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## Access to Sunlight: New Mexico's Solar Rights Act

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# NOTES AND COMMENTS

## ACCESS TO SUNLIGHT: NEW MEXICO'S SOLAR RIGHTS ACT

### INTRODUCTION

As fossil fuels become scarce and more expensive, the sun's rays will become an increasingly important source of energy. Solar collection systems for heating and cooling buildings are expected to be the first widespread uses of solar energy. These systems require the solar user to invest a large initial sum to install the solar collector panels. This investment is then repaid over the life of the system through lower fuel costs. But because the sun's rays usually strike the earth at a slant, developments on neighboring property can interfere with a collector's access to sunlight and render the system useless. Prospective solar users may expect some guarantee of solar access before they will risk an investment in a solar energy system.

Some state legislatures have already acted to help ensure access for solar collection. Two states have focused on protecting solar access in new subdivisions. A Minnesota statute allows municipalities to plan for solar access through subdivision regulations,<sup>1</sup> and a California statute provides that local governments may require the dedication of solar access easements in the course of approving new subdivisions.<sup>2</sup> The most common approach, however, has been the statutory creation of express solar easements. To date, California, Colorado, Georgia, Idaho, New Jersey, North Dakota, and Virginia all have statutes of this type.<sup>3</sup>

Solar easements have two main advantages: they may be contractually created<sup>4</sup> and they provide secured access in established neighborhoods as well as in new ones. One disadvantage with this approach is that, depending on the number of neighbors adjoining the land, voluntary easements will often have to be obtained from a large

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1. Minn. Stat. Ann. §462.358(2) (West Supp. 1979).

2. Cal. Gov't Code §66475.3 (West 1978).

3. Cal. Civ. Code §801 (West 1979); Colo. Rev. Stat. § §38-32.5-101 to -102 (Supp. 1978); Ga. Code Ann. § §85-1411 to -1414 (Supp. 1979); Idaho Code §55-615 (1979); N.J. Stat. Ann. § §46:3-24 to :3-26 (West Supp. 1979); N.D. Cent. Code § §47-05-01.1 to -01.2 (Repl. 1978); Va. Code § §55-352 to -354 (Supp. 1979).

4. *Kingdon v. Walker*, 156 So. 2d 208 (Fla. 1963) (agreement to convey an easement held enforceable by the court).

number of landowners.<sup>5</sup> These easements could thus add significantly to the cost of a solar system and in some cases might make such a system prohibitively expensive. As public policy increasingly favors solar development, means of protecting solar access must be found which do not place the entire cost of acquiring protection on the individual solar user. The most far-reaching approach of this type to date is the New Mexico Solar Rights Act.<sup>6</sup>

#### NATURE OF THE SOLAR RIGHT

In 1977, the New Mexico Legislature passed a statute creating a new type of solar right based on the concepts of beneficial use and prior appropriation. This statutory right is somewhat similar to a New Mexico water right. Just as the owner of a water right does not "own" water but rather has a right to divert it and put it to a beneficial use,<sup>7</sup> so the owner of a solar right does not "own" sunlight but has the right "to an unobstructed line-of-sight path from a solar collector to the sun, which permits radiation from the sun to impinge directly on the solar collector."<sup>8</sup> The sunlight must be put to a beneficial use for the solar right to vest under the statute. This beneficial use is the "basis, measure and limit of the solar right, except as otherwise provided by written contract."<sup>9</sup> Although the statute is not clear, a solar user apparently establishes a right only to the sunlight which is not blocked at the time the collector is first beneficially used.<sup>10</sup> Any buildings or structures which exist at the time the solar right vests have a "prior right" to the space they occupy. After the solar right vests, no new structures may impair the collector's access to direct sunlight at any time while the collector is being beneficially used. The effect of the statute is to create a system, similar to the prior appropriation system in water rights, by which the owners of solar collectors "appropriate" the skyspace which they need to ensure solar access.

Like a water right, a solar right is also freely transferable.<sup>11</sup> This means that a solar user may will his solar rights to anyone who wishes to put the collector's airspace to another use. The statute additionally provides for recording the transfer of a solar right in the same

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5. See Moskowitz, *Legal Access to Light: The Solar Energy Imperative*, 9 Nat. Resources Law. 177, 201 (1977).

6. N.M. Stat. Ann. § 47-3-1 to -5 (1978).

7. N.M. Stat. Ann. §§ 72-1-1 to -4 (1978).

8. N.M. Stat. Ann. § 47-3-3(B) (1978).

9. N.M. Stat. Ann. § 47-3-4(B)(1) (1978).

10. N.M. Stat. Ann. § 47-3-4(B)(1)-(2) (1978).

11. N.M. Stat. Ann. § 47-3-4(B)(3) (1978).

way that deeds, mortgages, and other instruments affecting title to real estate are recorded.<sup>1 2</sup>

### POTENTIAL PROBLEMS WITH THE SOLAR RIGHTS ACT

New Mexico is the first state to grant the owner of a solar collector the statutory right of access to sunlight. Since the concept of a solar right is new, some problems in the implementation and effect of this statute may be expected to arise. Although the Act has been in effect for less than two years, some of these problems can already be identified.

#### *Absolute Solar Rights*

The language of the Solar Rights Act effectively grants a solar right to anyone who puts a solar collector to beneficial use.<sup>1 3</sup> Once the requirement of beneficial use<sup>1 4</sup> is fulfilled, the solar right appears to be virtually unlimited. The practical effect of the Act is thus to create an absolute right of access to solar energy. No known disputes have yet arisen over the shading of an existing solar collector. This statutory right may, however, create problems in the future as solar energy systems become more common.

The most serious problem with an absolute solar right is that it may be unconstitutional. Once such a solar right is established, neighboring landowners cannot develop their property in any way that would impair the collector's access to sunlight. The solar right granted for certain collectors might so diminish the value of neighboring property that it would constitute a taking of property without just compensation in violation of the fifth amendment.<sup>1 5</sup> The rights granted by the Act may also be unnecessarily broad. Under the provisions of the Act, the solar access is protected during early morning and late afternoon hours, when shadows are longest and benefit to a collector is minimal. The solar right could easily be restricted to the three or three-and-a-half hours before and after solar noon without affecting the usefulness of a solar energy system.<sup>1 6</sup>

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12. *Id.*

13. See N.M. Stat. Ann. § 70-8-4(A), 4(B)(1)-(2) (1978).

14. The statute does not define "beneficial use" as this term is applied to solar energy. From the other definitions it can be inferred that beneficial use at least involves collecting solar energy with a device that meets the requirements of a "solar collector" and applying that energy to accomplish one or more of the enumerated purposes.

15. *United States v. General Motors Corp.*, 323 U.S. 373 (1945) ("taking" within the meaning of the fifth amendment includes depreciation in the value of property).

16. See the discussion of "tradeoffs" in Eisenstadt & Utton, *Solar Rights and Their Effect on Solar Heating and Cooling*, 16 Nat. Resources J. 363, 397 (1976).

The Solar Rights Act may prove unacceptable in the future because it establishes an inflexible preference for land use which allows solar access. Disputes concerning competing land uses are essentially political in nature. As such, they should be resolved through the process of compromise and trade off which characterize other political disputes. The establishment of individual solar rights should therefore be subject to the political process in some way.

### *Permit Systems*

Section 4(C) of the Solar Rights Act provides that "permit systems for the use and application of solar energy shall reside with county and municipal zoning authorities."<sup>17</sup> The purpose and effect of this provision is not entirely clear. For example, where local zoning authorities adopt a solar permit system, it is not clear whether a permit is a mandatory prerequisite to establishing a solar right. If the analogy to water law is extended, a permit would be necessary before a solar right could be perfected.<sup>18</sup> Yet a strict reading of the statute would lead one to believe that priority in time is the only factor to be considered in disputes involving solar rights.<sup>19</sup>

It is also unclear whether a zoning authority could deny a permit for a solar collector that did not comply with local zoning ordinances. Disputes involving solar access will occur primarily in urban areas where land use patterns are most complex. Zoning authorities in these areas can protect solar access with traditional land use controls such as height and setback restrictions. But urban centers also have an interest in reserving airspace for high-rise development. To allow optimal development of urban areas, the Solar Rights Act should grant local zoning authorities the power to place conditions on the location of solar collectors and to deny permits to collectors that would interfere with airspace reserved for development.

### *Eminent Domain*

Section 4(B)(2) of the Act provides that "the state and its political subdivisions may legislate, or ordain that a solar collector user has a solar right even though a structure or building located on neighboring property blocks the sunshine from the proposed solar collector site."<sup>20</sup> The next sentence provides that "(n)othing in this paragraph shall be construed to diminish in any way the right of eminent

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17. N.M. Stat. Ann. § 47-3-4(C) (1978).

18. N.M. Stat. Ann. §§ 72-5-1 to -7 (1978).

19. N.M. Stat. Ann. § 43-7-4(B)(2) (1978).

20. N.M. Stat. Ann. § 47-3-4(B)(2) (1978).

domain of the state or any of its political subdivisions or any other entity that currently has such a right."<sup>21</sup> These two provisions, read together, imply that state or local governments are empowered to condemn existing structures in order to provide solar access for solar collectors. The problem with this provision is that private property may be taken through eminent domain only if it is to be used for a public purpose.<sup>22</sup> As the statute now reads, it is not clear that a court would construe a grant of solar access to be a public use, particularly if the collector were privately owned.

In New Mexico, the courts determine whether a specific property use constitutes a public use. There is, however, a presumption that a use is public if the legislature so declares.<sup>23</sup> Solar energy use does provide many public benefits. It strengthens the state's energy independence, conserves fossil fuel for more important uses, and reduces the environmental degradation which accompanies the use of fossil and nuclear fuels. Furthermore, the United States Supreme Court has held that condemnation of private property for urban renewal is a public use even though private individuals and corporations are the primary benefactors.<sup>24</sup> Thus, the harnessing of solar energy might well constitute a public use.

But if the legislature intends state and local governments to employ their powers of eminent domain for the benefit of certain solar users, then it should expressly declare that solar energy utilization serves a strong public purpose. The legislature should also provide guidelines which specify the circumstances under which it is appropriate to employ this remedy to aid a solar user. Without these clarifications, the use of eminent domain power to provide for solar access might not withstand a constitutional challenge. Either the provision of solar access would not be considered a public use or the powers granted by the statute would be considered overbroad.

### *The Definition of Solar Collector*

The statute defines a solar collector as any device which "re[lies] upon sunshine as an energy source, and which [is] capable of collecting not less than twenty-five thousand Btu's [of thermal energy] on a clear winter solstice day."<sup>25</sup> The definition also includes solar collectors which serve additional purposes as windows or walls.<sup>26</sup>

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21. *Id.*

22. *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959).

23. *Kaiser Steel Corp. v. W. S. Ranch Co.*, 81 N.M. 414, 467 P.2d 986 (1970).

24. *Berman v. Parker*, 348 U.S. 26 (1954).

25. N.M. Stat. Ann. §47-3-3(A) (1978).

26. *Id.*

This definition thus recognizes passive as well as active solar systems. The inclusion of passive systems is important because these systems are much less expensive than active systems and are exceptionally well-suited to New Mexico's climate. This definition may, however, create future problems.

Many buildings gather twenty-five thousand Btu's of thermal energy through east, south, and west-facing windows. If insulated drapes are used to retain this heat, the windows of these buildings will probably qualify as passive solar systems. This situation would present no problem if local governments were given licensing powers over the creation of solar rights. But if the Solar Rights Act is construed to automatically grant a solar right to any collector which meets the Act's broad criteria, then buildings with such windows may already be subjecting large segments of land to potential restrictions.

### *Recording Solar Rights*

Section 4(B)(3) of the Act requires that "[t]he transfer of a solar right shall be recorded in accordance with Chapter 14, Article 9 NMSA 1978."<sup>27</sup> The statute does not, however, give any formula for describing the solar right being recorded. To avoid confusion, the statute should specifically set forth what information should be included in the description of the solar right. Title companies and developers are especially interested in seeing that the solar rights are recorded in a clear and accessible manner. Since solar rights may place use restrictions on adjoining property, a standardized recording system seems necessary so that these rights can be researched quickly when land is transferred.

### CONCLUSION

New Mexico's Solar Rights Act represents the strongest action yet taken by a state to protect solar access. The New Mexico statute may well become a model for other states as solar energy systems become more popular, and as the owners of these systems demand greater protection of their solar access. But the Act as currently drafted contains serious flaws which are likely to prove unacceptable to property owners who do not utilize solar collectors. A bill<sup>28</sup> which would have corrected some of the problems with the Act was introduced during the 1979 New Mexico legislative session. The bill

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27. N.M. Stat. Ann. §47-3-4(B)(3) (1978).

28. H.B. 333, 34th Leg., 1st Sess. (1979).

passed the House by a wide margin but was never reported out of committee in the Senate. An adequate revision of the statute should be adopted in the near future. As the Act now reads, the future development of New Mexico's urban areas may well be impeded by an unplanned array of solar rights restricting the use of urban air-space.

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[*Editor's Note:* The preceding article was condensed from an article appearing in the October, 1979 issue of *The Natural Resources Journal*. The original article contains proposed revisions of the Solar Rights Act which suggest a remedy for its most serious flaws.]