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NOTES

A PRIVATE NUISANCE REMEDY FOR OBSTRUCTION OF SOLAR ACCESS

Prah v. Maretti

The surge in energy prices during the 1970's has brought about several legal responses. Most have come through Congress or state legislatures, but a state court recently entered the field by creating a new cause of action which furthers the use of an alternative energy source: solar power. The Wisconsin Supreme Court, overruling virtually unanimous American common law precedents, has recognized a private nuisance action for obstruction of sunlight to a landowner's solar collector. The decision leaves unanswered remedial questions that will have to be faced by Wisconsin and the other jurisdictions that follow the decision.

The case began when Maretti bought a lot adjacent to Prah's home and proposed to build a house only a few feet away from the property line. Prah tried to convince Maretti to build the house further from the boundary line to maintain an unobstructed path for sunlight to Prah's solar collector. Negotiations between the two parties broke off, and Maretti began construction of the house. Prah sued for a temporary injunction to halt construction.

The trial court granted summary judgment for Maretti on the ground

1. 108 Wis. 2d 223, 321 N.W.2d 182 (1982).
2. The price of oil, for example, rose from $1.20 per barrel in 1970 to $38.00 in 1980. R. STOBAUGH & D. YERGIN, ENERGY FUTURE 25, 31 (1980).
4. 108 Wis. 2d at 225, 321 N.W.2d at 184-85.
5. Id. After construction of Maretti's home, Prah amended his complaint to include $8,000 in damages for the net present value of a claimed 5% loss in the collector's efficiency due to Maretti's chimney. Prah also claimed that the shadow from Maretti's chimney would cause his system to freeze periodically in the winter, causing extensive collector damage. As a consequence, he asked for another $8,000 to pay for antifreeze and structural modifications. Telephone interview with John F. Maloney, Mulcahy & Wherry, S.C., Milwaukee, attorney for the plaintiff (Jan. 22, 1983).
that Prah stated no claim on which relief could be granted. The appeals court certified the case to the Wisconsin Supreme Court as presenting an issue of first impression: whether a landowner using solar energy has a right to prevent blockage of sunlight by an adjacent landowner. The court held that the plaintiff stated a cause of action in private nuisance. The case is the first modern American decision to recognize a right to solar access outside the area of malicious interference.

To understand the holding in Prah, it is first necessary to examine the history and current status of the right of solar access. Early English common law recognized the doctrine of "ancient lights," a right of solar access through a negative prescriptive easement for sunlight. A prescriptive easement is established by use of the easement continuously and adversely for a prescribed number of years. Under ancient lights, a landowner who maintained access to sunlight for the prescriptive period acquired a right to that sunlight.

Some early American decisions followed the English common law doc-

6. 108 Wis. 2d at 226, 321 N.W.2d at 184-85.
7. Filing briefs as amicus curiae, both the Justice Department and the Natural Resources Defense Council argued for adoption of a right of solar access. Id. at 224, 321 N.W.2d at 184-85.
8. Id. at 240, 321 N.W.2d at 191.
9. An interesting recent case following the traditional American view rejecting a right of solar access is Fontainebleau Hotel Corp. v. Forty-five Twenty-five, Inc., 114 So. 2d 357 (Fla. Dist. Ct. App. 1959). In that case the owner of a Florida beachfront hotel sued to prevent construction of an adjoining hotel. The plaintiff alleged that the proposed 22-story structure would cast a shadow on his beach property and deprive him of guests. The plaintiff argued for application of the maxim sic utere tuo ut alienum non laedas (one must use his property so as not to injure another). Id. at 359. The court rejected the argument, holding that the maxim only applied to injuries to the rights of another. Since the plaintiff had no right to sunlight, he could not recover. Id.
11. See, e.g., Stein v. Houck, 56 Ind. 65 (1877); see generally 3 R. Powell, The Law of Real Property § 413, at 34-104 (rev. ed. 1979); Restatement of Property §§ 457-460 (1944). The biggest problem in applying prescriptive easements to solar access is determining how the use of light and air is "adverse" to the party against whom the easement is asserted. In Prah, for instance, Prah would have no cause of action against Maretti for obstruction of "Prah's" sunlight; the light was not actually Prah's until it entered his land. Professor Powell does not believe that a blockage of light alone can give rise to a negative prescriptive easement. 3 R. Powell, supra, § 413, at 34-119.
trine, but an 1838 New York case, *Parker v. Foote*, signalled an end to its acceptance in the United States. The *Parker* court gave three reasons for rejecting the doctrine. First, ancient lights impeded land development. If two landowners built on either side of a vacant lot, the owner of the middle lot would be precluded from building because he would obstruct sunlight to at least one of the adjacent buildings. The rapid growth of American cities during the nineteenth century increased the importance of unrestricted land development. Second, sunlight’s chief uses in the early nineteenth century were illumination and aesthetic enjoyment. Sunlight for illumination became less important after the use of artificial lighting became common, and American courts did not consider mere aesthetics a

13. *See* Gerber v. Grabel, 16 Ill. 217, 224 (1854); Story v. Odin, 12 Mass. 157, 160 (1815); Robeson v. Pittenger, 2 N.J. Eq. 57, 66 (1838); *see also* McReady v. Thompson, 23 S.C.L. (Dud.) 131 (1837) (unreasonable for man to build house with windows facing open field and later be deprived of light to those windows).


A doctrine similar to ancient lights still flourishes in one state, however. Louisiana, a civil law jurisdiction, allows a praedial servitude right in air and light similar to ancient lights. A praedial servitude resembles a common law easement. *See* Goodwin v. Alexander, 105 La. 658, 659, 30 So. 102, 103 (1905); La. CIV. CODE ANN. arts. 674, 711, 715, 717, 782 (West 1952); *see generally* Comment, *Adjoining Landowners: Right to Light and Air—Injunction*, 34 TUL. L. REV. 599 (1960).

16. 19 Wend. at 317.


18. *See* Robeson v. Pittenger, 2 N.J. Eq. 57, 62 (1838) ("and yet in populous cities, where land is very valuable. . . the enforcement of the same rule might work great inconvenience and injustice"). England, of course, also had growing cities. To ensure that ancient lights would not unreasonably restrict growth, English courts imposed a reasonableness or "grumble-line" test for applying ancient lights. *See* Colls v. Home & Colonial Stores, Ltd., 1904 A.C. 179, 182 ("application of . . . [ancient lights] would render it almost impossible for a town to grow").

19. The electric light bulb was invented around 1870. 10 ENCYCLOPAEDIA BRITANNICA 958 (1978).
valid reason for ancient lights.\textsuperscript{20} Third, the court believed that a landowner had the right to use his property as he saw fit.\textsuperscript{21} Violation of moral obligations to the landowner's neighbors did not overcome the owner's sovereign right to the unrestricted use of his property.

The \textit{Parker} court, like most American courts, did not reject absolutely the principle of solar rights. These jurisdictions recognized the "spite fence" doctrine: a cause of action for malicious obstruction of light.\textsuperscript{22} Under the spite fence doctrine, a tall fence could be built for the benefit of the builder (the servient holder), but it would be enjoined if built solely to injure the person whose access to sunlight was hampered (the dominant holder).\textsuperscript{23} Courts using the spite fence doctrine recognized a nuisance cause of action, generally finding the servient owner's conduct to be wholly lacking in utility.\textsuperscript{24}

Some courts refused to adopt the spite fence doctrine, holding that malice alone was not enough to establish a cause of action; the defendant had to invade a legally protected right.\textsuperscript{25} Since the dominant holder had

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\item \textsuperscript{20} See, e.g., Keiper v. Klein, 51 Ind. 316, 323 (1875) ("it would seem that . . . [land] ought not to be hampered or embarrassed in its legitimate use by anything so impalpable and fleeting as air and light").
\item \textsuperscript{21} 19 Wend. at 317. Wisconsin originally had such a doctrine as well. See Metzger v. Hochrein, 107 Wis. 267, 83 N.W. 308 (1900).
\item \textsuperscript{22} See Burke v. Smith, 69 Mich. 380, 383, 37 N.W. 838, 842 (1888); Annot., 80 A.L.R.3d 962 (1977). A majority of jurisdictions have adopted the spite fence doctrine. See, e.g., Brittingham v. Robertson, 280 A.2d 741, 744 (Del. 1971); Hornsby v. Smith, 191 Ga. 491, 493, 13 S.E.2d 20, 21 (1941); Sundowner, Inc. v. King, 95 Idaho 367, 368, 509 P.2d 785, 787 (1973); Erickson v. Hudson, 70 Wyo. 317, 327, 249 P.2d 523, 532 (1952). No Missouri appellate court has decided whether malicious obstruction of light is actionable. Dicta in one case, however, indicates that Missouri does not recognize such a cause of action:
\end{itemize}
no right to unobstructed light, these courts held that the servient owner did not invade the dominant owner's protected rights.26 Loud noises and bad odors, recognized as bases for nuisance actions, were distinguished from obstruction of light on the ground that a person who produced noise or odors invaded his neighbor's land, while a person who blocked sunlight merely prevented light from reaching that land.27

In reaching its decision, the Prah court expanded the spite fence doctrine28 and refuted each of Parker's reasons for rejecting ancient lights. First, the right of modern landowners to unrestricted use of their land has become limited by zoning laws and other use restrictions unknown in 1838.29 Property rights of individual landowners thus no longer constitute a valid reason for denying solar access.30 Second, the court reasoned that

26. See Letts v. Kessler, 54 Ohio St. 73, 75, 42 N.E. 765, 767 (1896).
27. "A man may be compelled to keep his gas, smoke, odors, and noise at home, but he cannot be compelled to send his light and air abroad." Id.
28. The Prah court's use of the spite fence doctrine is important. The doctrine provided the only private nuisance cause of action for deprivation of light prior to Prah. A court's willingness to allow a spite fence action may reflect its amenability to recognizing Prah's private nuisance action for solar access. Generally, three categories of courts can be distinguished. The first group includes those that allow a spite fence cause of action when the owner's conduct is malicious and the gravity of the harm he creates is not outweighed by the utility of his conduct. See, e.g., Bush v. Mockett, 95 Neb. 552, 555, 145 N.W. 1001, 1003 (1914); Hay v. Stevens, 271 Or. 16, 20, 530 P.2d 37, 39 (1975); Erickson v. Hudson, 70 Wyo. 317, 320, 249 P.2d 523, 525 (1952). These courts already balance the equities in particular cases, so extension of the spite fence doctrine to solar access in general would be relatively simple. The second group of courts recognizes a spite fence action, but only if erection of the fence by the servient holder lacks any utility; if the fence is even slightly useful to the builder, there is no cause of action. See, e.g., Norton v. Randolph, 176 Ala. 381, 386, 58 So. 283, 285 (1912); Hornsby v. Smith, 191 Ga. 491, 493, 13 S.E.2d 20, 21 (1941); Racich v. Mastrovich, 65 S.D. 321, 326, 273 N.W. 660, 661 (1937). These courts do not weigh the equities. Since Prah requires such balancing, these courts would have farther to go before adopting a solar access cause of action. The third group of courts is made up of those that do not recognize the spite fence doctrine. These courts find no legally protected right to sunlight. See, e.g., Triplett v. Jackson, 5 Kan. App. 777, 779, 48 P. 931, 932 (1897); Harrison v. Langlinais, 312 S.W.2d 286, 288 (Tex. Civ. App. 1958). Before adopting a right to solar access, these courts would have to first recognize that there may be a right to sunlight. Legislatures may also have an impact on the question of access. Wisconsin, for example, originally rejected the spite fence doctrine in Metzger v. Hochrein, 107 Wis. 267, 271, 83 N.W. 308, 310 (1900). The legislature subsequently created a cause of action. See Wis. Stat. Ann. § 280.08 (West 1982).
29. 108 Wis. 2d at 236, 321 N.W.2d at 189. See Euclid v. Ambler Realty Co., 272 U.S. 365, 390 (1926); Just v. Marinette, 56 Wis. 2d 7, 15, 201 N.W.2d 761, 768 (1972).
30. The dissent in Prah distinguished zoning restrictions as intended solely for benefit of public health, safety, morals, or welfare. 108 Wis. 2d at 246, 321 N.W.2d at 194 (Callow, J., dissenting). No public right was directly involved in Prah. But
Prah was using sunlight not for visibility or aesthetics but for a source of energy.\textsuperscript{31} Society values solar generation of power more than the aesthetics of sunlight.\textsuperscript{32} President Carter in 1979 called for twenty percent of the nation’s energy to come from the sun by the year 2000.\textsuperscript{33} The number of solar systems currently operating demonstrates substantial public interest in providing a right of solar access.\textsuperscript{34} Third, the court stated that unhindered development of land is no longer inherently desirable.\textsuperscript{35} Growing numbers of economists have determined that the world is reaching the outer limits of beneficial growth.\textsuperscript{36} Laws in areas such as coal strip mining indicate society’s willingness to trade growth for other economic goals.\textsuperscript{37} The court concluded that land development does not play the central role in twentieth-century America that it did during the industrial revolution.\textsuperscript{38}

Once the court accepted in theory that rights to solar access should be expanded, several different causes of action were available. One potential theory, ancient lights, was not pleaded by the parties. Prah’s house was constructed only two years before Maretti’s, so the prescriptive time limit would not have been met.\textsuperscript{39} In addition, ancient lights entitled the user only to enough light to read in the middle of a room,\textsuperscript{40} far less than Prah wanted.\textsuperscript{41} The court did not adopt ancient lights, although it based much of its analysis on the doctrine.

The court considered, but did not decide, whether the water allocation doctrine of prior appropriation should be applied to solar access.\textsuperscript{42} Fol-

\textsuperscript{31} 108 Wis. 2d at 236, 321 N.W.2d at 189.
\textsuperscript{32} The Prah court noted five separate federal acts encouraging the use of solar energy and two Wisconsin statutes, one of which permitted localities to guarantee access to sunlight by statute. \textit{Id.} at 236 n.11, 321 N.W.2d at 189 n.11.
\textsuperscript{34} One estimate places the number of solar homes world-wide at 2.5 million to 3 million. P. Steadman, \textit{Energy, Environment, and Building} 82 (1975).
\textsuperscript{35} 108 Wis. 2d at 237, 321 N.W.2d at 190 (citing State v. Deetz, 66 Wis. 2d 1, 224 N.W.2d 407 (1974) (adopting private nuisance reasonable use rule for surface water)). \textit{See also} Campbell v. Seaman, 63 N.Y. 568, 575 (1876) (landowner allowed exclusive use of property).
\textsuperscript{38} 108 Wis. 2d at 237, 321 N.W.2d at 190.
\textsuperscript{39} The time length for prescriptive easements in Wisconsin is 20 years, Wis. Stat. Ann. § 280.08 (West 1982), but the court could have created its own prescriptive time length as courts did with earlier ancient lights cases. \textit{See} Palmer v. Fletcher, 1 Lev. 122, 83 Eng. Rep. 329 (K.B. 1663).
\textsuperscript{41} \textit{See} note 5 supra.
\textsuperscript{42} 108 Wis. 2d at 242-43, 321 N.W.2d at 192.
allowed in many western states, prior appropriation enables the first user of water from a watercourse to acquire a property right in a certain quantity of water that cannot be diminished by subsequent users.\textsuperscript{43} The user must intend to use the water and give notice of his appropriation, but the actual taking can constitute constructive notice.\textsuperscript{44} Marett\i therefore would have had notice of Prah's solar collectors since he could see them. The appropriator must also actually capture the water and put it to a beneficial use.\textsuperscript{45} Courts have held that domestic and culinary uses are beneficial.\textsuperscript{46} Presumably, the use of sunlight for domestic production of energy would also satisfy the beneficial use criterion.\textsuperscript{47} Thus, under prior appropriation, Prah would have had an absolute right of access to the amount of sunlight being used to produce energy.

The prior appropriation system is generally statutory.\textsuperscript{48} One state, New Mexico, has adopted a prior appropriation statute for solar access.\textsuperscript{49} The New Mexico statute provides for unobstructed solar access where the sunlight is beneficially used. As long as the senior appropriator continues

\textsuperscript{43} See generally W. Hutchins, Selected Problems in the Law of Water Rights in the West 298-313 (1942).


\textsuperscript{45} The term "beneficial use" has never clearly been defined:

The usual purposes for which rights to the use of water may be acquired are mining, manufacturing and industrial uses generally, development of hydro-electric power, propagation of fish, irrigation, stockwatering, municipal, and domestic uses. All these have been held to be beneficial uses within the meaning of the statutory term. There can be little question about any proposed use which has as its object the substantial benefit or improvement of the appropriator's lands . . . and which is a reasonable use in view of all the circumstances.

W. Hutchins, supra note 43, at 314. Along with the traditional economic uses, the term today "is understood to embrace aesthetic, recreational, preservational, and pollution control purposes." W. Rodgers, Jr., Handbook on Environmental Law 168 (1977).

\textsuperscript{46} Cf. Kernan v. Andrus, 6 Alaska 54, 59-60 (1918).


\textsuperscript{49} N.M. Stat. Ann. §§ 47-3-1 to -5 (1978). The statute grants a solar easement to the first user who appropriates for beneficial solar energy purposes:

(1) "Beneficial Use." Beneficial use shall be the basis, the measure and the limit of the solar right . . . . If the amount of the solar energy which a solar collector user can beneficially use varies with the season of the year, then the extent of the solar right shall vary likewise;

(2) "Prior Appropriation." In disputes involving solar rights, priority in time shall have the better right . . . .

Id. § 47-3-4.
that beneficial use, he retains the statutory protection. Prah urged the Wisconsin court to adopt such a law judicially, but the court chose not to reach a decision on the issue.

The court instead adopted the action of private nuisance to enforce the right to solar access. Relying on State v. Deetz, in which the same court had rejected the traditional common enemy rule and adopted a reasonable use rule for diffused surface water interference, the court rejected a per se exclusion to nuisance law, saying that such exclusions could promote unreasonable behavior. It drew an analogy between nuisance theories for water and sunlight. The common enemy rule permits a non-malicious landowner to divert surface water onto his neighbor's land even if the diversion causes harm. Under the same analysis, a landowner could harm a


51. 108 Wis. 2d at 229-30, 321 N.W.2d at 188. There are some problems with using prior appropriation. The doctrine may be too inflexible since the use of the first person laying claim to the sunlight may later become comparatively unreasonable even though it is still beneficial to him. Under this theory, land development could be significantly and unnecessarily impeded. For instance, a house with a small solar collector could prevent the erection of a skyscraper, even if the larger building would be more useful. See Davis, Eastern Water Diversion Permits: Precedents for Missouri, 47 MO. L. REV. 429, 453-56 (1982).

52. 108 Wis. 2d at 243, 321 N.W.2d at 191.

53. 66 Wis. 2d 1, 224 N.W.2d 407 (1974).

54. The common enemy rule, also referred to as the common law rule, provides that "diffused surface waters are a common enemy and may be fought off in any way the landowner can best get rid of them, even though their diversion may injure the adjoining landowner." W. HUTCHINS, supra note 43, at 115 (citing Miller v. Letzerich, 121 Tex. 248, 49 S.W.2d 404 (1932)).

55. Diffused surface waters are those "which in their natural state are flowing vagrantly over the surface of the ground [e.g., rain or flood waters], or standing in bogs or marshes, from whatever source they may have originated." W. HUTCHINS, supra note 43, at 110.

56. 108 Wis. 2d at 238-39 n.13, 321 N.W.2d at 190-91 n.13. The court rejected the decision in Fontainebleau Hotel Corp. v. Forty-five Twenty-five, Inc., 114 So. 2d 357 (Fla. Dist. Ct. App. 1959), which is discussed in note 9 supra. The Prah court felt that Fontainebleau's reasoning was not persuasive since that court "did not explain why an owner's interest in unobstructed light should not be protected or in what manner an owner's interest in unobstructed sunlight differs from an owner's interest in being free from obtrusive noises or smells or differs from an owner's interest in unobstructed use of water." 108 Wis. 2d at 238-39 n.13, 321 N.W.2d at 190-91 n.13. The dissent in Prah argued that the plaintiff's solar energy heating system was "an unusually sensitive use"; since Maretti's house would not have interfered with a normal, non-sensitive use, it was reasonable. Id. at 246, 321 N.W.2d at 197 (Callow, J., dissenting) (citing Belmar Drive-In Theatre Co. v. Illinois State Toll Highway Comm'n, 34 Ill. 2d 544, 547-49, 216 N.E.2d 788, 799 (1966)).

57. 108 Wis. 2d at 240, 321 N.W.2d at 190.
neighbor by blocking sunlight to him if he did so without malice. Both harms would be justified by the earlier importance of land development and the landowner’s right to exclusive control of his property.\(^{58}\) Just as the *Deetz* court concluded that those rationales no longer supported the common enemy rule,\(^{59}\) the *Prah* court concluded that they no longer justified rejection of solar access.\(^{60}\)

Both the *Prah* dissent and the commentators have criticized creation of a private nuisance action for solar access.\(^{61}\) They argue that the action leaves the parties uncertain of their rights until litigation is commenced.\(^{62}\) But a nuisance cause of action can overcome the problem of uncertainty. Case law can create predictability even in an area as dependent on the facts as solar access.\(^{63}\) As more cases are litigated, courts will have an opportunity to shape the boundaries of the right to solar access.

The primary reason the *Prah* court chose private nuisance was the flexibility of the action.\(^{64}\) That flexibility will be critical in the area of solar access. Technology changes rapidly. In the future, Prah might have access to inexpensive technology allowing him to fit his solar collector into a smaller space, away from the shadow of Maretti’s chimney. If so, the court could permit Maretti to build his chimney after reassessing the reasonableness of his conduct. That process is common in states that have adopted

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59. 66 Wis. 2d at 21, 224 N.W.2d at 417. In the same year, Wisconsin also adopted the comparative reasonableness test for underground water. See *State v. Michels Pipeline Constr., Inc.*, 63 Wis. 2d 278, 217 N.W.2d 339 (1974).

60. 108 Wis. 2d at 238, 321 N.W.2d at 190.


63. For example, the prospective owner of a Missouri funeral parlor could know by cursory examination of the case law that a court would find his operation of the parlor in a purely residential area unreasonable. See *Leffen v. Hurlbut-Glover Mortuary, Inc.*, 363 Mo. 1137, 1141, 257 S.W.2d 609, 610 (1953); accord *Howard v. Etchieson*, 228 Ark. 809, 812, 310 S.W.2d 473, 474 (1958). Similarly, the increased volume of solar access cases that are likely to follow *Prah* should yield a reasonably coherent body of law that will enable persons to know when their actions are violating the rights of others.

64. 108 Wis. 2d at 237, 321 N.W.2d at 190. For instance, in the funeral parlor example in note 63 *supra*, the formerly residential district could later become more commercial. Under a prior appropriation theory, such as that used in New Mexico, see note 49 *supra*, a single landowner conceivably could appropriate rights and keep the parlor out virtually forever. Under a reasonable use nuisance theory, the court could recognize the changed use and allow the funeral parlor to move into the formerly residential area. The water analogy is even more forceful; if a prior water use later becomes unreasonable—though still beneficial—a court may readjust the rights of the parties.
reasonable use in water law, where, for example, a farmer uses an antiquated irrigation system that wastes water.

The flexibility of a nuisance action is further demonstrated by its response to existing uses. Had Maretti built his house before Prah installed his solar collector, Prah would not have obtained relief under a prior appropriation theory such as New Mexico's. But under a private nuisance action, the court would consider Maretti's status as first user as only one of several factors in a weighing process based on reasonableness.

Several states have enacted statutory remedies that courts will have to consider when assessing the scope of the nuisance cause of action. In Wisconsin, for example, legislators passed an act to deal with future solar access. The statute enables municipalities to opt into a system providing for

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65. See Hazard Powder v. Somersville Mfg. Co., 78 Conn. 171, 179, 61 A. 519, 522 (1905) (evidence of efficiency of other mills on stream admitted to evaluate reasonableness of mill's use). Factors used in assessing the reasonableness of the water use are found in Restatement (Second) of Torts § 850A (1979):

The determination of the reasonableness of a use of water depends upon a consideration of the interests of the riparian proprietor making the use, of any riparian proprietor harmed by it and of society as a whole. Factors that affect the determination include the following:

(a) The purpose of the use,
(b) the suitability of the use to the watercourse or lake,
(c) the economic value of the use,
(d) the social value of the use,
(e) the extent and amount of the harm it causes,
(f) the practicality of avoiding the harm by adjusting the use or method of one proprietor or the other,
(g) the practicality of adjusting the quantity of water used by each proprietor,
(h) the protection of existing values of water uses, land, investments and enterprises, and
(i) the justice of requiring the user causing harm to bear the loss.

Many of these factors, by analogy, should apply to solar access as well.

66. See Prather v. Hoberg, 24 Cal. 2d 549, 150 P.2d 405 (1944) (evaluation of present use, not greater past use, is material).

67. See note 49 supra.


solar access permits which, if violated by an adjoining landowner, would create a cause of action. Significantly, the statute was passed after the petition in *Prah* was filed but before the decision was rendered, so the court decided the case on common law principles. As a result, plaintiffs may have the common law remedy even in Wisconsin cities which have opted into the statutory scheme.footnote{71}

Courts that follow *Prah* will have to fashion a remedy for obstruction of solar access in private nuisance. Initially, courts will have to determine whether issuance of an injunction against construction of the obstructing building is proper. Enjoining proposed construction is difficult because the court must be certain that the building, when constructed, actually would obstruct light to the solar collector. In *Prah*, the claimed obstruction from Maretti's house was a five percent loss of efficiency caused by a chimney; the chimney would have been harmless had it been only eighteen inches shorter. It may be difficult to determine from construction plans how much obstruction would result, and a reasonable estimate seems necessary for the issuance of an injunction.footnote{72}

After the building has been constructed, the court will examine several factors to determine whether to issue an injunction ordering the obstruction torn down. First, it must measure the harm to the plaintiff.footnote{73} In solar ac-

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footnote{71} The passage of a statute by the legislature arguably precludes any action with a similar remedy by the court. But a contrary argument could be made that a statute presumptively does not remove a common law cause of action. See Huff v. Union Elec. Co., 598 S.W.2d 503, 511 (Mo. 1980) ("decision [on a close question] should be weighted in favor of retention of the common law right of action"). The statute instead could be construed to clarify and provide specific guidelines for the common law action without displacing it. See Helmcampt v. Clark Ready Mix Co., 214 N.W.2d 126, 129 (Iowa 1974) ("statutory enumerations . . . do not modify the common law application to nuisances") (construing *Iowa Code Ann.* § 657.01 (West 1950)). But see Hamms Brewing Co. v. Wiggam, 76 Minn. 246, 249, 134 N.W. 218, 220 (1912) (construing *Minn. Stat. Ann.* § 561.01 (West 1947)). For example, a California statute states specific guidelines for the blockage of solar collectors by trees. See *Cal. Pub. Res. Code* § 25980 (West Supp. 1982). It provides that for a public nuisance to exist, the trees must block more than 10% of the adjoining solar collector's surface between the hours of 10 a.m. and 2 p.m. If such a statute had been enacted in Wisconsin, the legislature could be presumed to have spoken only with regard to those specific requirements. The court would still be free to decide any other issues regarding solar access (e.g., blockage caused by a house).


footnote{73} That harm must also be balanced against the harm to the defendant. Under the doctrine of comparative negligence, if the court finds that the burden of removal of the obstructing structure would be grossly disproportionate to the benefit to the plaintiff, the court should refuse to issue an injunction. Moore v. Serafin,
cess, that harm is primarily monetary. The primary detriment to the plaintiff will be an increase in his utility bills and the loss of his investment in the solar collector.

Next, many courts will evaluate the adequacy of the remedy available at law. Given the nature of the harm, money, where calculable, should serve as an adequate remedy in all but exceptional cases. But money damages may prove speculative. To ascertain damages, the court would first have to distinguish between permanent and non-permanent obstructions. An object not easily repairable or correctable—like a house—is a permanent obstruction. Most cases of sunlight obstruction by structures are likely to be permanent. Generally, the measure of damages for a permanent obstruction is the diminution in market value of the plaintiff’s land caused by the obstruction, but that figure may be difficult to calculate. Initially, appraisers will have little basis for determining the loss of value because the market for solar homes is still limited in most areas of the country. The appraiser could attempt to value the cost of additional energy use over the life of the obstructed building, but even that would be speculative. Future energy prices are unpredictable. The percentage of the collector actually obscured may not be precise. And if there is actually some benefit to the plaintiff from the obstruction, e.g., when the shade from the obstruction would lower summer air conditioning costs, the plaintiff’s recovery would


74. A solar access case will not involve personal injury, noxious odors, or un- sightly conditions, conditions common in other types of nuisance cases in which injunctions are issued.


76. See Nicholson v. Connecticut Halfway House, Inc., 153 Conn. 507, 512, 218 A.2d 363, 366 (1965) (depreciation of land values not ground for injunctive relief); Johnson v. Independent School Dist., 239 Mo. App. 749, 756, 199 S.W.2d 421, 425 (Spr. 1947) (injunction denied even though no remedy at law); Robie v. Lillis, 112 N.H. 492, 495, 299 A.2d 155, 161 (1972) (law cannot protect homeowners from fluctuating land values); Conner v. Smith, 433 S.W.2d 911, 915 (Tex. Civ. App. 1968) (remedy at law adequate for loss in value of property). There may be circumstances under which the monetary remedy would not be sufficient. For instance, if the plaintiff lived in an outlying area with no other source of power available, the court might issue an injunction against the obstruction since the harm was partly non-economic.

77. See Patz v. Farmegg Prods., Inc., 196 N.W.2d 557, 563 (Iowa 1972) (large chicken farm deemed permanent nuisance); City v. Tice, 517 S.W.2d 428, 432 (Tex. Civ. App. 1974) (sanitary landfill); Jost v. Dairyland Power Coop., 45 Wis. 2d 164, 175, 172 N.W.2d 647, 654 (1969) (electric utility power plant); see also Alabama Great Southern Ry. v. Russell, 254 Ala. 701, 703, 48 So. 2d 249, 251 (1949).

have to be decreased. As more solar homes are built, however, appraisers should be able to create reasonably uniform standards and there should be fewer uncertainties in damage calculations. In the meantime, the speculative calculations may weigh in favor of granting injunctive relief.

Another group of courts would not consider the adequacy of damages. They reason that a nuisance that causes substantial injury to a neighbor must be enjoined because an award of damages results in inverse condemnation. In effect, a defendant who pays damages for the nuisance is paying money in exchange for a right to obstruct in the future, which is the equivalent of buying an easement for light from the plaintiff. This is private condemnation of property. If, for example, a landowner encroached one foot onto an adjoining lot, these courts would not permit him to pay damages to keep his house there. The solar cases can be distinguished, however, because the obstructor is not intruding onto his neighbor’s land; he is obstructing light from coming onto the land. Even so, courts have held that nuisances, as interference with property rights, are not susceptible to damages.

Courts should rarely issue an injunction if the permanent obstruction is

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80. Fletcher’s Gin, Inc. v. Crihfield, 423 F.2d 1066, 1068 (5th Cir. 1970) (landowner has right to enjoin nuisance); Crushed Stone v. Moore, 369 P.2d 811, 816 (Okla. 1962) (injunction granted to close rock quarry); Ellen v. City of Bryan, 410 S.W.2d 463, 466 (Tex. Civ. App. 1967) (if nuisance is permanent, plaintiff entitled to injunction regardless of remedy at law).


83. See, e.g., Geragosian v. Union Realty Co., 289 Mass. 104, 109, 193 N.E. 726, 728 (1935); Cutrona v. Columbus Theatre, 107 N.J. Eq. 281, 283, 151 A. 467, 468 (1930). Some courts will, however, permit the encroachment if it was made without knowledge or intent to encroach. See, e.g., Oertel v. Copley, 152 Cal. App. 2d 287, 289, 313 P.2d 105, 107 (1957).

84. See Fontainebleau Hotel Corp. v. Forty-five Twenty-five, Inc., 114 So. 2d 357, 358 (Fla. Dist. Ct. App. 1959) (solar access differs from other encroachments because plaintiff has no right to sunlight).

85. See Peterson v. Vak, 169 Neb. 441, 451, 100 N.W.2d 44, 51 (1959) (where nuisance prevents substantial enjoyment, injunction is proper remedy); Marullo v.
more valuable than the solar right, because the harm to the defendant outweighs the harm to the plaintiff. The solar collector’s chief purpose is to save money by lowering utility bills. The plaintiff thus can be fairly compensated through a damage award. The plaintiff is not being bought against his will, as he would be in the case of noxious odors or loud noises. Instead, he is simply having money taken from one hand (his loss from the solar collector) and put into the other (his recovery of damages). Allowing an injunction under these circumstances could lead to little more than legal extortion.86

Balancing of the equities will be necessary as other courts evaluate the nuisance cause of action created in Prah.87 That holding, which reverses 150 years of common law rejection of a right of solar access, may appear to be a major step for a court to take. But the policy reasons supporting the old doctrine no longer exist, and the law of nuisance is well adapted for extension into the solar access area. Other American courts should follow the lead of Prah and adopt a private nuisance right of action for solar access.

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Chresafis, 48 Misc. 2d 53, 55, 264 N.Y.S.2d 121, 124 (Sup. Ct. 1965) (court will enjoin permanent nuisance).

86. See Keeton, Notes on “Balancing the Equities,” 18 Tex. L. Rev. 412, 416 (1940). If the court, for example, would order a $100,000 home torn down to protect $10,000 in savings to a solar collector, the defendant probably would be willing to pay nearly $100,000 to the plaintiff to keep him from enforcing the injunction. That payment, which bears no relationship to the magnitude of the plaintiff’s loss, is simply a windfall.

87. The Prah court was careful not to indicate its view of how the case should be decided on the merits. It remanded the case, indicating that certain factors could be taken into consideration: (1) Maretti’s compliance with the applicable zoning laws; (2) Prah’s ability to have avoided the harm by putting his home in the middle of his lot instead of near Maretti’s property line; (3) the real extent of Prah’s harm; (4) the suitability of solar heat in the neighborhood; (5) the reasonableness of Prah’s remedies; and (6) the costs to Maretti in avoiding the harm. 108 Wis. 2d at 242, 321 N.W.2d at 192.