

Law Reform Commission of Saskatchewan

Background Paper: Solar Access Legislation
October 2007

The Law Reform Commission of Saskatchewan

The Law Reform Commission of Saskatchewan was established by *An Act to Establish a Law Reform Commission*, proclaimed in force in November 1973, and began functioning in February 1974.

The Commission is a statutory corporation whose members are appointed by the Lieutenant Governor in Council. There are at present nine commissioners, representing various aspects of the legal community as well as non-lawyers. Its recommendations are independent and are submitted to the Minister of Justice for consideration.

Projects are initiated by the Commission in response to suggestions from the public and the legal community, or at the request of the Minister of Justice. After preliminary research, the Commission usually issues background or consultation papers to facilitate consultation. Tentative Proposals may be issued if the legal issues involved in a project are complex. Upon completion of a project, the Commission's recommendations are formally submitted to the Minister as Final Proposals.

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Introduction

The Saskatchewan Environment Minister has requested the Law Reform Commission to give advice on solar access legislation. Solar access legislation is intended to ensure that a property owner's access to sunlight for solar energy generation will not be jeopardized by development on a neighbouring property. Such legislation has been widely adopted in the United States. It was identified as a priority in *Renewable Energy Conservation and Development in Saskatchewan: A First Report on Making Saskatchewan a Canadian Leader in Energy Conservation and Renewable Energy Development*, presented to Premier Lorne Calvert in December 2006 by Peter Prebble MLA, Legislative Secretary for Renewable Energy Development and Conservation. The Report stated:

Solar energy will be an important component of new building construction in the future. Moreover, commercial and residential building owners are going to install solar technology in existing homes, with the most frequent installations likely being solar collectors for domestic hot water.

Solar hot water, solar space heating and solar photovoltaic systems are all proven technologies and can be readily applied in urban and rural settings. Southern Saskatchewan has enormous potentials for solar applications because of our excellent sunlight resource with more hours of sunlight each year than any other part of Canada.

To prepare for and encourage transition to solar energy, I recommend that our government introduce legislation to protect the solar rights of all Saskatchewan residents who have installed solar systems on buildings they own.

I also recommend that our government undertake extensive consultations with municipalities to encourage municipal planners to facilitate solar access through appropriate subdivision layout and design. The Department of Government Relations should work to prepare a model municipal bylaw that goes further in guiding the layout of subdivisions, streets and buildings in such a way as to protect solar rights. Our government should encourage municipalities to study and adopt the model bylaw.¹

The Report suggests that “solar energy will be an important component of building construction in the future. Moreover, commercial and residential building owners are going to install solar technology in existing homes.”² Solar power is a good fit for Saskatchewan. According to the Saskatchewan Citizens' Federation, “we could become a world-leader in solar

¹ Saskatchewan, Legislative Secretary for Renewable Energy Development and Conservation (Peter Prebble), *Renewable Energy Conservation and Development in Saskatchewan* (Regina: Crown Investments Corporation, 2006) at 43-44, online: <http://www.cicorp.sk.ca/energy-development-conservation/ren-ene-dev-con-report.pdf> [Prebble Report].

² *Ibid.* at 43.

technology.” The Federation observes that “Estevan is the sunniest city in Canada receiving an average of 2,500 hours annually, [and] Saskatoon is one of the sunniest large cities in Canada receiving an average of 2,381 hours annually...”³

Because of the high cost of photovoltaic panels to produce electrical power directly from sunlight, large-scale solar generation of electrical power is not currently as attractive as alternative energy sources such as wind farms. There is, however, potential for small-scale solar power generation for individual residences and commercial buildings. Residential solar power installations have a small footprint and can typically be installed on roofs of existing buildings. In the near future, the Report suggests that solar hot water and space heating systems will likely be more popular than electrical power generation. Water is heated by pumping it through a rooftop heat collector. These systems are relatively low cost, and can be included in new construction or retrofitted into existing homes. Both types of solar installation can save considerable money for home owners and businesses, but only if they are operated long enough to recover capital costs.

If homeowners and businesses invest in solar energy systems, they need assurance that future development on neighbouring properties will not block access to sunlight. Saskatchewan legislation does not explicitly deal with solar access. At present, the only practical way to ensure access to sunlight is by negotiation of agreements with neighbouring landowners. Such agreements could be registered in the Land Titles Office as easements, which would be binding on future owners of the neighbouring properties. However, under the existing law, even a long established solar installation has no protection in the absence of an easement.

Advocates suggest that solar access legislation would protect the investment and effort of property owners who install solar energy systems. Because typical solar installations are placed on the roofs of residential or commercial buildings, problems of solar access as neighbouring properties are developed or re-developed can be expected to be frequent. Clarification of the law and encouragement of solar access easements would make a contribution to reducing access issues, but easements may be difficult to acquire in some cases. Installation of a solar panel or solar water heating system should not be discouraged by difficulty in obtaining easements, or jeopardized when easements are not in place. The UN International Sustainable Energy Organization (ISEO) has concluded that “the lack of such legal rights is a significant deterrent to investment in solar and wind energy.”⁴

However, protection of solar access has detriments as well as benefits. If the law protects a right to sunlight in the absence of an agreement with neighbouring property owners, it places limits on the rights of land owners to use and develop their property. Limitations on land use are of course a well established part of land use planning, particularly through municipal zoning bylaws. Limitations are deemed to be justified to protect both the interests of neighbours, and the wider public good. Trade-offs between the rights of a land owner and the rights of neighbours are inevitably required. The challenge for policymakers is to find the appropriate balance between the rights of owners of solar installations and their neighbours.

³ Saskatchewan Citizens’ Federation, “Solar Power in Saskatchewan” (28 August 2006), online: <http://citizensfederation.blogspot.com/2006/08/solar-power-in-saskatchewan.html>.

⁴ International Sustainable Energy Organization, *Energy Law and Sustainable Development* (Geneva, n.d.), online: <http://www.uniseo.org/legal.htm>.

The balance point depends on the relative importance of the competing interests of property owners who install solar energy installations and their neighbours. Because solar energy installations are expected to become much more common, and because of the social value attached to alternative energy sources, advocates of solar access legislation argue that the equation is changing. From a strictly legal perspective, shifting the balance toward greater protection for access to sunlight would not represent a novel departure from the principles that govern relations between neighbouring property owners. It is perhaps useful to contrast the legal treatment of access to light with access to water. Access to light is protected in Saskatchewan only if an easement has been granted by neighbours; access to the water in a river or stream by all property owners along its course is protected by operation of law. At common law the “riparian rights” of all landowners along the stream prevent each other from stopping the flow, or taking more than their fair share of the water. Riparian rights have been described in these terms: “Natural rights to water belong to the riparian owner as a natural incident to the right to the soil itself and are not in the nature of easements.”⁵ An analogous regime applied to solar access would recognize access to sunlight for solar power generation as an incident of ownership that could not be interfered with by neighbouring land owners.

No doubt, the greater attention has traditionally been given to riparian rights than to the right to light because access to water has long been recognized as vital. Access to light for domestic purposes such as providing natural light in buildings was regarded as less important, a matter safely left to agreements between neighbours. The development of solar power generation places new value and importance on access to light. An appeal court decision in Wisconsin has drawn the conclusion that the law must change to reflect this fact. The court granted an injunction to stop construction of a building in a location that would interfere with a neighbour’s solar panel installation. The court was willing to find that the builder’s refusal to re-site the building on his property amounted to a nuisance. In law, nuisance is interference with the use and enjoyment of property, but the courts in the common law world had not previously been willing to treat interference with sunlight as a nuisance. The Wisconsin appeal court was of the opinion that “the courts should not implement obsolete policies that have lost their vigor over the course of the years,” and held that changing needs require a redefinition of nuisance. In effect, the court found that the development of small-scale solar power has shifted the balance of interests in favour of protecting solar access.⁶

In some jurisdictions, access to light has been given enhanced protection. In California, for example, the *Solar Shade Control Act* prohibits nearby trees and shrubs from shading solar energy systems, and the *Solar Rights Act* limits the ability of homeowners associations and local governments to place restrictions on solar installations. The Wisconsin *Solar and Wind Access Permits Act* establishes municipal boards to grant solar access permits.⁷

Solar access legislation might include:

⁵ H.D. Anger & J.D. Honsberger, *Canadian Law of Real Property* (Toronto: Canada Law Book, 1959) at 1007, citing *Leahy v. North Sydney (Town)*, (1906) 37 S.C.R. 464. Riparian rights have been modified by statute; see for example *The Watershed Associations Act*, R.S.S. 1978, c. W-11.

⁶ *Prah v. Maretti*, 321 N.W. 2d 182 (Wis. 1982).

⁷ This legislation is discussed below.

1. Clarification and extension of the law governing the grant of solar access easements. “Easements for light” have long been recognized by common law, and almost certainly would include solar access easements to protect solar energy generation. However, the common law easement for light developed to allow protection of window lighting at a time when natural lighting was a virtual necessity. Before the advent of solar power, such easements largely fell into disuse. *The Land Titles Act, 2000* makes no express provision for easements for light, and they appear to have been very rare in the province. Statutory recognition of solar access easements, clearly setting out their scope and limitations, would ensure that appropriate protection is available, and encourage the use of solar access easements.

2. Creation of rights to solar access by operation of law when no easement has been negotiated and registered. Because solar access will be increasingly important as alternative energy resources are developed, it can be argued that solar installations should have some protection even when an easement has not been negotiated and registered: in effect, this approach would treat light rights more like water rights. The principle difficulty with this approach is that, even if the decision has been made to favour solar access, it may be difficult to craft a regulation that would apply fairly in all cases. Legislation such as the *California Solar Shade Control Act* that provides only limited protection is less problematic, but also less useful.

3. Permits for solar access. Balancing rights of property owners to produce fair results in all circumstances might be achieved by establishing an authority to grant permits or easements for solar access when voluntary agreements between neighbours are impractical. Because such an authority would affect the property rights of both applicants and neighbours, it could be organized as a tribunal, similar to municipal Development Appeal Boards or the provincial Water Appeal Board.

4. Zoning for solar access. In new real estate developments and in some older neighbourhoods, it may be possible to adopt a zoning requirement that access for properly sited solar installation should not be encroached by future development. The province could encourage such zoning regulations, or require them as a condition of approval of bylaws and development plans in appropriate cases.⁸

How far it is appropriate to shift the balance in favour of protecting solar access is a question of policy. This paper identifies, but does not resolve, the policy issues. After examining the present law in Saskatchewan and elsewhere, it discusses a series of options. Both the effectiveness of each option as a means of protecting solar access, and the impact of each option on the property rights of the owners of solar power installations and their neighbours will be considered. The Commission hopes this approach will facilitate consideration of policy options, and provide guidance for formulation of legislation.

⁸ The recommendation in the Prebble Report, *supra* note 1, for “a model municipal bylaw that goes further in guiding the layout of subdivisions, streets and buildings in such a way as to protect solar rights” (at 44) would include zoning regulations providing simple protection for solar installations, but would extend much further. Such a model bylaw is beyond the scope of this paper.

Solar Access: The Law in Canada

No province or territory in Canada has yet adopted solar access legislation. Protection of access to light therefore follows the common law, as modified by statute in various jurisdictions.

An easement for light is classified as a negative easement: a “right which the owner of the dominant tenement may acquire of preventing the owner or occupier of the adjoining tenement from building or placing upon the latter’s land anything which has the effect of illegally obstructing or obscuring the light of the dominant tenement.”⁹ The common law easement was limited in scope, protecting only access to light through a window or other aperture to provide “that amount of natural light which is sufficient, according to the notions of mankind, for the comfortable use and enjoyment of the house, if it were a dwelling house, or the beneficial use and enjoyment if it were a warehouse, shop, or other place of business.” The test for sufficient access is not quantified: “What is or is not an interference such as will support a claim for damages in respect to an injury to a building by the obstruction of light is one of considerable difficulty.”¹⁰

Easements may be registered against title under the Saskatchewan *Land Titles Act, 2000*.¹¹ The legislation does not define “easement”. Thus any easement that could be granted at common law, including an easement for light, can presumably be registered under *The Land Titles Act, 2000*. The Commission found no Saskatchewan example of an easement intended to protect access to sunlight for solar energy generation. However, the scope of such easements at common law is likely broad enough to cover any terms that might reasonably be included in an easement designed to ensure solar access to solar collectors. It is worth noting that the common law also recognized an easement for passage of air from a neighbouring property.¹² This easement has been widely adapted in North America to protect access to wind for energy producing wind turbines.¹³ There is less experience with solar access easements, but jurisdictions in which they are currently in use appear to have had little difficulty extending the common law easement for this purpose.

Nevertheless, solar access was not contemplated by the courts when they developed the easement for light in the 19th century. For that reason, application of the concept to solar access is somewhat uncertain. At common law, not every conceivable right over adjoining land could be made the subject matter of an easement. In particular, it has been held that if the right claimed is too wide or uncertain, it cannot be protected by an easement. Thus, for example, it has been held that an easement for view or to provide privacy cannot be granted.¹⁴ While these limitations on the

⁹ Anger & Honsberger, *supra* note 5 at 1001, citing *Colls v. Home & Colonial Stores Ltd.*, [1904] A.C. 179 (Eng).

¹⁰ *Carter v. Grasett*, (1888) 14 O.A.R. 685 (Eng).

¹¹ S.S. 2000, c. L-5.1.

¹² *Cable v. Bryant*, [1908] 1 Ch. 259 (Eng).

¹³ See Windustry, “Wind Energy Easements and Leases: Compensation Packages” (2005). The larger scale and investment typical of wind farms likely accounts for the greater attention given to wind access by lawyers.

¹⁴ *Copeland v. Greenleaf*, [1952] 1 All E.R. 809 (Eng.)

common law easement do not appear to be directly relevant to solar access, they underline the uncertainty in the common law.

Under *The Land Titles Act, 2000*, an easement can only be created by grant from the affected property owner. At common law, some easements, including easements for light, could also be created by long use, by what was called “prescription” in law. If access to sunlight across a neighbour’s property was uninterrupted for a period of 20 years, the landowner could claim an easement for light by prescription.¹⁵ Acquisition of easements by prescription was abolished in Saskatchewan when the land titles system was adopted.¹⁶ Easements can still be acquired in England by prescription, but the doctrine has been abolished in all Canadian provinces and territories. Although an easement for light can now be created only by grant, the old doctrine of easements by prescription is an interesting precedent for protection of solar access in the absence of an easement obtained from neighbours.

¹⁵ The 20 year prescription period was fixed by the *Prescription Act 1832* (U.K.), 2 & 3 Wm. IV, c. 71, which was received as part of the law of Saskatchewan.

¹⁶ *The Land Titles Act, 2000*, s. 150 provides:

No right to the access and use of light or any other easement, right in gross or profit à prendre is:

- (a) acquired by any person by prescription; or
- (b) deemed to have been acquired by prescription at any time.

Solar Access Legislation in the United States

The first solar access statutes in North America, the *Solar Rights Act*¹⁷ and *Solar Shade Control Act*¹⁸, were enacted in California in 1978. The impetus for the legislation was the oil shortage of the late 1970s, but the legislation has been integrated with more recent initiatives to encourage solar power. Solar rights statutes following the California model have been adopted in at least seven American states.

The *Solar Rights Act* provides limited protection for solar access in several ways:¹⁹

1. Solar easements: The legislation defines and regulates “solar easements” to protect access to light for solar energy systems. It gives explicit recognition to solar easements, and describes the minimum requirements needed to create a solar easement. However, the legislation provides only for creation of solar easements by grant.
2. Limits on restrictions on solar installations: Regulations governing land use in some communities prohibit solar installations, just as, for example, regulations may prohibit satellite dishes or other features deemed to be out of keeping with the character of the neighbourhood. The legislation prohibits zoning authorities, home owners’ associations, and developers from prohibiting or restricting solar installations by means of bylaws or restrictive covenants.
3. Limits on other local government restrictions on solar installations: The legislation discourages local governments from adopting ordinances that would unreasonably restrict the use of solar energy systems, and requires local governments to use a non-discretionary permitting process for solar energy.
4. Requirements of solar easements in some real estate developments: The legislation allows municipalities to require dedication of solar easements in certain subdivision developments as a condition of development approval.
5. Passive solar opportunities in subdivisions: The legislation requires certain future real estate developments to be designed to facilitate passive solar heating and cooling. “Passive” solar heating is achieved by design and placement of buildings, rather than by installing either dedicated solar collectors or solar panels. Passive solar heating designs cannot be the

¹⁷ The *Solar Rights Act* is a compilation of provisions in several California law codes: California Civil Code Sections 714 and 714.1, California Civil Code Section 801, California Civil Code Section 801.5, California Government Code Section 65850.5, California Health and Safety Code Section 17959.1, California Government Code Section 66475.3 and California Government Code Section 66473.1.

¹⁸ California Public Resources Code Sections 25980-25986.

¹⁹ For a recent summary and review of the legislation, see Scott Anders, Kevin Grigsby & Carolyn Adi Kuduk, *California’s Solar Rights Act: A Review of the Statutes and Relevant Cases*, (San Diego: Energy Policy Initiatives Center (EPIC), University of San Diego School of Law, 2007), online: http://www.sandiego.edu/epic/publications/documents/070123_RightsActPaperFINAL.pdf .

subject of solar easements under California law, but municipal zoning can protect and facilitate passive designs.

Note that the legislation focuses on facilitation rather than coercion. It regulates solar easements, but at least in regard to existing real estate developments, a land owner who installs a solar energy system must negotiate easements with neighbours in order to protect access to light. Other provisions remove impediments to use of solar energy without direct protection of access to light. Access to light is required only in new neighbourhoods designated by the legislation. In these neighbourhoods, access to light for solar installations will be part of the development plan, just as other neighbourhood features such as density and height restrictions are typically mandated.

Except where solar access is part of a zoning plan, California legislation imposes a right of access to sunlight only when solar collectors are blocked by vegetation. The *Solar Shade Control Act* restricts allowed shading of solar collectors by trees to 10 percent of the area of a collector between 10:00 a.m. and 2:00 p.m. The prohibition applies only to growth after installation of the solar collector. Trees that cast a shadow on the collector at the time of installation, or within one year of installation, are exempted. Prohibited tree growth is defined as a public nuisance by the legislation, punishable by a fine of \$1000 if the offending shade is not removed after notice.²⁰

While most solar access legislation in the United States follows the California model, some states have gone further to require neighbouring property owners to avoid interference with access to sunlight. In 1981, Wisconsin adopted the *Solar and Wind Access Permits Act*²¹, which authorizes municipalities to issue permits giving access across neighbouring properties for both solar and wind energy systems. A person who has installed or intends to install an energy system may apply to the municipality for a permit. Notice must be given by the applicant “to the owner of any property which the applicant proposes to be restricted by the permit”, stating that the permit “may affect the rights of the notified owner to develop his or her property and to plant vegetation”, and informing the notified property owner that he or she may request a hearing. The municipality may also request a hearing if it opposes granting the permit.

The legislation requires the municipality to grant the permit if (1) the energy system will not unreasonably interfere with orderly land use and the development plans of the municipality, (2) no person who has present plans to build a structure that would impermissibly interfere with the energy system has expended more than \$500 or otherwise made substantial progress toward planning or constructing such a structure, and (3) the benefits to the applicant and the public will exceed any burdens.

The permit can be registered against title, and thus amounts to an easement. Violation of the terms of the permit are grounds for claiming damages and injunctive relief in the courts.

²⁰ *Ibid.*

²¹ Wisconsin Statute 66.032 . For a summary and analysis of the legislation, see *State of Wisconsin ex rel. Norman Numrich and Ralph Kling v. City of Mequon Board of Zoning Appeals*, Wisconsin Court of Appeals No. 00-164300-1643, March 7, 2001.

A similar, but somewhat more limited system is in place in Iowa.²² Under the Iowa legislation, application for a solar access easement may be made to a municipal “solar access board”, but only after the applicant “has attempted to voluntarily negotiate a solar access easement with the owner of the servient estate [neighbouring property] and has been unsuccessful in obtaining the easement voluntarily”. The onus to justify the grant is shifted more to the applicant than in the Wisconsin legislation. Thus, the applicant must show that he or she “has done everything reasonable, taking cost and efficiency into account, to design and locate the collector in a manner to minimize the impact on development” of servient estates.” The legislation also provides for compensation of the landowner affected by the easement, which may be appropriate in legislation that appears to be designed more to resolve stalled negotiations than to enforce a right to solar access. The difference in the approach in Iowa and Wisconsin may reflect the support given by the Wisconsin courts in *Prah v. Maretti* to the notion that solar access should ordinarily be regarded as a right.

²² Access to Solar Energy, Iowa Code 564A.1-9 (2003).

Solar Access Options for Saskatchewan

Solar access legislation in the United States may provide models for Saskatchewan. However, it must be stressed that land titles and municipal legislation are significantly different in Canada than in the United States. In addition, the social and political context is very different in California than in Saskatchewan. For that reason, American models must be used carefully, and adapted for use in Saskatchewan.

In considering a possible method of facilitating solar access, three questions should be considered:

1. Would the proposal be useful in the Saskatchewan context?
2. Does the proposal achieve a balance between the interests of the public, the owner of the solar installation, and the owners of affected neighbouring properties that is acceptable in Saskatchewan?
3. What would be required to adapt the proposal to the legal and institutional environment of Saskatchewan?

In this part, options for facilitating solar access in Saskatchewan will be presented, and the questions set out above discussed in each case. However, choice of options, particularly when tradeoffs between the rights of owners of solar installations and their neighbours are involved, are ultimately questions of policy which must be answered by the Minister and his officials. The Commission's discussion is intended to facilitate consideration of policy options.

1. Voluntary grants of solar easements: Clarifying the law

When solar easements can be obtained from neighbours by negotiation, solar access can be guaranteed without interference with property rights. Since it appears that solar easements can be registered against title under *The Land Titles Act, 2000*, this option is available now. However, as noted above, easements for light have been rare in Saskatchewan in the past, and there is little precedent for adapting the common law easement for light to the specific requirements of solar access. For that reason, it may be useful to clarify the law by making explicit provision for recognition and registration of solar access easements. *The Land Titles Act, 2000* and other legislation contain special provisions for certain types of easements, including public utility rights of way and conservation easements. Special rules governing solar easements would similarly clarify the law, and encourage the use of solar easements.

The California *Solar Rights Act* is a good guide to the possible content of legislation regulating solar access. The Act defines a "solar easement" as the "right of receiving sunlight across real property of another for use by any solar energy system."²³ A "solar energy system" is defined as "any solar collector or other solar energy device or any structural design feature of a building whose primary purpose is to provide for the collection, storage, and distribution of solar

²³ California Civil Code 801.5.

energy for space heating, space cooling, electric generation, or water heating.” Both parts of the definition are useful. They make it clear that the subject matter is easements for the specific purpose of protecting access to sunlight for solar installations, and distinguish the more general common law easement for light. Note that the definition of “solar energy system” does not include so-called passive solar heating and cooling of buildings, which is a matter of building design and orientation not involving dedicated solar collectors and heat distribution systems.²⁴ Such features are likely too varied to qualify as proper subjects for an easement at common law. They could be better protected by good subdivision planning.

The *Solar Rights Act* sets out minimum requirements for solar access easements:

- description of the dimensions of the easement expressed in measurable terms;
- restrictions that would impair or obstruct the passage of sunlight through the easement; and
- the terms or conditions, if any, under which the easement may be revised or terminated.

These are appropriate minimum requirements. In addition, the legal description of the dominant estate (the property benefitted by the easement) and servient estate (the property subject to the easement) would be necessary for land titles purposes.

Iowa solar access legislation²⁵ contains some additional requirements not found in the California model. Iowa requires a description of the dimensions of the easement “in terms of the degrees of the vertical and horizontal angles through which the solar access easement extends over the burdened property and the points from which these angles are measured.” Such a requirement would avoid uncertainty concerning the dimensions of the easement, but are likely not a significant improvement on the simpler California requirement. The Iowa legislation also sets out some matters which the easement may include in addition to the minimum requirements:

In addition to the items required... the solar access easement may include, but the contents are not limited to, the following:

- a. Any limitations on the growth of existing and future vegetation or the height of buildings or other potential obstructions of the solar collector.
- b. Terms or conditions under which the solar access easement may be abandoned or terminated.
- c. Provisions for compensating the owner of the property benefiting from the solar access easement in the event of interference with the enjoyment of the solar access easement, or for compensating the owner of the property subject to the solar access easement for maintaining that easement.

²⁴ Although exclusion of passive solar heating and cooling was almost certainly the legislative intent, the definition could perhaps be more explicit. The definition has been interpreted by the courts to exclude passive solar energy systems: *Sher v. Leiderman*, 181 Cal. App. 3d 867 (1986).

²⁵ Iowa Code 564A.7 (2003).

Clarification of the law governing solar access easements would be useful both to avoid legal uncertainty and to encourage parties to negotiate them. However, because access cannot always be negotiated, in itself this option could be expected to make only a limited contribution to facilitating solar access.

2. Limiting restrictions on solar installations: Restrictive covenants and bylaws

American legislators have regarded efforts by developers, planners, and neighbourhood associations to restrict installation of solar energy systems as a problem. Solar collectors have sometimes been regarded as unsightly and inappropriate for upscale neighbourhoods that also regulate such matters as landscaping and satellite dishes.

In fact, a properly designed solar collector is less intrusive than a satellite dish. Although restrictive covenants, which put limits on what a purchaser can do with the property, can be placed on title in Saskatchewan, they are less frequently used to regulate neighbourhoods than in the United States. Neighbourhood associations are given what amounts to zoning bylaw making power in California, but the only parallel in Saskatchewan is perhaps a condominium corporation.

The California *Solar Rights Act* contains extensive provisions limiting and regulating the use of restrictive covenants, bylaws, and other mechanisms to restrict or prohibit solar installations.²⁶ Attempts by municipalities to circumvent the legislation seem to have been frequent enough to suggest that California needs a sophisticated code dealing with this issue, but such an approach may not be required in Saskatchewan. However, Saskatchewan solar access legislation might usefully include simple provisions to discourage restriction of solar installations.

A strong argument can be made that restrictive covenants prohibiting or restricting solar installations have no place. Reasonable restrictions on solar installations could be included in civic bylaws, if they are to exist at all. The Iowa Code provides that:

City councils and county boards of supervisors may include in ordinances relating to subdivisions a provision prohibiting deeds for property located in new subdivisions from containing restrictive covenants that include unreasonable restrictions on the use of solar collectors.²⁷

In Saskatchewan, where matters such as restrictive covenants are governed by the land titles system, such a restriction would likely be more appropriate in provincial law than in zoning bylaws.

If it is considered appropriate to discourage bylaws unreasonably restricting solar installations, the mechanism for doing so need not be complicated. Wisconsin provides a model:

No county, city, town or village may place any restriction, either directly or in effect, on the installation or use of a solar energy system or a wind energy system unless the restriction satisfies one of the following conditions:

²⁶ California Civil Code 714.

²⁷ Iowa Code 564A.8.

- (1) Serves to preserve or protect the public health or safety.
- (2) Does not significantly increase the cost of the system or significantly decrease its efficiency.
- (3) Allows for an alternative system of comparable cost and efficiency.²⁸

In Saskatchewan, the Minister responsible for municipalities may require amendment of zoning bylaws.²⁹ Because there can be ministerial oversight of bylaws restricting solar installations, a simple statement of policy, which could be inserted in municipal planning legislation, would provide adequate control of such bylaws.

3. Solar access permits granted by a public authority

As noted above, voluntary negotiation of solar access easements may be inadequate in itself. As a review of the California *Solar Rights Act* has observed:

Solar easements in theory can ensure access to unobstructed sunlight for a solar energy system; however, obtaining a solar easement can be difficult. Since a neighboring landowner must grant the easements to a solar energy system owner through a bilateral negotiation, the neighboring landowner can refuse to negotiate or to grant a solar easement. Further, easements can be burdensome and costly for individual homeowners to negotiate. Legal costs could exceed the cost savings of the system if neighbors are not willing to grant the easement for free.

Depending on the density of houses in a neighborhood, a prospective solar energy system owner might have to negotiate with several neighbors to have access to sunlight. This is often the case in cities or when multiple houses on a slope block access to sunlight. A greater number of parties negotiating typically increases cost and reduces the chance an easement will be created.³⁰

If solar access is regarded as both a public and private good deserving protection, it would be appropriate to impose easements or their equivalent in cases in which an investment is planned, or has been made, in a solar energy system and protection of access is possible without unreasonably jeopardizing neighbours' use and enjoyment of their property.

In many cases, protection need not be very invasive of neighbours' rights. For example, in residential neighbourhoods with zoning bylaws establishing height restrictions and setbacks, an easement might place some additional limits on the placement of a new garage or the location of trees, but would not significantly reduce property values or impede development of the type permitted by the zoning bylaw. On the other hand, in some neighbourhoods, easements may not be a reasonable solution. If, for example, the neighbourhood is zoned to permit high density, giving

²⁸ Wisconsin Statute 66.031.

²⁹ *The Planning and Development Act, 2007*, S.S. 2007, c. P-13.2.

³⁰ Anders et al., *supra* note 19.

protection to solar installations on existing low density buildings might impede desirable high density redevelopment. It has also been noted that

in certain cases a solar easement is just not possible. More established neighborhoods were built with no consideration for the need of solar access. Even if parties are willing to negotiate for a solar easement, because of the design of the neighborhood, it may be impossible to place solar collectors so that they can be used efficiently.³¹

These considerations suggest that the most viable approach would be establishment of a public authority to grant solar access rights in appropriate cases, what the Iowa legislation styles a “solar access regulatory board”. Because such an authority would affect the property rights of both applicants and neighbours, it should conform to the rules of administrative law that require procedural fairness when decisions affecting rights are made by officials. Most important, the parties should be given a right to be heard, in an open hearing, if they so request. Both the Iowa³² and Wisconsin³³ solar access regulatory boards described above are organized as administrative tribunals and hold hearings in disputed cases. Administrative tribunals are used for a variety of purposes in Saskatchewan. A close analogue to the American solar access regulatory boards are the Development Appeal Boards established by municipalities under the Saskatchewan *Planning and Development Act, 2007*.³⁴

If this approach is adopted, several policy issues will need to be resolved.

1. Should the board hear applications only when negotiation of an easement has been attempted and failed? The Iowa model requires an attempt to obtain a voluntary grant of easement; the Wisconsin model does not. If solar access is regarded as something that should ordinarily be protected, and if unreasonable refusal to facilitate protection is regarded as a nuisance contrary to public interest, the Wisconsin approach would be most appropriate.

2. Should neighbours be compensated when required to grant a solar access easement? This issue is closely connected to the first, and in principle depends on whether solar access is regarded as a right. As a practical matter, the task of the board will be considerably more difficult, and the cost of obtaining a remedy likely higher, if compensation is at issue. It can be argued that in cases in which access ought to be ordered, there is little real loss for the affected property owner.

3. Should the board be provincial or municipal? Municipalities are perhaps better situated to assess local issues and concerns affecting solar access, and decisions similar to those a solar access board would be required to make are made at present by municipal Development Appeals Boards. In Wisconsin, solar access decisions are assigned to other

³¹ *Ibid.*

³² Iowa Code 564A.1-9 (2003).

³³ Wisconsin Statute 66.032.

³⁴ *The Planning and Development Act, 2007*, S.S. 2007, c. P-13.2.

boards in most municipalities. In Saskatchewan, solar access might be made part of the duties of Development Appeals Boards. However, consideration should be given to the expertise required to make solar access decisions in determining what body should make them.

4. What criteria should be established for decisions? The Wisconsin legislation is perhaps a satisfactory model. It provides that solar access should be granted if:

(1) the energy system will not unreasonably interfere with the orderly land use and the development plans of the municipality,

(2) no person who has present plans to build a structure that would impermissibly interfere with the energy system has expended more than \$500 or otherwise made substantial progress toward planning or constructing such a structure, and

(3) the benefits to the applicant and the public will exceed any burdens.

Factor (1) allows the board to grant access in any case in which there is no significant cost to the property owner affected by the grant. Factor (2) is practically important. It ensures that an application for access cannot be made merely as a ploy to stop a development.

In addition, provisions governing procedure, notice requirements, and other matters must ensure a fair, unbiased procedure. If Development Appeals Boards are used to make solar access decisions, these protections will be in place.

Finally, the legislation should provide for registration of a decision granting solar access in the land titles office as an easement.

4. Solar access by operation of law

Although an easement for light could be acquired at common law by prescription if access to light had been enjoyed over a period of time, resurrection of this rule is probably not a viable or acceptable means of protecting solar access. Even if the prescription period is abridged, the protection would be uncertain. In England, where the doctrine of easement by prescription remains part of the law, land owners are often advised to take steps to block access before the prescription period has run in order to prevent creation of an easement.

The most significant criticism of the prescription doctrine is that it is inflexible. An easement will come into existence by prescription whether it is reasonable under the circumstances or not. This criticism applies to any approach which gives automatic protection to access to light for existing or potential solar installations.

There may, however, be room for automatic protection in some circumstances. The California *Solar Shade Control Act*³⁵ may deserve consideration as a model. It protects solar installations from growth of trees on neighbouring property. Presumably, California legislators regarded control of vegetation to protect solar installations as less problematic than interfering with

³⁵ California Public Resources Code Sections 25980-25986.

redevelopment. However, it should be noted that investment in trees in urban residential areas is often significant.

Only one automatic protection for solar access has been widely advocated. This is the adoption of zoning regulations that protect solar access. If solar access is made part of the plan of a neighbourhood, like height and setback requirements, solar energy systems will be more attractive to property owners. The California *Solar Rights Act*³⁶ allows municipalities to require of a developer who is presenting a plan of subdivision:

as a condition of the approval of a tentative map, the dedication of easements for the purpose of assuring that each parcel or unit in the subdivision for which approval is sought shall have the right to receive sunlight across adjacent parcels or units in the subdivision for which approval is sought for any solar energy system...

In Saskatchewan, plans of subdivision require Ministerial approval. Thus solar access rules could be required as a matter of policy in appropriate cases. Solar access legislation might expressly provide that the Minister may require solar access in a municipal plan or subdivision agreement.

³⁶ California Government Code Section 66475.3.

Conclusion

Effective solar access legislation should ensure that when money and effort is invested in a solar energy installation on a residential or commercial building, the owner can be reasonably certain that development on neighbouring properties will not block access to sunlight during the life of the installation. There are several legal strategies that could contribute to this goal. Experience in other jurisdictions suggests models, and also helps identify those approaches which would likely be most practical and effective in Saskatchewan.

The discussion in this report has attempted to identify options for policy makers in Saskatchewan to consider. Although some additional options have also been canvassed, those that would likely be most effective include:

1. Enactment of legislation to explicitly recognize and define “solar easements.” This would clarify the law, facilitate registration of easements in the land titles system, and encourage negotiation of easements between neighbours when solar energy panels are installed.
2. Enactment of legislation to allow a municipal or provincial board to grant solar easements in cases in which an easement would be appropriate, but has not or cannot be negotiated.
3. Adoption of a policy favouring zoning regulations that include protection of solar access.

Appendix: Selected Solar Access Legislation

California Solar Rights Act

(California Civil Code Sections 714 and 714.1, California Civil Code Section 801, California Civil Code Section 801.5, California Government Code Section 65850.5, California Health and Safety Code Section 17959.1, California Government Code Section 66475.3 and California Government Code Section 66473.1).

California Civil Code Section 714

(a) Any covenant, restriction, or condition contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale of, or any interest in, real property that effectively prohibits or restricts the installation or use of a solar energy system is void and unenforceable.

(b) This section does not apply to provisions that impose reasonable restrictions on solar energy systems. However, it is the policy of the state to promote and encourage the use of solar energy systems and to remove obstacles thereto. Accordingly, reasonable restrictions on a solar energy system are those restrictions that do not significantly increase the cost of the system or significantly decrease its efficiency or specified performance, or that allow for an alternative system of comparable cost, efficiency, and energy conservation benefits.

(c) (1) A solar energy system shall meet applicable health and safety standards and requirements imposed by state and local permitting authorities.

(2) A solar energy system for heating water shall be certified by the Solar Rating Certification Corporation (SRCC) or other nationally recognized certification agencies. SRCC is a nonprofit third party supported by the United States Department of Energy. The certification shall be for the entire solar energy system and installation.

(3) A solar energy system for producing electricity shall also meet all applicable safety and performance standards established by the National Electrical Code, the Institute of Electrical and Electronics Engineers, and accredited testing laboratories such as Underwriters Laboratories and, where applicable, rules of the Public Utilities Commission regarding safety and reliability.

(d) For the purposes of this section:

(1) (A) For solar domestic water heating systems or solar swimming pool heating systems that comply with state and federal law, “significantly” means an amount exceeding 20 percent of the cost of the system or decreasing the efficiency of the solar energy system by an amount exceeding 20 percent, as originally specified and proposed.

(B) For photovoltaic systems that comply with state and federal law,

“significantly” means an amount not to exceed two thousand dollars (\$2,000) over the system cost as originally specified and proposed, or a decrease in system efficiency of an amount exceeding 20 percent as originally specified and proposed.

(2) “Solar energy system” has the same meaning as defined in paragraphs (1) and (2) of subdivision (a) of Section 801.5.

(e) Whenever approval is required for the installation or use of a solar energy system, the application for approval shall be processed and approved by the appropriate approving entity in the same manner as an application for approval of an architectural modification to the property, and shall not be willfully avoided or delayed.

(f) Any entity, other than a public entity, that willfully violates this section shall be liable to the applicant or other party for actual damages occasioned thereby, and shall pay a civil penalty to the applicant or other party in an amount not to exceed one thousand dollars (\$1,000).

(g) In any action to enforce compliance with this section, the prevailing party shall be awarded reasonable attorney’s fees.

(h) (1) A public entity that fails to comply with this section may not receive funds from a state sponsored grant or loan program for solar energy. A public entity shall certify its compliance with the requirements of this section when applying for funds from a state-sponsored grant or loan program.

(2) A local public entity may not exempt residents in its jurisdiction from the requirements of this section.

California Civil Code Section 714.1

Notwithstanding Section 714, any association, as defined in Section 1351, may impose reasonable provisions which:

(a) Restrict the installation of solar energy systems installed in common areas, as defined in Section 1351, to those systems approved by the association.

(b) Require the owner of a separate interest, as defined in Section 1351, to obtain the approval of the association for the installation of a solar energy system in a separate interest owned by another.

(c) Provide for the maintenance, repair, or replacement of roofs or other building components.

(d) Require installers of solar energy systems to indemnify or reimburse the association or its members for loss or damage caused by the installation, maintenance, or use of the solar energy system

California Civil Code Section 801

The following land burdens, or servitudes upon land, may be attached to other land as incidents or appurtenances, and are then called easements:

1. The right of pasture;

2. The right of fishing;
3. The right of taking game;
4. The right-of-way;
5. The right of taking water, wood, minerals, and other things;
6. The right of transacting business upon land;
7. The right of conducting lawful sports upon land;
8. The right of receiving air, light, or heat from or over, or discharging the same upon or over land;
9. The right of receiving water from or discharging the same upon land;
10. The right of flooding land;
11. The right of having water flow without diminution or disturbance of any kind;
12. The right of using a wall as a party wall;
13. The right of receiving more than natural support from adjacent land or things affixed thereto;
14. The right of having the whole of a division fence maintained by a coterminous owner;
15. The right of having public conveyances stopped, or of stopping the same on land;
16. The right of a seat in church;
17. The right of burial;
18. The right of receiving sunlight upon or over land as specified in Section 801.5.

California Civil Code Section 801.5

(a) The right of receiving sunlight as specified in subdivision 18 of Section 801 shall be referred to as a solar easement. "Solar easement" means the right of receiving sunlight across real property of another for any solar energy system.

As used in this section, "solar energy system" means either of the following:

(1) Any solar collector or other solar energy device whose primary purpose is to provide for the collection, storage, and distribution of solar energy for space heating, space cooling, electric generation, or water heating.

(2) Any structural design feature of a building, whose primary purpose is to provide for the collection, storage, and distribution of solar energy for electricity generation, space heating or cooling, or for water heating.

(b) Any instrument creating a solar easement shall include, at a minimum, all of the following:

(1) A description of the dimensions of the easement expressed in measurable terms, such as vertical or horizontal angles measured in degrees,

or the hours of the day on specified dates during which direct sunlight to a specified surface of a solar collector, device, or structural design feature may not be obstructed, or a combination of these descriptions.

(2) The restrictions placed upon vegetation, structures, and other objects that would impair or obstruct the passage of sunlight through the easement.

(3) The terms or conditions, if any, under which the easement may be revised or terminated.

California Government Code Section 65850.5

(a) The implementation of consistent statewide standards to achieve the timely and cost effective installation of solar energy systems is not a municipal affair, as that term is used in Section 5 of Article XI of the California Constitution, but is instead a matter of statewide concern. It is the intent of the Legislature that local agencies not adopt ordinances that create unreasonable barriers to the installation of solar energy systems, including, but not limited to, design review for aesthetic purposes, and not unreasonably restrict the ability of homeowners and agricultural and business concerns to install solar energy systems. It is the policy of the state to promote and encourage the use of solar energy systems and to limit obstacles to their use. It is the intent of the Legislature that local agencies comply not only with the language of this section, but also the legislative intent to encourage the installation of solar energy systems by removing obstacles to, and minimizing costs of, permitting for such systems.

(b) A city or county shall administratively approve applications to install solar energy systems through the issuance of a building permit or similar nondiscretionary permit. Review of the application to install a solar energy system shall be limited to the building official's review of whether it meets all health and safety requirements of local, state, and federal law. The requirements of local law shall be limited to those standards and regulations necessary to ensure that the solar energy system will not have a specific, adverse impact upon the public health or safety. However, if the building official of the city or county has a good faith belief that the solar energy system could have a specific, adverse impact upon the public health and safety, the city or county may require the applicant to apply for a use permit.

(c) A city or county may not deny an application for a use permit to install a solar energy system unless it makes written findings based upon substantial evidence in the record that the proposed installation would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact. The findings shall include the basis for the rejection of potential feasible alternatives of preventing the adverse impact.

(d) The decision of the building official pursuant to subdivisions (b) and (c) may be appealed to the planning commission of the city or county.

(e) Any conditions imposed on an application to install a solar energy system shall be designed to mitigate the specific, adverse impact upon the public health and safety at the lowest cost possible.

(f) (1) A solar energy system shall meet applicable health and safety standards and requirements imposed by state and local permitting authorities.

(2) A solar energy system for heating water shall be certified by the Solar Rating Certification Corporation (SRCC) or other nationally recognized certification agency. SRCC is a nonprofit third party supported by the United States Department of Energy. The certification shall be for the entire solar energy system and installation.

(3) A solar energy system for producing electricity shall meet all applicable safety and performance standards established by the National Electrical Code, the Institute of Electrical and Electronics Engineers, and accredited testing laboratories such as Underwriters Laboratories and, where applicable, rules of the Public Utilities Commission regarding safety and reliability.

(g) The following definitions apply to this section:

(1) “A feasible method to satisfactorily mitigate or avoid the specific, adverse impact” includes, but is not limited to, any cost-effective method, condition, or mitigation imposed by a city or county on another similarly situated application in a prior successful application for a permit. A city or county shall use its best efforts to ensure that the selected method, condition, or mitigation meets the conditions of subparagraphs (A) and (B) of paragraph (1) of subdivision (d) of Section 714 of the Civil Code.

(2) “Solar energy system” has the same meaning set forth in paragraphs (1) and (2) of subdivision (a) of Section 801.5 of the Civil Code.

(3) A “specific, adverse impact” means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified, and written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.

California Health & Safety Code Section 17591

(a) A city or county shall administratively approve applications to install solar energy systems through the issuance of a building permit or similar nondiscretionary permit. However, if the building official of the city or county has a good faith belief that the solar energy system could have a specific, adverse impact upon the public health and safety, the city or county may require the applicant to apply for a use permit.

(b) A city or county may not deny an application for a use permit to install a solar energy system unless it makes written findings based upon substantial evidence in the record that the proposed installation would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact. This finding shall include the basis for the rejection of potential feasible alternatives of preventing the adverse impact.

(c) Any conditions imposed on an application to install a solar energy system must be designed to mitigate the specific, adverse impact upon the public health and

safety at the lowest cost possible.

(d) (1) A solar energy system shall meet applicable health and safety standards and requirements imposed by state and local permitting authorities.

(2) A solar energy system for heating water shall be certified by the Solar Rating Certification Corporation (SRCC) or other nationally recognized certification agency. SRCC is a nonprofit third party supported by the United States Department of Energy. The certification shall be for the entire solar energy system and installation.

(3) A solar energy system for producing electricity shall meet all applicable safety and performance standards established by the National Electrical Code, the Institute of Electrical and Electronics Engineers, and accredited testing laboratories such as Underwriters Laboratories and, where applicable, rules of the Public Utilities Commission regarding safety and reliability.

(e) The following definitions apply to this section:

(1) “A feasible method to satisfactorily mitigate or avoid the specific, adverse impact” includes, but is not limited to, any cost effective method, condition, or mitigation imposed by a city or county on another similarly situated application in a prior successful application for a permit. A city or county shall use its best efforts to ensure that the selected method, condition, or mitigation meets the conditions of subparagraphs (A) and (B) of paragraph (1) of subdivision (d) of Section 714 of the Civil Code.

(2) “Solar energy system” has the meaning set forth in paragraphs (1) and (2) of subdivision (a) of Section 801.5 of the Civil Code.

(3) A “specific, adverse impact” means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified, and written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.

California Government Code Section 66475.3

For divisions of land for which a tentative map is required pursuant to Section 66426, the legislative body of a city or county may by ordinance require, as a condition of the approval of a tentative map, the dedication of easements for the purpose of assuring that each parcel or unit in the subdivision for which approval is sought shall have the right to receive sunlight across adjacent parcels or units in the subdivision for which approval is sought for any solar energy system, provided that such ordinance contains all of the following:

(1) Specifies the standards for determining the exact dimensions and locations of such easements.

(2) Specifies any restrictions on vegetation, buildings and other objects which would obstruct the passage of sunlight through the easement.

(3) Specifies the terms or conditions, if any, under which an easement may be

revised or terminated.

(4) Specifies that in establishing such easements consideration shall be given to feasibility, contour, configuration of the parcel to be divided, and cost, and that such easements shall not result in reducing allowable densities or the percentage of a lot which may be occupied by a building or a structure under applicable planning and zoning in force at the time such tentative map is filed.

(5) Specifies that the ordinance is not applicable to condominium projects which consist of the subdivision of airspace in an existing building where no new structures are added.

For the purposes of this section, “solar energy systems” shall be defined as set forth in Section 801.5 of the Civil Code.

For purposes of this section, “feasibility” shall have the same meaning as set forth in Section 66473.1 for the term “feasible”.

California Government Code Section 66473.1

(a) The design of a subdivision for which a tentative map is required pursuant to Section 66426 shall provide, to the extent feasible, for future passive or natural heating or cooling opportunities in the subdivision.

(b) (1) Examples of passive or natural heating opportunities in subdivision design, include design of lot size and configuration to permit orientation of a structure in an east-west alignment for southern exposure.

(2) Examples of passive or natural cooling opportunities in subdivision design include design of lot size and configuration to permit orientation of a structure to take advantage of shade or prevailing breezes.

(c) In providing for future passive or natural heating or cooling opportunities in the design of a subdivision, consideration shall be given to local climate, to contour, to configuration of the parcel to be divided, and to other design and improvement requirements, and that provision shall not result in reducing allowable densities or the percentage of a lot that may be occupied by a building or structure under applicable planning and zoning in effect at the time the tentative map is filed.

(d) The requirements of this section do not apply to condominium projects which consist of the subdivision of airspace in an existing building when no new structures are added.

(e) For the purposes of this section, “feasible” means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social and technological factors.

California Solar Shade Control Act

(California Public Resources Code Sections 25980-25986).

25980. This chapter shall be known and may be cited as the Solar Shade Control Act. It is the policy of the state to promote all feasible means of energy

conservation and all feasible uses of alternative energy supply sources. In particular, the state encourages the planting and maintenance of trees and shrubs to create shading, moderate outdoor temperatures, and provide various economic and aesthetic benefits. However, there are certain situations in which the need for widespread use of alternative energy devices, such as solar collectors, requires specific and limited controls on trees and shrubs.

25981. As used in this chapter, “solar collector” means a fixed device, structure, or part of a device or structure, which is used primarily to transform solar energy into thermal, chemical, or electrical energy. The solar collector shall be used as part of a system which makes use of solar energy for any or all of the following purposes: (1) water heating, (2) space heating or cooling, and (3) power generation.

25982. After January 1, 1979, no person owning, or in control of a property shall allow a tree or shrub to be placed, or, if placed, to grow on such property, subsequent to the installation of a solar collector on the property of another so as to cast a shadow greater than 10 percent of the collector absorption area upon that solar collector surface on the property of another at any one time between the hours of 10 a.m. and 2 p.m., local standard time; provided, that this section shall not apply to specific trees and shrubs which at the time of installation of a solar collector or during the remainder of that annual solar cycle cast a shadow upon that solar collector. For the purposes of this chapter, the location of a solar collector is required to comply with the local building and setback regulations, and to be set back not less than five feet from the property line, and no less than 10 feet above the ground. A collector may be less than 10 feet in height, only if in addition to the five feet setback, the collector is set back three times the amount lowered.

25983. Every person who maintains any tree or shrub or permits any tree or shrub to be maintained in violation of Section 25982 upon property owned by such person and every person leasing the property of another who maintains any tree or shrub or permits any tree or shrub to be maintained in violation of Section 25982 after reasonable notice in writing from a district attorney or city attorney or prosecuting attorney, to remove or alter the tree or shrub so that there is no longer a violation of Section 25982, has been served upon such person, is guilty of a public nuisance as defined in Sections 370 and 371 of the Penal Code and in Section 3480 of the Civil Code. For the purposes of this chapter, a violation is hereby deemed an infraction. The complainant shall establish to the satisfaction of the prosecutor that the violation has occurred prior to the prosecutor’s duty to issue the abatement notice. For the purpose of this section, “reasonable notice” means 30 days from receipt of such notice. Upon expiration of the 30-day period, the complainant shall file an affidavit with the prosecutor alleging that the nuisance has not been abated if the complainant wishes to proceed with the action. The existence of such violation for each and every day after the service of such notice shall be deemed a separate and distinct offense, and it is hereby made the duty of the district attorney, or the city attorney of any city the charter of which imposes the duty upon the city attorney to prosecute state infractions, to prosecute all persons guilty of violating this section by continuous prosecutions until the violation is corrected. Each and every violation of this section shall be punishable by a fine not to exceed one

thousand dollars (\$1,000).

25984. Nothing in this chapter shall apply to trees planted, grown, or harvested on timberland as defined in Section 4526 or on land devoted to the production of commercial agricultural crops. Nothing in this chapter shall apply to the replacement of a tree or shrub which had been growing prior to the installation of a solar collector and which, subsequent to the installation of such solar collector, dies.

25985. Any city, or for unincorporated areas, any county, may adopt, by majority vote of the governing body, an ordinance exempting their jurisdiction from the provisions of this chapter. The adoption of such an ordinance shall not be subject to the provisions of the California Environmental Quality Act (commencing with Section 21000).

25986. Any person who plans a passive or natural solar heating system or cooling system or heating and cooling system which would impact on an adjacent active solar system may seek equitable relief in a court of competent jurisdiction to exempt such system from the provisions of this chapter. The court may grant such an exemption based on a finding that the passive or natural system would provide a demonstrably greater net energy savings than the active system which would be impacted.

Wisconsin Statute 66.031

Regulation of solar and wind energy systems.

No county, city, town or village may place any restriction, either directly or in effect, on the installation or use of a solar energy system or a wind energy system unless the restriction satisfies one of the following conditions:

- (1) Serves to preserve or protect the public health or safety.
- (2) Does not significantly increase the cost of the system or significantly decrease its efficiency.
- (3) Allows for an alternative system of comparable cost and efficiency.

Wisconsin Statute 66.032

Solar and wind access permits.

(1) DEFINITIONS.

In this section:

- (a) “Agency” means the governing body of a municipality which has provided for granting a permit or the agency which the governing body of a municipality creates or designates under sub. (2). “Agency” includes an officer or employee of the municipality.
- (b) “Applicant” means an owner applying for a permit under this section.
- (c) “Application” means an application for a permit under this section.
- (d) “Collector surface” means any part of a solar collector that absorbs solar energy for use in the collector’s energy transformation process. “Collector surface” does not include frames, supports and mounting hardware.
- (e) “Collector use period” means 9 a.m. to 3 p.m. standard time daily.
- (f) “Impermissible interference” means the blockage of wind from a wind energy system or solar energy from a collector surface or proposed collector surface for which a permit has been granted under this section during a collector use period if such blockage is by any structure or vegetation on property, an owner of which was notified under sub. (3) (b). “Impermissible interference” does not include:
 1. Blockage by a narrow protrusion, including but not limited to a pole or wire, which does not substantially interfere with absorption of solar energy by a solar collector or does not substantially block wind from a wind energy system.
 2. Blockage by any structure constructed, under construction or for which a building permit has been applied for before the date the last notice is mailed or delivered under sub. (3) (b).
 3. Blockage by any vegetation planted before the date the last notice is mailed or delivered under sub. (3) (b) unless a municipality by ordinance under sub. (2) defines impermissible interference to include such

vegetation.

(g) "Municipality" means any county with a zoning ordinance under s. 59.69, any town with a zoning ordinance under s. 60.61, any city with a zoning ordinance under s. 62.23 (7), any 1st class city or any village with a zoning ordinance under s. 61.35.

(h) "Owner" means at least one owner, as defined under s. 66.021 (1) (b), of a property or the personal representative of at least one owner.

(i) "Permit" means a solar access permit or a wind access permit issued under this section.

(j) "Solar collector" means a device, structure or a part of a device or structure a substantial purpose of which is to transform solar energy into thermal, mechanical, chemical or electrical energy.

(k) "Solar energy" means direct radiant energy received from the sun.

(l) "Standard time" means the solar time of the ninetieth meridian west of Greenwich.

(m) "Wind energy system" means equipment that converts and then stores or transfers energy from the wind into usable forms of energy.

(2) PERMIT PROCEDURE.

The governing body of every municipality may provide for granting a permit. A permit may not affect any land except land which, at the time the permit is granted, is within the territorial limits of the municipality or is subject to an extraterritorial zoning ordinance adopted under s. 62.23 (7a), except that a permit issued by a city or village may not affect extraterritorial land subject to a zoning ordinance adopted by a county or a town. The governing body may appoint itself as the agency to process applications or may create or designate another agency to grant permits. The governing body may provide by ordinance that a fee be charged to cover the costs of processing applications. The governing body may adopt an ordinance with any provision it deems necessary for granting a permit under this section, including but not limited to:

(a) Specifying standards for agency determinations under sub. (5) (a).

(b) Defining an impermissible interference to include vegetation planted before the date the last notice is mailed or delivered under sub. (3) (b), provided that the permit holder shall be responsible for the cost of trimming such vegetation.

(3) PERMIT APPLICATIONS.

(a) In a municipality which provides for granting a permit under this section, an owner who has installed or intends to install a solar collector or wind energy system may apply to an agency for a permit.

(b) An agency shall determine if an application is satisfactorily completed and shall notify the applicant of its determination. If an applicant receives notice that an application has been satisfactorily completed, the applicant shall deliver by

certified mail or by hand a notice to the owner of any property which the applicant proposes to be restricted by the permit under sub. (7). The applicant shall submit to the agency a copy of a signed receipt for every notice delivered under this paragraph. The agency shall supply the notice form. The information on the form may include, without limitation because of enumeration:

1. The name and address of the applicant, and the address of the land upon which the solar collector or wind energy system is or will be located.
2. That an application has been filed by the applicant.
3. That the permit, if granted, may affect the rights of the notified owner to develop his or her property and to plant vegetation.
4. The telephone number, address and office hours of the agency.
5. That any person may request a hearing under sub. (4) within 30 days after receipt of the notice, and the address and procedure for filing the request.

(4) HEARING.

Within 30 days after receipt of the notice under sub. (3) (b), any person who has received a notice may file a request for a hearing on the granting of a permit or the agency may determine that a hearing is necessary even if no such request is filed. If a request is filed or if the agency determines that a hearing is necessary, the agency shall conduct a hearing on the application within 90 days after the last notice is delivered. At least 30 days prior to the hearing date, the agency shall notify the applicant, all owners notified under sub. (3) (b) and any other person filing a request of the time and place of the hearing.

(5) PERMIT GRANT.

(a) The agency shall grant a permit if the agency determines that:

1. The granting of a permit will not unreasonably interfere with the orderly land use and development plans of the municipality;
2. No person has demonstrated that she or he has present plans to build a structure that would create an impermissible interference by showing that she or he has applied for a building permit prior to receipt of a notice under sub. (3) (b), has expended at least \$500 on planning or designing such a structure or by submitting any other credible evidence that she or he has made substantial progress toward planning or constructing a structure that would create an impermissible interference; and subject of an application shall be liable to the permit holder or applicant for damages, except as provided under par. (b), for any loss due to the impermissible interference, court costs and reasonable attorney fees unless:

1. The building permit was applied for prior to receipt of a notice under sub. (3) (b) or the agency determines not to grant a permit after a hearing under sub. (4).
2. A permit affecting the property is terminated under sub. (9).

3. An agreement affecting the property is filed under sub. (10).

(b) A permit holder is entitled to an injunction to require the trimming of any vegetation which creates or would create an impermissible interference as defined under sub. (1) (f). If the court finds on behalf of the permit holder, the permit holder shall be entitled to a permanent injunction, damages, court costs and reasonable attorney fees.

(8) APPEALS

Any person aggrieved by a determination by a municipality under this section may appeal the determination to the circuit court for a review.

(9) TERMINATION OF SOLAR OR WIND ACCESS RIGHTS.

(a) Any right protected by a permit under this section shall terminate if the agency determines that the solar collector or wind energy system which is the subject of the permit is:

1. Permanently removed or is not used for 2 consecutive years, excluding time spent on repairs or improvements.
2. Not installed and functioning within 2 years after the date of issuance of the permit.

(b) The agency shall give the permit holder written notice and an opportunity for a hearing on a proposed termination under par. (a).

(c) If the agency terminates a permit, the agency may charge

the permit holder for the cost of recording and record a notice of termination with the register of deeds, who shall record the notice with the notice recorded under sub. (6) (b) or indicate on any notice recorded under sub. (6) (b) that the permit has been terminated.

(10) WAIVER.

A permit holder by written agreement may waive all or part of any right protected by a permit. A copy of such agreement shall be recorded with the register of deeds, who shall record such copy with the notice recorded under sub. (6) (b).

(11) PRESERVATION OF RIGHTS.

The transfer of title to any property shall not change the rights and duties under this section or under an ordinance adopted under sub. (2).

(12) CONSTRUCTION.

(a) This section may not be construed to require that an owner obtain a permit prior to installing a solar collector or wind energy system.

(b) This section may not be construed to mean that acquisition of a renewable energy resource easement under s. 700.35 is in any way contingent upon the granting of a permit under this section.

Access to Solar Energy

Iowa Code § 564A.1-9 (2003)

564A.1 Purpose.

It is the purpose of this chapter to facilitate the orderly development and use of solar energy by establishing and providing certain procedures for obtaining access to solar energy.

564A.2 Definitions.

As used in this chapter, unless the context otherwise requires:

1. “Development of property” means construction, landscaping, growth of vegetation, or other alteration of property that interferes with the operation of a solar collector.
2. “Dominant estate” means that parcel of land to which the benefits of a solar access easement attach.
3. “Servient estate” means land burdened by a solar access easement, other than the dominant estate.
4. “Solar access easement” means an easement recorded under section 564A.7, the purpose of which is to provide continued access to incident sunlight necessary to operate a solar collector.
5. “Solar access regulatory board” means the board designated by a city council or county board of supervisors under section 564A.3 to receive and act on applications for a solar access easement or in the absence of a specific designation, the district court having jurisdiction in the area where the dominant estate is located. Notwithstanding chapter 602 the jurisdiction of the district court established in this subsection may be exercised by district associate judges.
6. “Solar collector” means a device or structural feature of a building that collects solar energy and that is part of a system for the collection, storage, and distribution of solar energy. For purposes of this chapter, a greenhouse is a solar collector.
7. “Solar energy” means energy emitted from the sun and collected in the form of heat or light by a solar collector.

564A.3 Designation.

The city council or the county board of supervisors may designate a solar access regulatory board to receive and act on applications for a solar access easement. The board designated by the city council may be a board of adjustment having jurisdiction in the city, the city council itself, or any board with at least three members. The board designated by the county board of supervisors may be a board of adjustment having jurisdiction in the county, the board of supervisors itself, or any other board with at least three members. The jurisdiction of a board designated by the city council extends to applications when the dominant estate is located in the city. The jurisdiction of a board designated by the county board of supervisors extends to applications when the dominant estate is located in the county but

outside the city limits of a city. In the absence of the designation of a specific board under this section, the district court having jurisdiction in the area where the dominant estate is located shall receive and act on applications submitted under section 564A.4 and to that extent shall serve as the solar access regulatory board for purposes of this chapter. Notwithstanding chapter 602 the jurisdiction of the district court established in this section may be exercised by district associate judges.

564A.4 Application for solar access easement.

1. An owner of property may apply to the solar access regulatory board designated under section 564A.3 for an order granting a solar access easement. The application must be filed before installation or construction of the solar collector. The application shall state the following:

- a. A statement of the need for the solar access easement by the owner of the dominant estate.
- b. A legal description of the dominant and servient estates.
- c. The name and address of the dominant and servient estate owners of record.
- d. A description of the solar collector to be used.
- e. The size and location of the collector, including heights, its orientation with respect to south, and its slope from the horizontal shown either by drawings or in words.
- f. An explanation of how the applicant has done everything reasonable, taking cost and efficiency into account, to design and locate the collector in a manner to minimize the impact on development of servient estates.
- g. A legal description of the solar access easement which is sought and a drawing that is a spatial representation of the area of the servient estate burdened by the easement illustrating the degrees of the vertical and horizontal angles through which the easement extends over the burdened property and the points from which those angles are measured.
- h. A statement that the applicant has attempted to voluntarily negotiate a solar access easement with the owner of the servient estate and has been unsuccessful in obtaining the easement voluntarily.
- i. A statement that the space to be burdened by the solar access easement is not obstructed at the time of filing of the application by anything other than vegetation that would shade the solar collector.

2. Upon receipt of the application the solar access regulatory board shall determine whether the application is complete and contains the information required under subsection 1. The board may return an application for correction of any deficiencies. Upon acceptance of an application the board shall schedule a hearing. The board shall cause a copy of the application and a notice of the hearing to be served upon the owners of the servient estates in the manner provided for service of original notice and at least twenty days prior to the date of the hearing. The notice

shall state that the solar access regulatory board will determine whether and to what extent a solar access easement will be granted, that the board will determine the compensation that may be awarded to the servient estate owner if the solar access easement is granted and that the servient estate owner has the right to contest the application before the board.

3. The applicant shall pay all costs incurred by the solar access regulatory board in copying and mailing the application and notice.

4. An application for a solar access easement submitted to the district court acting as the solar access regulatory board under this chapter is not subject to the small claims procedures under chapter 631.

564A.5 Decision.

1. After the hearing on the application, the solar access regulatory board shall determine whether to issue an order granting a solar access easement. The board shall grant a solar access easement if the board finds that there is a need for the solar collector, that the space burdened by the easement was not obstructed by anything except vegetation that would shade the solar collector at the time of filing of the application, that the proposed location of the collector minimizes the impact of the easement on the development of the servient estate and that the applicant tried and failed to negotiate a voluntary easement. However, the board may refuse to grant a solar access easement upon a finding that the easement would require the removal of trees that provide shade or a windbreak to a residence on the servient estate. The board shall not grant a solar access easement upon a servient estate if the board finds that the owner, at least six months prior to the filing of the application, has made a substantial financial commitment to build a structure that will shade the solar collector. In issuing its order granting the solar access easement, the board may modify the solar access easement applied for and impose conditions on the location of the solar collector that will minimize the impact upon the servient estate.

2. The solar access regulatory board shall grant a solar access easement only within the area that is within three hundred feet of the center of the northernmost boundary of the collector and is south of a line drawn east and west tangent to the northernmost boundary of the collector.

3. The solar access regulatory board shall determine the amount of compensation that is to be paid to the owners of the servient estate for the impairment of the right to develop the property. Compensation shall be based on the difference between the fair market value of the property prior to and after granting the solar access easement. The parties shall be notified of the board's decision within thirty days of the date of the hearing. The owner of the dominant estate shall have thirty days from the date of notification of the board's decision to deposit the compensation with the board. Upon receipt of the compensation, the board shall issue an order granting the solar access easement to the owner of the dominant estate and remit the compensation awarded to the owners of the servient estate. The owner of the dominant estate may decline to deposit the compensation with the board, and no order granting the solar access easement shall then be issued.

4. When the order granting the solar access easement is issued, the owner of the dominant estate shall have it recorded in the office of the county recorder who shall record the solar access easement and list the owner of the dominant estate as grantee and the owner of the servient estate as grantor in the deed index. The solar access easement after being recorded shall be considered an easement appurtenant in or on the servient estate.

564A.6 Removal of easement.

The owner of a servient estate may apply to the solar access regulatory board or may petition the district court for an order removing a solar access easement granted by a solar access regulatory board under this chapter under any of the following conditions:

1. If the solar collector is not installed and made operational within two years of recording the easement under section 564A.5.
2. If the dominant estate owner ceases to use the solar collector for more than one year.
3. If the solar collector is destroyed or removed and not replaced within one year.

The procedure for filing an application with the solar access regulatory board under this section and for notice and hearings on the application shall be the same as that prescribed for an application for granting a solar access easement. An order issued by the district court or a solar access regulatory board removing a solar access easement may provide for the return by the servient estate owner of compensation paid by the dominant estate owner for the solar access easement after the deduction of reasonable expenses incurred by the servient estate owner in proceedings for the granting and removal of the easement.

564A.7 Solar access easements.

1. Persons, including public bodies, may voluntarily agree to create a solar access easement. A solar access easement whether obtained voluntarily or pursuant to the order of a solar access regulatory board is subject to the same recording and conveyance requirements as other easements.
2. A solar access easement shall be created in writing and shall include the following:
 - a. The legal description of the dominant and servient estates.
 - b. A legal description of the space which must remain unobstructed expressed in terms of the degrees of the vertical and horizontal angles through which the solar access easement extends over the burdened property and the points from which these angles are measured.
3. In addition to the items required in subsection 2 the solar access easement may include, but the contents are not limited to, the following:
 - a. Any limitations on the growth of existing and future vegetation or the height of buildings or other potential obstructions of the solar collector.

b. Terms or conditions under which the solar access easement may be abandoned or terminated.

c. Provisions for compensating the owner of the property benefiting from the solar access easement in the event of interference with the enjoyment of the solar access easement, or for compensating the owner of the property subject to the solar access easement for maintaining that easement.

564A.8 Restrictive covenants.

City councils and county boards of supervisors may include in ordinances relating to subdivisions a provision prohibiting deeds for property located in new subdivisions from containing restrictive covenants that include unreasonable restrictions on the use of solar collectors.

564A.9 Assistance to local government bodies and the public.

The department of natural resources shall make available information and guidelines to assist local government bodies and the public to understand and use the provisions of this chapter. The information and guidelines shall include an application form for a solar access easement, instructions and aids for preparing and recording solar access easements and model ordinances that promote reasonable access to solar energy.