A Comprehensive Review of Solar Access Law in the United States

Suggested Standards for a Model Statue and Ordinance

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that as many buildings and lots as possible can have maximum access to sunlight. Trees, major vegetation, and taller buildings must be placed in such a way that the shadowing of adjacent residential structures will be minimized. In the site-planning process, a developer can provide that the solar sky space above neighboring parcels of land will remain clear and unobstructed to preserve solar access. One way to accomplish this objective is to provide for solar easements, which are defined as restrictions on adjoining lots that would prohibit intrusions into the solar sky space, such as another building or trees. A restrictive covenant can accomplish this as well by providing that no solar energy collector shall be shaded by any building, vegetation, or obstruction between certain hours on a certain date of any year.

Landscape ordinances can be modified to promote vegetation that complements solar energy use or provides exemptions for trees and vegetation that block solar access.

Solar Easements

A solar easement is the prevalent method of assuring solar access. The general principle of law in effect in the US is that a land owner owns at least as much of the air space above the ground as he can occupy or use in connection with the land, and the fact that he does not occupy it in a physical sense by erection of buildings and the like is not material (Caton, 1980). Because the property owner does have property rights in the air space above the land, he has the right to grant an easement for light within that air space. However, an easement for light and air cannot be created by implication nor can it be implied by any length of continuous enjoyment (Caton, 1980). This decision further eroded the doctrine of Ancient Lights and resulted in the need for statutory authority for modern solar easements (Caton, 1980).

Covenants, Conditions, and Restrictions

Condominium and homeowner associations are fairly common entities in residential communities today. The associations generally govern the affairs of the community and, in addition to enforcing and amending restrictive covenants, may impose other restrictions on property owners subject to their rules.

The condominium association is a corporate entity and has the authority to govern its affairs in accordance with a set of duly adopted bylaws. The bylaws of a condominium association are included in the declaration of condominium, the provisions of which are considered binding agreements that run with the land. Generally, condominium bylaws will not be invalidated unless their application is arbitrary, they are in violation of public policy, or they infringe upon a constitutional right. Where the bylaws empower the board of directors of the association with discretionary authority, such as architectural review and approval, its action must be reasonably related to the promotion of the health, happiness, and peace of mind of the unit owners. In addition, the courts have held that where the decision to allow a particular use is within the discretion of the board, the use must be allowed unless it can be demonstrated to be antagonistic to the legitimate objectives of the association.

A homeowners association is an organization consisting of property owners within a subdivision that has been granted or assumes certain powers and is in essence residential private government. Its authority and powers are contained in a variety of documents, including restrictive covenants and bylaws. Restrictive covenants are mutual agreements contained in deeds to real property. They are typically part of planned communities and subdivisions where the developer has stipulated the architectural form and general scheme of construction in the community. These restrictions are not personal in nature but rather are considered to “run with the land.” That is, they are effective against all subsequent owners of the affected property.

The most frequently found restrictive covenants relating to the use of solar energy include restrictions on where collectors may be located (e.g., a place other than on the front of the house), those that require board-of-architect approval as a condition precedent to external structural alterations (such as the installation of the solar collectors anywhere on the house), prohibitions against protrusions above roof level (television antennas are the usual subject of these restrictions but they can also affect roof-mounted solar collectors), or an outright prohibition of solar systems.

Homeowner association bylaws often contain the details as to how the powers of the association will be exercised and will often include the specifics of the guidelines to be followed by architectural review boards. Regarding the validity of homeowner association bylaws, it has been suggested that the power of the association is without limit, although basic consideration regarding the validity of use restrictions may still be relied upon.

Courts have long held restrictive covenants to be valid exceptions to the general principle against restraint on free use of property. Judicial acceptance of restrictive covenants is premised on the supposition that such recognition is not contrary to public policy or express law. The restriction must also be reasonable. A subdivision's restrictive covenant that effectively or directly prohibits the use of solar will not be upheld where state or local law expressly provides otherwise through a solar-rights statute or ordinance. If the restrictive covenant precedes the effective date of the statute or ordinance, the restriction may be invalidated by the court based on public policy considerations.

In the absence of a solar-rights law, it may still be possible for a homeowner to overcome a restrictive covenant that prohibits the use of solar energy. The deed that conveyed the covenant may stipulate a time of expiration for the restriction. In addition, the owners subject to the restriction and the courts may terminate the restriction under certain conditions.

Express termination

The restrictive covenant may specifically include the time and conditions under which it will no longer be effective. From a practical point of view, however, it is doubtful that a provision of this kind would be found in a restriction against solar energy. Since the motivating rationale behind these restrictions is usually based on aesthetics, the doctrine of "once an eyesore, always an eyesore" will usually make an express termination date unlikely. An alternative provision would stipulate the time for termination with a provision for automatic extension upon landowner approval. In either case, provisions dictating duration are valid and are consistent with the principle affording free use and enjoyment of land.

Modification

A landowner who is subject to restrictive covenants may, by release or upon agreement with the other owners within the subdivision, modify the restrictions. The deed may specify the manner by which the modification will be made, for example, by all or a majority of the affected owners. The developer may also exercise his or her right to modify the restrictions. However, agreement by the landowners to such modification is necessary unless the developer expressly reserved the right to future modifications.

Modification of a restrictive covenant could effectively operate to remove restrictions against the use of solar equipment. For example, where a restrictive covenant prohibits alterations to the street-facing facades of homes in the subdivision, an exception could be provided when the alteration is a solar energy system. The exception could remove all restrictions against the use of solar energy or allow the use of solar energy, subject to approval of an architectural review board. In either case, the restriction would still be effective against all frontal alterations except solar energy systems.

Cancellation

A court of competent jurisdiction may also act to terminate restrictive covenants. In a case in which a homeowner is violating a restriction, other parties to the covenant may sue to recover damages for breach of the covenant, or an injunction may be sought to enforce the restriction. The court may award damages or grant the injunction where it determines the activity is in fact a violation of a valid restriction. The court may, on the other hand, determine the activity is not a violation and deny an award of damages or the injunction. Or, the court may determine on the basis of "changed conditions" that the restriction is no longer valid and thus may order it cancelled. The latter instance is another method of terminating restrictive covenants that prohibit solar and one that has a good chance for success, given current energy policies favoring the use of solar energy.

There are affirmative defenses that can be raised in a situation in which the homeowner is taken to court by his association. Where other homeowners have acted in violation of the same restrictive covenant and the homeowners in the subdivision took no action or approved of the action, the solar owner may allege a waiver or abandonment of the restriction.

For example, in a subdivision where solar collectors are prohibited on the street-facing facade, yet one or more homeowners have installed collectors on this facade without reprisal from other homeowners, the court may deny any request for an injunction against subsequent homeowners installing solar collectors on the street-facing facade. Allowing collectors on the side-yard facing facades of the home that were, nonetheless, visible from the street may not constitute a waiver or abandonment of the restriction. One could maintain an argument for abandonment in that the overall effect is the same, that is, the introduction of a readily visible nonconforming or unaesthetic element into the community. Where work on an installation subject to the restriction has been allowed to progress to the point or where an injunction would present an undue hardship to the defendant, an injunction may only be granted where a nuisance has developed. The scope of the solar project would have an impact on the use of this defense. As in all equitable considerations, the benefits and burdens of competing interests are weighed by the court in arriving at its decision.

Local ordinances

Cities and counties are authorized to adopt ordinances for a variety of purposes. This typically includes the authority to prepare and enforce comprehensive plans, zoning regulations and building codes and to adopt ordinances and resolutions necessary for the exercise of its powers. Despite these broad grants of power for local self-government, the local ordinance is still subject to judicial scrutiny. In addition to the requirement that an act be one within the authority of the local government, it must be reasonable, equal, and impartial in its operation. However, there is a strong presumption of validity of a local ordinance, since local officials are in a better position than the courts are to have knowledge of any local conditions upon which the ordinance is predicated.

In spite of the scope of authority of the local governing body, the principles affecting the validity of its actions still provide several bases to void an anti-solar ordinance. The concepts of reasonableness, consistency and promoting the public interest will be considered. The reasonableness of a local ordinance will be gauged in the context of current events. What was reasonable in an era of inexpensive, plentiful fossil fuel supplies may no longer be considered reasonable given today's energy policies that encourage the use of renewable energy.

While there is authority indicating that land use restrictions may be based on aesthetic considerations alone, the courts have generally held that building regulations based solely on aesthetic considerations cannot be supported under the police power or in the absence of an actual finding of fact that the restrictions bear a reasonable relation to the public welfare. Given our current energy predicament, it would appear that restrictions

imposed on the use of solar energy devices would contravene rather than promote the public interest.

Where a state law prohibits a local government from enacting an ordinance, which directly or effectively prohibits the use of solar energy, the state law will take precedence over the local ordinance. In the case of an ordinance that was in effect prior to the state law, the solar owner may still prevail by citing public policies that favor the use of solar energy.

Analysis of State Solar Access Laws

Thirty-four states (and a handful of municipalities) have some kind of protection for solar easements or solar rights. That leaves 16 states that have no protection. Some of the states lacking solar easements or solar rights laws are surprising, given the other pro-solar/renewable energy policies in the state (Connecticut, Illinois, Pennsylvania, Texas, Vermont, for example). However, even those states that do have solar easements or solar rights laws have enforcement issues that can render the laws ineffective or subject to expensive litigation to enforce. The preliminary review of state solar access and solar rights laws indicates a real need for simplified enforcement of the protection afforded by solar rights laws. In addition, the voluntary nature of solar easement statutes makes them useless to property owners that have neighbors unwilling to provide the solar easement.

There are, however, some notable exceptions to this generalization, and the draft model statute will incorporate features of those states with good law.

Solar easement statutes

Solar easement statutes have very common elements, and virtually all are "voluntary," meaning that a solar owner cannot require that their neighbor agree to a solar easement. The standard elements of a typical solar access law are that it must be in writing, be recorded (as any other real property interest), express the horizontal and vertical angles of the easement, include provisions relating to the grant or termination of the easement, and provide for any compensation arrangements to the grantor for maintaining the easement or to the grantee in the event of interference.

Short of mandating solar easement, one approach used by a state includes a registration process that allows a solar owner to register their solar system with the local governing body—essentially putting their neighbors on notice that the solar system is in place. In that event, a solar owner can, in essence, impose a solar easement on the neighbor. This is a very unique and potentially effective solar access tool. There are also states that direct the local governing body to require a solar access element in subdivision or development plans submitted for their review and approval. While this is noteworthy, it will only protect solar access in new construction.

Solar rights

There are essentially two models that have perpetuated over the last two-plus decades that attempt to protect the right of homeowners to install solar energy systems. The first model addresses local government ordinances; the second model addresses private land use restrictions, such as covenants, conditions, and restrictions in deeds, as well as declarations in condominiums documents. Some states address both.

The typical language of a statute that protects solar rights at the state or local government level will contain language such as, "The adoption of an ordinance by a governing body which prohibits or has the effect of prohibiting the installation of solar collectors is expressly prohibited." The typical language of a statute that protects solar rights in the context of private land use restrictions is, "Any covenant, restriction, or