A New Place Under the Sun: Prah v. Maretti and Common Law Solar Access Remedies

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INTRODUCTION

The legal status of a right to light is on the verge of imminent expansion. Traditionally, American courts have refused to grant relief to a plaintiff complaining that construction on adjoining property blocked the free flow of sunlight.\(^1\) The doctrine of ancient lights,\(^2\) a unique prescriptive easement to light and air recognized in British common law, has been disavowed in this country for a century and a half.\(^3\) Yet now, the Wisconsin Supreme Court’s decision in Prah v. Maretti\(^4\) has indicated that the plaintiff has an enforceable interest in unobstructed sunlight. The implications of Prah, granting a cause of action in private nuisance for the blockage of a solar collector, involve a radical change in the American jurisprudential treatment of sunlight.

The focus of this comment is on common law remedies available to solar users,\(^5\) with particular emphasis on Illinois precedent. First, the area of solar easements as a defendable property interest will be examined. Next, the arguments by analogy to watercourse law with close attention to the Illinois doctrine of riparian water rights, will be outlined. Finally, the potential remedy of private nuisance, exemplified by Prah, will be discussed. Although Illinois precedent will be highlighted, in most jurisdictions the common

\(^1\) E.g., Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five Inc., 114 So. 2d 357 (Fla. Dist. Ct. App. 1959) (construction of fourteen-story tower that blocked swimming pool of Eden Roc Hotel during the winter months violated no legal rights of the plaintiff Eden Roc).

\(^2\) See infra note 42.

\(^3\) See infra note 48.

\(^4\) 108 Wis. 2d 223, 321 N.W.2d 182 (1982). See infra notes 95-137 and accompanying text.

\(^5\) For the purposes of this article, any person who has an active or passive solar energy system, for the heating of water or space, or who converts sunlight into an energy source by means of any device, shall be designated a “solar user.”
law requirements for all three causes of action are substantially similar. Additionally, the change in the common law treatment of an interest in sunlight which Prah presents is so novel that precedent in virtually every jurisdiction, as in Illinois, will be antithetical.

BACKGROUND

Alternative energy sources are making an impact on our energy-dependent society. Increasingly, Americans have turned to a variety of alternative sources to supplement their energy needs, due to the rising costs and supply variations of traditional, nonrenewable resources. In particular, large numbers of energy consumers have resorted to solar energy devices to supplement the heating and cooling of their homes and businesses, or for the supplemental heating of water. Architectural designs intended to maximize the natural heating and cooling of buildings are increasingly evident. Furthermore, enacted federal and state legislation demonstrates strong support for the continued use and development of solar energy as a viable alternative energy source.


8. See, e.g., S. Kraemer, supra note 6, at 344-47.


See also Cal. Civ. Code § 714 (West 1982) ("[I]t is the policy of the state to
Although no longer prohibitively high, the initial expenses incurred when modifying one’s home for solar utilization are still a major financial outlay.\(^\text{10}\) Such a large expenditure is partially the result of reliance, knowingly or unwittingly, on the belief that the active device or passive design will continue to have access to all the necessary direct sunlight.\(^\text{11}\) This reliance may be well-founded due to any one of a number of means by which the solar user may be ensured continued solar access.

For instance, the solar user may have contracted with his neighbor to ensure the necessary access, as by restricting through agreement the neighbor’s use of his land.\(^\text{12}\) Such a contract would be an express grant of an easement of light and air, which Ameri-
The maxim "Cujus est solum ejus est usque ad coelum" (The owner of the soil owns to the sky) indicated that the law gives a property interest to the owner of land in the airspace above the land. Ballentine's Law Dictionary 295 (3d ed. 1969).

"Easements for light can be granted because the grantor has property rights in the airspace above the land; the right to grant the easement is only one of the incidents of ownership of the airspace." S. Kraemer, supra note 6, at 36. Hence, courts have supported an express grant of an easement of light and air. See, e.g., Petersen v. Friedman, 162 Cal. App. 2d 245, 328 P.2d 264 (Cal. Dist. Ct. App. 1958) (express easement of light, air and unobstructed view enforceable against subsequent owner of servient estate). See also Maioriello v. Arlotta, 364 Pa. 557, 73 A.2d 374 (1950) (dicta indicating that easement may be acquired by express grant); Keating v. Springer, 146 Ill. 481, 34 N.E. 805 (1893) (dicta expressing opinion that authorities agree that easement to light and air may be acquired by express grant); Gerber v. Grabel, 16 Ill. 217 (1854) (dicta indicating the plaintiff might have been successful in suit if he had pleaded and proved an express grant of light and air).


16. E.g., Colo. Rev. Stat. § 38-32.5-101 (1982) states: "Any easement obtained for the purpose of exposure of a solar energy device shall be created in writing and shall be subject to the same conveyancing and instrument recording requirements as other easements . . . ."; Iowa Code Ann. § 564A.7(1) (West Supp. 1982) states: "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."; Tenn. Code Ann. § 66-9-206 (1982) states: "Any [solar] easement obtained pursuant to this part shall be in writing and shall be recorded with the register of deeds in the county in which the land is situated."

See also Pedowitz, Solar Energy Easements, 15 Real Prop., Prob. & Trust J. 797, 802-03 app. (1980).

17. Statutes may indicate what means are to be used to describe the solar easement. For instance, the "solar skyspace" defined under the Illinois statute is a three-dimensional space measured in terms of the location of the sun at certain times of the day during certain months of the year. Ill. Rev. Stat. ch. 96½, § 7303(e)(1), (2), (3) (1981). See infra note 28.

Alternatively, the description may be in terms of angles. For example, Iowa Code Ann. § 564A.4(g) (West Supp. 1982) states: "A legal description of the area
property interests, care must be taken in an express grant of a solar easement so that the terminology used reflects the interest meant to be conveyed.\textsuperscript{18}

Alternatively, the solar user may have established a real covenant or equitable servitude, binding the neighboring landowner to either an affirmative duty (such as trimming vegetation) or a negative restriction (such as limiting the height of any construction on the adjoining land).\textsuperscript{19} Although now applied to a novel circumstance, classifications based on existing property law, as with solar

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 point from which those angles are measured." See also COLO. REV. STAT. § 38-32.5-102(1)(a) (1982); MINN. STAT. ANN. § 500.30 subd. 3(b) (West Supp. 1982); TENN. CODE ANN. § 66-9-204(2) (1982).

The statute may not prescribe a specific means for describing the easement, but instead accept any of the above means. See CAL. CIV. CODE § 801.5(b)(1) (West 1982).

The flaw with such statewide descriptions as those used in the Illinois statute is that shadow variations for longitudinal differences are not considered. For example, a California law specifying 10:00 A.M. to 2:00 P.M., in relation to standard hours, becomes 9:43 A.M. to 1:43 P.M. at the western edge of California, and 10:25 A.M. to 2:25 P.M. at the eastern edge, at winter solstice, when the hours are converted to actual solar time. G. HAYES, \textit{supra} note 7, at 43 n.16.

Relatively simple calculations may be used to translate the variable standard time to the static solar time, based on addition or subtraction of time per degrees of location east or west. \textit{Id.} See also \textit{id.} at app. A, for detailed tables of shadow variations based on time, latitude, and degrees of ground slope.

18. The words "lease" or "let" connote an easement of a restricted duration, whereas "bargain and sell," "grant" and "convey" may indicate a conveyance of a fee interest rather than an easement. "Grant" is generally the proper word when accurately limited by the specific use to which the easement is to be put. 3 R. POWELL, \textit{THE LAW OF REAL PROPERTY} ¶ 407 (1981).

The parties involved should take care to ensure that no interest beyond that desired is conveyed. In First Nat'l Trust & Savings Bank v. Raphael, 201 Va. 718, 113 S.E.2d 683 (1960), the court ruled that an easement of light and air had been granted for the benefit of the dominant estate and ran with the land. The change in the nature of the property from residential to commercial, with the additional fact that the windows of the dominant tenement had not been used for years, did not result in the termination of the easement. A better solution in that case might have been to have created the easement for the benefit of the building rather than the land. See S. KRAEMER, \textit{supra} note 6, at 40.

In high density urban areas, such express easements, created for the benefit of buildings rather than for that of the whole dominant estate, would allow access to light and air without the undesirable possibility of limiting all further development of adjoining land. The destruction of the benefitted building would terminate the easement. \textit{See generally id.} at 33-43.

easements, must meet the same requirements established by common law or statute in the more mundane situations. Thus, a real covenant must "touch and concern" the land and must be established between parties having privity of estate who intend the covenant to run.

Other extrajudicial means of ensuring or enhancing access to sunlight have been proposed. For example, zoning ordinances could be enacted which restrict the dimensions of buildings, thus protecting access to sunlight. Solar zoning would be appropriate for application on a city-wide basis. Also available is the use of

20. See supra note 16 and accompanying text.
21. 5 R. Powell, supra note 18, ¶ 673(1).

Equitable servitudes also require that the covenant touch and concern the land and that the parties intend the covenant to run, but additionally require notice to the servient land owner for enforceability. Historically, real covenants provide a remedy at law while servitudes, being an equitable cause of action, have the equitable remedy of injunctive relief which may be more appropriate to a solar user's claim against a neighboring blockage. Id.

The requirements for covenants in both equity and law must be met to ensure the covenant "runs with the land" rather than exists merely as a personal agreement between the two property owners. Id. ¶ 673(2).

Solar users might prefer to use a personal contract rather than a real covenant or equitable servitude, to allow greater flexibility in the future.


See generally G. Hayes, supra note 7, at 77-168, 201-14 (zoning, solar envelopes, transferable development rights); S. Kraemer, supra note 6, at 57-128, 143-49, 159-64 (zoning, solar covenants, transferable development rights, public nuisance).

23. G. Hayes, supra note 7, at 77-135; S. Kraemer, supra note 6, at 73-113.

Utilizing existing commissions to enforce specific solar zoning ordinances would enable local governments to support solar access on a city or neighborhood scale. For instance, existing setback and height restrictions, especially in low-density residential districts, might become mandatory solar zones with regulations barring obstructions to airspace. Note, supra note 22, at 378-89.

Use of such solar zoning, as in any zoning, is a power derived from the police power of the state, and requires enabling legislation in order to be practiced on a local level. Care must be taken to ensure that the solar zoning ordinance relates to public health, safety and welfare so as to be a legitimate exercise of the police power, while not limiting the use of the affected property or reducing its value so as to be an unconstitutional taking of property without just compensation. Com-
transferable development rights (TDRs) by which the future right to develop property is sold to a public agency or another private landowner. 24 The landowner whose property has been restricted thus receives compensation for his future restraint. 25 The sale of TDRs is a potentially useful device on either an individual or area-wide scale.

In the absence of legislative action, solar covenants, or community solar zoning, however, a number of persons have already installed solar devices. Illinois solar users fall within this group, for the Comprehensive Solar Energy Act of 1977 26 is not a truly comprehensive statute on solar access. 27 What recourse do such Illinois residents have in the event a tree does block their solar water heater, or a soon-to-be-constructed apartment building does curtail their southern exposure? In the absence of any contractual or consensual agreement between neighboring parties, what means of legal recourse are available to current Illinois solar users to protect their investment?

**Solar Easement**

One approach available to solar users in Illinois is a claim of a solar skyspace easement. 28 Such an easement would indicate that

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24. See G. HAYES, supra note 7, at 204-12; S. KRAEMER, supra note 6, at 159-65.

25. TDRs have been highlighted in landmark preservation cases. See, e.g., Penn Central Transp. Co. v. City of New York, 397 N.Y.S.2d 914, 366 N.E.2d 1271 (1977). Because a TDR scheme is generally neighborhood-wide, detailed examination of community goals and requirements are recommended. See G. HAYES, supra note 7, at 204-12.


27. See infra notes 32-40 and accompanying text.

28. The Illinois statutory definitions used are:

   (e) "Solar Skyspace" means (1) The maximum three dimensional space extending from a solar energy collector to all positions of the sun necessary for efficient use of the collector. (2) Where a solar energy system is used for heating purposes only, "solar skyspace" means the maximum three dimensional space extending from a solar energy collector to all positions of the sun between 9 a.m. and 3 p.m. Local Apparent Time from September 22 through March 22 of each year. (3) Where a solar energy system is used for cooling purposes only, "solar skyspace" means the maximum three dimensional space extending from a solar energy collector...
there has been established between neighbors a property interest, enabling the solar user to limit the development of the servient estate if that development would hamper the effectiveness of the solar device. The law governing solar skyspace easements would be that which traditionally governs easements of land.  

Numerous states have legislatively established solar easements, ensuring judicial acceptance. Often such statutes require the recording of the solar easement, similar to the recording re-

lector to all positions of the sun between 8 a.m. and 4 p.m. Local Apparent Time from March 23 through September 21.

(f) "Solar skyspace easement" means (1) a right whether or not stated, in the form of a restriction, easement, covenant, or condition, in any deed, will, or other instrument executed by or on behalf of any owner of land or solar skyspace or in any order of taking, appropriate to protect the solar skyspace of a solar collector at a particularly described location to forbid or limit any or all of the following where detrimental to access to solar energy. (a) structures on or above ground; (b) vegetation on or above the ground; or (c) other activity; (2) and which shall specifically describe a solar skyspace in three dimensional terms in which the activity, structures, or vegetation are forbidden or limited or in which such an easement shall set performance criteria for adequate collection of solar energy at a particular location.

ILL. REV. STAT. ch. 96½, § 7303(e), (f) (1981).  

29. An easement is a nonpossessory interest in the land of another, which enables the easement-holder to protect his interest against interference by third parties, or from termination at the will of the possessor of the servient estate. Such an interest is in the limited use or enjoyment of the land and may be classified as either affirmative (allowing the easement-holder to perform certain activities on the servient estate) or negative (requiring the owner of the servient estate to refrain from certain activities). 3 R. Powell, supra note 18, ¶ 405.

An easement may be created by several means: 1) By express conveyance, required to be in writing, stating the limited purposes for which the grantor is allowing the grantee to use his estate. Generally, this conveyance is recorded to give notice to future purchasers of the servient estate. Id. ¶ 407. 2) By necessity, as when the conveyor grants the inner section of his land, with no access other than over land retained by the conveyor. An easement by necessity of right-of-way will be enforced provided there is original unity of title of both parcels, and that the easement is not merely a convenience. Id. ¶ 410. 3) By implication, arising from particular factual settings of the claimed easement, with the requirement of original unity of title of the parcels. Such implied easements generally are required to "have been 'apparent', 'permanent' and 'important for the enjoyment of the conveyed [dominant] parcel.'" Id. ¶ 411 at 34-82 (footnotes omitted). 4) By prescription, on the theory of a "lost grant," when use of the easement has been adverse, and continuous and uninterrupted for the prescriptive period, set by statute. Id. ¶ 413.

30. See supra notes 14-16.
quirements of the traditional easements. Illinois is currently in an unusual position, having legislative definitions of "solar skyspace" and "solar skyspace easement" but no affirmative legislative directions that establish such solar easements or require that they be recorded. It is uncertain whether the legislature intended to create a property interest in a solar skyspace. The opening sections of the Comprehensive Solar Energy Act of 1977 recite a desire to promote solar energy utilization for the public welfare of the people of Illinois, which indicates a positive legislative opinion to-

31. See supra note 16.
32. See supra note 28.
33. Thus, the Illinois statute does not specifically state that solar skyspace easements will be recognized by courts, nor does it state that solar skyspace easements should be recorded. In fact, House Bill 1512 which would have provided the requirements to be met for recording a solar easement died with the close of the 1977 legislative session. H.R. 1512, 80th Leg. (1977). ILLINOIS DEPARTMENT OF ENERGY AND NATURAL RESOURCES, ENERGY LEGISLATION IN ILLINOIS 1977-1982 (1982). See supra note 16 and the statutory language therein for examples of state statutes that do require the recording of solar easements.
34. Comments made in both the Illinois House of Representatives and the Illinois Senate by sponsors of the bill enacting the Comprehensive Solar Energy Act of 1977 did not deal with any property law repercussions:

This Bill provides for informational, technical and developmental activities regarding solar energy. There is no fiscal impact in it because the staff is already there in the Division of Energy in the Business and Economic Development Agency . . . . But what this Bill does is give them enabling legislation. [It establishes] [t]he use of incentives . . . for solar energy development and use of the facet of the solar energy development program. And an important component of this solar energy development program will be demonstration projects . . . . Public accessibility and awareness and information collection are purposes of these demonstrations.

Representative Geo-Karis, speaking to the House at the Third Reading of Senate Bill 944, House Debates, 80th Session, 57th Legislative Day (June 24, 1977) (available on microfiche at 151).
35. The statute states:

The General Assembly finds: (a) That the public health, safety, and welfare of the People of the State of Illinois require that an adequate supply of energy be made available to them at all times; (b) That at the present time existing energy sources are becoming more limited; (c) That it is the responsibility of the State government to encourage the use of alternative renewable energy sources; (d) That solar energy systems are an effective and feasible means of reducing the dependence of the State government and the People of the State on non-State energy sources and of conserving valuable fossil fuel and other non-renewable energy sources; (e) That it is in the public interest to define solar energy systems, demonstrate solar energy feasibility, apply incentives for using so-
ward solar energy. Additional sections outline other positive steps to be taken, including preparation of demonstration projects, an incentive program, public education programs, and studies of public energy suppliers and of solar energy system regulation. The existence of such definitions, although lacking specific procedural instructions for implementation, and the concisely articulated legislative support for solar energy, are strong persuasive authority to a hesitant court faced with a conflict over a solar easement that the legislature intended to promote not only solar energy in general in Illinois, but specifically solar skyspace easements.

Explicit legislative provisions for a solar easement would markedly enhance the success of any claim to such an easement made by solar users in Illinois who have not established an express contractual agreement with the obstructing property owner. The claim to a solar skyspace easement would be characterized as an attempt to establish a prescriptive easement to light and air. The British doctrine of ancient lights was initially followed in Illinois

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lar energy, educate the public on solar feasibility, study solar energy application and coordinate governmental programs affecting solar energy.


36. Id. § 7307.
37. Id. § 7308.
38. Id. § 7310.
39. Id. § 7312.
40. Id. § 7314.
41. Illinois courts have indicated a willingness to support an express grant of access to light and air. Keating v. Springer, 146 Ill. 481, 493, 34 N.E. 805, 807 (1893); Gerber v. Grabel, 16 Ill. 217, 224 (1854).
42. The doctrine of ancient lights grants an easement by prescription to light and air once the plaintiff proves use of the light for the requisite prescriptive period. Early British cases addressed the issue of the obstruction of light, indicating that the use of light must have continued for “time out of memory” for the interest in the light to be enforceable. E.g., Palmer v. Fleshees, 83 Eng. Rep. 48 (K.B. 1675); Bowry v. Pope, 74 Eng. Rep. 155 (K.B. 1588).

The requisite time period has alternately been established as extending to the time of the coronation of Richard I, or the year 1189, as set by the Statute of Westminster, 13 Edw., ch. 46 (1275). Subsequent fluctuation in the prescriptive period ranged from 60 years set by Henry VIII (31 Hen. 8, ch. 2 (1534)) to 20 years (21 Jac., ch. 16 (1623), and 2 & 3 Will. 4, ch. 71 (1832)). The Rights of Light Act, 7 & 8 Eliz. 2, ch. 56 (1559), increased the period to 27 years. The repeal of section one of the Rights to Light Act by The Statute Law (Repeals) Act, 1974, ch. 22 returned the prescriptive period to 20 years. Note, supra note 22, at 358 n.4.

The ancient lights doctrine assured the landowner who met the requisite time
and a prescriptive right to light and air was allowed once a plaintiff pleaded and proved "use and enjoyment [of the free flow of light and air] for a time whereof the memory of man runneth not to the contrary." The use of this flow of light and air over the neighboring land would not become a prescriptive easement "until it begins to operate upon the owner's right of obstructing the light and air." The Illinois courts recognized that such a limit on the use of one's property might result in a loss of value, and reasoned that a truly "ancient" easement would best safeguard the development of land in the state—"unsettled and unimproved as it is."

The fear of restricting development of unsettled areas by the acquisition of prescriptive easements of light and air subsequently caused Illinois to reject its adoption of ancient lights. This reversal paralleled that which occurred in other jurisdictions. In the period sufficient light by which to read. The standard was the "grumble line," meaning that position in a room at which an ordinary person reading ordinary print grumbles and turns on the artificial light. S. Kraemer, supra note 6, at 131. Thus, at common law there was a remedy available without a total blockage of light.

43. Gerber, 16 Ill. at 220.

44. Id. at 223. To establish a prescriptive right to light, the servient landowner's knowledge of the invasion of his rights was presumed. The court would only presume such knowledge, however, if the servient estate was more than a mere vacant lot. Thus the servient landowner had to make some use of the servient estate before the prescriptive period would begin to run.

45. Id. at 219 (dicta distinguishing Illinois from England by the quantity of vacant land which existed in Illinois and raising the question of the applicability of the ancient lights doctrine which might limit the development of vacant lots and hence depreciate the land's value). See also Guest v. Reynolds, 68 Ill. 478, 488 (1873) (resolving the question raised in Gerber by rejecting the ancient lights doctrine).

46. Gerber, 16 Ill. at 221. Given the two requirements of "ancient" lights going back to the time of Richard I (which the Gerber court adopted) and an actual obstruction for the requisite period, it is questionable that such a prescriptive right to light could ever have been established by any claimant in Illinois, despite the language of the Gerber decision.


48. E.g., Metzger v. Hochrein, 107 Wis. 267, 83 N.W. 308 (1900); Parker v. Foote, 19 Wend. 309 (N.Y. 1838).

See also Note, supra note 22, at 359 (the general rule that there could not be an adverse use of light—necessary to establish the presumption of the servient landowner's acquiescence required for a prescriptive claim—was primarily based on the policy consideration of the need for land development); Comment, supra note 23, at 579 n.77 (cases listed demonstrating rejection of ancient lights doctrine).
early cases, the courts expressed concern for the diminished value of the unsettled servient estate.\footnote{49} More recently, an Illinois court has refused to consider the economic depreciation caused by the deprivation of air, light and ventilation, holding such a loss in property value "a loss for which the law provides no remedy."\footnote{50} 

The overwhelming common law precedent against a prescriptive right to light makes it imperative to a solar easement claimant that the legislature has expressed support for solar use. The potential economic loss to a solar user may too easily be classified as "damnum absque injuria"\footnote{51} by courts which have continued to favor the developer of property over the adjoining enjoyer of light and air, even when the loss of such light has caused economic injury to the solar user.\footnote{52} It has been proposed that the doctrine of ancient lights could be reintroduced as a workable legal theory in a changed social setting,\footnote{53} although perhaps with a modification of the lengthy time interval now required.\footnote{54} The doctrine originally dealt with sufficient light by which to read, which would be quite different from the currently proposed use.\footnote{55} In support of the possibility of a changed setting, there is a broadening of the definition

\footnote{49} "It is held to be inapplicable in a country like this, where the use, value and ownership of land are constantly changing." Keating, 146 Ill. at 492, 34 N.E. at 807; "It [ancient lights] . . . can not be applied to the growing cities and villages of this country without working the most mischievous consequences . . . ." Guest, 68 Ill. at 488.


\footnote{51} "Damage without wrong, the sense of the expression being that there is no cause of action." BALLETINE'S LAW DICTIONARY 304 (3d ed. 1969).


\footnote{53} The importance of sunlight is now far more than mere illumination. Light and air and their important aesthetic qualities are increasingly valued in both city planning and architectural design. In fact, land with ample light and air is valued at a higher rate than land with limited sunlight. Comment, Private Nuisance, supra note 22, at 106.

\footnote{54} One suggestion is to limit the prescriptive period to five years. Comment, supra note 52, at 430. Shortening the prescriptive period, however, would present potentially greater burdens on adjoining property interests, by increasing the risk that such a prescriptive claim over one's property could be acquired with a minimum of adverse use by the party claiming the easement.

\footnote{55} See supra note 42. See also Comment, supra note 52, at 430 (pointing out the distinguishing feature between the ancient use of light and the current use).
of "public welfare" in Illinois zoning ordinance enforcement to include an increased awareness of aesthetics, which by analogy might indicate a new judicial awareness of the value of light and air.56

The lack of any case law interpreting the definitions in the Comprehensive Solar Energy Act makes it difficult to anticipate the success of a prescriptive claim of solar skyspace easement.57 Legislative definitions notwithstanding, it is not likely that the Illinois courts will resurrect a modern version of the doctrine of ancient lights while there remain unresolved problems of notice of the prescriptive claim and of the running of the time limit. Thus, although an argument may be made for a solar easement by prescriptive right, sole reliance on such a claim would be tenuous. The possibility exists, however, that the impact of Prah may spread beyond nuisance law and permeate other property areas related to sunlight. If so, the revival of a prescriptive right to light may be more seriously considered by the courts. In such a case, a statutory solar easement will strengthen the claim; the existence of only legislative definitions, although not as persuasive, will certainly be noteworthy.

**Watercourse Law**

A second approach for dealing with the new uses and demands for unrestricted sunlight would be to rely on other, established areas of natural resource law for analogous arguments. Oil and gas laws have been suggested,58 but are distinguishable on the grounds

56. La Salle Nat'l Bank v. City of Evanston, 57 Ill. 2d 415, 432, 312 N.E.2d 625, 634 (1974) ("[T]here would appear to be significant authority that aesthetic factors may, in some instances, be utilized as the sole basis to validate a zoning classification . . ."); Ward v. County of Cook, 68 Ill. App. 3d 563, 571, 386 N.E.2d 309, 316 (1979) (citing La Salle).

57. Since the legislature did not specifically establish a definite property right called a "solar skyspace easement," it is hard to ascertain the effect on property law in Illinois. But see Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1284 (7th Cir. 1977) and Sawyer Realty Group, Inc. v. Jarvis Corp., 89 Ill. 2d 379, 432 N.E.2d 849 (1982) (both citing Cort v. Ash, 422 U.S. 66 (1975), which gives a four-part test for implying a private cause of action from legislation: (1) the plaintiff is within the group for whose benefit the statute was enacted; (2) legislative history indicates an intent to create a remedy; (3) the cause of action is consistent with the underlying legislative scheme; (4) the cause of action is traditionally associated with a state, rather than a federal law).

58. Oil and gas both must be "captured" to develop their energy potential, which is somewhat analogous to the need to "capture" the sunlight by means of an active or passive solar device in order to maximize its heating capabilities.
that applicable doctrines in those fields deal with ownership rights, whereas an interest in sunlight is of a usufructuary nature. Watercourse law is potentially the most analogous doctrine of natural resources to sunlight access due to its similar usufructuary nature, as well as the similarities of the “stream of sunlight” and the stream of water.

American watercourse law follows two major theories and breaks roughly into an east-west division. The prior appropriation doctrine, whereby priority of rights are set by the chronology of the user’s claim, is followed mainly in the western states and has already been explicitly adopted by one legislature as the analogous

However, both oil and gas law deal with ownership rights, and the relevant doctrines accordingly emphasize the importance of title in terms of capture, pooling and correlative rights of surface owners. Also, oil and gas laws currently are inextricably mixed with leasing and taxation laws. See Comment, supra note 52, at 428-29.

59. A usufructuary right is “[t]he right to the use, enjoyment, profits, and avails of property belonging to another.” BALLENTINE'S LAW DICTIONARY 1328 (3d ed. 1969). See infra notes 60-61 and accompanying text.

60. “There are some few things which . . . must still unavoidably remain in common, being such wherein nothing but a usufructuary property is capable of being had; . . . Such (among others) are the elements of light, air and water, which a man may occupy by means of his windows, his gardens, his mills, and other conveniences . . . .” 5 R. POWELL, supra note 18, ¶ 710 at 351 n.5, quoting 2 W. BLACKSTONE, COMMENTARIES 14, 18.

See also Comment, supra note 52, at 434 (“Sunlight itself is used, not captured and sold. Potential sales will be of products of sunlight, not the resource itself.”).

61. See, e.g., Note, supra note 22, at 368 (“Streams of light may be analogized to surface watercourses insofar as rights to both attach to the flow and not the corpus.”); Comment, supra note 52, at 435 (“Some uses of water, as in agriculture, are necessarily consumptive, and thus take the water away from the natural stream. Most uses of sunlight are likewise ‘consumptive.’”); Comment, Private Nuisance, supra note 22, at 104 (sunlight characterized as one of the “freeflowing elements that no one person can possess”).

62. The prior appropriation doctrine, with state-to-state variations, establishes a property right in stream water based on: a) priority in time of claim; b) suitability, importance and quantity of use; and c) ascertainability of the diversion or use of water. Statutory and even constitutional provisions are significant not only in clarifying the superior public right, but also in defining permissive uses. The key policy of the prior appropriation doctrine is the maximizing of a vital, limited resource. 5 R. POWELL, supra note 18, ¶¶ 735-736.

63. Seventeen arid and semi-arid western states rely on the doctrine of prior appropriation: Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming. Id. ¶ 733.
doctrine for solar access. It has been argued that because prior appropriation is the doctrine of the drier states where there has been more litigation over water, the details of the doctrine have been more clearly resolved. In contrast, there has been criticism of the prior appropriation doctrine because it is based on a “first in time, first in right” concept that is neither flexible nor fair. But because the doctrine relies on a permit system, prior appropriation might serve the unique needs of urban areas with high density populations.

The second watercourse theory, exemplified by Illinois common law, is that of riparian use. Some aspects of this doctrine

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64. New Mexico has added the following section:

B. The following concepts shall be applicable to the regulation of disputes over the use of solar energy where practicable: . . . (2) “prior appropriation.” In disputes involving solar rights, priority in time shall have the better right except that the state and its political subdivisions may legislate, or ordain that a solar collector user has a solar right even though a structure or building located on neighborhood property blocks the sunshine from the proposed solar collector site.

N.M. STAT. ANN. § 47-3-4(B) (1978).

65. The details of intent, notice, beneficial use, diversion, and reasonable diligence (all of which are generally required for a claim under the prior appropriation doctrine) have been clarified by numerous case decisions as well as statutory enactments. See, e.g., Colorado River Water Conservation Dist. v. Rocky Mountain Power Co., 174 Colo. 309, 486 P.2d 438 (1971) (definite intent for appropriation for project established by date of final decision to proceed, not by the earlier date of land surveying); Steptoe Livestock Co. v. Gulley, 53 Nev. 163, 295 P.771 (1931) (regular and repeated stock watering constituted a diversion of stream); ARIZ. REV. STAT. ANN. § 45-150 (1956) (statutory standards for reasonable diligence). See also Comment, supra note 52, at 437-41 nn.69, 84 & 89.

66. The race-to-the-courthouse inherent in the prior appropriation doctrine does not easily lend itself to an evaluation of the equities involved in individual cases. Comment, supra note 23, at 606-07.

However, the requirement of beneficial use might be adaptable to instill flexibility. Compare Comment, supra note 52, at 439-40 (supporting this possibility) with Comment, supra note 23, at 606-07 (refuting suitability of beneficial use).

67. See supra notes 62 & 65.

68. The restricted airspace of high density urban areas is comparable to the limited availability of water in prior appropriation states. A permit system ensures beneficial use and allows control of the amount of solar access required. Note, supra note 22, at 371-74.

69. E.g., Evans v. Merriweather, 4 Ill. (3 Scam.) 492 (1842) (each riparian landowner may consume all the stream water needed to meet his natural wants, but water used for artificial needs is to be divided on the basis of the needs of the circumstances).

70. The American version of riparian watercourse law evolved from the Eng-
make it more appropriate for rural or suburban areas.\textsuperscript{71} For Illinois solar users, the use of an analogy to the riparian doctrine would have the benefit of applying a law with which the court is familiar.\textsuperscript{72} Also, the Illinois watercourse common law provides an analysis of riparian ownership rights which is well suited for adoption by analogy to “stream of sunlight” ownership rights.\textsuperscript{73} The Illinois courts have repeatedly held that the rights of riparian owners in the natural stream flowing over their property is a usufructuary right,\textsuperscript{74} and that rights of the upstream user must be limited by the need of the downstream owner.\textsuperscript{75} The balance of their respective rights is made on the basis of the reasonableness of use.\textsuperscript{76}

\begin{itemize}
  \item \textsuperscript{71} As the riparian doctrine originated and flourished where water was abundant, so the doctrine by analogy is appropriate for areas where skyspace is abundant. The fact that most residentially-zoned suburban areas have similar use and minimum lot size requirements ensures open airspace. Note, supra note 22, at 369-71. See supra note 68 (urban areas with dissimilar lot usages more suitable for prior appropriation analogy).
  \item \textsuperscript{72} Some of the benefits include “familiarity with the basic principles of allocation and local variations, efficient use of the research and study applied to other areas, avoidance of ad hoc piecemeal decisions within the state, and regularity of expectations for resource users.” Comment, supra note 52, at 436.
  \item \textsuperscript{73} See supra notes 60 & 61.
  \item \textsuperscript{74} The law has been long settled, in this State, that there can be no property merely in the water of a running stream. The owner of land over which a stream of water flows, has, as incident to his ownership of the land, a property right in the flow of the water at that place for all the beneficial uses that may result from it, whether for motive power in propelling machinery, or in imparting fertility to the adjacent soil, etc.,—in other words, he has a \textit{usufruct} in the water while it passes; but all other riparian proprietors have precisely the same rights in regard to it . . . .
  \item Druley v. Adam, 102 Ill. 177, 193 (1882).
  \item See Tetherington v. Donk Bros. Coal Co., 232 Ill. 522, 525, 83 N.E. 1048, 1049 (1908) (co-equal rights of riparian owners to reasonable use of the stream in its natural and unpolluted state entitled lower user to recover damages for pollution caused by the dumping of coal mine refuse by upstream user); Bliss v. Kennedy, 43 Ill. 67, 76 (1867) (competing industrial users of stream required to share stream water so as to meet their respective needs); Evans, 4 Ill. (3 Scam.) at 496.
  \item “The right of each proprietor to use the stream is subject to a like reasonable right in other riparian owners, and each must submit to such reasonable use by his neighbor . . . .” Tetherington, 232 Ill. at 525, 83 N.E. at 1049.
\end{itemize}
A balance of the competing interests of the upstream user and the downstream potential user based on the reasonableness of use, rather than a strict claim of ownership, favors the adoption of riparian watercourse law to solar access situations, where use of sunlight is more easily demonstrable than ownership of the sunlight. Reasonableness requires that neither user divert more than can be put to beneficial purposes, unless the purpose is to serve a natural need. Additionally, Illinois law supports contractual agreements between riparian landowners. Subjecting solar access to the same test of reasonableness would allow flexible allocation of sunlight between competing users. Perhaps more weight should be given to the claim of the solar user who relies on his solar energy system for a large percentage of his heat or hot water, as a use serving his natural needs.

The use of riparian watercourse law does permit a case-by-case approach, relying on the facts of the individual situation to determine the rights of the parties. Although this is potentially a costly and time-consuming process, it does allow a more gradual resolution of conflicts in the very new area of solar access law. However, as in any argument by analogy, the court may not accept the analogy and may reject the usufructuary claim to sunlight in

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77. Although no watercourse law theory is based on ownership of the stream water, the prior appropriation doctrine is much less flexible than the riparian doctrine. See supra notes 62-66 and accompanying text.

78. The riparian rights of property owners abutting on the same body of water are co-equal. Such rights being equal, the general rule is that no riparian owner can exercise his riparian rights in such a way as to prevent the exercise of the same right by the owners of other riparian rights. Bouris v. Largent, 94 Ill. App. 2d 251, 254, 236 N.E.2d 15, 17 (1968). See also Evans, 4 Ill. (3 Sca.) at 496.

79. See, e.g., Bliss, 43 Ill. at 74; Evans, 4 Ill. (3 Sca.) at 496.

80. "It necessarily results from this joint ownership of the water in the stream, that the proprietors of the property on both sides of the stream have the right to make some arrangement with each other for the joint use of the water of the stream." Sanitary Dist. of Chicago v. Adam, 179 Ill. 406, 433, 53 N.E. 743, 752 (1899).

81. For example, the interest of the property owner with the tree versus the interest of the property owner with the solar energy system.

82. The special protection given necessities under the riparian doctrine would support this. See supra note 70.

83. See Prah v. Marette, 108 Wis. 2d 223, 248, 321 N.W.2d 182, 195 (1982) (Callow, J., dissenting) (citing Comment, Solar Rights: Guaranteeing a Place in the Sun, 57 OR. L. REV. 94, 126-27 for espousing the view that legislation is a more cost efficient means to establish solar access principles).
its entirety.84

PRIVATE NUISANCE

The third non-legislative approach which would be available to Illinois solar users would be a private nuisance argument for the blockage of sunlight needed for the collector or system. The law of private nuisance serves to relieve the plaintiff of an interference with the reasonable use and enjoyment of his land85 caused by some activity of the defendant.86 It is required that the plaintiff

84. Note that the Prah court was presented with a watercourse analogy argument by the plaintiff, but did not address the issues thus raised. See infra text accompanying notes 103 & 107.


Originally, the cause of action for private nuisance was a criminal writ of the assize of nuisance, which granted incidental civil relief for an invasion of the plaintiff’s land caused by conduct wholly on the defendant’s land. The action on the case for nuisance, which gradually evolved, granted relief strictly for an interference with the use and enjoyment of the plaintiff’s land. Id. § 86. See also Restatement (Second) of Torts § 821D comment a (1979). (It may be noted that the cause of action of public nuisance, which developed separately, originally dealt with encroachments upon the royal domain or the public highway. W. Prosser, supra, § 86).

The interference must be substantial and must be of a nature for which the court will grant relief. Physical injury to the plaintiff or his property may persuade a court to grant relief more readily than when the damage is less tangible, as when the defendant’s activity causes personal inconvenience or annoyance. It must be more than petty annoyances. In many instances, there is also involved a continuous or repeated interference. See 5 R. Powell, supra note 18, ¶ 705; W. Prosser, supra, § 87; Restatement (Second) of Torts, supra, § 821F comment c.

The interest involved may not be only in the present use of the land, but also in the unimpaired value of the land, and in the enjoyment of land free from discomfort and annoyance. Restatement (Second) of Torts, supra, § 821D comment b. See also id. § 821E.

The Restatement offers factors for determining the gravity of the harm caused (including the extent and character of the harm involved), and suggests the harm be balanced against the suitability and social value of the plaintiff’s use and the burden on the plaintiff to avoid the harm. Restatement (Second) of Torts, supra, § 827.

86. The defendant’s activity may be either intentional or negligent. A third area, involving ultrahazardous activities, is not relevant to the current discussion. See 5 R. Powell, supra note 18, ¶ 705. See also W. Prosser, supra note 85, § 87.

The defendant’s activity need not be an actual invasion, although trespass was at one time distinguished from nuisance as being a direct rather than indirect
have an interest in land\textsuperscript{87} and that he not be especially susceptible to harm.\textsuperscript{88} The defendant's activity may be enjoined\textsuperscript{90} or damages may be granted\textsuperscript{89} when the social value of that activity is less than the social value placed on the plaintiff's enjoyment of his land.\textsuperscript{91}

physical invasion. Generally, the two causes of action are now distinguishable as an interference with possession (trespass) versus an interference with the use and enjoyment of the land (nuisance). The difference in a given situation may be nonexistent (as when the plaintiff's land is flooded, depriving him of possession, use and enjoyment) but is relevant insofar as the statute of limitations for trespass begins to run when the land is invaded, whereas the nuisance statute of limitations begins only when the interference has caused substantial harm. W. Prosser, \textit{supra} note 85, § 89. See also \textit{Restatement (Second) of Torts}, \textit{supra} note 85, § 821D, comments d & e.

87. Thus a tenant or easement holder would have a cause of action whereas a licensee or lodger would not. W. Prosser, \textit{supra} note 85, § 89. See also 5 R. Powell, \textit{supra} note 18, ¶ 705.

88. "To the extent that the claimed harm becomes more subjective, the likelihood of relief is decreased." 5 R. Powell, \textit{supra} note 18, ¶ 705. The standard of the character of the interference used by the court is "that of definite offensiveness, inconvenience or annoyance to the normal person in the community . . . . The plaintiff cannot, by devoting his own land to an unusually sensitive use, . . . make a nuisance out of conduct of the adjoining defendant which would otherwise be harmless." W. Prosser, \textit{supra} note 85, § 87, at 578-79. See also \textit{Restatement (Second) of Torts}, \textit{supra} note 85, § 821F comment d.

The significance of this standard for a solar user is readily apparent: if the court characterizes the use of solar devices as supersensitive in nature, the cause of action in private nuisance will fail, and relief will be denied. The decision of the court in \textit{Prah} becomes especially important in this regard. See infra text accompanying notes 142-44.

89. The granting of the equitable remedy of an injunction has long been a recognized remedy for a private nuisance claim and may be granted prior to actual harm. See W. Prosser, \textit{supra} note 85, § 90.

"The wrongful conduct is commonly recurrent, causing a multiplicity of suits at law, while equity can give complete relief in a single action. Furthermore, nuisance involves harm to land, for which money damages are traditionally said to be inadequate." 5 R. Powell, \textit{supra} note 18, ¶ 707, at 344.1.

90. The legal remedy of damages will be based on the specific losses suffered by the plaintiff, as well as the value attached to the use and enjoyment of which he has been deprived. W. Prosser, \textit{supra} note 85, § 90. Additionally, a limited remedy of abatement by self-help exists. \textit{Id.}; 5 R. Powell, \textit{supra} note 18, ¶ 707.

91. The defendant's conduct is held to a standard of reasonableness, and the social utility of his activities are considered when the court examines the harm suffered by the plaintiff. Those uses which are of higher utility to society will be less likely to be enjoined than activities with little or no social value. Thus, relief may be granted concerning a foul-smelling pond but not concerning an airport or oil refinery. W. Prosser, \textit{supra} note 85, § 89.

The social utility of the defendant's conduct is also a factor in establishing the suitability of the defendant's activities to the location and the practicability
For several reasons, private nuisance appears to be the preferable legal doctrine for Illinois solar users. First, the absence of judicial interpretation of the statutory definitions makes reliance on them tenuous.92 Second, current users may have installed their systems without obtaining any express skyspace easement which could be enforced by the courts. Third, the use of a private nuisance theory allows argumentation following an existing and traditional theory, rather than the use of the more radical approach of solar easement in the absence of indisputable legislative direction.93 Lastly, as in the adoption of watercourse law, private nuisance claims use a case-by-case approach which facilitates the more gradual resolution of solar use problems.94

**Prah v. Maretti**

A recently decided Wisconsin case lends considerable support to the establishment of a cause of action under the theory of private nuisance for interference with a solar collector.95 The Wisconsin Supreme Court held that the plaintiff stated a claim for which relief could be granted when he filed suit seeking to enjoin the property owner to the south from building his colonial home closer than twenty-five feet from the common boundary line.96 The plaintiff had built his home in 1979 and installed a solar heating system at a cost of $18,000 which was to provide part of the hot water of avoiding the interference. See *Restatement (Second) of Torts*, *supra* note 85, § 828.

92. See *supra* note 57 and accompanying text.

93. The benefits of following a traditional theory include familiarity with the doctrine and clarification of details. See *supra* note 72 and accompanying text. "The advantage of applying old law to new situations is that courts and citizens feel comfortable with laws they are used to. It also makes sense to avoid writing new laws if they are unnecessary." G. Hayes, *supra* note 7, at 169.

94. Conflicts over solar access are in essence no different from other conflicts involving the use of property. As such, the "centuries-long evolution of rules governing the relationships between property owners" provides stability and predictability; yet on individual bases, solutions may be found which adapt the law to the demands placed upon it by changes in society and technology. Zillman, *Common-Law Doctrines and Solar Energy* in *Legal Aspects of Solar Energy*, *supra* note 6, at 25. By way of contrast, see *supra* note 83 for Justice Callow's dissenting view in *Prah* that legislation is more cost effective.


96. *Id.* at 225, 321 N.W.2d at 192; Amicus Curiae Brief for the United States of America at 6, *Prah*. 
needs and all of the heating needs for the home.\textsuperscript{97} The proposed construction by the defendant originally would have placed the new home within ten feet of the property line. This would have blocked the collectors during part of the winter, causing them to freeze and resulting in serious damage.\textsuperscript{98} At an Architectural Control Board (ACB) meeting, the plaintiff sought to have the defendant’s proposed home placed fifteen feet further back, thus leaving the collectors exposed throughout the winter.\textsuperscript{99} There was a factual dispute as to whether or not the parties agreed to the new location,\textsuperscript{100} although the affidavits of two ACB members indicated that the defendant did agree.\textsuperscript{101} However, plans subsequently filed by the defendant showed the house again ten feet from the boundary line, and on October 9, 1980, the defendant began construction. Four days later the plaintiff filed suit in the Circuit Court of Waukesha County, seeking a temporary injunction barring construction of the home.

At the trial court’s hearing to consider the motion, the plaintiff presented three arguments: (1) that the Wisconsin statutes provided a remedy by permitting the bringing of an action for damage to real property;\textsuperscript{102} (2) that the construction of the neighboring home interfered with a solar easement acquired by the plaintiff under the doctrine of prior appropriation;\textsuperscript{103} and (3) that construction of the home was a private nuisance under the common law.\textsuperscript{104} The court denied the plaintiff’s motion and granted

\begin{itemize}
  \item[97.] Brief, supra note 96, at 5.
  \item[98.] Brief, supra note 96, at 6. The danger of a shadow being cast in winter is avoided by determining the shadow cast by the sun on December 21, and using that as the lower boundary of the easement. Conservation and Renewable Energy Inquiry and Referral Serv., U.S. Dep’t of Housing and Urban Dev., Fact Sheet 111 (1st ed. July 1979). See also S. Kraemer, supra note 6, at 34.
  \item[99.] Brief, supra note 96, at 6.
  \item[100.] 108 Wis. 2d at 226 n.2, 321 N.W.2d at 185 n.2.
  \item[101.] Brief, supra note 96, at 6.
  \item[102.] 108 Wis. 2d at 229, 321 N.W.2d at 186. The plaintiff relied on Wis. Stat. § 844.01 (1979), which provides in part:
  \begin{itemize}
    \item[1.] Any person owning or claiming an interest in real property may bring an action claiming physical injury to, or interference with, the property or his interest therein;
    \item[2.] Interference with an interest is any activity other than physical injury which lessens the possibility of use or enjoyment of the interest.
  \end{itemize}
  \item[103.] 108 Wis. 2d at 230, 321 N.W.2d at 186. See supra notes 62 & 65.
  \item[104.] 108 Wis. 2d at 229, 321 N.W.2d at 186. See supra notes 85-88 and accompanying text.
\end{itemize}
summary judgment for the defendant.\footnote{105}

On appeal from the summary judgment, the state supreme court first clarified that it was seeking to test the sufficiency of the complaint and hence would accept as true all facts pleaded by the plaintiff.\footnote{106} The court then proceeded to analyze the plaintiff's claim under the private nuisance doctrine.\footnote{107} Recently decided cases in Wisconsin had adopted the private nuisance analysis of the Restatement (Second) of Torts;\footnote{108} hence, the Prah court cited the Restatement at length.\footnote{109} Additionally, the majority opinion stated that the "private nuisance doctrine has traditionally been employed in this state to balance the rights of landowners."\footnote{110} The balancing of interests, as detailed in the Restatement, was not, however, the original policy of the Wisconsin common law. Initially, the Wisconsin courts had required a physical injury to the plaintiff's property before allowing a cause of action for private nuisance.\footnote{111} Even construction of an eyesore out of pure malice was not actionable.\footnote{112} Gradually, however, the Wisconsin courts recognized a private nuisance for "unreasonable interference with the interest of an individual in the use or enjoyment of land,"\footnote{113} and noted that such interference could even be the result of only negligent conduct.\footnote{114} The adoption of the Restatement standards was a logical step in the progressively wider cause of ac-

\begin{footnotes}
\item[105] 108 Wis. 2d at 227, 321 N.W.2d at 184.
\item[106] Id. at 229, 321 N.W.2d at 186.
\item[107] The majority opinion specifically stated that the possible causes of action under the theories of prior appropriation and statutory violation were not addressed. Id. at 242-43, 321 N.W.2d at 192.
\item[108] E.g., CEW Management Corp. v. First Fed. Sav. & Loan Ass’n, 88 Wis. 2d 631, 277 N.W.2d 766 (1979) (defendant’s failure to prevent erosion onto plaintiff’s property following building construction on defendant’s property constituted a cause of action in private nuisance; failure to act, as indicated in \textit{Restatement (Second) of Torts}, supra note 85, § 824, may impose liability); State v. Deetz, 66 Wis. 2d 1, 224 N.W.2d 407 (1974) (reasonableness of defendant’s use of land must be considered in determining utility of defendant’s conduct). See supra notes 85-88 and accompanying text.
\item[109] 108 Wis. 2d at 231-32, 241, 321 N.W.2d at 187, 190-91.
\item[110] Id. at 231, 321 N.W.2d at 187.
\item[111] Thus, a spite fence made of “rough, old, unsightly and partly decayed” lumber taken from an old ice house did not constitute an actionable private nuisance. Metzger v. Hochrein, 107 Wis. 267, 268, 83 N.W. 308, 309 (1900).
\item[112] Id.
\item[113] Hoene v. City of Milwaukee, 17 Wis. 2d 209, 214, 116 N.W.2d 112, 115 (1962).
\item[114] Id.
\end{footnotes}
tion in private nuisance recognized by the Wisconsin court.

Despite this liberalization of the doctrine of private nuisance, the Wisconsin common law remained traditionally reluctant to recognize a legal interest in sunlight. Thus, in order to ascertain whether the plaintiff had stated a claim supportable under the private nuisance doctrine, the Prah court analyzed the unique treatment of light and air in the law, both the general jurisprudential background and the specific Wisconsin precedent. The majority referred to the early American acceptance and later rejection of the doctrine of ancient lights. Wisconsin common law had been even more strict than other American state courts, refusing to enjoin even intentional interferences, such as spite fences. As in other jurisdictions, the early decisions in Wisconsin did not favor easements of light and air. The overwhelming concern for development of land meant that only if the easement for light and air was expressly granted and clearly stated would such an easement be upheld.

The majority of the Prah court identified three reasons why nineteenth and early twentieth century courts failed to protect a property interest in light and then noted why such reasons were no longer appropriate. First, the earlier courts "jealously guarded" the property owner's freedom to use his property in any way he desired, limited only by a requirement not to do physical harm to the property of a neighbor. The Prah court majority noted that this freedom had been curtailed by zoning laws, indicat-

115. See cases cited infra note 119.
116. 108 Wis. 2d at 233-34, 321 N.W.2d at 188.
117. Id. at 233, 321 N.W.2d at 188. See supra note 42.
118. Metzger, 107 Wis. at 269, 83 N.W. at 309. See also supra note 111.
119. E.g., Depner v. United States Nat'l Bank, 202 Wis. 405, 232 N.W. 851, 853 (1930) (lease of hotel adjoining a vacant lot would not be construed to include an easement to light and air); Miller v. Hoeschler, 126 Wis. 263, 105 N.W. 790, 792 (1905) (no easement of light and air acquired by plaintiff over strip of land belonging to defendant, despite strip's use by plaintiff as front yard).
120. "No words need be used to withhold an easement of light and air, but to create one [,] words must be employed which clearly show the intention to give such an easement." Depner, 202 Wis. at 408, 232 N.W. at 853. Thus, a lease of "Hotel Kenosha and appurtenances" would not be construed as an express grant of an easement of light and air without the use of specific words. Id. See also Miller, 126 Wis. at 270, 105 N.W. at 792.
121. 108 Wis. 2d at 235-36, 321 N.W.2d at 189.
122. Id.
123. E.g., Metzger, 107 Wis. at 272, 83 N.W. at 310.
ing increasing regulation of one's property. Second, the previous uses of sunlight were limited to aesthetic or illuminative purposes; however, the increasing utilization of sunlight as an energy source required a new judicial perspective. Third, the overriding and repeated concern of the earlier courts was the potential for unimpeded development of the land. Such emphasis on unrestricted development, according to the Prah court, is "no longer in harmony with the realities of our society."

Given the change in societal concerns, as well as recent precedent in tempering common law doctrines to fit newer, more vital interests, the court held that the law of private nuisance was applicable to the instant case. Hence, the same reasonable use standard would apply to future situations of obstructions of sunlight. Further, the court reemphasized its intention not to inhibit land development, but to allow flexibility in the face of competing landowners' interests. The decision of the circuit court was reversed, and the case was remanded so that the parties might present the evidence needed for the court to rule on the "reasonableness" of the plaintiff's use.

124. 108 Wis. 2d at 236, 321 N.W.2d at 189, citing Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (zoning ordinance restricting areas of city to strictly residential use was a valid exercise of police power despite the fact that plaintiff's land in that area had market value of $10,000 per acre if used for industry, and only $2,500 per acre if used residentially) and citing Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) (shoreland zoning ordinance seeking to protect wetlands from uncontrolled use and development was constitutional, hence plaintiff as property owner was prohibited from using fill on his wetland property).

125. 108 Wis. 2d at 236 & n.11, 321 N.W.2d at 189 & n.11.

126. "The cistern, the outhouse, the cesspool, and the private drain must disappear in deference to the public waterworks and sewer; the terrace and the garden, to the need for more complete occupancy . . . ." Miller, 126 Wis. at 270, 105 N.W. at 791, quoted in Prah, 108 Wis. 2d at 236, 321 N.W.2d at 189.

127. 108 Wis. 2d at 238, 321 N.W.2d at 190, quoting Deetz, 66 Wis. 2d at 1415, 224 N.W.2d at 414.

128. See, e.g., Deetz, 66 Wis. 2d 1, 224 N.W.2d 407 (common law "common enemy" rule of surface water, allowing landowner total latitude to rid property of surface water, replaced by "reasonable use" as determined by the balancing approach of the Restatement (Second) of Torts).

129. 108 Wis. 2d at 240, 321 N.W.2d at 191.

130. Id. at 239, 321 N.W.2d at 191. Private nuisance is particularly adaptable to such flexibility. Compare Restatement (Second) of Torts, supra note 85, § 827 (gravity of harm) with id. § 828 (utility of conduct). See also supra notes 85 & 91.

131. The application of the reasonable use standard in nuisance cases normally requires a full exposition of all underlying facts and circum-
In the sole dissent, Justice Callow refuted the majority's premise that changes in society call for a new perspective on a landowner's right of access to sunlight. He emphasized that the court should uphold a landowner's right to use his property freely, within the limits of ordinances and statutes;\textsuperscript{132} he questioned the economic value and efficiency of solar collectors;\textsuperscript{133} and he argued that the majority ignored continued public interest in land development.\textsuperscript{134} Further, Justice Callow criticized the court for intruding into an area of legislative, not judicial, concern.\textsuperscript{135} Finally, the dissenting justice noted that in the instant case the record failed to indicate that the plaintiff "disclosed his situation"\textsuperscript{136} to the defendant prior to the latter's purchase of the lot and argued that inaction by the plaintiff should be considered when granting a cause of action.\textsuperscript{137}

\textbf{IMPACT OF Prah}

By allowing a cause of action for obstruction of a solar energy system, the Wisconsin Supreme Court has taken an innovative position. The long line of precedent repeatedly rejecting any claims

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  \item Too little is known in this case of such matters as the extent of the harm to the plaintiff, the suitability of solar heat in that neighborhood, the availability of remedies to the plaintiff, and the costs to the defendant of avoiding the harm.  
108 Wis. 2d at 242, 321 N.W.2d at 192.
  \item "Solar energy for home heating is at this time sparingly used and of questionable economic value because solar collectors are not mass produced, and consequently, they are very costly. Their limited efficiency may explain the lack of production." \textit{Id.} at 247, 321 N.W.2d at 194 (Callow, J., dissenting).  
132. 108 Wis. 2d at 246-47, 321 N.W.2d at 194 (Callow, J., dissenting).
  \item The dissent did not support this statement. The actual expense of solar collectors may be quite modest. \textit{See supra} note 10.
133. 108 Wis. 2d at 247, 321 N.W.2d at 194-95 (Callow, J., dissenting). Justice Callow conceded that "the law may be tending to recognize the value of aesthetics over increased volume development," but supported the need for volume land development by emphasizing "the present housing shortages." \textit{Id.}
134. 108 Wis. 2d at 247, 321 N.W.2d at 194-95 (Callow, J., dissenting). Although Justice Callow referred specifically to solar access, the establishment of a cause of action in private nuisance has historically been a judicial concern. \textit{See supra} note 85 (history of the private nuisance cause of action).
135. \textit{Id.} at 248, 321 N.W.2d at 194-95. Although Justice Callow referred specifically to solar access, the establishment of a cause of action in private nuisance has historically been a judicial concern. \textit{See supra} note 85 (history of the private nuisance cause of action).
136. 108 Wis. 2d at 256, 321 N.W.2d at 199 (Callow, J., dissenting). The Amicus Curiae Brief for the United States indicated the defendant did have notice at least at the time he sought the approval of the ACB in August, 1980. Brief, \textit{supra} note 96, at 6.
137. 108 Wis. 2d at 256, 321 N.W.2d at 199 (Callow, J., dissenting).
of a legal interest in light and air has been given its first setback. Recognition of a defendable interest in sunlight serves as an acknowledgment by the court of the new uses to which light is put. Whereas previously sunlight for aesthetic or illuminative purposes was not a legal interest which the courts would uphold, the Prah decision established that sunlight used as an energy source is substantially different. Access to light has become a potential appurtenance to land which may, under certain conditions, be a defendable legal interest.

The recognition of this interest in sunlight also demonstrates the beginning of the necessary recognition by the law of the technological realities of modern society. Just as courts gradually adapted traditional tort concepts of reasonable care to the realities of railroad traffic, and property concepts of trespass to the advent of air travel, so now the Wisconsin court's decision serves as the first step toward legal recognition of the technological aspects of solar energy.

Additionally, the Prah court has implicitly established that a solar collector is not a "supersensitive use" per se. The summary judgment denying a cause of action would have been affirmed if the solar collector was a sensitive use as a matter of law. A successful claim in private nuisance requires that the injured party's use be reasonable, and that the plaintiff not have contributed to his own harm. Arguably, relying on sunlight for heat could have been viewed as so specialized as to be beyond court-granted re-

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138. See, e.g., supra note 1 (decision in Fontainebleau Hotel denying relief for blockage of sunlight); supra notes 47 & 48 (cases rejecting an interest in light and air).

139. See, e.g., supra notes 47-50 and accompanying text (Illinois precedent refuting a claim to a prescriptive easement to light and air); supra note 111 and accompanying text (Wisconsin precedent denying a private nuisance claim to light).

140. "When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track . . . In such circumstances . . . a driver . . . must stop and get out of his vehicle . . . ." Baltimore & Ohio Ry. v. Goodman, 275 U.S. 66, 69-70 (1927), criticized in W. Prosser, supra note 85, § 35, at 188.

141. United States v. Causby, 328 U.S. 256 (1946) (limiting the upper extent of property ownership so as to allow air travel without claims of trespass). Cf. supra note 13 (no limitations on maxim that the owner of the soil owns to the sky).

142. See supra note 88 and accompanying text.

143. Restatement (Second) of Torts, supra note 85, § 827.
The willingness of the court to examine additional factors beyond the mere use of a solar collector, and the subsequent remanding for additional factual determination supports not only the argument that solar devices will not always be viewed automatically as supersensitive, but also that the use of solar collectors may in fact be a reasonable use of one's property.

Finally, the court has granted injunctive relief to the plaintiff pending further factual determination. For a solar user who has invested in a solar energy system, injunctive relief is preferable to damages. Final determination of the Prah dispute will be most significant in establishing precedent for the relief to be granted in future cases.

In order for Illinois solar users to capitalize on the new opportunity presented by the Prah decision, the private nuisance claim must be supported by Illinois precedent. A private nuisance in Illinois has been defined as "an individual wrong arising from an unreasonable, unwarrantable or unlawful use of one's property producing such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequent damage."145 Thus, the plaintiff must prove both "unreasonable, unwarrantable or unlawful use" by the offending party, and "material annoyance, inconvenience [or] discomfort" caused. These terms are substantially the same as those used by the Restatement (Second) of Torts.146 The harm caused by the obstruction of the sunlight would be actionable, especially where there would be resulting damage to the collector itself, as was the case in Prah.147 In applying the Restatement standard, reasonableness of the use which blocks the light would

144. Both amici curiae briefs submitted to the Wisconsin Supreme Court argued that solar collectors should not be considered sensitive per se. Amicus Curiae Brief of the Natural Resources Defense Council at 11; Brief, supra note 96, at 19-24.

145. Merriam v. McConnell, 31 Ill. App. 2d 241, 244, 175 N.E.2d 293, 295 (1961) (annual infestation of box elder bugs alone not sufficient for the court to grant relief, without some action on the part of the defendant), citing Gardner v. International Shoe, 319 Ill. App. 416, 433, 49 N.E.2d 328, 335 (1943) (operations of the defendant tannery were permitted to continue, despite noxious odors which were viewed as a necessary part of urban life).

See also Laflin & Rand Powder Co. v. Tearney, 131 Ill. 322, 326, 23 N.E. 389, 390 (1890) (storage of dynamite by defendant on his property, which subsequently exploded, constituted nuisance).

146. Restatement (Second) of Torts, supra note 85, § 821F.

147. Brief, supra note 96, at 19-20. The more easily the court may discover a physical injury, the more readily it will grant relief. See supra note 85.
be determined by a variety of factors, including the social value of the use invaded and the burden on the person harmed. The inclusion of such factors bodes well for Illinois users, as it demonstrates a flexibility which was not apparent in earlier cases. This balancing approach is based on the same authority which was persuasive to the Wisconsin Supreme Court in Prah.

Implicit in the balancing of landowners' interests, which is involved in a claim of private nuisance, is the requirement that one's use of the land not be special and delicate. The standard for private nuisance remains that of a person of ordinary sensibilities, which usually is not an issue of fact. What constitutes a sensitive use would vary with its plentifulness so that while a single solar user might be special, a majority in the community with solar devices would be the norm against which sensitivity could be measured. There is also a policy decision made by the court when it determines whether a use is unusually sensitive or not. The Prah decision, regardless of the final outcome in the individual situation, has given credence to a determination that a solar collector is a reasonable, not special, use by allowing the facts of the particular circumstance to control.

CONCLUSION

Current Illinois solar users do not have strong legislative pro-


In neither case was there any discussion of the relative utility of the conduct of the defendants, or the land use by the plaintiffs. Both decisions took strict doctrinal stances granting no relief if no act by the defendant was argued, or if the plaintiff's use was special.

150. Great Atl. & Pac. Tea Co., 77 Ill. App. 3d at 485, 395 N.E.2d at 1198-99; and Prah, 108 Wis. 2d at 241 n.16, 321 N.W.2d at 192 n.16, both quoting Restatement (Second) of Torts, supra note 85, § 827 (listing factors for use in determining gravity of harm caused).

151. See, e.g., Belmar Drive-In, 34 Ill. 2d at 547-48, 216 N.E.2d at 791. See also Comment, supra note 23, at 589.

152. See supra note 88.

153. Belmar Drive-In, 34 Ill. 2d at 548, 216 N.E.2d at 791.

154. See Comment, supra note 23, at 589; Brief, supra note 96, at 20.

tection of the direct sunlight needed for their solar devices, although they do have legislative definitions available for the granting of express solar skyspace easements. Precedent in the area of watercourse law under the common law may be an argument used to defend one's solar access. However, the landmark Wisconsin case of *Prah v. Maretti*, following precedent similar in many ways to Illinois common law, contains strong persuasive authority for the Illinois courts to recognize a cause of action in private nuisance for the obstruction of necessary sunlight.

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