



LEGAL TOOLS TO PROTECT ACCESS TO SOLAR AND WIND RESOURCES

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With the growing interest in harnessing Nevada's plentiful wind and solar resources for the production of electricity, the question arises: once a solar or wind facility has been built, what legal protections exist to prevent someone from subsequently taking steps that might obstruct the sun's rays, alter air flow patterns or otherwise interfere with the harnessing of these renewable energy sources?

For example, does the owner of a building that uses roof-top solar panels for its power needs have any legal grounds to prevent the construction of an adjacent shade-creating high-rise? Does the law protect a wind power company with considerable capital investment in turbines and other infrastructure from a competitor who wants to locate another wind park nearby, in a way that reduces the total wind energy that can be captured?

While the framework in which these issues now arise may be new, the concepts of negative easements for light and air have been contemplated by courts for many years. This article provides an historical overview of relevant legal concepts and then discusses how the law addresses the competition for light and air resources in this new era of renewable energy development.

Historical Overview

Any discussion of the legal framework for protecting access to light and air must necessarily start with the English doctrine of “ancient lights.” Under the ancient lights doctrine, a landowner could acquire an implied easement for the passage of light and air over adjoining property through prescription.¹ In other words, where the land had historically benefitted from unimpeded light infiltration and air flow, a landowner could enjoin new uses on adjacent property that would interfere with the existing use.

The ancient lights doctrine did not get much traction in the United States and was eventually repudiated here. The reason is simple: in this young and rapidly growing country, society had a significant interest in encouraging, rather than restricting, land development. Additionally, if a landowner could claim an unwritten negative prescriptive easement over a neighbor’s property, the purposes of the recording statutes would be frustrated. As a result, the majority American rule is now that the law does not recognize an implied easement for light or air. A landowner’s use and enjoyment of air and light is limited to the actual land owned and does not spill over to an adjacent property by way of an implied easement.

The applications of this rule are numerous. In New Hampshire, an owner could not claim a prescriptive easement to occupy the adjoining owner’s air space with portable air conditioners.² In the District of Columbia, the court allowed an owner to build a wall that completely obstructed the windows of a neighbor’s basement.³ In Florida, the law did not prevent the construction of a 14-story addition to the neighboring building that would shade the cabana, pool and sunbathing area of a luxury hotel.⁴ In sum, it is now well settled under the common law that, in the context of renewable energy production, someone who is capturing solar and wind resources for the generation of power cannot use the law of prescriptive easements to protect the unimpeded access to those resources in perpetuity.

In fact, some states have enacted legislation that codifies the common law prohibition on implied easements for light and air. The Missouri Legislature has explicitly determined that “easements for solar light shall be considered a negative easement and cannot be acquired by prescription but must be negotiated expressly.”⁵ To that end, the statute demands that any written instrument creating a solar easement must set forth the specific vertical and horizontal angles at which the solar easement extends over the servient tenement. Similarly, in Kentucky, the legislature expressly stated that a solar easement cannot be acquired by prescription and confirmed that express easements for access to sunlight are subject to the same conveyancing and recording requirements as other real property instruments.⁶

Other Common Law Theories

Although American courts have ubiquitously rejected the notion of prescriptive easements for light and air, previously existing access to these resources has been upheld under other common law theories. For example, even where a claim for an implied easement has been ineffective, litigants have had some success asserting that the interference with an established use of light or air amounts to a private nuisance. A private nuisance exists where the use or enjoyment by one landowner unreasonably interferes with or impairs the use or enjoyment of another landowner. Because the analysis of whether or not a private nuisance exists involves a comparative evaluation of the competing uses, courts have been willing to recognize that an established use of light or air can trump a proposed conflicting use under a private nuisance theory.⁷ Due to the necessary balancing test required for a nuisance analysis, however, the law of nuisance does not provide a developer of renewable power with enough certainty that his unrestricted access to solar or wind resources will be protected into the future.

Other Legal Mechanisms

In light of the limitations that exist in the common law, other methods have emerged for protecting access to solar and wind energy, including statutes, permits and zoning. Many states, including Nevada, have enacted legislation allowing for the creation of express easements to facilitate the capture and use of renewable energy sources.⁸ These types of statutes recognize the validity of private solar and wind easement arrangements between landowners.⁹ While express easements for solar or wind access can be established at common law, legislation that explicitly codifies the common law rule is nevertheless beneficial to provide additional legal safeguards for renewable energy users.

Most statutes related to easements for solar and wind energy regulate the form and content of the written instrument to ensure its enforceability. As an example, the Nevada statute allows for the creation of a solar easement agreement between neighboring landowners and sets forth specific guidelines as to what must be included in the writing to ensure valid creation of the easement. This includes “a description of:

- (a) The burdened and benefited lands;
- (b) The location, size and periods of operation of the equipment to be used in collecting the solar energy;
- (c) The open area to be preserved for passage of direct solar radiation across the burdened land to the collecting equipment, by dimensions or bearings from the collecting equipment or by a statement that no obstructions which cast a shadow on the equipment during its periods of operation are allowed on the burdened land.”¹⁰

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While seemingly simple in principle, the practical obstacles of obtaining a written easement for light and air may be prohibitive. For example, wind flow patterns change with the speed and direction of the wind, the size of obstructions, temperature and a host of other factors. It just may not be feasible to acquire an express easement from the multiple parties whose activities could influence the air flow necessary to maximize the capture of wind resources. Additionally, neighboring landowners might be unwilling to grant long-term easements that would limit their own future development possibilities. Without long-term commitments to the unrestricted access of wind or solar resources, it would likely be difficult to justify the considerable investment of time and resources required for the development of a renewable energy project. Nevertheless, the statutory recognition of express easements for wind and solar resources is an important step in facilitation of renewable energy development.

Besides providing for express easements, states use other statutory methods to encourage the development of

renewable energy. Some legislation bars the imposition of a restrictive covenant that might interfere with the capture and use of solar or wind energy. In Nevada, for example, “[a]ny covenant, restriction or condition contained in a deed, contract or other legal instrument which affects the transfer, sale or any other interest in real property that prohibits or unreasonably restricts the owner of the property from using a system for obtaining solar or wind energy on his property is void and unenforceable.”¹¹ Many other states have enacted similar protections.¹² Additionally, California’s Government Code prohibits local governments from adopting ordinances that create unreasonable barriers to the installation of solar energy systems, including restrictions based on aesthetics.¹³

Zoning is another popular method of encouraging the use of wind and solar resources for energy production. The New York City General Law allows zoning districts to pass regulations that provide for “adequate light, air, convenience of access, and the accommodation of solar energy systems and equipment and access to sunlight necessary therefore”¹⁴ In Colorado, county planning commissions have the right to

create zoning ordinances or regulations to protect homeowners with solar energy devices.¹⁵ In addition to statutes and zoning, some states expressly authorize the granting of municipal permits for solar energy systems.

Wisconsin, for example, has a statute that allows municipalities to adopt a permitting system for solar access and wind access permits.¹⁶ Such permits may be granted if the proposed system will not unreasonably interfere with the orderly use of land, and the benefits to the applicant and the public exceed any burdens. If the homeowner uses the property in a way that is contrary to the permit, remedies to the aggrieved party include damages, costs, injunctive relief and attorneys' fees.

This type of permit program has survived legal challenge. A Colorado court found that, under that state's solar access statute, the holder of a solar access permit could enforce his permit against other property owners.¹⁷ The court noted that the permit would be valid, so long as the holder has recorded the permit such that a comprehensive title search would reveal that a permit had been recorded against the property.

States, counties and municipalities walk a fine line in creating such protections, balancing the rights of all property owners with the growing desire to facilitate the use of renewable energy resources. One battle that has recently gained significant media attention shows the complications that are attendant with regulation in this area. In 1978, California adopted the Solar Shade Control Act.¹⁸ Under the law, property owners could face criminal prosecution for public nuisance and fines of \$1,000 per violation if their trees grew to shade a solar panel, regardless of whether the trees predated installation of the solar collection system. A conflict emerged between two neighbors, both of whom considered themselves dedicated to the environment, and both of whom vehemently opposed the neighboring use.¹⁹ One couple had planted redwood trees in their yard. Several years later, their neighbor installed solar panels. As the trees grew, the neighbor claimed that the trees were reducing the amount of electricity that he could generate with his solar panels and demanded that they be removed.

The redwood tree owners were convicted of violating the Solar Shade Control Act, and several of the trees were ordered cut down. Subsequently, California enacted a new law under which trees can grow to shade solar panels without penalty, so long as the trees were in place first, and violations are not considered criminal.²⁰ This squabble exposed one of the many problems that may occur in this emerging area of the law and underscores the difficulties inherent to balancing competing interests with regard to renewable energy generation.

Conclusion

Although in the past, the common law provided some protection for the capture of light and wind resources, alternative statutory and regulatory methods have evolved to encourage and facilitate the use of these renewable energy sources. Nevada has some significant protections in place already which are comparable to those enacted elsewhere, allowing homeowners to voluntarily enter into legally binding solar easements and prohibiting restrictive covenants that impede the construction of wind and solar energy systems on private property. As solar and wind energy collection becomes more widespread in Nevada, the competition for light and air resources will inevitably lead to some conflict. Until that time, it is hard to know whether Nevada's statutory scheme is adequate to address this emerging area of law. **NL**



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- 1 See *Wilson v. Handley*, 119 Cal.Rptr.2d 263, 267 (Cal. Ct. App. 2002); *Kruger v. Shramek*, 565 N.W.2d 742, 747 (Neb. 1997); *Collinson v. Scott*, 778 P.2d 534, 537 (Wash. 1989); *Prah v. Maretti*, 321 N.W.2d 182, 188 (Wisc. 1982) for general discussion of ancient lights doctrine.
- 2 *Tenn v. 889 Assocs., Ltd.*, 500 A.2d 366, 372 (N.H. 1985).
- 3 *Hefazi v. Stiglitz*, 862 A.2d 901, 911-12 (D.C. 2004).
- 4 *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So.2d 357, 360 (Fla. 1959).
- 5 Mo. Rev. Stat. § 442.012.
- 6 Ky. Rev. Stat. § 381.200.
- 7 See *Tenn v. 889 Assocs., Ltd.*, 500 A.2d 366, 370 (N.H. 1985); *Prah v. Maretti*, 321 N.W.2d 182, 189-191 (Wisc. 1982).
- 8 NRS 111.370.
- 9 See, e.g., Alaska Stat. § 34.15.145; Cal. Civ. Code §§ 801, 801.5; Fla. Stat. Ann. § 704.07; Kan. Stat. Ann. § 58-3801; Minn. Stat. Ann. § 500.30; Mont. Code Ann. § 70-17-301; N.J. Stat. Ann. § 46:3-24; Or. Rev. Stat. § 105.895; Utah Code Ann. § 57-13-1.
- 10 NRS 111.370.
- 11 NRS 111.239.
- 12 See, e.g., Fla. Rev. Stat. § 163.04; Col. Rev. Stat. § 38-30-168; Ariz. Rev. Stat. Ann. § 33-439 (2006).
- 13 See California's Solar Rights Act, Cal. Gov't Code § 65850.5.
- 14 New York Gen. City L., Article 2-A § 20(24).
- 15 Col. Rev. Stat. § 30-28-111.
- 16 Wis. Stat. Ann. § 66.0403 "Solar and wind access permits."
- 17 *Arndt v. City of Boulder*, 895 P.2d 1092 (Colo. Ct. App. 1994).
- 18 California Public Resources Code §§ 25980-25986.
- 19 See www.nytimes.com/2008/04/07/science/earth/07redwood.html; www.npr.org/templates/story/story.php?storyId=18905405 (accessed May 1, 2009).
- 20 See California Senate Bill 1399 (2008).