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Prah v. Maretti: Solar Rights and Private Nuisance Law, 16 J. Marshall L. Rev. 435 (1983)

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PRAH v. MARETTI:*
SOLAR RIGHTS AND PRIVATE
NUISANCE LAW

The Supreme Court of Wisconsin has recently held that obstruction of the passage of sunlight may create a cause of action under private nuisance law¹ if such sunlight is being used as an energy source.² In *Prah v Maretti*,³ the court faced the issue of whether private nuisance law may protect the owner of a solar home when the owner's access to an unobstructed path for sunlight is jeopardized by proposed construction on an adjoining landowner's property.⁴ The court answered affirmatively and held that private nuisance law is an appropriate means of regulating access to sunlight in today's society.⁵

In *Prah*, the plaintiff constructed a solar-heated home which required the placement of solar collectors⁶ on the southern portion of the roof of the house. The defendant subsequently purchased an adjoining lot south of the plaintiff's property. After receiving the proper building permits,⁷ the defendant com-

* 108 Wis. 2d 223, 321 N.W.2d 182 (1982).

1. The Restatement of Torts defines a private nuisance as a "non-trespassory invasion of another's interest in the private use and enjoyment of land." RESTATEMENT (SECOND) OF TORTS § 821D (1977). See *infra* notes 64-69 and accompanying text.

2. *Prah v. Maretti*, 108 Wis. 2d 223, 321 N.W.2d 182 (1982).

3. 108 Wis. 2d 223, 321 N.W.2d 182 (1982). The case was one of first impression in Wisconsin.

4. The case came to the Supreme Court of Wisconsin as an appeal from an order of summary judgment. Thus, the court did not hold that the plaintiff was entitled to relief, but held only that the plaintiff stated a claim upon which relief could be granted. *Id.* See *infra* notes 10, 12 and accompanying text.

5. 108 Wis. 2d at 239, 321 N.W.2d at 191.

6. A solar collector is the portion of a solar-energy system which is used to absorb the incoming rays of the sun.

7. The original plans submitted by Maretti to the local architectural control committee provided for the construction of a two-story home (also equipped with a solar-heating system) to be located approximately 10 feet south of the northern boundary of the Maretti lot, at an elevation of 785.5 feet above sea level. Appellant's Brief at 4-5, *Prah v. Maretti*, 108 Wis. 2d 223, 321 N.W.2d 182 (1982). From this point in time until the filing of the suit, the facts are in dispute. Though not relevant to the case before the court, the following facts will be relevant on remand in determining the reasonableness of the parties' conduct.

At a meeting held by the architectural control committee, Prah asked Maretti to move his house farther south on the Maretti lot to prevent a shadow from being cast on Prah's collectors. Maretti denied that he verbally agreed to move the proposed residence an additional fifteen feet south

menced construction of a family residence on his lot. Concerned that the construction would impair the efficiency of his solar-heating system⁸ by casting a shadow over the collectors,⁹ the plaintiff sought to enjoin the defendant from constructing the house. The circuit court entertained the defendant's motion for summary judgment,¹⁰ concluding that the plaintiff had failed to state a claim upon which relief could be granted.¹¹

(25 feet from the lot line). Respondent's Brief at 10, *Prah v. Maretti*, 108 Wis. 2d 223, 321 N.W.2d 182 (1982). Subsequent attempts by the parties to reach an agreement concerning the location of the proposed home were unproductive. It is clear, however, that the committee later ordered Maretti to construct the residence ten additional feet to the south (20 feet from the lot line dividing the parties' properties). Appellant's Brief at 6, *Prah v. Maretti*, 108 Wis. 2d 223, 321 N.W.2d 182 (1982).

For reasons in dispute, the final building permit issued to Maretti set the grade at 787.5 feet above sea level—two feet higher than the elevation provided in the original plans. According to the testimony of Prah, the shadow would not interfere with the passage of sunlight to the collectors had the grade remained at the original 785.5 feet and had the house been moved back an additional five feet from where the foundation now rests. Appellant's Brief at A-23, *Prah v. Maretti*, 108 Wis. 2d 223, 321 N.W.2d 182 (1982). Additionally, Prah testified that the chimney was the only portion of the Maretti home which would be guilty of casting the shadow and that the placement of the chimney on any side of the house, except the north face, would have prevented this lawsuit. *Id.* at A-26.

8. In heating Prah's home, water, swimming pool, and therapeutic whirlpool, the solar-heating system supplied approximately 55- to 60-percent of Prah's energy requirements. *Id.* at 4. Expert testimony indicated that the shadow would cause a five- to ten-percent loss in efficiency. *Id.* at A-27. The parties, however, disagree over the amount of actual efficiency loss.

9. The Maretti structure would cast a shadow onto the collectors only during the winter months, but the shadowing could then induce freezing and cracking of the collector plates, and the Prah home could sustain considerable water damage from the resulting leakage. *Id.* at A-27—A-28.

10. On a motion for summary judgment, the court does not decide the issues of fact set forth in the pleadings. *Grams v. Boss*, 97 Wis. 2d 332, 338, 294 N.W.2d 473, 477 (1980). The court decides only whether there is a genuine issue of fact in dispute. *Id.* A motion for summary judgment should be denied "unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy." *Id.* If the facts are subject to conflicting interpretations, summary judgment should be denied. *Coleman v. Outboard Marine Corp.*, 92 Wis. 2d 565, 571, 285 N.W.2d 631, 634 (1979).

11. Respondent's Brief at A-11, *Prah v. Maretti*, 108 Wis. 2d 223, 321 N.W.2d 182 (1982). In the trial court, the plaintiff sought relief under three theories. First, plaintiff attempted to establish a claim under a Wisconsin statute which allows any person with an interest in real property to bring an action claiming physical injury to, or interference with, his property. WIS. STAT. ANN. § 844.01 (West 1977). Prah claimed that the cracked pipes and resulting water leakage caused by the shadow-induced freezing would constitute a physical injury to his property. Appellant's Brief at 15, *Prah v. Maretti*, 108 Wis. 2d 223, 321 N.W.2d 182 (1982). The circuit court concluded that the statute did not apply to the case because the statute contemplates a duty owed to the adjacent landowner to take positive action. Respondent's Brief at A-6—A-7, *Prah v. Maretti*, 108 Wis. 2d 223, 321 N.W.2d 182

On appeal from the summary judgment,¹² the Supreme Court of Wisconsin reversed the circuit court decision¹³ and remanded the case, holding that the plaintiff had stated a claim upon which relief could be granted.¹⁴ Applying the Restatement of Torts' reasonable-use doctrine,¹⁵ the court noted that private nuisance law has the flexibility to protect both a landowner's

(1982). The court held that land use which conforms to local ordinances does not create such a duty. *Id.*

Second, Prah claimed that Maretti's proposed residence would constitute a private nuisance. The circuit court disposed of this claim, stating that proper planning could have avoided the situation; Prah should have foreseen that a neighbor would construct a residence at a location of his choice on the adjoining lot, as long as no zoning restrictions were violated. *Id.* at A-8.

Finally, Prah asked the court to extend the doctrine of prior appropriation, *see infra* note 78, from water to solar rights. Appellant's Supplemental Brief at 3, Prah v. Maretti, 108 Wis. 2d 223, 321 N.W.2d 182 (1982). The court noted that because this requested change in the law was a question of policy, adopting the doctrine would constitute a judicial trespass into the domain of the legislature. Respondent's Brief at A-9, Prah v. Maretti, 108 Wis. 2d 223, 321 N.W.2d 182 (1982). *See infra* notes 92-93 and accompanying text.

12. On appeal, the defendant argued that the trial court's decision must be viewed as an order for judgment and not as a decision granting summary judgment. Respondent's Brief at 14, Prah v. Maretti, 108 Wis. 2d 223, 321 N.W.2d 182 (1982). On this theory, the defendant argued that since the plaintiff had requested a temporary injunction, the trial court had to determine whether the plaintiff had a reasonable probability of ultimate success on the merits of the case. *Id.* at 15. The defendant further argued that in determining the plaintiff's probability of success, the trial court had made a decision as to material issues of fact. *Id.* at 16. Thus, because the trial court had considered all of the relevant facts relating to the plaintiff's theories, *see supra* note 10, no material issues of fact remained to be decided. *Id.* at 17.

Stating that a ruling on a request for temporary injunction is not conclusive as to the issue of whether the moving party will in fact prevail in the lawsuit, the court rejected the defendant's argument. 108 Wis. 2d at 227-28, 321 N.W.2d at 185. *See also* Waste Mngmt., Inc. v. Wisconsin Solid Waste Recycling Auth., 84 Wis. 2d 462, 267 N.W.2d 659 (1978). The court held that the circuit court clearly dealt with the case as a motion for summary judgment. 108 Wis. 2d at 228, 321 N.W.2d at 185.

13. Justice Abrahamson wrote the opinion for the court, while Justice Callow dissented. Justice Ceci did not participate.

14. 108 Wis. 2d at 240, 321 N.W.2d at 191. Noting that the record was insufficient as to the extent of the plaintiff's harm, the burden on the defendant of avoiding the harm, and the presence of alternative remedies, the court stated that "[s]ummary judgment is not an appropriate procedural vehicle . . . when the circuit court must weigh evidence which has not been presented at trial." *Id.* at 242, 321 N.W.2d at 192.

15. One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either

(a) intentional and unreasonable, or

(b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

RESTATEMENT (SECOND) OF TORTS § 822 (1977). *See infra* notes 64-69 and accompanying text.

right to an unobstructed path for sunlight and a neighboring landowner's right to develop his land.¹⁶ As a result, the court determined that the owner of a solar home may seek judicial relief against his neighbor when the neighbor's proposed construction would impair the efficiency of the solar system by interfering with the flow of sunlight to the collectors.¹⁷

The court began its analysis by enumerating the various policy considerations which support the traditional judicial refusal to expand the protection of a landowner's access to sunlight.¹⁸ The court first noted that a landowner once had the right to use his property as he desired so long as he inflicted no physical damage onto his neighbor.¹⁹ The court also stated that sunlight has traditionally been valued only as a source of illumination and that the loss of sunlight was regarded as only

16. 108 Wis. 2d at 239, 321 N.W.2d at 191. "Recognition of a nuisance claim for unreasonable obstruction of access to sunlight . . . will promote the reasonable use and enjoyment of land in a manner suitable to the 1980's." *Id.* For a discussion of the validity of this statement, see *infra* notes 62-63, 70-76 and accompanying text.

Finding that the plaintiff stated a claim based on private nuisance, the court found no need to discuss the additional claims. *Id.* at 242-43, 321 N.W.2d at 192. See *supra* note 11.

17. Defendant argued that even if plaintiff stated a claim for private nuisance, the plaintiff could not recover because the defendant's conduct was not unreasonable within the meaning of the Restatement of Torts. The defendant contended that because his proposed residence conformed to the local zoning regulations and his conduct could not be characterized as malicious or negligent, his use of land was reasonable. Respondent's Brief at 31-32, *Prah v. Maretti*, 108 Wis. 2d 223, 321 N.W.2d 182 (1982). The court concluded that although compliance with the law is a factor to be considered, it is not controlling. 108 Wis. 2d at 242, 321 N.W.2d at 192. See also *Bie v. Ingersoll*, 27 Wis. 2d 490, 495, 135 N.W.2d 250, 253 (1965) (although operation of asphalt plant was within provisions of zoning ordinance, such compliance is entitled only to some weight and is not controlling).

18. The trend of American courts in disfavoring "spite fences," *infra* notes 36-41 and accompanying text, is an indication that the courts are willing to protect a landowner's access to sunlight to some degree. See, e.g., *Sundowner, Inc. v. King*, 95 Idaho 367, 509 P.2d 785 (1973) (ordering the defendant to reduce from 18 feet to 6 feet in height a maliciously erected fence which obstructed the passage of light and air to the plaintiff's property). See also *infra* cases cited at note 38.

19. 108 Wis. 2d at 235, 321 N.W.2d at 189. See *Metzger v. Hochrein*, 107 Wis. 267, 83 N.W. 308 (1900). In *Metzger*, the defendant erected a 16-foot-tall fence of unsightly, partially decayed lumber only four feet from the plaintiff's windows. The court held that as long as no material physical discomfort was inflicted upon the neighbor, the doctrine of personal dominion over one's own property enabled one to do things which annoyed one's neighbors. *Id.* at 272, 83 N.W. at 310.

Today, a Wisconsin statute declares that any hedge or fence over six feet in height, maliciously erected for the purpose of annoying adjoining landowners, is a private nuisance. WIS. STAT. ANN. § 844.10 (West 1977). See *infra* notes 36-41 and accompanying text.

an inconvenience.²⁰ Finally, the court concluded that recognition of a right to sunlight, at the turn of the century, would have been inconsistent with society's interest in promoting land development.²¹

The court then recognized that various societal changes compel a reevaluation of the validity of these policies. While noting that society has increasingly regulated private land use for the public welfare,²² the court emphasized the importance of sunlight as an energy source both to society and to the private landowner.²³ Incorporating these two observations, the court reasoned that the traditional policy justifications reflect the social priorities of a bygone era.²⁴ Thus, the court discarded the policy favoring unhindered private development²⁵ as no longer compatible with modern society.²⁶

The next phase of the court's analysis involved an analogy to *State v. Deetz*.²⁷ In *Deetz*, the court disposed of the "common

20. 108 Wis. 2d at 235, 321 N.W.2d at 189. See *infra* notes 98-103 and accompanying text for a discussion of "ancient lights."

21. 108 Wis. 2d at 235, 321 N.W.2d at 189. See *Miller v. Hoeschler*, 126 Wis. 263, 270, 105 N.W. 790, 792 (1905) (reluctance to recognize easements of light and air over adjacent premises facilitates rapid expansion of municipalities).

22. 108 Wis. 2d at 236, 321 N.W.2d at 189. See *infra* note 53 and accompanying text.

23. 108 Wis. 2d at 236, 321 N.W.2d at 189. See also National Energy Conservation Policy Act, 42 U.S.C. § 8201(a) (Supp. 1980) (all sections of the nation's economy must begin immediately to reduce demand for nonrenewable energy resources, such as oil and gas, to reduce the nation's dependence on foreign oil); Energy Security Act, 12 U.S.C. § 3610 (1980) (setting forth maximum amounts of financial assistance for solar energy systems in residential, multifamily, commercial, and agricultural buildings).

24. Justice Callow, who dissented, was not convinced that these policies are obsolete. He agreed with the reasoning of *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357 (Fla. Dist. Ct. App. 1959), *cert. denied*, 117 So. 2d 842 (Fla. 1960), which held that if a structure serves a useful and beneficial purpose, it does not give rise to a cause of action, even if the structure obstructs the flow of light and air to adjoining property. *Id.* at 359. Callow maintained that "a landowner's right to use his property within the limits of ordinances . . . where such use is necessary to serve his legitimate needs is a precept of a free society which this court should strive to uphold." 108 Wis. 2d at 245, 321 N.W.2d at 194 (Callow, J., dissenting).

25. 108 Wis. 2d at 237, 321 N.W.2d at 190. "The need for easy and rapid development is not as great today as it once was, while our perception of the value of sunlight as a source of energy has increased significantly." *Id.*

26. *Id.* See also *State v. Deetz*, 66 Wis. 2d 1, 15-16, 224 N.W.2d 407, 414 (1974) ("When a rule of law thwarts social policy rather than promotes it, it is the obligation of a common law court to undo or modify a rule that it has previously made.").

27. 66 Wis. 2d 1, 224 N.W.2d 407 (1974). In *Deetz*, the defendant developed a residential area on a bluff overlooking a lake. The resulting construction caused surface waters to wash sand down from the bluff, through the lakeshore property below the bluff, and into the lake, thereby disrupting swimming, fishing, and boating. The state of Wisconsin sought relief under

enemy" rule²⁸ which had given a landowner an unrestricted right to fight off surface waters. The *Deetz* court held that a landowner's conduct with respect to surface waters should be subject to the Restatement of Torts' reasonable-use rule.²⁹ Recognizing that private nuisance law has resolved prior disputes between adjoining landowners when one of them asserts a right of unrestricted development, the *Prah* court reasoned that the same theory could be equally effective in regulating access to sunlight.³⁰

Finally, in applying private nuisance law to the facts in *Prah*, the court rejected the prevailing view, illustrated by *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*,³¹ which held that a landowner's interest in access to sunlight across adjoining land is not a legally protectable right.³² The *Prah* court justified this rejection on the grounds that the use of private nuisance law is more in harmony with the legislative policy of encouraging use of solar energy than is the *Fontainebleau* approach.³³ Without considering any alternative theories of recovery, the court ruled that private nuisance

a state statute which allowed the attorney general to abate a public nuisance. The trial court held for the defendant, based on the "common enemy" rule. See *infra* note 28. The Wisconsin Supreme Court abandoned the common enemy rule and reversed. See *infra* notes 48-61 and accompanying text.

28. The "common enemy" rule holds that a landowner has an unrestricted right to fight off surface waters on his land in any manner that he pleases, regardless of harm to his neighbor. See *Watters v. National Drive-In, Inc.*, 266 Wis. 432, 63 N.W.2d 708 (1954). In *Watters*, the defendant drive-in owner graded his land and installed drainage tiles in such a manner as to cause surface water to flow onto the plaintiff's land, forcing the plaintiff to reconstruct an existing driveway. The court upheld the common enemy rule and ruled that the plaintiff had no cause of action for damage caused by the drainage. *Id.* at 436, 63 N.W.2d at 711. See also *Gannon v. Hargadon*, 92 Mass. (10 Allen) 106, 109-10 (1865) (erecting barriers to alter the course of water will afford no cause of action to one who suffers a loss therefrom, as long as the former party acted consistently with due exercise of dominion over his own soil).

For an exception to the rule, see *Pettigrew v. Village of Evansville*, 25 Wis. 223, 237-38 (1870) (landowner may not collect and discharge water from a pond or other standing body of water, to his neighbor's detriment). For a discussion of the common enemy rule, see Kinyon & McClure, *Interferences With Surface Waters*, 24 MINN. L. REV. 891, 898-904 (1940).

29. *State v. Deetz*, 66 Wis. 2d 1, 18, 224 N.W.2d 407, 416 (1974).

30. 108 Wis. 2d at 239, 321 N.W.2d at 191.

31. 114 So. 2d 357 (Fla. Dist. Ct. App. 1959), *cert. denied*, 117 So. 2d 842 (Fla. 1960). See *infra* notes 39 & 45-47 and accompanying text.

32. 114 So. 2d at 359. See also *Prah v. Maretti*, 108 Wis. 2d 223, 238-39 n.13, 321 N.W.2d 182, 190-91 n.13 (1982).

33. 108 Wis. 2d at 239, 321 N.W.2d at 191. The court believed that the *Fontainebleau* approach was inflexible because it failed to recognize any interest in access to sunlight. The *Prah* court felt that private nuisance law has the flexibility to encourage solar energy use.

law will promote the reasonable use and enjoyment of land in modern society.³⁴

To comprehend the uniqueness of the *Prah* decision, it is necessary to examine the traditional American approach to cases involving access to sunlight.³⁵ At the turn of the century, there was considerable litigation dealing with structures which were erected by a landowner solely to obstruct his neighbor's access to sunlight.³⁶ Without inquiry into the actor's motive, most early American courts refused to grant relief to the aggrieved landowner because the obstruction of sunlight presented no legally cognizable injury.³⁷ Since that time, the courts have relaxed their strict adherence to this rule and have allowed recovery when such structures are erected for a purely malicious motive and serve no useful purpose.³⁸ *Fontainebleau*,³⁹ however, illustrates that relief will still be de-

34. *Id.* at 240, 321 N.W.2d at 191.

35. Perhaps the best summary of this view is that "the owner of land has no 'natural right' to light and air, and cannot complain that either has been cut off by the erection of buildings on adjoining land." 3 H. TIFFANY, *THE LAW OF REAL PROPERTY* § 763, at 216 (1939).

36. Such situations are referred to as "spite fence" cases. The term includes fences, planks, hedges, or other structures in the nature of a fence which are built out of spite. For a discussion of fences as nuisances, see *Annot.*, 80 A.L.R. 3d 962 (1977).

37. See *Bordeaux v. Greene*, 22 Mont. 254, 255, 56 P. 218, 219 (1899) (court need not inquire into landowner's motive for constructing a 40-foot-tall fence because he has a legal right to build it regardless of inconvenience to his neighbors); *Mahan v. Brown*, 13 Wend. 261, 264 (N.Y. 1835) (whether defendant acted maliciously in erecting a 50-foot-high fence was irrelevant because no legal right of plaintiff had been violated); *Letts v. Kessler*, 54 Ohio St. 73, 81, 42 N.E. 765, 766 (1896) (inquiry into a man's motive in erecting a structure would be an attempt to control his moral conduct); *Koblegard v. Hale*, 60 W. Va. 37, 41, 53 S.E. 793, 794 (1906) (motive irrelevant in determining what right a plaintiff has to light and air); *Metzger v. Hochrein*, 107 Wis. 267, 83 N.W. 308 (1900) (personal dominion over one's property enables one to do things which annoy one's neighbors).

38. *Hornsby v. Smith*, 191 Ga. 491, 499, 13 S.E.2d 20, 24 (1941) (erecting a fence for the sole purpose of injuring another is a malicious use of property resulting in injury to another and is unlawful); *Barger v. Barringer*, 151 N.C. 433, 440, 66 S.E. 439, 442 (1909) (allowing one to make a malicious use of his property so as to injure his neighbor would make the law an "engine of oppression"); *Piccirilli v. Groccia*, 114 R.I. 36, 39, 327 A.2d 834, 837 (1974) (action maintainable only if structure is erected solely for the purpose of injuring the adjoining landowner); *Racich v. Mastrovich*, 65 S.D. 321, 326, 273 N.W. 660, 663 (1937) (court will enjoin construction of a fence if fence is erected for a malicious motive with no benefit to the owner).

39. 114 So. 2d 357 (Fla. Dist. Ct. App. 1959), *cert. denied*, 117 So. 2d 842 (Fla. 1960). In *Fontainebleau*, the Eden Roc Hotel was constructed immediately north of the defendant Fontainebleau Hotel approximately one year after the completion of the Fontainebleau. The Fontainebleau then commenced construction of a fourteen story addition, which upon completion, would cast a shadow over the Eden Roc's swimming pool and bathing area during the winter months. Alleging that the construction was motivated by malice, and that the structure would interfere with the flow of light

nied so long as some useful purpose is served by the structure.⁴⁰ There are some jurisdictions, however, which balance the usefulness of the structure against the harm inflicted upon the adjoining landowner.⁴¹

The first aspect of the *Prah* decision which warrants discussion is the manner in which the court dealt with *Fontainebleau*. The *Prah* court refused to apply the "spite fence" approach typified by *Fontainebleau* and disposed of the *Fontainebleau* rationale in a footnote.⁴² Thus, one could argue that the court's holding represents a deviation from the settled case law on spite fences, since the court recognized a cause of action for an obstruction of sunlight even though the construc-

and air to its property, the Eden Roc sought to enjoin the *Fontainebleau* from proceeding with construction. The court held that because there is no legal right to the free flow of light and air, there is no relief so long as the structure serves a useful and beneficial purpose. *Id.* at 359. *See supra* note 24.

The *Fontainebleau* reasoning has been criticized. *See infra* note 42 and accompanying text. *See also* Williams, *Solar Access and Property Rights: A Maverick Analysis*, 11 CONN. L. REV. 430, 440-41 (1979) (the argument that there is no right to light is pure tautology); Comment, *Solar Rights: Guaranteeing a Place in the Sun*, 57 OR. L. REV. 94, 125 n.126 (1977) (statement that there is no legal right to the free flow of light and air should be the conclusion, not the original premise).

40. *Accord* Cain v. American Nat'l Bank & Trust Co. of Chicago, 26 Ill. App. 3d 574, 579-80, 325 N.E.2d 799, 804 (1975) (defendant owes plaintiff no duty to assure plaintiff's continued access to light and air). *See also* People *ex rel.* Hoogasian v. Sears Roebuck & Co., 52 Ill. 2d 301, 287 N.E.2d 677 (1972) (construction of 110-story tower, though interfering with television and radio waves, did not constitute a nuisance).

41. *See* Webb v. Lambley, 181 Neb. 385, 148 N.W.2d 835 (1967) (balancing the interest in an unobstructed view against the utility of fence as a wind-break); Schork v. Epperson, 74 Wyo. 286, 287 P.2d 467 (1955) (obstruction of plaintiff's view and sunlight outweighed benefit of a nine-foot fence to defendant).

42. *Prah* v. Maretti, 108 Wis. 2d 223, 238-39 n.13, 321 N.W.2d 182, 190-91 n.13 (1982). The court was dissatisfied with the *Fontainebleau* rationale because it failed to explain why a landowner's interest in unobstructed sunlight differs from his interest in freedom from stench or loud noises, interests which have been protected in Wisconsin for many years. *See, e.g.*, Bie v. Ingersoll, 27 Wis. 2d 490, 135 N.W.2d 250 (1965) (noxious odors from asphalt plant); Rachlin v. Drath, 26 Wis. 2d 321, 132 N.W.2d 581 (1965) (howling, barking dogs in neighboring kennel); Hasslinger v. Village of Hartland, 234 Wis. 201, 290 N.W. 647 (1940) (stench from sewage disposal plant).

Although some authors see no practical difference between dust, noises, and odors, on one hand, and solar access blockage on the other, *e.g.*, Williams, *supra* note 39, at 441, there may be some bases for distinguishing the situations, such as that an obstruction of sunlight adversely affects only one's property. Dust, noise, and odors, however, have a direct physiological effect on humans and are therefore more worthy of regulation. *But see* Comment, *Obstruction of Sunlight as a Private Nuisance*, 65 CALIF. L. REV. 94, 106 (1977) (absence of sunlight may lead to psychological depression). Finding no rational basis to distinguish these situations, the *Prah* court implied that the application of private nuisance law to obstruction-of-sunlight cases would be a logical extension of the odor and noise cases.

tion was devoid of malicious intent and served a useful purpose. A better view, however, would justify the court's refusal to follow the traditional approach on the ground that *Prah* was concerned with access to sunlight as an energy source. *Fontainebleau*, as do many of the spite fence cases, deals entirely with access to sunlight as a source of illumination or aesthetic beauty.⁴³ Society's recent interest in pursuing alternative forms of energy justifies such a distinction.⁴⁴

The pitfall associated with the *Prah* court's treatment of the *Fontainebleau* rationale is that the court failed to distinguish *Fontainebleau*. In rejecting the *Fontainebleau* approach,⁴⁵ the *Prah* court implied that it would balance the competing interests of landowners in access to sunlight situations regardless of whether the case involves the shadowing of a solar collector or the construction of a spite fence. With respect to the latter category, *Prah* clearly attempts to establish a new trend. The decision leaves virtually nothing to prevent a landowner from claiming that his garden, grass, swimming pool, or sunbathing area is being shaded by his neighbor's unsightly tree.⁴⁶ The unfortunate result is that Wisconsin may have opened itself to greatly increased litigation between adjoining landowners.

The court could have prevented this problem by expressly limiting its holding to cases involving the use of sunlight as an energy source. To support such a limitation, the court could have declared that all obstructions of sunlight in situations involving sunlight as an energy source shall be unreasonable uses of land within the meaning and application of the Restatement test.⁴⁷ This declaration would have left the well-settled law governing spite fences undisturbed. Consequently, the court should not have rejected the *Fontainebleau* approach in its entirety. Rather, it should have held that *Fontainebleau* is inapplicable to cases involving sunlight as an energy source. From a standpoint of judicial economy, *Prah* was decided poorly.

Another questionable aspect of the *Prah* decision is the court's comparison of *Prah* to *State v. Deetz*⁴⁸ and the Wisconsin

43. See *supra* cases cited at notes 37-38.

44. See *supra* note 23.

45. *Prah v. Maretti*, 108 Wis. 2d 223, 238-39 n.13, 321 N.W.2d 182, 190-91 n.13 (1982).

46. One certainly cannot believe that the landowners' ability to reach an agreement among themselves will preclude these situations. The events which led to the filing of the *Prah* suit indicate that *Prah* represents a setback for those who believe in the word "compromise."

47. See *supra* note 15.

48. 66 Wis. 2d 1, 224 N.W.2d 407 (1974). The dissent in *Prah* evidently considered *Deetz* applicable only in situations in which the public is harmed. The dissent apparently attempted to distinguish *Prah* from *Deetz*

policy regarding surface waters. From the language of *Deetz*, it is evident that the common enemy rule,⁴⁹ which gave a landowner the right to fight off surface waters, was adopted to enhance the improvement and development of land.⁵⁰ Land development at the end of the nineteenth century would have been hindered if laws had been enacted to regulate surface drainage.⁵¹ Wisconsin courts have also held that the recognition of an implied or prescriptive easement to sunlight would be inconsistent with the policy of rapid development of its municipalities.⁵² The common enemy rule and the rule denying access to sunlight were, therefore, two means of obtaining the identical goal of economic expansion. In this respect, the *Prah* court was correct in holding that society once had a significant interest in not restricting or impeding land development.

By the time *Deetz* and *Prah* were decided, however, economic expansion had slowed considerably. Noting that a state, using its police power, could effectively regulate the use of land through conventional zoning,⁵³ both *Deetz* and *Prah* announced that the old policy favoring unrestricted land development had

on the ground that the former case involves a private benefit, whereas the latter dealt with a harm to the public. *Prah v. Maretti*, 108 Wis. 2d 223, 247, 321 N.W.2d 182, 194-95 (1982) (Callow, J., dissenting). A reading of *Deetz* reveals no intent to restrict the application of the "reasonable use" rule to situations involving public injury. In fact, *Deetz* implicitly overruled a case involving an injury to a private landowner. See *Watters v. National Drive-in, Inc.*, 266 Wis. 432, 63 N.W.2d 708 (1954).

49. See *supra* note 28.

50. *State v. Deetz*, 66 Wis. 2d 1, 15, 224 N.W.2d 407, 414 (1974).

51. "It is also for the public interest . . . that towns and cities shall be built. To adopt the principle that the law of nature must be observed in respect to surface drainage, would . . . place undue restriction upon industry . . . and the control by an owner of his property." *Barkley v. Wilcox*, 86 N.Y. 140, 148 (1887).

52. *Depner v. United States Nat'l Bank*, 202 Wis. 405, 410, 232 N.W. 851, 852 (1930). In *Depner*, the lessor owned a hotel and an adjacent vacant lot. The plaintiff subsequently leased the hotel, but the lessor retained the vacant lot. The defendant, successor to the lessor's title, built an eight-story building on the vacant lot, thereby obstructing the passage of light and air to the plaintiff's hotel. The court held that to create an easement to light and air the words used to create the easement must show an unequivocal intent to grant such an easement. *Id.* Easements of light and air cannot be created by prescription, and implied easements, though disfavored, could be permitted only where absolutely necessary. *Id.* See *infra* note 81.

53. Both courts supported this proposition with the case of *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972). In that case, the plaintiffs challenged the constitutionality of a shoreland zoning ordinance which prohibited the filling of wetlands without a permit. Recognizing that the purpose of the ordinance was to prevent the degradation of natural resources, the court upheld the ordinance, concluding that a disturbance in the natural environment caused by the transformation from wetlands to private use is an unreasonable use of land and is subject to the state's police power. *Id.* at 17-18, 201 N.W.2d at 768.

expired.⁵⁴ It is logical to conclude that Wisconsin no longer believes that the recognition of a cause of action which results from either surface drainage or sunlight obstruction will hinder land development.

Although the comparison to *Deetz* appears to be acceptable at this point, there are two problems with such an analogy. First, by recognizing the public interest in alternative forms of energy,⁵⁵ the *Prah* court introduced a new policy consideration. In *Deetz*, the court did not introduce any new policy justifications. Rather, the court seems to have held that because the national goal of economic expansion had been fulfilled, it was no longer necessary to enforce the means necessary to accomplish that goal. The effect of the *Prah* court's addition of a new policy consideration to justify its position casts some doubt over the appropriateness of a judicial determination in this area.⁵⁶

The second problem with the analogy is that the cases may be distinguished on their facts. In *Deetz*, the court was concerned with preventing a resource from entering an owner's land. *Prah*, however, dealt with an attempt to provide access to a resource. The court could have drawn a more appropriate analogy by comparing access to sunlight with the law regarding subterranean percolating waters.⁵⁷ In *State v. Michels Pipeline Construction, Inc.*,⁵⁸ Wisconsin adopted the Restatement of Torts' rule to govern disputes over percolating waters.⁵⁹ The similarity between *Michels* and *Prah* is that in each case the plaintiff sought access to a resource which would, if not interrupted by the conduct of his neighbor, eventually reach the plaintiff's property. Consistent with the theory of vertical own-

54. At the same time, however, *Deetz* did not discard the policy favoring land development, but rather warned that the utility of land development will be given less consideration than it had received in prior years. 66 Wis. 2d at 20-21, 224 N.W.2d at 417.

55. 108 Wis. 2d at 236, 321 N.W.2d at 189.

56. See *infra* notes 88-93 and accompanying text.

57. At common law, a landowner had the right to drill a well on his land and consume any amount of water he desired, regardless of malicious intent or the effect on a neighbor's well. *Huber v. Merkel*, 117 Wis. 355, 363, 94 N.W. 354, 357 (1903). The rule was apparently based on the lack of knowledge concerning the mysterious underground forces. See *State v. Michels Pipeline Constr., Inc.*, 63 Wis. 2d 278, 290-91, 217 N.W.2d 339, 344 (1974).

58. 63 Wis. 2d 278, 217 N.W.2d 339 (1974). The court noted that the present knowledge of hydrology enables one to comprehend the cause and effect relationship triggered by the tapping of a well near the well of another, and liability could be fairly adjudicated, if necessary. *Id.* at 292, 217 N.W.2d at 345. The court issued a second opinion in this case, in which it made the holding prospective only, except for the parties which appeared as *amicus curie*. 63 Wis. 2d 278, 219 N.W.2d 308 (1974).

59. 63 Wis. 2d at 301, 217 N.W.2d at 350.

ership of land,⁶⁰ the *Prah* court could have argued that if the Restatement rule protects one's access to resources below the ground, it should also protect one's access to resources above the ground.⁶¹ As a result of these problems, the *Deetz* analogy was not a sound means of support for the court's decision.

A third debatable aspect of the court's decision is the statement that private nuisance law "will promote the reasonable use and enjoyment of land in a manner suitable to the 1980's."⁶² If this phrase contemplates the promotion of solar energy to conserve natural resources, the court erred in failing to consider alternative means of regulating solar access.⁶³ Private nuisance law, standing alone, is not the optimum method of promoting solar energy.

A private nuisance is generally referred to as an interference with the use and enjoyment of land.⁶⁴ A person may use his own property for a lawful purpose provided that he does not deprive a neighbor of the reasonable use and enjoyment of his land.⁶⁵ According to the Restatement of Torts,⁶⁶ one of the determinations to be made by a court with respect to a private nuisance action is whether the invasion of another's land is intentional and unreasonable.⁶⁷ To determine whether the defendant's conduct has been reasonable, a court must balance the gravity of harm to the plaintiff against the utility of the defend-

60. The common law maxim, *cujus est solum, ejus est usque ad coelum et ad infernos* (he who owns the soil owns to the heavens and to the depths), was limited by *United States v. Causby*, 328 U.S. 256 (1946), which stated that a literal interpretation of the maxim would subject the operator of a transcontinental flight to countless trespass suits. *Id.* at 260-61.

61. See also Comment, *Obstruction of Sunlight as a Private Nuisance*, 65 CALIF. L. REV. 94, 102-03 (1977) (noting the similarities between percolating water and sunlight obstruction).

62. *Prah v. Maretti*, 108 Wis. 2d 223, 240, 321 N.W.2d 182, 191 (1982).

63. Despite the plaintiff's request, the court did not discuss the possibility of adopting the prior appropriation doctrine to govern solar access. See *supra* note 11. For a discussion of the prior appropriation doctrine and other alternatives, see *infra* notes 78-87 and accompanying text.

64. W. PROSSER, LAW OF TORTS § 89, at 591 (4th ed. 1971). See also *Copart Indus., Inc. v. Consolidated Edison Co. of N.Y., Inc.*, 41 N.Y.2d 564, 568, 362 N.E.2d 968, 971, 394 N.Y.S.2d 169, 172 (1977) (essential feature of a private nuisance action is interference with use and enjoyment of land).

65. 58 AM. JUR. 2D *Nuisances* § 20, at 580-81 (1971).

66. RESTATEMENT (SECOND) OF TORTS § 822 (1977). See also *supra* note 15.

67. RESTATEMENT (SECOND) OF TORTS § 822 (1977). It must also be shown that the actor's conduct was the legal cause of the invasion. This element should pose little problem in a private nuisance case dealing with obstruction of sunlight since the presence of the physical structure itself should be sufficient proof of causation.

ant's conduct,⁶⁸ liability for a private nuisance occurs only when there has been some significant harm to the plaintiff.⁶⁹

Since the purpose of private nuisance law is to balance the competing interests of landowners, it superficially appears to be an ideal means of governing solar access. The limitations of private nuisance law, however, could frustrate promotion of solar energy use. A court might protect the solar-energy user when his collector becomes substantially shadowed by a condemned building or unmanicured vegetation. Given the long-established precedent favoring land development,⁷⁰ however, it is unlikely that a court would hold that the interest of a landowner in receiving an unobstructed path for sunlight outweighs an adjoining landowner's interest in providing shelter for his family.⁷¹ Unless a substantial portion of the collector surface is shadowed, private nuisance law will probably not provide an aggrieved solar energy user with a remedy. Consequently, landowners might actually be deterred from installing a solar-heating system if there is a possibility that a neighbor could lawfully build, or improve upon, a residence on the adjoining land. More seriously, private nuisance law cannot diminish the possibility of extortion, and extortion will frustrate the policy of encouraging the use of solar energy.⁷²

Resolution of the issue of the defendant's conduct in a private nuisance action will depend on the remedy sought by the

68. PROSSER, *supra* note 64, at 596. "The plaintiff must be expected to endure some inconvenience rather than curtail the defendant's freedom of action, and the defendant must so use his own property that he causes no unreasonable harm to the plaintiff." *Id.* See also RESTATEMENT (SECOND) OF TORTS §§ 827, 828 (1977).

69. The Restatement of Torts also provides that "[t]here is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or *by property in normal condition and used for a normal purpose.*" RESTATEMENT (SECOND) OF TORTS § 821F (1977) (emphasis added).

70. This concept is not inconsistent with the court's abandonment of the "obsolete" policy considerations. See *supra* note 26 and accompanying text. The court only discarded the policy of *unhindered* land development. See *supra* note 54. See also *Moritz v. Buglewicz*, 187 Neb. 819, 821, 194 N.W.2d 215, 216 (1972) (the public favors the full utilization of land).

71. Comment, *Assuring Legal Access to Solar Energy: An Overview With Proposed Legislation for the State of Nebraska*, 12 CREIGHTON L. REV. 567, 587-88 (1978) [hereinafter cited as *Assuring Legal Access*].

72. Suppose that A, B's neighbor, needs an unobstructed path for sunlight for his solar energy system. With absolutely no intention of future construction, B tells A that he is considering the addition of a second story to his home, the addition of which would obstruct the flow of sunlight to A's property. Since the future of A's solar system is now in jeopardy, A agrees to pay an exorbitant sum to B in return for the forfeiture of B's right to build.

plaintiff.⁷³ Although a lesser showing of unreasonableness would be required when a plaintiff seeks damages as opposed to injunctive relief,⁷⁴ monetary compensation, though helpful, will not promote solar energy. It is inconsistent to argue that damages should be awarded for an obstruction of sunlight while simultaneously arguing that solar energy, because it reduces dependence on oil and gas, is in the public interest. By giving the solar energy user only a monetary remedy a court forces the user to resort to traditional energy sources. Private nuisance law will promote solar energy use and the national policy of energy conservation only if a court grants injunctive relief which eliminates the obstruction.⁷⁵ Since this would require a stringent showing of unreasonableness, and since courts may be reluctant to consider new construction as unreasonable, an injunction is unlikely. Consequently, private nuisance law provides only limited protection to the solar energy user.⁷⁶

73. Comment, *Obstruction of Sunlight as a Private Nuisance*, 65 CALIF. L. REV. 94, 116-19 (1977).

74. *Id.*

75. A decisive consideration in many nuisance cases is the nature of the locality, and the suitability of the use of land made by each party. PROSSER, *supra* note 64, at 599. See, e.g., *Abdella v. Smith*, 34 Wis. 2d 393, 149 N.W.2d 537 (1967). In *Abdella*, the court denied relief on the plaintiff drive-in owner's claim that the aroma of horse manure and the presence of flies from defendant's stables were a nuisance. The defendant's use of land was reasonable in the predominantly rural area.

Furthermore, a plaintiff cannot make a nuisance action from the otherwise harmless conduct of an adjoining landowner, when the plaintiff's use of his own land is unusually sensitive. PROSSER, *supra* note 64, at 579. See *supra* note 69. See also *Belmar Drive-In Theatre Co. v. Illinois St. Toll Hwy. Comm'n*, 34 Ill. 2d 544, 216 N.E.2d 788 (1966) (a drive-in theater owner may not recover when the bright lights of adjoining landowner interfere with operation of the theater). But see *Bell v. Gray-Robinson Constr. Co.*, 265 Wis. 652, 62 N.W.2d 390 (1954) (defendant was aware that noisy machinery operated near mink ranch during whelping season would pose danger to mink; defendant liable in negligence rather than nuisance).

The dissenting opinion in *Prah* concluded that a solar-heating system is an unusually sensitive use of land. *Prah v. Maretti*, 108 Wis. 2d 223, 252, 321 N.W.2d 182, 197 (1982) (Callow, J., dissenting). Although solar energy use may not yet be considered a "normal" use of land, the view typified by the dissent will prevent solar energy from becoming a normal use.

76. The facts of *Prah* indicate that the plaintiff is unlikely to prevail on remand. Although in dispute, the amount of collector surface which would be shaded by the defendant's proposed residence is only eight- to ten-percent of the total surface area. See *supra* note 8. Since the plaintiff's actual energy savings with the solar system were approximately \$600 per year, see Appellant's Brief at 3, *Prah v. Maretti*, 108 Wis. 2d 223, 321 N.W.2d 182 (1982), the loss resulting from the system's diminished efficiency is quite small. This interference, even coupled with society's interest in solar energy and the potential physical damage to the plaintiff's property, see *supra* note 11, appears to be insubstantial when balanced against the defendant's interest in lawfully constructing shelter for his family.

The court should have considered the following alternatives which have been used or suggested to assure some protection for solar access. The first, and perhaps the boldest, alternative is illustrated by the New Mexico Solar Rights Act.⁷⁷ Based on the water law doctrine of prior appropriation,⁷⁸ the statute declares that the right to use solar energy is a property right.⁷⁹ The second, and most popular, mode of recognizing solar access rights has been achieved by solar easement legislation⁸⁰ which unequivocally recognizes the validity of an express easement⁸¹ to light and air. Third, a statute could be enacted which declares

77. N.M. STAT. ANN. §§ 47-3-1—47-3-5 (1978).

78. The prior appropriation doctrine originated in the arid lands of the West where water was less plentiful than in the eastern states. Comment, *The Allocation of Sunlight: Solar Rights and the Prior Appropriation Doctrine*, 47 U. COLO. L. REV. 421, 436 (1976) [hereinafter cited as *Allocation of Sunlight*]. The doctrine apportions the available water from streams according to who first put the water to beneficial use. *Id.* Thus, in New Mexico, one who first puts the sunlight to beneficial use may prevent a subsequent obstruction of his access to sunlight. The plaintiff in *Prah* argued that Wisconsin should adopt the prior appropriation doctrine to govern solar access and that the trial court's failure to do so was contrary to the continuing development of the common law. Appellant's Supplemental Brief at 13, *Prah v. Maretti*, 108 Wis. 2d 223, 321 N.W.2d 182 (1982). See *supra* note 11.

79. N.M. STAT. ANN. § 47-3-4A (1978). The statute gives the solar user 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." *Id.* at § 47-3-3B.

The statute has been criticized on two grounds. First, the statute may be unconstitutional. Since a neighboring landowner's right to develop his property is restricted, the solar right may diminish the value of the property without just compensation, in violation of the fifth amendment. Note, *Access to Sunlight: New Mexico's Solar Rights Act*, 19 NAT. RESOURCES J. 957, 959 (1979). Second, the statute is unclear. For example, § 47-3-4B(2) of the statute has been interpreted as being inconsistent with the doctrine of prior appropriation. Hillhouse & Hillhouse, *New Mexico's Solar Rights Act: A Cloud Over Solar Rights*, 1 SOLAR L. REP. 751, 755 (1979). But see Kerr, *New Mexico's Solar Rights Act: The Meaning of the Statute*, 1 SOLAR L. REP. 737 (1979) (defending the Act).

Regardless of the criticisms, the statute promotes solar energy in a manner superior to private nuisance law because it grants the user an absolute right to sunlight.

80. At least fifteen states have passed solar easement statutes. Pfeiffer, *Ancient Lights: Legal Protection of Access to Solar Energy*, 68 A.B.A.J. 288, 289 (1982). See, e.g., COLO. REV. STAT. §§ 38-32.5-100.3—103 (1982); VA. CODE §§ 55-352—55-354 (1981) (requiring the easement to include the angle at which the easement extends over the servient property). These statutes benefit the solar user in that they remove any uncertainty which may have been created by the common-law concepts of easements for light and air. Berryhill & Parcell, *Guaranteeing Solar Access in Virginia*, 13 U. RICH. L. REV. 423, 445 (1979). For a survey of such laws, see Johnson, *State Approaches to Solar Legislation: A Survey*, 1 SOLAR L. REP. 55, 111-16 (1979).

81. Although extortion may co-exist with easement legislation, the chances of occurrence are reduced. If the solar energy user is aware that such easements exist, unlike the parties in *Prah*, he may be able to

the shadowing of solar collectors to be a public nuisance.⁸² At least one state has enacted a law which prohibits the shadowing of a solar collector by trees or shrubs which are permitted to grow subsequent to the installation of the solar collector.⁸³

purchase the easement before he installs the solar unit, or before the neighbor "decides to build."

Since the owner of the dominant estate (solar user) seeks by agreement to prevent the owner of the servient estate from using a portion of his land, the easement is referred to as an express negative easement. The advantage of express negative easements in protecting solar rights is that they can be freely negotiated between individuals without governmental intervention. Comment, *The Dawning of Solar Law*, 29 BAYLOR L. REV. 1013, 1015-18 (1977).

The disadvantages of such easements are threefold. First, they can be cost prohibitive. Since the sun almost never strikes directly overhead at any point in the United States, the sun's rays may pass over many lots before reaching the collectors. Consequently, a landowner may be forced to purchase more than one easement if the neighboring homes and buildings are not uniform in height. Second, the agreements are purely voluntary. Neighboring landowners may either refuse to negotiate or charge outrageous prices. Finally, the legal descriptions of the easement, in terms of angle size and hours of use, may be insufficient. Gergacz, *Solar Energy Law: Easements of Access to Sunlight*, 10 N.M.L. REV. 121, 134-38 (1979). See generally J. MINAN & W. LAWRENCE, LEGAL ASPECTS OF SOLAR ENERGY 31-34 (1981).

82. Goble, *Solar Access and Property Rights: Reply to a "Maverick" Analysis*, 12 CONN. L. REV. 270, 289 (1980).

A public nuisance is an interference with an interest which is common to the general public rather than to one individual. PROSSER, *supra* note 64, at 585. Since the law of public nuisance requires that the plaintiff's harm must be different in kind, rather than degree, from that shared by the general public, *id.* at 587, public nuisance may pose a potential impediment to solar access. This problem could be solved in one of two ways. First, one could argue that the harm received by the general public in an obstruction case is that the plaintiff must now consume additional oil and gas, thereby reducing the available supply for other citizens. The plaintiff's pecuniary loss resulting from his increased energy costs and decreased investment value could be regarded as a harm different in kind from that to the general public. Second, a statute could be enacted which gives a solar user the standing to commence such a lawsuit. The court in *Prah* believed that a statute which declares that any obstruction is a nuisance could invite unreasonable behavior. 108 Wis. 2d at 239 n.13, 321 N.W.2d at 190 n.13.

The advantage of a public nuisance statute over private nuisance law is that it does not require an inquiry into the reasonableness of the defendant's conduct. See PROSSER, *supra* note 64, at 583. See also *supra* note 68 and accompanying text.

83. CAL. PUB. RES. CODE § 25982 (West Supp. 1982). Buildings and pre-existing shrubs which cast shadows on the collector when it is installed are excluded. Additionally, California will not enforce any covenant, deed restriction, or any other instrument affecting the sale of, or interest in, real property, which prohibits or restricts the installation or use of a solar energy system. CAL. CIV. CODE § 714 (West 1982). Despite the imposing restriction placed on the adjoining landowner, it is believed that this type of provision could withstand judicial scrutiny in a constitutional challenge. See Goldman, *Constitutionality of § 714 of the California Solar Rights Act*, 9 ECOLOGY L.Q. 379 (1980).

Fourth, conventional zoning⁸⁴ may be an effective and feasible means of obtaining solar energy protection.⁸⁵ Finally, the concept of transferable development rights (TDR) has been suggested as a means of obtaining solar use protection.⁸⁶ This brief

84. A typical solar zoning ordinance would provide for height restrictions and set-back requirements to assure an unobstructed flow of sunlight to the collector surface. The power to zone is derived from the police power of a state, and has been recognized for over fifty-five years as a valid restriction upon the use of land. See *Village of Euclid v. Amber Realty*, 272 U.S. 365 (1926). "Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed . . . which require . . . additional restrictions in respect of the use and occupation of private lands . . ." *Id.* at 386.

There are three constitutional requirements for a valid zoning ordinance. First, "the ordinance must bear a rational relationship to the health, morals, or general welfare of the community" in a manner sufficient to satisfy the due process requirement of the fourteenth amendment; second, the ordinance must not be so discriminatory as to deny equal protection under the fourteenth amendment; and third, the ordinance must not so diminish the value of land "as to constitute a taking without just compensation, in violation of the fifth amendment." Eisenstadt & Utton, *Solar Rights and Their Effect on Solar Heating and Cooling*, 16 NAT. RESOURCES J. 363, 379 (1976). See also *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (upholding ordinance which prohibited excavation below the water table). If solar energy as an alternative form of energy is linked to the public welfare, and the restriction of airspace is an appropriate method of protecting solar access, an enactment to establish and protect access to solar energy would be, presumably, a constitutional exercise of a state's police power. Note, *Obtaining Access to Solar Energy: Nuisance, Water Rights, and Zoning Administration*, 45 BROOKLYN L. REV. 357, 379 (1979). See generally R. ANDERSON, *AMERICAN LAW OF ZONING* (2d ed. 1976).

85. See, e.g., Note, *Solar Energy: An Analysis of the Implementation of Solar Zoning*, 17 WASHBURN L.J. 146 (1977) (containing a model ordinance); *Assuring Legal Access*, *supra* note 71, at 623. But see Comment, *Solar Rights: Guaranteeing a Place in the Sun*, 57 OR. L. REV. 94, 127 (1977) (zoning is an unsatisfactory method of providing solar access).

Assuming that it is constitutionally acceptable, a solar zoning ordinance has advantages over private nuisance law in that it is an established method of restricting land use, eliminates the need for personal negotiation, could provide for uniform solar rights, and would save the solar user the cost of purchasing an easement. Comment, *The Dawning of Solar Law*, 29 BAYLOR L. REV. 1013, 1019 (1977). At least one state has enacted legislation granting municipalities the power to implement zoning laws to assure access to solar energy. MINN. STAT. ANN. § 462.358(2)(a) (West Supp. 1982).

Solar zoning does have some drawbacks. Although there appears to be no superior method of guaranteeing solar access in a new subdivision, solar zoning would pose a burden on pre-existing structures in an established neighborhood. Zillman & Denny, *Legal Aspects of Solar Energy Development*, 1976 ARIZ. ST. L.J. 25, 43 (1976). The ease and frequency with which ordinances are modified is also an objection to solar zoning. Comment, *Solar Rights: Guaranteeing a Place in the Sun*, 57 OR. L. REV. 94, 123 (1977) (noting that since 1960, a majority of American cities have revised their zoning ordinances).

86. Comment, *A Legislative Approach to Solar Access: Transferable Development Rights*, 13 NEW ENG. 835, 853-61, 867-74 (1978) [hereinafter cited as *Transferable Development Rights*]. Development rights are the rights that a landowner has to develop unused space within applicable zoning laws. *Id.* at 853. Under the TDR concept, land ownership is divided into two

survey demonstrates that there are methods other than private nuisance law which are more in harmony with the national policy of promoting solar energy.⁸⁷ Many of these alternatives provide broad protection for the solar user by lessening the burden of proof in situations in which private nuisance law would require an application of the cumbersome reasonableness test.

The fourth aspect of the *Prah* decision which warrants discussion is whether the court's decision invaded the realm of the legislature. It is evident that the national policy of encouraging alternative forms of energy⁸⁸ provided the impetus for the court's decision.⁸⁹ In holding that private nuisance law is a suitable means of regulating access to sunlight in today's energy-conscious society,⁹⁰ the court implied that the public interest requires the adoption of a law to govern solar access. Wisconsin has held, however, that the power to declare the policy or purpose to be achieved by a law, or even whether there shall be a law, is a power vested in the legislature.⁹¹ A judicial determination of what "is in the best interest" is an exercise of legislative power if political considerations are involved.⁹²

An application of the above criteria to *Prah* reveals that the decision did encroach upon legislative territory. Although one

categories: a) physical ownership; and b) the development potential associated with that land. See also S. KRAEMER, SOLAR LAW 159-65 (1978) (discussing the TDR concept).

87. To make the proposed alternatives more effective, various problems must be remedied. Such problems include: a) inadequate definition of key terms; b) ineffective or unclear delegation of administrative responsibility to state solar agencies; and c) poor coordination between state agencies and federal or local solar programs. Warren, *Common Problems in Drafting State Solar Legislation*, 1 SOLAR L. REP. 157, 159 (1979).

88. See *supra* note 23.

89. The dissenting justice was not convinced that solar energy has become more significant in recent years. *Prah v. Maretti*, 108 Wis. 2d 223, 247, 321 N.W.2d 182, 194 (1982) (Callow, J., dissenting). While it is true that the high cost of solar collectors may make a solar energy system uneconomical and has led to sparse use, this viewpoint mistakenly equates popularity with importance. The goal of the policy is to encourage harnessing the energy potential of the sun by any means possible, regardless of its popularity. Costs incurred by the solar user can be offset with energy tax credits. For a discussion of the feasibility of solar heating systems, in both a price-controlled and deregulated energy market, see Ben-David, Schulze, Balcombe, Katson, Noll, Roach & Thayer, *Near Term Prospects for Solar Energy: An Economic Analysis*, 17 NAT. RESOURCES J. 169 (1977).

90. 108 Wis. 2d at 239, 321 N.W.2d at 191.

91. *Schmidt v. Department of Res. Dev.*, 39 Wis. 2d 46, 59, 158 N.W.2d 306, 313 (1968) (power to declare a law is vested by the Constitution in the legislature and may not be delegated).

92. *Town of Beloit v. City of Beloit*, 37 Wis. 2d 637, 644, 155 N.W.2d 633, 636 (1968) (ordinance that gave the court the power to determine whether annexation was in the public interest was an unauthorized delegation of legislative power to the judiciary).

could argue that *Prah* was consistent with prior decisions which judicially adopted the reasonable-use rule,⁹³ *Prah* is distinguishable. The presence of a legislative declaration of the national interest in encouraging solar use suggests that a legislative decision regulating solar access is a more harmonious means of accomplishing the national goal than is a judicial decision.

Two additional reasons support the argument that a judicial decision to regulate solar access is inappropriate. First, those jurisdictions which have attempted to recognize solar access have protected the solar user by various legislative enactments.⁹⁴ In this respect, *Prah's* judicial solution to the solar access problem stands in sharp contrast to the approaches taken by other jurisdictions, and is, therefore, a deviation from the norm.⁹⁵ The problem with such a deviation is that the alternative approaches provide more comprehensive protection for the solar user, and the deviation precludes their adoption. Second, legislative action would be more consistent with prior Wisconsin efforts to recognize access to sunlight.⁹⁶ The legislature took the first step toward recognition of access to sunlight in Wisconsin when it declared that a maliciously erected fence is a private nuisance.⁹⁷ The next logical step toward protection of solar ac-

93. *State v. Deetz*, 66 Wis. 2d 1, 224 N.W.2d 407 (1974); *State v. Michels Pipeline Constr., Inc.*, 63 Wis. 2d 278, 217 N.W.2d 339 (1974).

94. See *supra* notes 77-88 and accompanying text.

95. There is at least one other pro-solar case where a court implied that one should have a right to light. In a New York case, the plaintiff requested a variance from a local zoning authority to install rooftop collectors. Although the ordinance made no specific reference to solar collectors, it restricted the amount of roof area which could be covered by a structure. When the request was denied, the plaintiff took legal action against the zoning board. The court ordered the zoning authority to allow the installation of the collectors despite the fact that they covered twice the amount of roof area permitted by the ordinance. The judge suggested that the zoning authority reexamine its attitude in the face of changing scientific advances and national and state interests in energy conservation. *Katz v. Bodkin*, 1 SOLAR L. REP. 495, 501 (1979). For a discussion of the *Katz* case, as well as suggestions for those who wish to install solar heating systems despite local zoning restrictions, see Barrett, *Overcoming the Solar Zoning Barrier: Katz v. Bodkin*, 1 SOLAR L. REP. 925 (1980).

96. Before the *Prah* decision, but after the filing of the suit and presentation of oral arguments, Wisconsin enacted legislation encouraging local governments to protect access rights to the wind and the sun by creating a procedure for the issuance of solar access permits. 1981 Wis. Legis. Serv. § 354 (West). The enactment enables one to seek damages resulting from an "impermissible interference" with the sun. *Id.* at § 10(3). The enactment clearly illustrates Wisconsin's policy favoring solar energy use.

As a result of the new legislation, the dissenting justice argued that a judicial determination was unnecessary and an unwarranted intrusion into legislative territory. *Prah v. Maretti*, 108 Wis. 2d 223, 249, 321 N.W.2d 182, 195 (1982) (Callow, J., dissenting).

97. 1903 Wis. Laws ch. 81 § 1, at 124.

cess would be a legislative declaration that an obstruction to sunlight is a private or public nuisance.

The final and most bizarre aspect of the court's reasoning spawns an inquiry into the status of the doctrine of "ancient lights."⁹⁸ Although the doctrine governs solar access in England, it has been rejected unanimously in the United States.⁹⁹ In *Prah*, the court noted that Wisconsin had rejected ancient lights because the doctrine was inconsistent with the needs of a developing country.¹⁰⁰ Later in the opinion, however, the court appears to have disposed of the argument which justified a rejection of the ancient lights doctrine when it stated that the need for easy and rapid development is not a dominant consideration today.¹⁰¹ In abandoning the policy favoring unhindered private development,¹⁰² the court may have implicitly resurrected the doctrine of ancient lights. Regardless of whether such a doctrine would provide adequate protection for solar energy in modern society,¹⁰³ the court should have clarified its view of the

98. The doctrine of ancient lights states that if a landowner has received uninterrupted access to sunlight adverse to an adjoining landowner for a stated period of time, an easement to sunlight will be presumed. See *Aldred's Case*, 77 Eng. Rep. 816 (K.B. 1610). See also *Allocation of Sunlight*, *supra* note 78, at 429-32.

99. The doctrine was first rejected in America in *Parker v. Foote*, 19 Wend. 308, 308-09 (N.Y. Sup. Ct. 1838). In *Parker*, the plaintiff enjoyed uninterrupted sunlight for 24 years until the defendant constructed a house blocking the sunlight to the plaintiff's windows. The court held that the ancient lights doctrine is an anomaly in the law and could not be applied in the growing cities of this country without "mischievous consequences." *Id.* at 318. For a list of cases rejecting the doctrine, see Moskowitz, *Legal Access to Light: The Solar Energy Imperative*, 9 NAT. RES. L. 177, 188 n.60 (1976).

100. 108 Wis. 2d at 233-34, 321 N.W.2d at 188.

101. *Id.* at 237, 321 N.W.2d at 190.

102. *Id.*

103. The first problem in applying the doctrine of ancient lights as a means of solar protection in the United States is that the scope of the doctrine's protection would need to be enlarged. English courts considered sunlight only as a source of illumination and were concerned only with the quantity of light remaining, not the quantity obstructed. To measure whether the remaining light was sufficient, the courts invented the "grumble line", or the point at which a reasonable person would grumble and resort to artificial light. *Assuring Legal Access*, *supra* note 71, at 578. If half of the room remained between the grumble line and the window, or if one was able to read a book, the quantum of light was sufficient. S. KRAEMER, *SOLAR LAW* 131-32 (1978).

The second problem in adopting the doctrine is that the prescriptive period is too long. Two suggestions for this problem have been advanced; shorten the period or eliminate it. See Myers, *The Common Law of Solar Access*, 6 REAL EST. L.J. 320, 328-29 (1978).

Finally, when would the prescriptive period commence, and would the number of years in which the first owner used sunlight as an energy source accrue to the second? It has been suggested that the prescriptive period should begin at the installation of the solar collector since such installation would give the neighbor sufficient notice of adverse use. *Transferable De-*

doctrine. Its failure to do so may have opened Wisconsin and other jurisdictions to future litigation over the potential protection that ancient lights could offer.

On the strength of the foregoing analysis, it is clear that the court has taken aim at precedent which ignores the right to sunlight. Although it was correct in recognizing the need for solar-access protection in modern society, the court failed to use energy conservation as a means of distinguishing *Prah* from past access-to-sunlight cases. By failing to limit the scope of its holding to the facts before it, *Prah* will certainly revive litigation in areas of the law which have been dormant for many years. Although private nuisance law could be used to regulate solar access, it will be more effective if it is used in conjunction with some type of solar legislation. If the underlying purpose of the court's decision was to promote the policy of energy conservation, *Prah* will have little precedential value since solar-energy legislation provides a more effective and harmonious means of reserving a path to the sun.

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velopment Rights, supra note 87, at 841. See also Comment, *Solar Rights: Guaranteeing a Place in the Sun*, 57 OR. L. REV. 94, 112 (1977) (suggesting that the doctrine be reconsidered in light of the need for new energy sources).

