that drafters of an express easement for solar energy should clearly and completely describe the airspace which is to remain unobstructed.\(^{22}\) If properly drafted, the express negative easement should establish the dominant tenant’s legal right to access to the sunlight.

In the absence of a conveying instrument, a prescriptive easement may be created through long-continued enjoyment or use of the easement by the dominant tenant. This use must be with the knowledge and acquiescence of the servient tenant. It must be exercised under a claim of right by the dominant tenant adverse to the interests of the servient tenant.\(^{23}\) Thus, a solar energy user could argue that his continued use of the sun creates a prescriptive easement over his neighbor’s land.

A few state courts in the nineteenth century, and Delaware until 1939, permitted prescriptive easements for sunlight.\(^{24}\) The courts based their decisions on the English doctrine of *ancient lights* which provided that, through long-term enjoyment of the sunlight, one could obtain a legal right to its continued unobstruction.\(^{25}\) This was a minority position in the nineteenth century and has been completely rejected.\(^{26}\) The reasons for its rejection are, first, prescriptive creation was unsuitable for rapidly growing, ever-changing conditions in communities which existed in the United States and, second, by


\(^{23}\) *See generally* 3 R. POWELL, *supra* note 16, § 413.

\(^{24}\) Courts for a time in the following states permitted prescriptive creation of easements for sunlight: Delaware, Illinois, Massachusetts, New Jersey, South Carolina, and West Virginia. The last state court to reject prescriptive creation of easements for sunlight was in Delaware in 1939. Lynch v. Hill, 24 Del. Ch. 86, 6 A.2d 614 (1939). *See generally* Gergacz, *Solar Energy Law*, supra note 12, at 141-44.

\(^{25}\) Clawson v. Primrose, 4 Del. Ch. 643 (1873); Robeson v. Pittenger, 2 N.J. Eq. 57 (Ch. 1838).

merely enjoying sunlight as it flowed across a neighbor’s property, no adverse use (a requirement for creation of a prescriptive easement) was made of the property. Therefore, the doctrine by its definition was inapplicable to solar access.  

Implied easement doctrine, unlike express and prescriptive doctrine, has not been uniformly applied by courts in creating easements of access to sunlight. An implied easement is created by a court construing the intent of parties to a land transaction. Although the parties failed to expressly create the easement in their documents of conveyance, the facts and the conditions of the land subject to the transaction may lead the court to find that an easement was created by implication. Some state courts considered the implied easement doctrine inapplicable to create easements of access to sunlight. These courts generally emphasized the same reasons cited by the courts in rejecting prescriptive creation. That is, the method of creating easements for sunlight was not suitable to conditions in the United States. However, other state courts have upheld implied easements. These courts rejected a broad public policy analysis and instead examined the particular conveyance, focusing on the necessity of the easement to the party seeking its creation. Presumably, then, the creation of an implied solar access easement is still possible in some states.

Even though common law express and implied easement doctrines may be utilized in some states to provide a right to unobstructive sunlight for a solar energy user, problems remain with these approaches. Express solar access easements must be carefully drafted. Also, a solar energy user must find a willing grantor of such an easement at a reasonable price. Neighbors unwilling to convey such an easement or neighbors who demand high prices could frustrate a solar energy user’s plan to obtain the express easement right. Further, courts will most likely remain hostile to creation of an easement by prescription. Finally, the creation of implied solar access

29. BLACK’S LAW DICTIONARY 600 (rev. 4th ed. 1968).
30. E.g., Baird v. Hanna, 328 Ill. 436, 159 N.E. 793 (1928); Blumberg v. Weiss, 129 N.J. Eq. 34, 17 A.2d 823 (1941).
31. E.g., Lane v. Flautt, 176 Md. 620, 6 A.2d 228 (1939); Nomar v. Ballard, 134 W. Va. 492, 60 S.E.2d 710 (1950).
32. For a discussion of drafting and valuation of an express solar access easement see Gaumnitz and Gergacz, supra note 22.
easements would occur so infrequently as to make the doctrine almost useless. 33 Because of the limitations of the common law in dealing with access to sunlight, statutory approaches to the problem have been instituted.

III. RECENT LEGISLATION: ACCESS TO SUNLIGHT

During the last six years, a number of states have passed "solar rights" statutes. 34 These statutes provide a mechanism for solar energy users to obtain a legal right to unobstructed sunlight. Solar rights statutes may be divided into four categories: common law codifications; prior appropriation statutes; shade control statutes; and administrative allocation procedures. These various legislative methods of guaranteeing access are described in detail below.

A. Common Law Codification

Several states have passed statutes which merely codify the common law doctrine of express easements. The statutes allow landowners to convey the right to use airspace above their property as an unobstructed conduit for sunlight. The right is conveyed to an adjoining solar user. The airspace overlying the grantor's property which may not be obstructed is described in some form of conveying

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33. For expanded discussion of problems with common law easement doctrine applied to solar energy see supra articles cited at note 12.


For a discussion of the solar access statutes as well as tax and financial incentives passed by various states to encourage use of solar energy, see Johnson, State Approaches to Solar Legislation: A Survey, 1 Solar L. Rep. 56 (1979).
instrument. As discussed below, "common law" statutes generally regulate only the form of the description which must be contained in
the conveying instrument.\textsuperscript{35} Some statutes also require liquidated damages clauses.\textsuperscript{36} Unlike the statutes discussed later in this article, "common law" statutes require that the landowner agree to grant
the easement to the solar user.

Statutes in Missouri and Washington declare that an easement for
sunlight necessary to fuel a solar collector is a property right which
may be transferred to an adjoining property owner.\textsuperscript{37} This provision
was probably a response to some early illumination access cases
which held that sunlight is not subject to ownership; therefore, no
property right could be asserted in sunlight.\textsuperscript{38} Popular writers often
rhetorically ask, "who owns the sunlight?," suggesting that the
sunlight is actually "owned" by the solar energy user. The answer is
that no one owns the sunlight under any resource allocation scheme.
These ideas are misconceptions since the sunlight is not "owned."
Instead, a solar energy user is using the airspace above the land of
his neighbor as a conduit for the energy resource.\textsuperscript{39} The right to use
the airspace may be purchased by a solar energy user from his
neighbor as an express negative easement under common law
statutes.

Most of the "common law" statutes require a description of the

\textsuperscript{35} See supra statutes cited at note 34. Although many of the statutes differ somewhat in
their requirements for creating an express solar access easement, most include provisions for
recording, description, and remedies for encroachment on the easement. The Colorado statute

\textit{Solar easements—creation.} Any easement obtained for the purpose of exposure of a
solar energy device shall be created in writing and shall be subject to the same con­
veyancing and instrument recording requirements as other easements.

\textit{Contents.} (1) Any instrument creating a solar easement shall include, but the con­
tents shall not be limited to:

(a) The vertical and horizontal angles, expressed in degrees, at which the solar
easement extends over the real property subject to the solar easement;
(b) Any terms or conditions or both under which the solar easement is granted or
will be terminated;
(c) Any provisions for compensation of the owner of the property benefitting from
the solar easement in the event of interference with the enjoyment of the solar
easement or compensation of the owner of the property subject to the solar
easement for maintaining the solar easement.

\textsuperscript{36} See infra text and note at note 48.

\textsuperscript{37} Mo. \textit{Ann. Stat.} \textsection 442.012 (Vernon Supp. 1980); Solar Easements, Sub. House Bill No.

\textsuperscript{38} Stein \textit{v.} Hauck, 56 Ind. 65 (1877); Keiper \textit{v.} Klein, 51 Ind. 316 (1875); Parker \textit{v.} Foote,
19 Wend. 309 (N.Y. Sup. Ct. 1838). See \textit{generally} Gergacz, \textit{Solar Energy Law, supra} note 12,
at 146.

\textsuperscript{39} See supra text and notes at notes 12-14.
airspace to be used above the servient tenement. Two states provide that the airspace be “sufficiently described.” Of course, this is a necessity in any conveyance, not only in one for solar access.

Since solar energy easements are very new, however, a statute, by being more demanding in its description requirements, may decrease the necessity for judicial constructions of solar access conveyances which might frustrate the purpose of the draftsmen. Most statutes require that the dimensions of the easement be included in the conveyance. The most frequent requirement in this regard is the inclusion of the vertical and horizontal angle of the easement, expressed in degrees. Although this method of description will most certainly define the extent and location of the easement, it may result in problems. One such problem arises because, unlike a roadway, an easement through airspace is impossible to see. Disputes may arise between the dominant and servient tenants over whether trees, bushes, or buildings encroach on the easement. Some statutes avoid this difficulty by providing that the easement description may take the form of a height restriction above the servient tenement beyond which the easement exists. Such a description would not be as precise as one expressed in vertical and horizontal degrees and also may affect more total airspace above the servient tenement than would a more precisely described easement. However, it would be easier for the landowners to understand. The servient tenant could not obstruct airspace above a certain distance over his property. Thus, both statutory methods for describing easements achieve their purpose, although each has certain drawbacks.

41. See supra notes 21-22. Some sample forms for solar energy easements have been published. S. KRAEMER, supra note 22, at 50-52, 54-55. See also A. ARNOLD, supra note 22, at § 40.18 (Supp. 1981).
43. Such disputes may be settled by consulting a surveyor; however, a good draftsman should attempt to minimize the potential for conflict over the terms of the instrument. If it is difficult to ascertain the terms of the instrument in everyday practice, then disputes may arise frequently.
The more precisely drawn the easement, the less airspace above the servient tenant’s property must remain unobstructed. A simple height limitation may convey more airspace than is needed for the solar collector. Yet, the solar energy user will pay for the unused airspace since the price charged reflects the size of the conveyance, not the ability of the buyer to use it effectively. Perhaps a draftsman would want to combine the provisions of the horizontal/vertical degree measurement and the height above the surface measurement. In this way, the exact size of the easement could be described and a guideline be given to the servient tenant concerning future use of the surface of his property.

A few states have gone further than requiring an accurate description of the spacial dimensions of the easement by providing that the easement description may include the hours of the day and days of the year when the solar collector is to remain unobstructed. This method of description allows the solar collector and servient tenant to balance more accurately the costs and benefits of the easement. A solar collector may not require 100 percent unobstructed sunlight in a day; the user may have greater energy needs during certain seasons of the year than others. Careful planning by the solar energy user would enable him to determine the exact temporal characteristics of the easement he requires. The servient tenant may be more willing to convey the easement so described, since it may have less impact on his use of the property. He may also demand a lower price. The solar energy user will then be certain of receiving unobstructed sunlight during the times which are most beneficial to him. The solar collector could be obstructed by the servient tenant’s use of his own property during the hours when the easement is not in effect.

In addition to requiring a clear and accurate description of the easement, many statutes also require that provisions concerning remedies available to the solar energy user be inserted in the conveying instrument in the event the sunlight striking his collector is obstructed. The usual requirement is for a term in the document


which provides compensation for the dominant tenant—a "liquidated damages clause." Such statutes recognize that unforeseen needs may arise which require the servient tenant to violate the easement. They also recognize that the existence of such an easement may preclude new and perhaps more beneficial uses of the servient tenement. The liquidated damages clause encourages monetary settlements in the event of an obstruction of sunlight rather than litigation aimed at obtaining equitable relief. The servient tenant is not forever burdened with an undesirable easement if he can compensate the dominant tenant for the loss of the easement.

States have been active in enacting solar access legislation. Generally those statutes which codify common law easement doctrine require that various terms be included in the conveyance, such as a description of the dimensions of the easement and remedies in the event of violation. Additionally, the statutes require that the easement be in writing and that it be made subject to the recording acts in existence. However, the "common law" statutes alone will not alleviate the concern over obtaining access to sunlight. Under "common law" statutes, a solar energy user must reach an agreement with adjoining landowners to purchase the right to use needed


49. A liquidated damage clause is a contract provision in which an amount of money is stipulated by the parties as the amount of damages to be recovered by one party upon a breach of the contract by the other. Black's Law Dictionary 468 (rev. 4th ed. 1968).


Tennessee includes in its solar rights statute a provision that the parties may provide a period of time during which the easement will exist. Tenn. Code Ann. § 64-9-204 (Supp. 1979). This would permit creation of a lease of the solar easement. See generally Gergacz, Solar Energy Law, supra note 12, at 132-33.
airspace. Some adjoining landowners may refuse to sell at any price; others may demand a very high price, thereby removing any economic incentive to install solar power. The solar energy user is at the mercy of the adjoining landowners, since he cannot secure a substitute for their airspace which would allow him to install and use a solar collector. In light of the problems inherent in obtaining sunlight access via an express easement, New Mexico, California, and Iowa have enacted statutes which provide a new approach to the problem.

B. The New Mexico Experiment: Prior Appropriation

One of the advantages of state legislation is that each state is a proving ground for novel ways to cope with legal problems. One of the major problems with an express solar access easement is that it requires an agreement for its acquisition between the solar energy user and the adjoining landowner. The neighbor over whose property the easement is proposed may refuse to convey it, or may demand a very high price for doing so. In recognition of this problem, New Mexico passed a solar rights act which 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. A number of state statutes include a provision that the terms or conditions for granting or terminating the easement be included. COLO. REV. STAT. § 38-32.5-102 (Supp. 1978); FLA. STATS. § 704.07 (Supp. 1981); GA. CODE ANN. § 85-1414 (Supp. 1979); IDAHO CODE § 55-615 (1978); IND. CODE ANN. § 32-5-2.5-3 (Burns 1980); KAN. STAT. § 58-3802 (Supp. 1978); MINN. STAT. ANN. § 500.24 (West Supp. 1980); MO. ANN. STAT. § 442.012 (Vernon Supp. 1980); MONT. REV. CODE ANN. § 70-17-302 (1979); An Act relating to Solar Energy, Leg. Bill No. 353, 1979 Neb. Laws; N.J. STAT. ANN. § 46:3-26 (West Supp. 1978); N.Y. REAL PROP. LAW § 335b (McKinney Supp. 1980-81); N.D. CENT. CODE § 47-05-01.2 (1978); OHIO REV. CODE ANN. § 5301.63 (Page Supp. 1981); TENN. CODE ANN. § 64-9-204 (Supp. 1979); UTAH CODE ANN. § 57-13-2 (Supp. 1979); VA. CODE § 55-354 (Supp. 1979); Solar Easements, Sub. House Bill No. 912, 1979 Wash. Legis. Service ch. 170 (West). California has a similar provision in its statute. CAL. CIVIL CODE § 801.5 (West Supp. 1979). The statute includes a provision that terms and conditions under which the easement be revised or terminated be included.

52. This concern will not plague all solar energy users. Those who own sufficient land surrounding the solar collector will be able to control airspace use. Other solar energy users—those whose collectors require unobstructed airspace over the land of another—will need to negotiate with that neighbor to obtain the easement.

53. See generally Gaumitz & Gergacz, supra note 22 for a discussion of the valuation issue.

54. Of course the solar energy user may install his system without securing access rights to the sunlight. However, the usefulness of his solar energy system will be dependent upon his neighbor’s use of his airspace. See supra text within note 8.

The New Mexico statute defines a "solar right" as an "unobstructed line-of-sight path from a solar collector to the sun."\(^{56}\) It provides that the first user of the solar right has priority over any subsequent users. The extent to which the solar energy is "beneficially used" determines the extent of the solar right.\(^{57}\) Since the ability to use solar energy varies with the seasons, so does the extent of the solar right.

Once the solar right is established, it may not be obstructed. Thus, if an individual erects a solar energy system, he immediately gains the permanent right to continuous unobstructed sunlight for that collector. Adjoining landowners would be precluded from using their property in such a way as to block the sunlight falling upon the collector. For example, suppose A and B are adjoining landowners, and A is the first to erect a solar energy collector system to heat and cool his home. By constructing the system, he has established a solar right—a path from the collector to the sun—which protects his beneficial use of the sunlight during the hours when the collector is operating. B is precluded from utilizing his adjoining property in such a way as to shade A’s collector.

The purpose of the New Mexico Act is not limited to encouraging the erection of active solar energy systems in undeveloped areas. The Act gives local governments the power to ordain a solar right for a proposed solar energy system even though the collector would be obstructed by existing buildings, trees, or other structures.\(^{58}\) New Mexico’s Solar Rights Act also recognizes a right to solar access for passive systems. 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.\(^{59}\) One commentator has suggested that under New Mexico’s recognition of a solar access right arising from the use of a passive solar collector, a number of existing buildings already have a solar right over large amounts of land.\(^{60}\) The New Mexico Act, then, provides an access right to future solar users and passive solar users as well as to those landowners who construct solar energy collector systems.

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56. N.M. STAT. ANN. § 47-3-3 (1978).
57. Id. § 47-3-4.
58. Presumably the local government would bring an eminent domain proceeding to clear the adjacent land. Such a proceeding would be constitutionally required, see infra text at notes 62-74, and appears to be contemplated by the statute itself. N.M. STAT. ANN. § 47-3-4 (1978).
59. An example of a passive solar energy system is Montezuma’s Castle, built in 700 A.D. by cliff dwellers in Arizona. The structure is located in a cliff recess and faces south. The massive adobe walls help to heat it in the winter and cool it in the summer.
The most important feature of the New Mexico statute is the recognition of "the right to use the natural resource of solar energy" as a property right. 61 This is a radical break from traditional American property law. Only a few states have ever recognized that a legal right to unobstructed sunlight could be acquired by mere use. 62 Yet, the New Mexico Solar Rights Act goes far beyond the old state decisions. It provides an immediate right to sunlight upon its use by a solar energy collector.

The Act is a legislative attempt to address a fundamental problem in solar access rights, and it has been the subject of much criticism. 63 New Mexico's solar right involves neither ownership of sunlight nor the right to use the natural resource of solar energy. Instead, it creates a right to use the airspace above neighboring land as a conduit through which the sunlight travels. This adjacent airspace, unless conveyed away, is the property of the neighboring landowner. In 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. The fifth amendment of the United States Constitution provides that: "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation." 64 Unquestionably, the government has the right to regulate land use under the police power. 65 Such regulation may occur without compensation being paid to the landowner even though as a result some economic loss to the landowner may occur. 66 However, a precise definition of how much regulation is permitted before a "taking" requiring just compensation occurs is unclear. 67 It is possible that the unilateral creation by the solar user of a solar access right over his neighbor's land so diminishes the value of that land that it requires some form of compensation.

Sixty years ago Oliver Wendell Holmes wrote:

Government could hardly go on if to some extent values incident to property could not be diminished without paying for

62. See supra text at notes 23-27.
63. E.g., Hillhouse & Hillhouse, supra note 55; Note, Access to Sunlight, supra note 55.
64. U.S. Const. amend. V.
66. Id.
every general change in the law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits.

One fact for consideration in determining such limits is the extent of the diminution [in value]. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. 68

Although Holmes clearly stated the problem, we are no closer today to determining when a regulation so diminishes the value of land as to constitutionally require compensation be paid to the landowner. 69

In a recent case, 70 Justice Powell candidly stated the problems in determining when land use control became a compensable "taking":

The question of what constitutes a ‘taking’ for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the Fifth Amendment’s guarantee . . . [i]s designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole . . . this Court, quite simply, has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government rather than remain disproportionately concentrated on a few persons . . . Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government’s failure to pay for any losses proximately caused by it depends largely “upon the particular circumstances [in that] case.” 71

As noted by Justice Powell, it appears that courts make such determinations on a case-by-case basis, resulting in a particularly confused area of law. 72

In deciding “taking” cases, courts utilize concepts such as whether the regulation has an unduly harsh impact upon the owner’s use of his property; whether the property owner can still receive a reasonable return on his investment; and whether the property re-

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68. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).
69. Compare Barrett v. Hamby, 219 S.E.2d 399 (Ga. 1975) (where an unconstitutional taking was found when a zoning ordinance permitting only single-family homes made the property worth $2,000 per acre while with commercial zoning the property was worth $35,000 per acre) with HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975) (property prior to the enactment of the zoning ordinance was purchased for $388,000; after enactment it was worth $75,000).
71. Id. at 123-124.
72. Levin & Gergacz, supra note 66.
mains economically viable. However, no precise definition or mathematical formula is given to compute "reasonable return" or "economic viability." The question is one of balancing the public need for the regulation with the harm caused to the affected landowner.\textsuperscript{73} One commentator recently pointed out that only when land use regulation renders the subject property useless will an unconstitutional taking result predictably occur.\textsuperscript{74}

Even 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. Since no limitation is placed upon the size or location of the solar collector, the broad sweep of the protection given to the solar energy user could well render useless the property of the adjoining landowner. For example, if a large solar collector was installed near the lot line at ground level, the owner of the adjoining land would be unable to use that land since any development would impermissibly shade the solar collector. That land would be rendered useless by the operation of a state statute which favors the solar user to a constitutionally impermissible degree. Furthermore, the Act protects sunlight access throughout the day without regard for peak times of sunlight efficiency. The solar collector receives the most sunlight, having the greatest intensity, when the sun reaches its highest point in the sky. Late and early in the day the radiation of the sun is weakest. Therefore, shading a solar collector at different times of the day would have a different effect on the amount of energy lost.\textsuperscript{75} The New Mexico Act would prohibit shading at any time throughout the day even though the collector performs less efficiently early and late in the day.\textsuperscript{76} A tree casting a shadow in a portion of the collector late in the day would violate the Act in the same manner as one which totally obstructs the collector at high noon. As a result of its over-

\textsuperscript{73} An interesting and rather candid discussion of the balance is contained in a land-use regulation opinion from New York. The court stated:

In times of easy affluence, preservation of historic landmarks through use of the eminent domain power might be desirable, or even required. But when a less expensive alternative is available, especially when a city is in financial distress, it should not be forced to choose between witnessing the demolition of its glorious past and mortgaging its hopes for the future.


\textsuperscript{74} Levin & Gergacz, supra note 67, at 506.

\textsuperscript{75} AMERICAN PLANNING ASSOCIATION, SITE PLANNING FOR SOLAR ACCESS 13-18 (1979).

\textsuperscript{76} Id. at 131.
whelming preference for solar users the Act places an intolerable burden on adjoining landowners.\textsuperscript{77}

A final criticism of the New Mexico law is that in its zeal to encourage solar development, the legislature created a solar right which takes precedence over all other uses of the adjoining property. For example, the use of a qualifying solar collector to heat a swimming pool or hot tub, may preclude a neighboring parcel from being used for building an orphanage or hospital. The statutory scheme does not provide for a comparison between the relative social utility of the solar use and the competing land use; it protects the solar access right each time.\textsuperscript{78}

In a recent article, one of the legislative sponsors of the New Mexico Act defended it.\textsuperscript{79} He considered solar energy as a natural resource, like water or oil, which can be allocated like any other resource. But, sunlight is unlike water or oil resources. Sunlight is diffuse, it is everywhere. It cannot be placed in a barrel or put in a cup. Unlike water, sunlight does not flow in any recognizable stream. There is a clear boundary between a waterway (\textit{i.e.}, a stream, river, or lake) and the land which surrounds it. Indeed, not all land has a source of water or borders a stream. Yet there is no similar division between areas with sunlight and surrounding land. Sunlight falls upon all parcels of land. Every lot has its own supply of solar energy. It is not a scarce resource. Sunlight's physical characteristics distinguish it from other natural resources, in particular, water, which has been regulated by the state.

Because of the physical differences between sunlight and water, it is inappropriate to regulate them under the same statutory scheme. Western water law, upon which the New Mexico statute is patterned, is based in part upon the scarcity of water.\textsuperscript{80} There is no scar-

\begin{footnotes}
\textsuperscript{77} E.g., Hillhouse & Hillhouse, \textit{supra} note 55. Note, \textit{supra} note 55.
\textsuperscript{78} Note, \textit{supra} note 55, at 171-79.
\textsuperscript{79} Kerr, \textit{supra} note 55.
\textsuperscript{80} For a general discussion of water law see 5 R. Powell, \textit{supra} note 16, at § 710. Water law does present the temptation to use it as an analogy for solar access laws. Water can be diverted from its stream and used. Sunlight can also be used by a solar collector as it flows across adjoining airspace from the sun to the collector surface. Ownership of the water is not the issue, rather the questions concern the right to use it. A similar concept is applicable to sunlight. One commentator suggested that the precedent from water law should apply to protection of solar energy access questions. Note, \textit{The Allocation of Sunlight: Solar Rights and the Prior Appropriation Doctrine}, 47 Colo. L. Rev. 421 (1976). But, as briefly discussed in the text accompanying this footnote, there are fundamental differences between sunlight and water, as well as the future impact of the analogy. There is a finite amount of water and therefore a limited number of users regulated under water law. No similar limit applies to sunlight; therefore, virtually every lot in the country will be capable of claiming a sunlight use right.
\end{footnotes}
city of sunlight. As a result, potentially every parcel of land in New Mexico is able to establish a solar right by prior appropriation. A similar result is not contemplated under Western water law. 81 In addition, use of water does not involve limiting the use of a neighbor's property. That neighbor may be limited in the water he can take from the same stream, but he is not precluded, legally, from utilizing his property. Since sunlight does not flow within recognizable boundaries, a solar user takes over the use of adjoining landowners' airspace when he appropriates sunlight, thereby precluding use of that airspace by its owner. Since the sun changes position throughout the day and with the seasons the stream of sunlight striking the solar collector also changes location. Yet, the airspace through which sunlight passes at any time must remain unobstructed. No similar burden occurs under water allocation law. Water users other than the first user may also utilize the water. Once a sunlight access path has been allocated, however, any additional solar collectors blocking that path would act as impermissible obstructions. It would be as if one water user per stream always totally precluded all other users of the water from that stream. Consequently, one of the basic assumptions of the New Mexico statute—that sunlight is similar to other natural resources and can be allocated accordingly—is simply not accurate.

Analogies are important when we are confronted with new situations which need legal answers. However, analogies are only useful when the factual situations are similar and the analogous experience assists in suggesting an equitable answer to the new problem. A body of law more clearly analogous to solar access than water allocation is common law negative easements. What is needed for solar energy access protection is an equitable system which balances the legitimate energy needs of the solar user with the burdens that will be placed on adjoining landowners. Western water law, with its emphasis on who is first, fails to meet this need. A solar access statute, such as new Mexico's, based on water law does not provide answers to all the questions raised by this new legal problem.

The New Mexico Act, passed in 1977, has not yet generated litigation. 82 Various attempts are being made to suggest modifications. As

81. Water law is not consistent throughout the country. In the east, the riparian system of water allocation places water rights generally with the owners of land bordering the waterways. In the west, a prior appropriation system applies to establish water rights. This system awards water rights, generally on a permit basis, to users who physically divert the water from its natural stream and put it to beneficial use. See generally Note, supra note 80.

enacted, the New Mexico Act is a noble experiment designed to encourage use of solar energy. However, it is unworkable, impractical, and probably unconstitutional.

C. California’s Solar Shade Control Act

Another unique approach for protecting solar access is California’s Solar Shade Control Act.83 The Act declares that certain obstructions of solar collectors are public nuisances. The prohibited obstructions consist of planted vegetation which shades greater than 10 percent of the solar collector surface at any time between 10 a.m. and 2 p.m.84 The statute does not apply to vegetation existing at the time the solar collector is installed. Replacements for such trees and shrubs which die after installation of the collector are also exempt from the provisions of the Act. Thus, the solar user’s right to unobstructed sunlight is not absolute.85

The Act is not limited to regulating the planting of trees and shrubs on adjacent property; it also sets up certain restrictions on the unlimited use of a solar collector. First, the Act regulates the placement of the solar collector on the user’s property. The collector location must comply with local building and setback regulations, must be at least five feet from the lot line, and at least ten feet above the ground.86 Second, the Act provides that existing passive solar heating systems may take precedence over solar collector systems: tree and shrub placement may work “passively” with the design of a building to naturally heat or cool it, at least in part.87 The legislature provided that adjoining landowners with natural or passive solar energy systems may seek relief from the provisions of

84. Id.
85. Id.
86. The Act provides some flexibility as to the location of the solar collector. The collector may be placed lower than 10 feet above the ground. However, the Act provides that in addition to the 5 foot set-back rule, the collector must be set back a distance equal to three times the amount the collector is lowered from the 10 foot rule. For example, if a solar energy user wanted to locate his collector 8 feet above the ground, it would need to be placed at least 11 feet from the lot line.
87. A passive solar energy system captures sunlight and distributes it naturally throughout the building. An example of such a system would be a building designed with large glass windows facing south, or perhaps skylights on the roof. The solar energy is collected and used in the same area of the building. The usable heat flows by convection, conduction, or radiation throughout the building. An active solar energy system consists of a solar collector—a specially designed device for solar energy systems. The collected sunlight may be used to heat a liquid which is then either stored or mechanically pumped throughout the building as a source of heat. This section of the Act recognizes the importance of passive solar energy systems which may save more energy than an active solar panel collector system. AMERICAN PLANNING ASSOCIATION, PROTECTING SOLAR ACCESS FOR RESIDENTIAL DEVELOPMENT 10-13 (1980).
the Act. Without such a provision, even if a neighbor locates his solar collector carefully, an adjoining landowner may be precluded from enjoying the energy benefits of well-placed trees. The Act, then, regulates activity by both landowners.

The Act grants private parties a means of protecting solar access across neighboring property. It is a legislative attempt to balance the interests of solar energy users, against the property rights of adjoining landowners, thereby encouraging use of alternative energy sources. Although the right to unobstructed sunlight arises automatically without the consent of the adjoining landowner, it is a qualified right. Structures may be placed on neighboring lots. Existing trees and shrubs need not be removed. The solar energy user is required to locate his collector beyond a certain distance from his neighbors' property. Furthermore, all collector shading is not precluded. The Act merely prohibits 10 percent or more shading during peak sunlight hours. All of these provisions indicate an intent to protect the interests of the solar energy user and his neighbor.

Despite the attempt to balance the interests of both parties, the California Solar Shade Control Act does raise some issues. The balance of this section will examine those problems, namely: a) constitutional questions concerning the limitations on the state's power to regulate land use; b) the questionable classification of solar obstruction as a public nuisance; c) the potential for abuse of the Act by an overreaching solar energy user; d) the failure of the Act to promote efficient and socially beneficial use of solar energy as opposed to inefficient and frivolous use; and e) the failure of the Act to provide a meaningful and effective dispute settling mechanism as an alternative to litigation.

Two general constitutional problems are raised by the California Solar Shade Control Act. First, the Act may involve a "taking" of a neighbor's airspace without just compensation. Second, if no "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. The Constitution requires that such regula-

89. The Act seems to encourage the individual in an established, developed area to erect a solar energy system. This is not to say that the Act is inapplicable to undeveloped neighborhoods. In an undeveloped area, the solar energy user must assume that no construction will be done on the adjoining lot. Such construction could well render his solar energy system useless since the Act only applies to vegetation. However, in areas with buildings or homes already existing on the lots, it is unlikely that new structures will be built thereby obstructing a solar collector. In this sense, the Act envisions encouraging solar energy use in already existing neighborhoods.
90. See supra text and notes at notes 64-74.
tions bear a rational relationship to the health, morals, or general welfare of the community rather than merely regulating private landowner disputes. 91 The regulation must also be for public purposes. 92 If the Act is either a taking without just compensation or an unreasonable exercise of the police power, it may violate the fifth amendment to the United States Constitution. The Act may violate the fifth amendment by permitting a landowner who installs a solar collector to take, without compensation, the property of his neighbor under certain circumstances. 93 Airspace is owned by the owner of the underlying land. 94 Yet, California allows the use of the airspace of one landowner by another landowner who constructs a solar collector on his property. This is similar to what would occur under a statute which allows a person to obtain the right to use a portion of his neighbor's land surface as a driveway. Clearly in such a case, the state would have clothed the auto owner with the power to "take" his neighbor's property for personal use without compensation. The effect is the same under the Solar Shade Control Act except that the property in question is airspace rather than land. In both situations, compensation by the state to the landowner for lost property rights is required under the fifth amendment.

One may argue that under the California Act there is no taking of any airspace in a constitutional sense. The Act is akin to height and set-back regulations which are clearly within the state's police power to prescribe and which do not effect unconstitutional takings. Police power regulation of land use is permitted without payment of compensation to the affected landowners. One could argue that since the Act merely regulates tree and bush height, it is similar to height restrictions permissible under the police power. However, there is a major distinction between admittedly permissible land use restrictions and the regulation in question. Unlike a statutory height restriction, the California Solar Shade Control Act does not regulate the height of all newly planted vegetation. It merely regulates planting on land adjoining that of a solar energy user when the new vegetation would obstruct the solar user's access to sunlight. It does not affect the public in general, only the neighbors of solar energy users. The regulation does not apply to a certain area or defined place; instead it applies only where a landowner erects a solar collec-

92. Id.
93. See supra text and notes at notes 64-74.
In this sense, it is far different from a general height restriction. Even if the Act does not authorize the unconstitutional “taking” of a neighbor’s property, as a land use regulation, it must conform with the limits of the state’s police power to regulate land use. Statutory land use restrictions based on the police power must be for the public benefit. 95

Yet, the Act benefits only self-selected individual landowners. It is only through attenuated reasoning that it can be said to benefit the welfare of the public. Arguably, the use of solar energy by a substantial number of individuals conveys benefits to the public, including decreased reliance on foreign oil and decreased pollution from the acquisition and burning of fossil fuel. However, for these benefits to occur, a very large number of solar users must exist. Since that threshold has yet to be crossed, the only measurable benefit the Act provides is to the individual solar user. The value of his property will increase since, in addition to his property’s inherent value, the Act has given him a right of solar access through the airspace of his neighbor. The value of his neighbor’s property will, correspondingly, decrease in accordance with the lessening of airspace to accommodate new trees or shrubs. Furthermore, questions arise as to the fairness of subsidizing the solar user at the expense of his neighbor; who, if he cannot afford to install a solar energy system, must continue to pay full utility bills in addition to losing the partial use of his airspace. For all of these reasons, the Act can be viewed as an unreasonable exercise of the state’s police power.

One of the myths of solar energy is that it is “free.” It is not free because it usually requires the acquisition of a negative easement through some adjoining neighbor’s airspace. The California and New Mexico Acts both attempt to remove the necessity of a neighbor’s conveyance of an easement to a solar energy user by simply allowing him to take it. Both Acts abuse the police power of the state and are unconstitutional. 96

95. See supra note 91.

96. It may be argued that under the California Act no rights for the use of the neighbor’s airspace are transferred to the solar energy user. The only protection available to the solar user is against planting new trees or bushes. Buildings or natural growth of preexisting vegetation may obstruct the solar collector without running afoul of the Act. Furthermore, a neighbor may seek equitable relief from the coverage of the Act if a planned natural solar energy system would save more energy than the existing solar collector system in operation. Therefore, it may be said that the Act merely regulates a certain use of the airspace.

As a practical matter, this argument, too, is faulty. The Act was designed to promote solar conversion in established areas. This is clearly suggested by the careful balance between the location of the solar collector and the type of prohibited obstruction. The Act envisions placement of the collector facing an already developed lot. Otherwise, since under the Act erection
Through the Solar Shade Control Act, the California Legislature declared that the planting of trees and bushes which shade a solar collector on neighboring land at certain times is a public nuisance. Only through distortion of the term can such activity be deemed a public nuisance.

Inconvenience or annoyance to the public is an essential element without which there is no public or common nuisance. A source of damage to a single private house is not a public nuisance, even if similar damage is inflicted on others in different places, the damage not becoming common or public.\(^97\)

Clearly, conduct prohibited by the Solar Shade Control Act does not inconvenience or annoy the general public. The annoyance is between adjoining landowners. One erects a solar collector; the other plants a tree which shades the collector, rendering it useless (or severely restricting its efficiency). The only possible general public injury argument is similar to one utilized in contending that the Act is merely a valid exercise of the police power for the public welfare: the use of solar power decreases reliance on traditional fuels which may be polluting or increasing our dependence on unreliable foreign sources.\(^98\) Therefore, the obstruction of a working solar collector would inconvenience the general public because the cumulative effect of a number of such obstructions would increase the need for traditional fossil fuels. This is a very tenuous argument.\(^99\) The of a building obstructing a solar collector is not a violation, it is difficult to imagine a solar energy user investing in a system in an undeveloped neighborhood. He would realize that the solar collector may be rendered useless by a neighbor's fully constructed home. The most likely solar collector obstructions in fully developed neighborhoods are newly planted trees or shrubs. Of course, an addition may be built onto a home which would obstruct the solar collector, but it is unlikely that obstructing additions will be a frequent problem. Judicious placement of the solar collector, avoiding building and vegetation shading, in effect "takes" otherwise usable airspace above the neighbor's land. The only thing the neighbor would be likely to use such airspace for is an area where new trees or bushes may grow. The trigger mechanism for the airspace-taking is not the regulation by the statute, but rather the decision of an individual to erect a solar collector. The Act then transfers airspace rights of the neighbors to the user of the solar collector.

\(^97\) 66 C.J.S. Nuisance § 2 (1950).
\(^98\) See supra text following note 95.
\(^99\) The argument may gain some strength only if the sense of affecting the general public is understood to be that concept as defined by the poet, John Donne.

No man is an Iland intier of it selfe; every man is a peece of the Continent, a part of the maine; if a Clod bee washed away by the Sea, Europe is the lesse, as well as if a Promontorie were, as well as if a Mannor of thy friends or of thine owne were; any man's death diminishes me, because I am involved in Mankinde; And therefore never send to know for whom the bell tolls; it tolls for thee.

classification of sunlight obstruction as a public nuisance is a very questionable use of that doctrine.

The legislature may not simply declare something a public nuisance which is not a public nuisance. The planting of trees or bushes which obstruct a neighbor’s sunlight access is not a public nuisance.\textsuperscript{100} A number of California cases support the conclusion that the obstruction of sunlight passing across one’s property is not in and of itself a nuisance.\textsuperscript{101} These cases affirm that public nuisance requires interference with the community’s rights.\textsuperscript{102} Although the relevant case law concerns the use of sunlight for illumination rather than solar power, the restriction on the adjoining landowner where solar power is at issue is the same. In either case, the burdened landowner would be required to keep his airspace unobstructed for the benefit of his neighbor or he is deemed to have created a public nuisance.\textsuperscript{103}

Because it is based on the public nuisance doctrine, the California Solar Shade Control Act is enforced by the district or city attorney.\textsuperscript{104} Thus, the burden of enforcing the Act is lifted from the solar user, but the cost of defense must still be borne by the neighbor. The only obligation placed on the solar energy user is the requirement that he complain to the district or city attorney. At that point, the resources of the state are brought to bear against the resources of the neighbor. The proportional cost to the state of one such prosecution is miniscule compared to the expense which must be borne by the neighbor.

\textsuperscript{100} \textit{See generally} 47 \textit{Cal. Jur. 3d Nuisance} § 4 (1979). “A public nuisance is one that affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted on individuals may be unequal.” 47 \textit{Cal. Jur. 3d Nuisance} § 24 (1979).


One recent California decision specifically concluded that mere obstruction of the sunlight is not a nuisance.

Accordingly, in this state an owner of property may construct or erect on his land any sort of structure provided it is not such as the law will pronounce it as a nuisance, but it is not a nuisance \textit{merely} because it obstructs the passage of light and air to the building of the adjoining owner or \textit{merely} because it obstructs his view of neighboring property.

\textit{Venuto,} 22 Cal. App. 3d at 127, 99 Cal. Rptr. at 357.

\textsuperscript{102} \textit{Venuto,} 22 Cal. App. 3d at 124, 99 Cal. Rptr. at 355.

\textsuperscript{103} Although the California Solar Shade Control Act permits obstruction of solar collectors by preexisting trees and shrubs or by buildings, as a practical matter it does preclude some airspace use.

\textsuperscript{104} \textit{Cal. Pub. Res. Code} § 25980 (West Supp. 1981). The Act provides that the district or city attorney give 30-day written notice to the party whose trees or bushes obstruct the solar
The Act’s enforcement provisions make it an excellent tool for neighbor harassment. The solar energy user runs no risk in filing a complaint. The state will conduct the prosecution while the neighbor will bear the financial and psychic burden of conducting a collector in violation of the Act. If no action to remove the obstruction occurs, then the solar energy user is to file an affidavit with the district or city attorney who will then prosecute the neighbor. *Id.* The Act further provides that its violation may result in a fine up to $500. A separate violation is deemed to exist for each day after service of the notice that the solar collector remains unobstructed. *Id.*

105. When relations between neighbors become very strained, the law, at times, is used as another tool for venting anger. Often the issues raised through legal proceedings are merely convenient manifestations of a long-simmering feud. One noteworthy case concerns the physical “trespassing” of an arm into a neighbor’s airspace. *Hannabalsan v. Sessions*, 116 Iowa 457, 90 N.W. 93 (1902). The case involved the erection of a “spite fence,” and although it is only marginally related to solar access, it is of sufficient anecdotal interest to justify a short aside.

The plaintiff and defendant in *Hannabalsan* were adjoining landowners who were constantly at war. On the parties’ boundary line was a board fence which was built in part by the plaintiff’s husband; “unfortunately, this barrier, while all sufficient to prevent the passage of the dove of peace, is neither high enough nor tight enough to prevent the interchange of brick bats or the bandying of approbrious epithets.” *Id.* 116 Iowa at 458, 90 N.W. at 94. The dispute started when the defendant threatened the plaintiff’s child with arrest for narrowly missing him with a thrown brick. The plaintiff and her husband who were nearby heard the threat and joined the quarrel. They discovered that the defendant had hung a ladder on a peg in the fence and they attempted to remove it. The defendant rushed to the defense of his property. Much of the testimony at trial conflicted. The plaintiff claimed that as she stuck her arm over the fence, invading the defendant’s airspace, the defendant struck her arm. The defendant denied striking the plaintiff. He contended that the plaintiff reached over the fence, seized his ladder and removed it from its resting place. The court summarized the defendant’s argument as follows:

> Thereupon, actuated by a natural and lawful desire to protect his property from such ravishments, and being goaded on by statements from the other side of the fence reflecting upon his mother and casting doubt upon his proper rank in the animal kingdom, he [the defendant] gently, and without unreasonable force, laid his open hand upon plaintiff's arm, and mildly but firmly suggested the propriety of her keeping on her own side of the fence.

*Id.* at 94.

The testimony continued to be in dispute. The plaintiff contended that as a result of the attack she became sick, nervous, and suffered great pain and anguish. The defendant contended that she had those ills prior to the incident. In addition he claimed she frequently worked outside “with the strength of an athlete.” *Id.* The court then commented on the testimony of the plaintiff’s physician: “Her physician, who was a witness in her behalf, says that while ‘she is not quite so fleshy as she was a year ago, she is still fleshy enough,’ and the jury, who saw her at the trial, seem to have adopted his conservative estimate.” *Id.*

The court upheld the verdict for the defendant and in doing so discussed the issue of the plaintiff violating the airspace of the defendant. As the court stated:

> The mere fact that plaintiff did not step across the boundary line does not make her any less a trespasser if she reached her arm across the line, as she admits she did. It is one of the oldest rules of property known to the law that the title of the owner of the soil extends, not only downward to the center of the earth, but upward ad coelum, although it is, perhaps, doubtful whether owners as quarrelsome as the parties in this case will ever enjoy the usufruct of their property in the latter direction.

*Id.* at 95. The opinion was rather sarcastic and concluded by stating that such litigation should not burden the courts. *Id.*
defense. This allocation of costs between the landowners does encourage installation of solar energy systems and discourage planting trees or shrubs which shade the collector; but, it also seems to encourage frivolous disputes. The system is also inequitable since a neighbor may elect to trim or remove vegetation, even though he has a good defense to an action under the Act. The cost of hiring an attorney and the possibility of a large fine make the choice to dispute the solar user's complaint economically unwise. Under the present Act, then, the solar energy user receives all the benefits of enforcement without bearing any of the costs while his neighbor's position is precisely the opposite.

A better alternative would be to make solar collector obstruction a private nuisance. In this way each party would have to consider economics in deciding whether to enforce his rights under the statute. The user could still collect damages for his loss; however, he would be more reluctant to use the courts as a means of harassing his neighbors.

106. The Act does provide defenses for the adjoining landowners whose vegetation obstructs or grows to obstruct a solar collector. Vegetation in place at the time the solar collector is erected is exempt even if it grows to obstruct the collector. Additionally, if such vegetation is removed by the landowner, the replacement vegetation is also exempt from the Act.

Adjoining landowners in some circumstances may plant new vegetation which will obstruct the solar collector. The Act provides that if the adjoining landowner plans a passive or natural solar energy system he may petition a court for relief from the Act's prohibition. The term passive solar energy system is not defined in the Act, but since the only prohibited collector obstructions are new trees and bushes, this exception is meaningless unless applied to them. The Act provides that the court may grant the adjoining landowner's petition for relief if the net energy saving of his passive or natural solar energy system will be demonstrably greater than that of the installed active solar collector system.

This section of the Act, CAL. PUB. RES. CODE § 25980 (West Supp. 1981), unfortunately includes trendy jargon which is confusing. For example:

Any person who plans a passive or natural solar heating and cooling system which would impact on an adjacent active solar system may seek equitable relief in a court of competent jurisdiction to exempt such system from the provisions of this chapter.

The court may grant such an exemption based on a finding that the passive or natural system would provide a demonstrably greater net energy saving than the active system which would be impacted. (emphasis supplied)

Id. The essence of statute drafting is the use of clear and concise language. Use of such language should give the reader of the statute a firm understanding of the conduct which the legislature intended to regulate. The reader should not be required to render modern slang or babble in order to understand a statute. Standard English should be the norm. For a discussion of legal drafting see R. Dickerson, THE FUNDAMENTALS OF LEGAL DRAFTING (1965); C. Jones, STATUTE LAW MAKING IN THE UNITED STATES (1923). Writers have joked fun at misuse of language. See e.g., E. Newman, A CIVIL TONGUE (1976) and STRICTLY SPEAKING: WILL AMERICA BE THE DEATH OF ENGLISH? (1974). For a general discussion on the use of language see W. Strunk and E. B. White, THE ELEMENTS OF STYLE (1979). The California legislature does a great disservice to the art of statute drafting by introducing babble into its Solar Shade Control Act.

neighbor or for protecting frivolous solar energy use. If the loss of access is so insignificant that it would be economically unwise for the user to proceed, then perhaps it is best that he lose the access. If his use of solar energy is so frivolous or so cost-inefficient that he is unwilling to take the risk of proceeding in court, then his neighbor should be able to enjoy planting trees or shrubs which shade his home and provide aesthetic benefits.\textsuperscript{108}

Another criticism of the California Shade Control Act is that it contains no requirement as to either the amount of power to be generated by the solar collector system, the type of use for which that power is intended, or the efficient use of that power.\textsuperscript{109} Under the statute, an unnecessarily large solar energy system would be protected by the 10 percent rule, even if only a small percentage of the output was actually needed by the solar user. Further, a solar collector used to heat a teapot would be protected from obstruction by neighboring vegetation. And, although the Act contains guidelines for the placement of the solar collector, it fails to provide direction or angle location requirements for the collector. An inefficiently angled solar collector could unnecessarily preclude planting some trees and shrubs on the adjoining property. No requirements concerning the efficient placement of the solar collector are stated in the Act. Solar access protection will inevitably infringe on the ability of an adjoining landowner to use his property. A properly drafted statute not only will protect solar access, but will ensure that the burdens placed on adjoining landowners will be minimal and will result in important energy benefits for the solar energy user. The California statute protects solar access, but does not ensure the fair, efficient use of solar energy.

A final problem with guaranteed solar access which the California Act fails to address is that traditional court designated remedies may be inappropriate for resolving solar disputes. Such remedies may not have the flexibility needed by a long-term, solar user-adjoining landowner relationship. They protect the user's right to the sunlight even though his needs or the needs of his neighbor may change. Solar energy is a new technological development. Fining the adjoining landowner or issuing an injunction prohibiting an obstruction may not recognize that the best solution to the dispute would be moving

\textsuperscript{108} This alternative might also provide for the award of attorney fees and other costs to the party winning a private nuisance action. This would cause the party with a less tenable position to consider seriously the risk of increasing his cost by an additional attorney fee assessment. Harassing suits or defenses may be inhibited by such a measure.

\textsuperscript{109} \textit{CAL. PUB. RES. CODE} § 25980 (West Supp. 1981).
the solar collector to a different location with compensation being awarded to the solar user. Since the Act affects property rights of the neighbor110 as well as the decision to use solar energy, a mediation procedure which provided an opportunity for flexible alternative solutions would be preferable to judicial action.

The California Solar Shade Control Act reflects a greater awareness of the rights of both the solar energy user and his adjoining neighbor than the New Mexico statute. Unlike New Mexico's legislation, California's Act attempts to balance the interest of the solar energy user in unobstructed sunlight and that of the neighboring landowner's in the continued use of his airspace. To accomplish this goal, the Act provides that: the prohibited obstruction be by vegetation only; the vegetation must be planted after the collector is built; the obstruction occur during certain hours of the day and cover a certain percentage of the collector; the collector be placed a distance from the property line and be elevated; and a passive system may be excepted from the Act's requirements. Despite these improvements over the New Mexico Act, problems still exist under the California effort. First, the Act may violate the fifth amendment either under a theory of an uncompensated taking or an unreasonable exercise of the police power. Second, the application of the public nuisance doctrine is improper. Third, the Act opens the door to unjustified, even malicious, suits over alleged obstructions. Fourth, efficient power generation for nonfrivolous reasons is not required. Fifth, the Act's reliance on the judiciary to resolve disputes may not be the most equitable method. These problems are serious deficiencies and point out that California's answer to the issues of solar access is far from satisfactory.

D. Iowa—Administrative Allocation for Solar Easements

A fourth approach for providing access to sunlight has been taken by Iowa.111 The Iowa Solar Energy—Access and Use Act is a legislative attempt to balance the needs of solar energy users against the rights of adjoining landowners. Under the Act, a Solar Access Regulatory Board reviews applications by solar energy users for solar access easements.112 The Act lists criteria for granting such

110. See United States v. Causby, 328 U.S. 256 (1945). The Court clearly recognized that a landowner has ownership rights in at least as much of the airspace which may be used in connection with the land. Invasion of that airspace is like an invasion of the land's surface. See generally Gergacz, Legal Aspects, supra note 12, at 24-26 (examining solar access issues for central solar utility projects).
112. Id. at 509.
easements and provides that the solar user must compensate the servient tenant for the easement.\textsuperscript{113}

As noted in connection with common law statutes,\textsuperscript{114} one of the major problems associated with protecting solar access through an express solar easement is obtaining that easement from the servient tenant. The common law does not provide a procedure for forcing the servient tenant to convey at a reasonable price. As a result, the utility of express solar easements as a means of encouraging solar energy use is limited. New Mexico\textsuperscript{115} and California\textsuperscript{116} have enacted statutes which guarantee solar access, but such statutes overly restrict the property rights of neighboring landowners. The approach taken by Iowa is significantly different. It recognizes the property interests of adjoining landowners while avoiding some of the difficult problems associated with mere codification of common law express easement doctrine.

The Iowa Act resembles a grant of eminent domain power to individual solar energy users. The user, with the approval of the Board, may take the airspace property of a neighbor for the limited purpose of guaranteeing sunlight access. The neighbor is awarded compensation for the taking of the airspace as determined by the Solar Access Regulatory Board and is paid by the party granted the solar easement. This approach seems to be the most equitable and workable one for providing solar access rights while protecting the property interests of adjoining landowners.

The Iowa statute responds in a reasoned manner to many of the other problems raised by the New Mexico and California attempts. The legislature was careful in its drafting of the statute to provide clear procedures and requirements. The statute defines most relevant terms\textsuperscript{117} and creates a solar access regulatory board to act on applications concerning solar easements.\textsuperscript{118} The Act requires that enough information appear in the solar user’s application to provide a sufficient description of the parcels of land, the proposed easement, and the type and location of the solar collector.\textsuperscript{119} The applicant must explain his need for the solar access easement as well as

\textsuperscript{113} Id. at 510-13.
\textsuperscript{114} See supra text at note 33 and notes at notes 35-54.
\textsuperscript{115} See supra text and notes at notes 55-82.
\textsuperscript{116} See supra text and notes at notes 83-110.
\textsuperscript{118} Id. at 510. The solar access regulatory board need not be a separately created unit. Instead, it is a local board (city or county council designated) given jurisdiction by the council to act on solar easement applications. If no designation is made then the district court acts on the applications.
\textsuperscript{119} Id. at 510-11.
indicate that attempts to voluntarily acquire it have failed.\textsuperscript{120} The board may modify the solar user’s request before granting the easement.\textsuperscript{121} These requirements eliminate frivolous and inefficient uses of solar energy which might result in easements unnecessarily burdening the servient tenant.

The application procedure reflects concern for the interests of both the solar user and the adjoining neighbor in the use of their properties. Under Iowa’s approach, an adjoining neighbor may not frustrate the solar energy user’s quest for an unobstructed flow of sunlight. Yet, the solar energy user is inhibited from making a frivolous or inefficient use of his solar energy system by the requirement that he pay for the easement. The easement is created either by voluntary agreement or by the decision of a third party. This is a major improvement over the New Mexico\textsuperscript{122} and California\textsuperscript{123} approaches which are so concerned with protecting solar access that they overly restrict the interests of neighboring landowners.

An important provision in the Act concerns compensation awarded to the servient tenant. The statutory measure of compensation is the difference between the fair market value of the servient estate prior to and after the granting of the solar access easement.\textsuperscript{124} This may prove, at least at the outset, to be a rather difficult determination to make, given the infrequent severing of airspace easements from the balance of the real property. “In general, the valuation of a solar access easement in economic terms must be based on the discounted net present value of all cost reductions attributable to the easement itself.”\textsuperscript{125} Techniques have been suggested for valuing solar access easements which may assist in assuring the consideration of all the relevant variables in order that a fair compensation award will be entered.\textsuperscript{126} The Iowa scheme permits an accounting of all relevant factors to reach an equitable compensation award.

A further indication of the care used in the Iowa statute to balance the parties’ interests is the provision that the solar easement may not be granted until the compensation award has been deposited with the Board.\textsuperscript{127} This provision serves to ease the burden on the

\textsuperscript{120} The Iowa Act also provides provisions and requirements for the voluntary creation of an express solar access easement. Id. at 514.
\textsuperscript{121} Id. at 512.
\textsuperscript{122} See supra text and notes at notes 55-82.
\textsuperscript{123} See supra text and notes at notes 82-110.
\textsuperscript{125} Gaumitz & Gergacz, supra note 22, at 143.
\textsuperscript{126} Id. at 138-43.
servient tenant by assuring receipt of payment without his resorting to exhortation or litigation.

A final section of the Act provides a procedure for terminating the solar access easement. The Act contemplates three conditions under which the easement would be terminated upon application by the servient tenant: failure to install and operate the solar collector within two years after the order granting the easement; failure to use the solar collector for more than one year; and failure to replace the solar collector within one year of destruction or removal. The conditions for termination reflect the notions that the easement should expire if unused and that the easement, once granted, becomes property appurtenant to the dominant estate.

Although the Iowa approach is more flexible than the solar access approaches of New Mexico and California, it too poses several problems. First, the same constitutional questions exist concerning compensation and public use as were raised under the New Mexico and California Acts. The concern shown by the Iowa Act for the rights of landowners adjoining the solar energy user distinguish it from New Mexico and California, which may strengthen its claim to constitutionality. A second problem with the Iowa Act concerns its procedure for extinguishing the solar easement.

There are two problems with the constitutionality of the Iowa approach. Both involve construction of the eminent domain power—in particular, the meaning of public use. Eminent domain is the right of government, upon payment of just compensation, to assert its dominion (to “take”) over private property for public use without the property owner’s consent. To be constitutionally exercised, however, the eminent domain power cannot involve a purely private taking of another’s property. Nor does the power legitimately allow the public taking of private property for private use. Clearly, the individual solar energy user who is empowered to “take” a neighbor’s airspace under the Iowa Act is not the government. Neither is the fulfillment of an individual’s energy needs a clear public use of the property taken. 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.

However, the eminent domain doctrine may be analyzed in such a

128. Id. at 513-14.
129. Id.
130. See supra text and notes at notes 64-74 and 93-96.
131. BLACK’S LAW DICTIONARY 616 (rev. 4th ed. 1968); 1 NICHOLSON EMINENT DOMAIN §1.11 (rev. 3rd ed. J. Sackman ed. 1973). The problem of the “taking” for a private use is discussed supra text and notes at notes 93-96.
manner as to minimize those constitutional problems. The right of eminent domain is not limited solely to the government. Government may delegate that power to public or private corporations, agencies, or even individuals. The Iowa Act provides that an individual solar energy user may petition a board requesting the award of a solar access easement through a neighbor's airspace. Whether the eminent domain power is vested in the petitioning solar user or in the board which actually awards the easement is not crucial. The legislature has the power to delegate the eminent domain power as has occurred in the Iowa Act. Therefore, the first constitutional question—whether the Iowa Act involves a purely private taking—is not at issue.

The second constitutional issue raised—a public taking for private use—turns on the meaning of public use. As discussed earlier, describing the use of a neighbor's airspace to supply unobstructed sunlight for an individual collector as "public" is a distortion of the term. This distorted use of the term "public" is inconsistent with the narrow view of eminent domain's "public use" requirement. This narrow view requires that the public use of the taken property be held in common by all. Under this view, it is not the amount of use which the public makes of the property, but rather the extent of the public's right to use the property which makes a use "public." The Iowa Act fails to meet this view of "public use" because the only person with a right to use the easement is the individual solar energy user. The easement does not involve the public, and the public does not have the right to use that airspace any more than it has the right to use coal purchased by an individual homeowner as fuel for his coal-burning furnace. Under this narrow view, the Iowa statute would appear to be unconstitutional.

A more expansive view of "public use" has been suggested in recent years and is gaining acceptance. It holds that:

Anything that tends to enlarge the resources, and promote the productive power of any considerable number of inhabitants of a section of the state, or which leads to the growth of towns and the creation of new resources for the employment of capital and labor, and contributes to the general welfare and the prosperity of the whole community, constitutes a public use.

133. See generally 1 Nichols on Eminent Domain, supra note 131, at §§ 3.1(2), 3.21(2).
135. See supra text and notes at notes 93-98.
136. S. Kraemer, supra note 22, at 144.
137. Id. at 145.
138. Id.
As noted by its findings, the Iowa legislature had this broad view in mind when it drafted the statute. At least one court has held such seemingly individual activity to be a “public use.” Further, there are also good reasons to utilize an expansive definition of “public use.” Unlike the New Mexico and California Acts, the Iowa Act provides compensation to the servient tenant for the use of his property. The “public use” concept should be narrower in the land use regulation context because no compensation is paid to the owner of the regulated land. Under those circumstances, the government should be required to demonstrate a clear, direct benefit to the community as a whole, not attenuated “John Donne” benefits. Eminent domain public use, however, should have more flexibility since the burdened landowners will be compensated. The Iowa Act involves a creative attempt by Iowa to meet the need for adequate legal protection and encouragement for solar energy users, while continuing to be fair in the treatment of their neighbors. “The inn that shelters for the night is not the journey’s end. The law, like the traveler, must be ready for the morrow. It must have the principle of growth.”

Thus, the expanded meaning of public use is appropriate here, and as such, the statute is constitutional.

The second problem with the Act arises with respect to the termination of the solar access easement. The list of factors for extinguishing the easement limits the reason for termination to lack of use by the dominant tenant. This is very shortsighted by the Iowa legislature, which otherwise has been quite innovative in its approach. Solar energy collection is a new technology; it may be that the amount and location of open space needed for solar collection may change as new collection devices are developed. Yet, under the statute an easement owner retains the entire easement, even if his most recently installed collector system requires less unobstructed

139. The legislature noted the need for reliable energy supplies in an era of shortages, dependence on foreign energy sources and rapid consumption of nonrenewable resources. Solar energy, the legislature found, was a desirable, renewable source of energy, which if developed, would keep money currently leaving Iowa within the state. However, the legislature noted an obstacle to the development of solar energy in the state: inadequate laws concerning solar access rights. The legislature then concluded that “[i]t is therefore in the public interest and the interest of the state to provide adequate laws which will expedite the development and use of solar energy.” Solar Energy—Access and Use, 1981 Iowa Legis. Serv. 508-09 (West).


141. See supra note 99.


143. See supra text accompanying notes 128-29.
airspace than a previous collector. Simply because the right granted to the solar energy user is called an easement, the legislature makes it a virtually permanent part of the solar user's property.

Uses of property change. Unnecessarily encumbering a large tract of land with solar easements may inhibit future development and use of that property. One of the reasons nineteenth century courts rejected prescriptive creation of easements for sunlight was that they would be inconsistent with the ever-changing uses and development of land. Easements would unduly restrict future use of the property. To remedy this potential problem, it would make sense to have a procedure for the return of unneeded airspace to the servient tenant, in the event that the solar energy user's needs change; perhaps the reverse of the solar access granting procedure contained in the Act. The servient tenant could petition the board for alteration of the easement so that it crosses a different portion of his airspace, or for termination of all or a part of the easement. Compensation, paid by the servient tenant, could be awarded to the solar user for the loss of the use of the easement or to offset costs incurred by the solar user in relocating or modifying his solar energy system to conform to a modified easement. Such a procedure would eliminate the only major weakness in the Iowa law on solar access.

IV. CONCLUSION

This article has discussed the four statutory approaches which have been adopted in order to provide a mechanism so solar energy users might acquire a legal right to unobstructed sunlight. To reiterate, these four statutory approaches involve: codification of common law negative easement doctrine statutes; prior appropriation statutes; shade control statutes; and administrative allocation procedures. Each method has been analyzed concerning its ability to protect solar access as well as its effect on traditional property rights.

The common law codification approach has been adopted by the most states. However, the approach is flawed in its inability to provide sunlight access protection for the solar user who is unable to reach an agreement with his neighbor through whose airspace the sunlight will pass. Such an approach does little to encourage solar

144. See supra notes 23-29.  
145. See generally Gergacz, Solar Energy Law, supra note 12, at 144-45.  
146. For a discussion of techniques to value a solar access easement see Gaumnitz & Gergacz, supra note 22.
energy use or simplify the acquisition of solar access protection.

The other three approaches innovatively address this problem by providing solar access without relying on an agreeable neighbor. The New Mexico (prior appropriation) and California (shade control) Acts protect sunlight access upon proper installation of the solar collector. The property rights of adjoining landowners to the airspace above their land is unduly restricted. These two statutory approaches are also flawed. The Acts so favor the solar energy user that their effect is seriously to burden any landowner whose neighbor erects a solar collector. In attempting to solve the problem of the common law access approach, these Acts go too far in the limits they impose on adjoining landowner airspace use.

The Iowa Act (administrative allocation procedures) is the most innovative and workable solar access statute yet enacted. It balances the need for solar access protection with the burdens such a protection will place on adjoining property. The compensation features of the Act are in marked contrast to the overreaching land-use planning statutes in effect in California and New Mexico. Although the Iowa Act may be criticized as inflexible, its approach should be carefully studied by other states considering solar access protection.