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Letting the Sunshine In: Protecting Residential Access to Solar Energy in Common Interest Developments

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LETTING THE SUNSHINE IN:
PROTECTING RESIDENTIAL ACCESS TO
SOLAR ENERGY IN COMMON INTEREST DEVELOPMENTS

Evan J. Rosenthal

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LETTING THE SUNSHINE IN: PROTECTING RESIDENTIAL ACCESS TO SOLAR ENERGY IN COMMON INTEREST DEVELOPMENTS

EVAN J. ROSENTHAL*

I.	INTRODUCTION	995
II.	THE COMMON INTEREST DEVELOPMENT	1000
	<i>A. Covenants, Conditions, and Restrictions (CC&Rs)</i>	1000
	<i>B. Perception and Reality: Common Interest Developments and Their Residents</i>	1002
III.	SOLAR ACCESS LAWS.....	1005
	<i>A. Solar Access Laws and the Contract Clause: “To Unreasonably Restrict or Not to Unreasonably Restrict”</i>	1006
	<i>B. The Curious Case of Oregon</i>	1009
IV.	UP AGAINST THE ODDS: RESOLUTION OF HOMEOWNER/ASSOCIATION DISPUTES	1011
	<i>A. Judicial Deference to Community Associations</i>	1011
	<i>B. Burden of Proof?</i>	1014
	<i>C. The Interaction of CC&Rs and Solar Access Laws—A Case Study</i>	1014
V.	LESSONS FOR POLICYMAKERS	1016
	<i>A. Specify the Scope</i>	1017
	<i>B. Define “Reasonable” Restrictions as Narrowly as Possible Through References to Numerical Valuations of Cost and Efficiency</i>	1018
	<i>C. Eliminate the Ability of Community Associations to Restrict Solar Devices on Solely Aesthetic Grounds</i>	1020
	<i>D. Affirmative Statement of Public Policy</i>	1021
	<i>E. A Role for the Courts—Deference to Solar Access Laws and Tapping into the “Public Policy” Exception</i>	1021
VI.	CONCLUSION	1023
VII.	APPENDIX A: HOW STATE SOLAR ACCESS LAWS ADDRESS CC&RS.....	1025

I. INTRODUCTION

Concerned about rising energy prices, global climate change, and energy security, Henry Homeowner¹ decided to pursue the installation of a renewable energy system for his suburban home. After extensive research, Henry concluded that a rooftop photovoltaic solar energy collection system was the most prudent option, taking into consideration cost, efficiency, and feasibility of installation. Henry’s home is located in “Resounding Residences,” a common interest development (CID),² and initially Henry worried that installing a solar energy device might conflict with certain restrictions on rooftop “protrusions” imposed by the development’s governing body, the Resounding Residences Community Association. However, in the course of his

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research, Henry discovered that his state had recently passed the “State Solar Rights Act of 2012,” which provided that:

A. Notwithstanding any provision in the community documents, an association shall not prohibit the installation or use of a solar energy device

B. An association may adopt reasonable rules regarding the placement of a solar energy device if those rules do not prevent the installation, impair the functioning of the device or restrict its use or adversely affect the cost of efficiency of the device.³

Assuming that the statute would protect his solar energy system, Henry decided to proceed as planned and contracted with a company named Sol R Us to complete the installation. The company determined the front half of Henry’s roof, which faces the street, was the optimal location to place and align the panels to true south.⁴ However, several days after work had commenced, Henry received notice from the community association that he was in violation of a restrictive covenant prohibiting homeowners from installing rooftop devices (excluding television satellites and antennas) that face the street, because such devices create an aesthetic nuisance to neighbors and can potentially lower property values. Henry responded that he was entitled to install a solar device under the State Solar Rights Act of 2012, and besides which, the installation was almost finished.

1. Henry Homeowner is an entirely fictional character. However, his story is not so far removed from that of real-life California homeowner Stacey Rodman, who made the assumption that California’s solar rights law protected his right to install a solar device on his home within a common interest development, despite conflicting covenants, conditions, and restrictions that applied to his property. *See* Palos Verdes Homes Ass’n v. Rodman, 227 Cal. Rptr. 81 (Cal. Ct. App. 1986).

2. CIDs possess “several essential characteristics: common ownership of residential property, mandatory membership of all owners in an association that governs the use of the common property, and governing documents that provide a ‘constitution’ by which the association and its members are governed.” Stephen E. Barton & Carol J. Silverman, *History and Structure of the Common Interest Community*, in COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST 3 (Stephen E. Barton & Carol J. Silverman eds., 1994). *See also* Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 598-99 (1993) (“Simply stated, a common interest community is one in which the property owners are tied together with a strong common interest. The interest may be in property owned by the community association of which the owners are all members, or in property owned by the members themselves. In either case, the organization maintains and controls the property, and it embodies the sharing of interest and cohesiveness that comes not only from a legal structure but also from that sharing.”).

3. This statute is borrowed from ARIZ. REV. STAT. ANN. § 33-1816 (2012).

4. For maximum efficiency, solar collectors should be responsive to the sun, tilting to track its path throughout the year. However, because this adds cost, many opt for fixed solar collectors. In a fixed system, solar collectors in the northern hemisphere should always face true south, while in the southern hemisphere they should face true north. *See* NORTH CAROLINA SOLAR CENTER, SITING OF ACTIVE SOLAR COLLECTORS AND PHOTOVOLTAIC MODULES 1 (Revised Sept. 2001), available at <http://ncsc.ncsu.edu/wp-content/uploads/SitingActive.pdf>.

The association filed a covenant enforcement action against Henry seeking an injunction requiring him to remove the solar panels. The trial court ruled in favor of the association, stating that the association's rules were "reasonable" and did not effectively prohibit Henry from installing a solar energy system. Later, while nursing a headache and reviewing a stack of legal and construction bills, Henry Homeowner resolved that the costs of environmental and energy consciousness were simply not worth the benefits.

While Henry Homeowner's saga is purely fictional, it is nonetheless emblematic of a major hurdle standing between millions of U.S. residents and their access to residential solar energy: covenants, conditions, and restrictions, collectively referred to as "CC&Rs," imposed by common-interest developments. Former Vice President and climate change activist Al Gore was recently hindered by restrictive ordinances when he attempted to install solar panels on his Tennessee home.⁵ Others—real life "Henry Homeowners"—have similarly found their access to clean, renewable solar energy limited or altogether prohibited by community associations.⁶

CC&Rs are "[c]ovenants running with the land,"⁷ dictating what a homeowner can and cannot do with her property. Oftentimes CC&Rs are aesthetic in nature, designed to ensure uniformity in appearance and protect property values.⁸ In the realm of solar energy, CC&Rs may outright restrict all solar devices, or they might affect the siting of such a device (i.e., where it can and cannot be placed).

5. Gore's situation involved a town's ordinances, although they closely resembled the types of CC&Rs promulgated by a CID. Gore was eventually able to install a solar energy system, and his town has since altered its ordinances as well. See Kristina Caffrey, *The House of the Rising Sun: Homeowners' Associations, Restrictive Covenants, Solar Panels, and the Contract Clause*, 50 NAT. RESOURCES J. 721, 731 (2010).

6. See Scott Condon, *Solar Showdown in Some Neighborhoods*, VAIL DAILY (July 9, 2007), <http://www.vaildaily.com/article/20070709/NEWS/70709026>; Ray Henry, *Homeowners Associations and Solar Panels Don't Always Mix*, HUFFINGTON POST (Apr. 25, 2012, 4:22 AM), http://www.huffingtonpost.com/2012/04/25/homeowners-associations-solar-panels_n_1451234.html; Carolyn Quinn, *Homeowner Sues Association over Solar Panels*, VENTURA COUNTY STAR (Oct. 21, 2008, 12:00 AM), <http://www.vcstar.com/news/2008/oct/21/homeowner-sues-association-over-solar-panels-he/>.

7. WAYNE S. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW §1.05(b)(3) (3d ed. 2000). CC&Rs are, more generally, servitudes. They all run with the land (if written properly) and either impose negative or affirmative obligations on all owners within the subdivision. Another non-technical definition of restrictive covenants defines them as follows: "A restrictive covenant is a promise made by one property owner to limit the use of his or her realty . . . so as to benefit other parties. Restrictive covenants are commonly used by planned communities to ensure that all units adhere to a common design theme, and to prevent activities deemed to be undesirable by the community at large." THOMAS STARRS, LES NELSON & FRED ZALCMAN, BRINGING SOLAR ENERGY TO THE PLANNED COMMUNITY: A HANDBOOK ON ROOFTOP SOLAR SYSTEMS AND PRIVATE LAND USE RESTRICTIONS 12 (2000), available at http://www.consumerenergycenter.org/erprebate/documents/CC+Rs_and_solar_rights.pdf.

8. As one attorney put it: "[H]omeowners associations) are all about looks. Is your lawn green? Are your hedges trimmed?" Henry, *supra* note 6.

State legislatures have attempted to provide protection for solar energy users—both residential and commercial—by passing solar access laws.⁹ As of 2012, forty states have some form of solar access law on their books, with some local governments taking action as well.¹⁰ These laws are diverse in makeup but can provide a number of rights and protections, including: the right to install a solar device on a property subject to countervailing building codes or local ordinances; the creation of a solar easement; and provisions mandating the removal of vegetation that blocks sunlight.¹¹ Twenty-one states have also specifically addressed CC&Rs that “effectively prohibit” or “unreasonably interfere” with a homeowner’s ability to install a solar energy generation system.¹² Despite these efforts, the path to residential solar use in CIDs remains full of potential obstacles, partially due to ineffective and unclear solar access laws that leave too much room for community associations to continue to restrict the use and placement of solar devices. Some associations are unaware of the solar access laws that apply to their CC&Rs.¹³ Other associations have maintained outright bans on solar devices—or the equivalent—despite the existence of laws preventing them from doing so.¹⁴

Community associations are, to a large extent, right to feel so empowered. When a homeowner within a CID wishes to undertake a home improvement project—such as a solar installation—CC&Rs will often require the homeowner to seek prior approval from the association’s governing board.¹⁵ Courts are highly deferential to the decisions made by these boards; many courts apply a form of the business judgment rule when assessing an association board’s decision.¹⁶

9. The website “Go Solar California” defines solar access rights as “protections to allow consumers access to sunlight (and prevent shading of systems) and to limits [sic] the ability of homeowner associations (HOA) and local governments from preventing installation of solar energy systems.” STATE OF CAL. ET AL., *Solar Rights: Access to the Sun for Solar Systems*, GO SOLAR CALIFORNIA, http://www.gosolarcalifornia.ca.gov/solar_basics/rights.php (last visited July 6, 2013).

10. *State Solar Access Laws*, DSIRE, http://www.dsireusa.org/documents/summarymaps/Solar_Access_Map.pdf (last visited July 6, 2013). Included in the forty state total are states that have only passed provisions pertaining to the creation of solar easements.

11. See COLLEEN MCCANN KETTLES, FLA. SOLAR ENERGY RESEARCH & EDUC., A COMPREHENSIVE REVIEW OF SOLAR ACCESS LAW IN THE UNITED STATES 1 (Oct. 2008), available at <http://www.solarabcs.org/about/publications/reports/solar-access/pdfs/Solaraccess-full.pdf>.

12. See *Database of State Incentives for Renewables & Efficiency*, DSIRE, <http://www.dsireusa.org> (last visited July 6, 2013); see also *infra* Appendix A.

13. STARRS, NELSON & ZALCMAN, *supra* note 7, at 37.

14. See Condon, *supra* note 6 (“Some homeowner associations have adopted restrictions that make it more costly or even impossible for members to install solar electric or thermal devices, despite a Colorado law barring such limits.”).

15. These boards are generally made up of members from the community.

16. See, e.g., *Levandusky v. One Fifth Ave. Apartment Corp.*, 553 N.E.2d 1317, 1321 (N.Y. 1990); *Schoninger v. Yardarm Beach Homeowners Ass’n*, 523 N.Y.S.2d 523, 529 (N.Y. App. Div. 1987).

Common law principles also strongly favor the enforceability of private contractual agreements, including CC&Rs.¹⁷ In the end, as one commentator noted, “more than likely, community associations will win in court if the family agreed to rules when joining a community.”¹⁸

Considering the deferential treatment community associations receive in the courts, the importance of solar access laws becomes clear—without them, homeowners face nearly impossible odds when challenging the adverse decision of an association board. But can solar access laws turn the tide in favor of homeowners? Despite the spread of statutes addressing solar rights, little case law involving homeowners pitted against their associations has developed, perhaps due to homeowners deciding to abandon their efforts rather than potentially face litigation.¹⁹ Solar access laws are also a relatively recent phenomenon.²⁰ However, several cases indicate that courts will carefully scrutinize the language of solar access laws in determining how they impact a traditional review of an association board’s decision.²¹ Statutory construction of these laws is thus of critical importance.

This Note utilizes some of the case law that does exist to demonstrate how states can craft laws that effectively protect the rights of homeowners to install a solar energy system in the face of prohibitive CC&Rs. Part II explores the history and development of common-interest communities. Part III surveys the various solar access laws that exist at the state level, with a focus on how these laws affect the rights of homeowners living in CIDs. I will also address whether these laws can withstand scrutiny under the Contract Clause. Part IV concerns the resolution of disputes between homeowners and associations. Finally, Part V presents some essential attributes of an effective residential solar access law.

17. Caffrey, *supra* note 5, at 737.

18. Mark A. Pike, Note, *Green Building Red-Lighted by Homeowners’ Associations*, 33 WM. & MARY ENVTL. L. & POL’Y REV. 923, 935 (2009).

19. Larry Lohrman, a homeowner in a CID in Salem, Oregon, successfully argued against his community association’s rejection of his request to install solar panels. Yet at one point, he “nearly abandoned the effort in frustration.” Henry, *supra* note 6.

20. See, e.g., ARIZ. REV. STAT. ANN. § 33-1816 (2012) (enacted in 2007); TEX. PROP. CODE ANN. § 202.010(b) (West 2012) (enacted in 2011).

21. See, e.g., *Tesoro Del Valle Master Homeowners Ass’n v. Griffin*, 133 Cal. Rptr. 3d 167 (Cal. Ct. App. 2011).

II. THE COMMON INTEREST DEVELOPMENT

“With little fanfare or notice, common interest communities have become the dominant form of new community development in the United States”²² Yet the CID is by no means a new concept. Its origins stem from medieval Europe, where peasants received land for cultivation and in return promised not to use the soil in ways that might adversely affect their neighbors.²³ CIDs were imported to the United States in the 1830s, where communities were created “to protect residents with restrictive covenants such as ones that prohibited certain religious activities, dictated racial makeup, and prescribed the way in which the land could be used.”²⁴

Common interest developments began to flourish following the Second World War, coinciding with the growth of “suburbia,”²⁵ but they truly exploded over a thirty-year period spanning from 1970 to 2000.²⁶ In 1970, there were 10,000 such communities containing 2.1 million residents.²⁷ By 2000, there were more than 222,000 CIDs, housing 45.2 million residents.²⁸

As of 2012, there were 323,600 association-governed communities²⁹ in the United States containing some 25.9 million housing units.³⁰ Roughly twenty percent of all Americans live in some form of association-governed community.³¹ The CID model for residential development is as popular as ever, particularly in states like California, Florida, and Texas, where “‘nearly all new residential development is governed by a [CID].’”³²

A. Covenants, Conditions, and Restrictions (CC&Rs)

As previously mentioned, CIDs are governed by an oftentimes elaborate set of rules referred to collectively as covenants, conditions,

22. Steven Siegel, *A New Paradigm for Common Interest Communities: Reforming Community Associations Through the Adoption of Model Governing Documents that Reject Intricate Rule-Bound Legal Boilerplate in Favor of Clarity, Transparency and Accountability*, 40 REAL EST. L.J. 27, 28 (2011).

23. Pike, *supra* note 18, at 929.

24. *Id.* Some examples include: “New York’s Gramercy Park (1831), Boston’s Louisburg Square (1844), and San Francisco’s South Park (1852)” *Id.* at 929 n.39.

25. *Id.* at 929.

26. See *Industry Data*, CMTY. ASS’NS INST., <http://www.caionline.org/info/research/Pages/default.aspx> (last visited July 6, 2013).

27. *Id.*

28. *Id.*

29. *Id.* (“Association-governed communities include homeowners associations, condominiums, cooperatives and other planned communities.”).

30. *Id.*

31. See *id.* (stating that 63.4 million Americans live in some form of CID).

32. Siegel, *supra* note 22, at 30 (citation omitted).

and restrictions (CC&Rs).³³ Such rules are typically laid out in a community's declaration of CC&Rs, also sometimes referred to as a declaration of condominium.³⁴ This "master document" is similar to a local government's comprehensive plan and will often contain "the plan of development and ownership, the proposed method of operation, and the rights and responsibilities of owners within the association."³⁵ Prior to the sale of any unit within a CID, the declaration is—or at least is supposed to be—recorded, thus providing buyers with actual or constructive notice of its contents.³⁶

Community associations have at their disposal an alternative way to create binding restrictions: ad hoc decisions and resolutions made by the association board, typically in response to a particular case or controversy in the community.³⁷ These boards, generally composed of and elected by the community's membership, are responsible for enforcing the association's rules.³⁸ When a homeowner seeks to install a solar energy generation system, she often must seek approval from the board, as would a homeowner who wants to undertake a major addition to his property, such as constructing a swimming pool.³⁹ The decision made by the board in such a situation can thereafter create a condition or restriction affecting other CID residents.⁴⁰

In the past, restrictions were utilized to preclude "undesirable" minority and/or religious groups from owning property.⁴¹ For instance, a number of communities in the 1940s enacted restrictions preventing racial minorities from owning property therein.⁴² Similarly, in the nineteenth century, some communities enacted restrictions that were intended to prevent alcoholism and other socially denounced habits.⁴³ Today, CC&Rs are generally aimed at restricting certain property uses and ensuring uniformity of appearance.⁴⁴ Un-

33. EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* 20 (1994).

34. Paula A. Franzese, *Common Interest Communities: Standards of Review and Review of Standards*, 3 WASH. U. J.L. & POL'Y 663, 672 (2000).

35. *Id.* (quoting WAYNE S. HYATT, *CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW* § 1.05 (b)(3) (2d ed. 1988)).

36. *Id.*

37. *Id.*

38. *Id.*

39. *See, e.g.*, KEENE MILL VILL. IV HOMEOWNERS ASS'N, *ARCHITECTURAL STANDARDS & PROCEDURES* (2006), available at <http://www.keenemillvillage.org/documents/Architectural.pdf>.

40. *See* Franzese, *supra* note 34, at 672.

41. Pike, *supra* note 18, at 929.

42. *Id.*

43. Dana Young, *Common Interest Developments: An Historical Overview of CID Development* 2 (Pub. Law Research Inst., Univ. of Cal. Hastings Coll. of the Law, Working Papers Series Fall 1996-02).

44. Pike, *supra* note 18, at 929-30, 932.

doubtedly, “the overall objective is to guarantee uniformity in order to preserve stability, and, ultimately, property value.”⁴⁵

B. Perception and Reality: Common Interest Developments and Their Residents

Despite one recent commentator’s depiction of CIDs as “picky authoritarian neighborhood organizations run by ex-high school vice principals,”⁴⁶ CIDs can and do serve some legitimate purposes; for example, CIDs provide for the development of private infrastructure and the creation of common recreational areas, such as swimming pools and gymnasiums.⁴⁷ Moreover, there is something to be said for the desire of people to live in clean, safe neighborhoods, amongst neighbors who (in theory, at least) share their values.⁴⁸ Overwhelmingly, residents seem to enjoy living in CIDs, with seventy percent of respondents to a 2012 poll rating their overall experience living in a CID as “positive.”⁴⁹ Respondents in the same poll also answered favorably when asked whether their association boards “serve the best interests of the community as a whole.”⁵⁰

Regarding the effect of CIDs on property values, the picture is not entirely clear. Despite the fact that preserving property value is generally considered one of the cornerstone objectives of the common interest development, there is little data to support a positive correlation. One could further argue that if an association defaults on its responsibilities and the community’s infrastructure and common ar-

45. *Id.* at 932.

46. *Id.* at 934.

47. *See id.* at 934 & n.83.

48. *See id.* In a 2007 poll of CID residents, clean/attractive neighborhoods and safe neighborhoods were amongst the most frequently reported answers in response to the question, “What is the single best thing about living in a community association?” ZOGBY INT’L, FOUNDATION FOR COMMUNITY ASSOCIATION RESEARCH TRACKING POLL 15 (2007), available at http://www.cmgcharleston.com/managers_files/Zogby_HOA_Survey_2007.pdf.

49. IBOPE ZOGBY INT’L, WHO SHOULD JUDGE COMMUNITY ASSOCIATION SUCCESS? THE RESIDENTS WHO LIVE IN COMMUNITY ASSOCIATIONS! 2 (2012), available at http://www.caionline.org/info/research/Documents/National_Homeowner_Research.pdf. It should be noted that concerns exist regarding the partisanship of the Community Association Institute (CAI), which conducted this and other surveys referenced in this Note. Several commentators have stated that the organization appears to exist primarily to serve the interests of “industry insiders,” that is, developers, community association managers, lawyers, etc., rather than homeowners. Steven Siegel, *The Public Role in Establishing Private Residential Communities: Towards a New Formulation of Local Government Land Use Policies that Eliminates the Legal Requirements to Privatize New Communities in the United States*, 38 URB. LAW. 859, 871-72 n.31 (2006) (“CAI is well-known for protecting the interests of the industry.”). *See also* EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 136 (1994).

50. IBOPE ZOGBY INT’L, *supra* note 49, at 4. Eighty-eight percent responded that the elected members of their association boards either absolutely, or for the most part, served the best interests of the community as a whole. *Id.*

eas fall into disrepair, property values could suffer as a result.⁵¹ Nonetheless, CID residents *believe* that the CC&Rs governing their communities “protect and enhance” property values.⁵² This is likely due, at least in part, to a view that the presence of CC&Rs and association governance is a means of ensuring consistency and stability in the community.⁵³ As one homeowner stated, “I wanted the community to stay the way it looked when I bought my home. A homeowners’ association was the only way I could control my neighbors over time.”⁵⁴

As a result of the various restrictions imposed by CC&Rs, residents must necessarily relinquish some of their freedoms. For example, many community associations prohibit basketball hoops, boats, satellite dishes, and various other objects considered to be “aesthetic nuisances.”⁵⁵ Restrictions regulating lawn care and landscaping are also commonplace.⁵⁶ A Florida man actually served jail time after being cited by his community association for failing to maintain his lawn.⁵⁷ Another CID resident in Medford, New York was forced to remove a statue of the Virgin Mary from her lawn,⁵⁸ raising all sorts of First Amendment questions in the process.⁵⁹ As can be expected, such restrictive measures can often breed disagreement and discon-

51. The author served as a law clerk at a Florida agency tasked with administrative oversight of community association managers (CAMs). The agency frequently received complaints from homeowners containing allegations that their community associations were not performing their responsibilities. Complainants would often go on to argue that their property values were suffering as a result.

52. IBOPE ZOGBY INT’L, *supra* note 49, at 5 (finding that in 2012, seventy-six percent of respondents said that the rules in their community “protect and enhance” property values).

53. “One significant factor in the continued popularity of the common interest form of property ownership is the ability of homeowners to enforce restrictive CC & R’s against other owners (including future purchasers) of project units.” *Nahrstedt v. Lakeside Vill. Condo. Ass’n*, 878 P.2d 1275, 1282 (Cal. 1994).

54. Gregory S. Alexander, *Conditions of “Voice”: Passivity, Disappointment, and Democracy in Homeowner Associations*, in COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST, *supra* note 2, at 157.

55. See Pike, *supra* note 18, at 934.

56. See Henry, *supra* note 6. The city of Albuquerque, New Mexico recently held that even in the desert, CIDs can require homeowners to keep and maintain lawns. Dan McKay, *Lawns Can Be Required, City Council Votes*, ABQ J. (Aug. 3, 2010), <http://www.abqjournal.com/news/metro/032341574109newsmetro08-03-10.htm>.

57. Erin Sullivan, *Man Jailed for Brown Lawn Gets Help From Neighbors*, ST. PETERSBURG TIMES (Oct. 12, 2008), <http://www.tampabay.com/news/humaninterest/article850257.ece>.

58. Jonathan Starkey, *Condo Owners Told to Remove Religious Statues*, FREE REPUBLIC (Oct. 10, 2007, 9:46 AM), <http://www.freerepublic.com/focus/f-news/1909162/posts>.

59. A full consideration of this topic is outside the scope of this article. Some commentators have expressed concern over whether under the scaled back “State Action Doctrine,” citizens in CIDs have contractually agreed to a curtailment of their First Amendment rights. See generally Adrienne Iwamoto Suarez, *Covenants, Conditions, and Restrictions . . . on Free Speech? First Amendment Rights in Common-Interest Communities*, 40 REAL PROP. PROB. & TR. J. 739 (2006); Aaron R. Gott, Note, *Ticky Tacky Little Governments? A More Faithful Approach to Community Associations Under the State Action Doctrine*, 40 FLA. ST. U. L. REV. 201 (2012).

tent amongst residents. A protracted dispute over a swing set led one homeowner in a Pennsylvania CID to ask, "Who are these little Hitlers making these rules?"⁶⁰

Moreover, for some homeowners, discovering that their property is subject to CC&Rs and association governance can come as a surprise.⁶¹ Twelve percent of respondents in a national 2007 poll of CID residents indicated they were not informed prior to purchasing their homes that their properties were subject to association governance.⁶² A survey of CID residents in Arizona found that only ten percent of the respondents had actually read the rules prior to closing on their homes.⁶³ This may be due, at least in part, to ambivalence; more than three-quarters of respondents in the same survey indicated they placed little importance on the existence of a homeowners' association.⁶⁴ As one homeowner put it: "I would have bought my home if it didn't have [an association]. . . . The most important factors in my decision were price, location, [and] functionality of the home. Presence or absence of a homeowners' association did not sway me one way or the other."⁶⁵

Yet homeowners interested in "going solar" may want to start paying attention. Considering community associations regulate lawn ornaments and basketball hoops, it should come as no surprise that they also frequently restrict the placement and/or design of solar devices.⁶⁶ CC&Rs might require solar devices to be placed out-of-sight of neighboring views,⁶⁷ impose setback or height restrictions,⁶⁸ or even dictate the color of solar panels.⁶⁹ Some community associations have even gone so far as to ban any and all solar devices without qualification.⁷⁰

After one Georgia resident's request to install a rooftop solar device was denied by his association, he compared his experience to

60. Mary McCullough, *It's a Swing Set! There Goes the Neighborhood Integrity, Value and Beauty Are At Stake, Say a Development's Rules. The Swing Set Must Go*, PHILA. INQUIRER (Oct. 9, 1991), http://articles.philly.com/1991-10-09/news/25814221_1_swing-homeowners-association-chartwell/2.

61. See Alexander, *supra* note 54, at 155.

62. ZOGBY INT'L, *supra* note 48, at 19.

63. Alexander, *supra* note 54, at 155.

64. *Id.* at 156.

65. *Id.*

66. See *infra* notes 67-69 and accompanying text.

67. "Solar Units not on the roof should be . . . concealed from the neighboring view." Palos Verdes Homes Ass'n v. Rodman, 182 Cal. App. 3d 324, n.2 (Cal. Dist. Ct. App. 1986).

68. "Solar Units not on the roof should be maintained a minimum of [five feet] from property line." *Id.* "Solar Units should be in or below the plane of roofing material." *Id.*

69. "Panel material should be dark in color." *Id.*

70. Some real-life examples include: "Solar panels and solar collectors are prohibited"; "Exterior solar collection systems . . . or other similar appliances are prohibited." Stan Cox, *The Property Cops: Homeowner Associations Ban Eco-Friendly Practices*, ALTERNET (Apr. 25, 2007), <http://www.alternet.org/envirohealth/51001>.

“living under communism—someone gets to dictate every possible thing you do.”⁷¹ The next section discusses one of the primary means by which states have acted to protect the rights of citizens and businesses seeking to employ a solar energy generation system: solar access laws.

III. SOLAR ACCESS LAWS

Although solar access laws are a relatively recent phenomenon, the concept of a “right to sunlight” is considerably older.⁷² The doctrine of “Ancient Lights” is an English common law concept whereby “a person who opened a window in his house had a natural right to receive the flow of light that passed through it.”⁷³ The doctrine essentially created a negative easement preventing the owner of property from obstructing sunlight to her neighbors.⁷⁴ This common law principle was eventually codified in the Prescription Act of 1832:

When the access and use of light to and for any . . . building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.⁷⁵

However, the doctrine of Ancient Lights was never incorporated into American common law.⁷⁶ Concerned the doctrine would thwart development,⁷⁷ U.S. courts have consistently rejected a common law right to sunlight, as evidenced, for example, in *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*⁷⁸

Perhaps due in part to the absence of common law protections, the majority of states have enacted some form of solar access law.⁷⁹ To be sure, in passing these laws, some states seek to promote the use of renewable energy,⁸⁰ and not just to ensure that residents have ade-

71. Henry, *supra* note 6.

72. KETTLES, *supra* note 11, at iii.

73. *Id.* at 1.

74. *Id.*

75. Prescription Act, 1832, 2 & 3 Will. 4, c. 71, § 3 (Eng.), available at <http://www.legislation.gov.uk/ukpga/Will4/2-3/71/section/3>.

76. See KETTLES, *supra* note 11, at 2.

77. Debbie Leonard & Denise Pasquale, *Legal Tools to Protect Access to Solar and Wind Resources*, NEV. LAWYER, July 2009, at 14, 15, available at http://www.mcdonaldcarano.com/read_news/view.asp?ID=133.

78. 114 So. 2d 357, 359 (Fla. 3d DCA 1959). “No American decision has been cited, and independent research has revealed none, in which it has been held that—in the absence of some contractual or statutory obligation—a landowner has a legal right to the free flow of light and air across the adjoining land of his neighbor.” *Id.*

79. See *Database of State Incentives for Renewables & Efficiency*, *supra* note 12.

80. See, e.g., N.M. STAT. ANN. § 47-3-7 (2012) (“The legislature finds that in view of

quate light to grow gardens or avoid shading of their pool. In Florida, for example, “[t]he Legislature intends that the use of solar energy, renewable energy sources, highly efficient systems, cogeneration, and load-control systems be encouraged.”⁸¹ Analysis of state solar access laws reveals that they vary in scope and nature. This section will survey the protections such laws provide to homeowners.

A. Solar Access Laws and the Contract Clause: “To Unreasonably Restrict or Not to Unreasonably Restrict”

Although forty states have enacted some form of solar access law, only twenty-one contain any sort of provision directed at CC&Rs.⁸² While the language of these statutes varies, virtually all of them provide that community associations may continue to promulgate and enforce “reasonable” regulations pertaining to solar energy systems. Specifically, eighteen of the twenty-one state statutes that address CC&Rs allow for either: (1) “reasonable restrictions,”⁸³ or (2) restrictions that either do not “effectively prohibit” or “unduly restrict”⁸⁴ a homeowner’s ability to install a solar device.⁸⁵ For instance, a Colorado law provides that “[a] covenant, restriction, or condition contained in any deed, contract, security instrument, or other instrument . . . that *effectively prohibits or restricts* the installation or use of a renewable energy generation device is void and unenforceable.”⁸⁶ In Wisconsin, “[a]ll restrictions on platted land that *prevent or unduly restrict* the construction and operation of solar energy systems . . . are void.”⁸⁷

Why not enact a law containing a blanket prohibition of CC&Rs that have *any* effect on the ability of a homeowner to install a solar device? To be sure, legislatures simply might not be willing to go that

the present energy crisis, all renewable energy sources must be encouraged for the benefit of the state as a whole. The legislature further finds that solar energy is a viable energy source in New Mexico, and as such, its development should be encouraged. Since solar energy may be used in small-scale installations and one of the ways to accomplish such encouragement is by protection of rights necessary for small-scale installations, the legislature declares such protection to be the purpose of the Solar Recordation Act and necessary to the public interest.”).

81. Fla. H.R. Env'tl. & Natural Res. Council, HB 7135 (2008) Staff Analysis 3 (final Apr. 16, 2008).

82. See *Database of State Incentives for Renewables & Efficiency*, *supra* note 12. See also *infra* Appendix A for a complete breakdown of solar access laws and how they relate to CC&Rs.

83. States following this model are these: Louisiana, California, Nevada, Utah (but only plat renewal/approval), Indiana, Virginia, Maryland, Delaware, Massachusetts, and Washington. See *infra* Appendix A.

84. States following this model are these: Wisconsin, Colorado, New Mexico, Illinois, West Virginia, North Carolina, Vermont, and Florida. See *infra* Appendix A.

85. See, e.g., COLO. REV. STAT. § 38-30-168 (2012); FLA. STAT. § 163.04 (2012).

86. COLO. REV. STAT. § 38-30-168(1)(a) (2012) (emphasis added).

87. WIS. STAT. § 236.292(2) (2012) (emphasis added).

far. Yet the answer also may lie, at least in part, in Article I, Section 10, Clause 1 of the Constitution, also known as the Contract Clause.⁸⁸ A large body of scholarship exists concerning the Contract Clause, and a full discussion is well beyond the scope of this Note.⁸⁹ Nonetheless, some discussion is necessary in order to understand why state and local governments may err on the side of caution and, additionally, why such caution may potentially be unwarranted.

The Contract Clause limits the power of the state and federal government to pass laws “impairing the Obligation of Contracts.”⁹⁰ A plain language reading of the Contract Clause therefore might indicate that governments have virtually no power to pass legislation that affects the ability of private parties to freely contract. Yet this is far from a reality. The seminal case pertaining to the Contract Clause is *Home Building & Loan Ass’n v. Blaisdell*.⁹¹ In this case, in which the United States Supreme Court upheld a Minnesota law passed during the Great Depression that postponed foreclosure sales, the Court described in great detail the history and intent of the Contract Clause.⁹² The Court explained that the Contract Clause was particularly intended to cover one type of contractual relationship in particular—“that which exists between debtor and creditor.”⁹³

The more recent case of *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*⁹⁴ specifically addressed the Contract Clause as it relates to the police power. There, the Supreme Court found that where a state law impairs contractual interests but “rests on, and is prompted by, significant and legitimate state interests,”⁹⁵ such a law might be proper. The Court fashioned a multi-part method of analysis for addressing such claims.⁹⁶ First, a court must decide whether the law in question has “‘operated as a substantial impairment of a contractual relationship.’”⁹⁷ If a substantial impairment exists, then the state “must [offer] a significant and legitimate public purpose behind the regulation.”⁹⁸ After the state has identified its public purpose, the court must consider “whether the adjustment of ‘the rights and responsibilities of contracting parties [is based] upon reasonable

88. U.S. CONST. art. I, § 10, cl. 1.

89. For an extensive discussion of the Contract Clause as it pertains to solar access laws—and why such laws *can* withstand scrutiny under the Contract Clause—see Caffrey, *supra* note 5, at 748-58.

90. U.S. CONST. art. I, § 10, cl. 1.

91. 290 U.S. 398 (1934).

92. *Id.* at 427-30.

93. Caffrey, *supra* note 5, at 750 (citing *Blaisdell*, 290 U.S. at 427).

94. 459 U.S. 400 (1983).

95. *Id.* at 416.

96. *Id.* at 411-12.

97. *Id.* at 411 (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978)).

98. *Id.* at 411 (citing *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977)).

conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.’”⁹⁹

This final prong, wherein the adjustment of a contract must be based upon “reasonable conditions,”¹⁰⁰ contains the key to why state statutes allow CIDs to have at least *some* ability to regulate solar devices. It is furthermore, at least in the eyes of one commentator, the reason why a number of states specifically reference the word “reasonable” in their statutes.¹⁰¹ “The statutes definitely do adjust the rights and responsibilities of the individual and the community association, but they do so in a reasonable way—and some of the better drafted laws even define ‘reasonable.’”¹⁰²

Would state legislation that declares void *any* covenant that affects a homeowner’s ability to install a solar device withstand a challenge under the Contract Clause? The answer is unclear, although it is worth noting that the test advanced by the Court in *Energy Reserves Group* leaves substantial discretion to the courts in its application. There are thus several avenues by which such a law could potentially survive scrutiny under the Contract Clause. A court could avoid the reasonableness question altogether by finding that the law’s impairment of contractual obligations does not rise to the level of “substantial.” Alternatively, Kristina Caffrey has suggested that in regulating the placement of solar devices, community associations have essentially assumed a function traditionally performed by state and local governments: “All the way back to *Village of Euclid v. Ambler Realty*, state and local governments have told property owners what they can and cannot do and where they can or cannot do it.”¹⁰³ Thus, courts could view solar access laws as “taking back” the responsibility of zoning and land use planning from community associations.¹⁰⁴

Should a court find that a solar access law imposes a substantial impairment, it could nonetheless uphold the law under the reasonableness prong, especially in light of what it may see as a particularly important public purpose (i.e., decreasing dependence on foreign oil, climate change and air pollution concerns, or rising energy prices). Furthermore, considering the way in which Contract Clause analysis has changed over the years,¹⁰⁵ often in response to the “times,” it is conceivable that the Court could continue to refine its approach. One

99. *Id.* at 412 (quoting *U.S. Trust Co.*, 431 U.S. at 22).

100. *Id.*

101. Caffrey, *supra* note 5, at 756.

102. *Id.*

103. *Id.* at 755 (footnote omitted).

104. *Id.* (alteration in original).

105. For instance, consider the different analyses adopted by the court in the two cases described above, *Energy Reserves Group, Inc. v. Kansas Power & Light Co.* 459 U.S. 400 (1983), and *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934).

way in which it could potentially do so would be to focus on the application of the contractual obligation in question. For instance, CC&Rs that conflict with solar access laws may be deemed void as applied to solar panels ad hoc, yet legitimate as applied to other things (such as a television antenna or other object that does not provide the utility of a solar device).

Before leaving this brief inquiry into the Contract Clause, it bears mentioning that homeowners might themselves attempt to invoke the Contract Clause to argue that CC&Rs are preventing them from entering contractual agreements with utility companies. Such an “inverse” Contract Clause argument would run as follows: in recent years, a number of utility providers have entered into “net energy metering” (NEM) contracts with residential customers that have installed solar electrical systems.¹⁰⁶ Under such an agreement,

the customer’s electric meter keeps track of how much electricity is consumed by the customer, and how much excess electricity is generated by the system and sent back into the electric utility grid. . . . [T]he customer has to pay only for the net amount of electricity used from the utility over-and-above the amount of electricity generated by their solar system.¹⁰⁷

A homeowner might therefore argue that CC&Rs are impairing her right to enter into NEM contracts. Naturally, this line of reasoning raises a number of other contractual issues that are well beyond the scope of this Note. Nonetheless, it is illustrative of an untapped means by which homeowners can challenge anti-solar CC&Rs.

B. The Curious Case of Oregon

Enacted in 2012, Oregon’s residential solar access law employs a unique method of regulating residential solar energy.¹⁰⁸ Instead of allowing certain “reasonable” restrictions on solar devices and then working to define those restrictions, the statute takes the opposite approach. First, it grants a presumption of validity to solar devices in any area zoned as residential, by stating that “[t]he installation and use on a residential structure of a solar photovoltaic energy system or a solar thermal energy system *is an outright permitted use* in any zone in which residential structures are an allowed use.”¹⁰⁹ The statute then establishes that approval of a homeowner’s permit to install a solar device is a “ministerial function,”¹¹⁰ so long as:

106. STATE OF CAL. ET AL., *Net Energy Metering in California*, GO SOLAR CALIFORNIA, http://www.gosolarcalifornia.ca.gov/solar_basics/net_metering.php (last visited July 6, 2013).

107. *Id.*

108. OR. REV. STAT. § 227.505 (2012).

109. *Id.* § 227.505(1) (emphasis added).

110. *Id.* § 227.505(3).

(a) The installation of a solar energy system can be accomplished without increasing the footprint of the residential or commercial structure or the peak height of the portion of the roof on which the system is installed; and

(b) The solar energy system would be mounted so that the plane of the system is parallel to the slope of the roof.¹¹¹

By classifying the granting of a solar permit as a ministerial act and then laying out the only applicable qualifications, the statute appears to broadly empower homeowners. However, questions remain. Although the law makes approval of a *permit* a ministerial function, it does not speak to CC&Rs that might nonetheless apply to a homeowner living within a CID. One could imagine a situation where a homeowner receives a permit, yet an association board does not grant approval to a homeowner's solar installation. Can the homeowner proceed and argue that (a) he had a validly issued permit, and (b) the statute states that the installation of a solar device is an outright permitted use?

Moreover, the statute may implicate the Contract Clause as well. Recall the test employed by the Court in *Energy Reserves Group*, requiring a consideration of "whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions.'" ¹¹² Associations will likely argue that under Oregon's law, calling it an "adjustment" of rights is a misnomer, as they can claim to have lost *all* of their rights under existing CC&Rs to regulate the use and placement of solar devices. Yet as previously discussed, there are several lines of reasoning a reviewing court could invoke to uphold the law.¹¹³

Presently, I am unaware of any pending challenges to Oregon's solar access law predicated on the Contract Clause, although it should be noted that as of this writing, the law has been in place for less than a year. Unfortunately, despite the forthcoming discussion¹¹⁴ pertaining to the importance of precisely defining the rights of the affected parties (homeowners and community associations) in the interest of avoiding costly litigation, the courts may eventually be needed to determine whether laws such as Oregon's can withstand constitutional scrutiny.

111. *Id.*

112. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 (1983) (quoting *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977)).

113. See *supra* Part III.A.

114. See *infra* Part V.A (discussing ambiguous statutory language).

IV. UP AGAINST THE ODDS: RESOLUTION OF HOMEOWNER/ASSOCIATION DISPUTES

As one commentator recently noted, “the broad rule-making and rule-enforcement functions entrusted to association boards renders conflict inevitable.”¹¹⁵ Consider the following case study:

In the unusually warm autumn months of 2010, the High Desert homeowners’ Board of Directors in Albuquerque, New Mexico, exploded in controversy. The issue? A resident complained about the solar panels on a neighbor’s roof. . . . In this dispute between individual neighbors, the governing body of the High Desert development will eventually have to take a position on the future of solar energy in the neighborhood—if not an actual substantive position, then at least a position on resolving disputes between neighbors over solar energy. . . . New Mexico’s solar-siting-guarantee statute will also likely come into play, although it may prove more of a problem than a solution. Given the extremely problematic language of New Mexico’s statute, this small-scale controversy could easily erupt into a huge mess with both sides arguing over statutory construction and public policy. One board member even warned, “[w]e’ll end up in court if someone doesn’t get a handle on this.”¹¹⁶

Despite the board member’s warning, there is a scant body of case law featuring homeowners seeking judicial approval of a solar project in the face of prohibitive CC&Rs and/or an adverse decision by an association board. Homeowners may simply abandon plans for a solar device in the face of potential legal hurdles, figuring that the up-front costs of installation are substantial enough as is before factoring in legal fees, as well (think Henry Homeowner). Others likely realize that any legal challenge they could mount faces an uphill battle considering the deference courts give to the decisions of community association boards.¹¹⁷ The first two sections of this Part concern the standard of review and burden of proof utilized by courts when cases pitting homeowners against their community associations come before them. The third section takes a look at a case involving a solar-inclined homeowner that did end up in court.

A. *Judicial Deference to Community Associations*

As briefly discussed in the introduction, courts have generally treated the decisions of community association boards with considerable deference.¹¹⁸ However, the actual standard under which such cases are evaluated varies from jurisdiction to jurisdiction, despite

115. Franzese, *supra* note 34, at 674.

116. Caffrey, *supra* note 5, at 723-24 (footnotes omitted).

117. See *supra* notes 15-18 and accompanying text.

118. See *supra* notes 15-18 and accompanying text.

the proclamation by at least one court that “a single standard for judicial review of the propriety of board action is desirable.”¹¹⁹

Many courts apply a form of the business judgment rule in reviewing actions taken by an association board.¹²⁰ A concept borrowed from corporate law, the business judgment rule establishes the presumption that the directors of a corporation are motivated “in their conduct by a bona fide regard for the interests of the corporation whose affairs the stockholders have committed to their charge.”¹²¹ In other words, directors receive the benefit of the doubt that their actions were in the best interest of the corporation, and substantial evidence to the contrary is required to find otherwise. Many such cases also involve a discussion of fiduciary duties,¹²² thus clearly establishing that many courts see association boards as roughly analogous to corporate entities.¹²³

In fact, the majority of modern community associations are incorporated as non-profit corporations.¹²⁴ However, commentators have pointed out the flaws in applying standard corporate law to these entities: “[T]o superimpose corporate or business models upon residential, family settings seems inconsistent with, if not a dehumanization of, the values, norms, and needs of home life.”¹²⁵ The decisions of association boards have a real, tangible impact on the way in which people live within their homes and communities. This is not to say that the decisions of a standard corporation’s board are not capable of having a direct impact on individuals; on the contrary, they often have profound repercussions. Yet while corporations exist for the purpose of maximizing profit,¹²⁶ community associations exist for the betterment of the communities they serve.

Moreover, corporate directors cannot ensure the success of their actions, as they are limited by various unknowns, often in the form of market uncertainties. Their decisions therefore require an additional degree of protection; courts have responded by dismissing claims where a director acted in good faith, but it becomes clear in hindsight

119. *Levandusky v. One Fifth Ave. Apartment Corp.*, 533 N.E.2d 1317, 1323 (N.Y. 1990).

120. *See id.*; *see also* *Lamden v. La Jolla Shores Clubdominium Homeowners Ass’n*, 980 P.2d 940, 947-50 (Cal. 1999); *Schoninger v. Yardarm Beach Homeowners Ass’n*, 523 N.Y.S.2d 523, 528-30 (N.Y. App. Div. 1987).

121. *Gimbel v. Signal Cos.*, 316 A.2d 599, 608 (Del. Ch. 1974).

122. *See, e.g., Levandusky*, 533 N.E.2d at 1322.

123. *See, e.g., Papalexou v. Tower W. Condo.*, 401 A.2d 280, 285-86 (N.J. Super. Ct. Ch. Div. 1979) (applying a hybrid reasonableness/business analysis to a condominium association’s decision to impose penalties on unit owners who failed to pay part of assessment).

124. *Franzese, supra* note 34, at 668.

125. *Id.* *See also* *Gott, supra* note 59, at 216 n.104 (explaining that the purposes behind the business judgment rule are not served by its application to community associations).

126. *See Dodge v. Ford Motor Co.*, 170 N.W. 668, 682 (Mich. 1919).

that she acted in a way that ultimately hurt the corporation.¹²⁷ In contrast, community associations do not deal with nearly the same breadth of challenges. Furthermore, it would be a mistake to grant association directors the presumption of the business judgment rule on the basis that their primary task is to protect property values, thus equating their function with that of a traditional corporate director. This is hardly their sole function.

A number of other courts have evaluated the actions of association boards under a more general standard of “reasonableness.”¹²⁸ While typically not as deferential as the business judgment rule, this can still be a very deferential standard, depending on the court applying it. In *Nahrstedt v. Lakeside Village Condominium Ass’n*,¹²⁹ the Supreme Court of California upheld the validity of a residential community’s ban on household pets.¹³⁰ A California statute established that a community association’s CC&Rs are enforceable “unless unreasonable.”¹³¹ The court identified three circumstances under which a particular covenant, condition, or restriction might be deemed unreasonable: “[the restriction] violates public policy; it bears no rational relationship to the protection, preservation, operation or purpose of the affected land; or it otherwise imposes burdens on the affected land that are so disproportionate to the restriction’s beneficial effects that the restriction should not be enforced.”¹³² The court emphasized that the outcome of cases where the validity of a private CC&R is at issue should not rest on a case-by-case inquiry into the objecting homeowner’s particular circumstances.¹³³ Rather, the appropriate inquiry concerns the effect of the restriction on the community as a whole, and whether the restriction is so repugnant as to fit into one of the three categories of exceptions identified by the court.¹³⁴ In establishing such a deferential standard, the court made clear that it was sympathetic to protecting the reasonable expectations of consenting homeowners. The court also expressed concern over the potential for “increases in association fees to fund the defense of legal challenges to recorded restrictions.”¹³⁵

However, while the court in *Nahrstedt* undoubtedly imposed a substantial burden on those seeking to challenge a CC&R, it also

127. See, e.g., *Gagliardi v. TriFoods Int’l, Inc.*, 683 A.2d 1049, 1052 (Del. Ch. 1996) (discussing the rationale behind the business judgment rule).

128. See *Nahrstedt v. Lakeside Vill. Condo. Ass’n*, 878 P.2d 1275, 1290 (Cal. 1994); see also *River Terrace Condo. Ass’n v. Lewis*, 514 N.E.2d 732, 738 (Ohio Ct. App. 1986).

129. *Nahrstedt*, 878 P.2d 1275.

130. *Id.* at 1292.

131. *Id.* at 1286.

132. *Id.* at 1287.

133. *Id.* at 1290.

134. *Id.*

135. *Id.* at 1288.

may have created an avenue through which courts can provide relief to homeowners specifically in the realm of solar installations. The first of the three exceptional circumstances identified by the court concerns CC&Rs that are abhorrent to public policy.¹³⁶ It follows that particularly where state legislatures have addressed the importance of solar energy via statute, this may create the requisite evidence of countervailing policy needed to overturn CC&Rs that restrict residential solar use. We will come back to this idea at the end of Part V.

B. Burden of Proof?

To make matters worse for homeowners seeking relief from burdensome restrictions, courts generally place the burden of demonstrating that a CID's land use restrictions are "unreasonable" squarely on the party challenging those restrictions.¹³⁷ The burden of proof typically will remain with the homeowner, even where a state statute protects the homeowner from unreasonable restrictions that "effectively prohibit" or "unduly interfere" with the placement and/or functioning of a solar device.¹³⁸ This stems from the legal principle whereby a "party seeking a right or benefit under a statute bears the burden of proving that he comes within the ambit of the statute."¹³⁹

This is exemplified in *Fox Creek Community Ass'n v. Carson*,¹⁴⁰ where the court stated at the outset of its analysis that "the homeowner has the burden to show that a deed restriction effectively prohibits a solar device."¹⁴¹ The court in *Garden Lakes Community Ass'n v. Madigan*¹⁴² echoed this sentiment in stating, "[t]he Association correctly asserts that the burden of proof was on the homeowners to prove that the Declaration and guidelines effectively prohibited them from installing and using a solar energy device."¹⁴³

C. The Interaction of CC&Rs and Solar Access Laws—A Case Study

The 2011 case *Tesoro Del Valle Master Homeowners Ass'n v. Griffin*¹⁴⁴ consisted of a familiar factual scenario. A homeowner wanted to

136. *Id.* at 1287-88.

137. *See, e.g., id.* at 1286 (discussing the burden of showing a particular land use restriction rests on the party challenging the land use restriction).

138. *See Fox Creek Cmty. Ass'n v. Carson*, No. 1 CA-CV 11-0676, 2012 WL 2793206, at *3 (Ariz. Ct. App. July 10, 2012) (unpublished) (noting that the burden rests with the homeowner to show that a deed restriction effectively prevents the installation of a solar device); *see also Garden Lakes Cmty. Ass'n v. Madigan*, 62 P.3d 983, 987 (Ariz. Ct. App. 2003).

139. *Harvest v. Craig*, 990 P.2d 1080, 1083 (Ariz. Ct. App. 1999).

140. *Fox Creek Community Ass'n*, 2012 WL 2793206.

141. *Id.* at *3.

142. *Garden Lakes Community Ass'n*, 62 P.3d 983.

143. *Id.* at 987.

144. 133 Cal. Rptr. 3d 167 (Cal. Ct. App. 2011).

install a photovoltaic solar energy generation system on a hillside slope located on his property.¹⁴⁵ The CC&Rs of the community required homeowners to submit all proposals for improvements to an Architectural Control Committee, which was made up of volunteers from the community.¹⁴⁶ The committee denied the homeowner's application, citing CC&Rs pertaining to drainage and erosion as well as aesthetic considerations.¹⁴⁷ In spite of this, the homeowner went along with the installation, and the association brought suit.¹⁴⁸ At trial, the jury found in favor of the association, and the homeowner subsequently appealed.¹⁴⁹

In upholding the trial court's decision, the district court of appeals found that "[t]he determination of whether Tesoro's CC & R's and Design Guidelines imposed 'reasonable' restrictions was necessarily a question of fact for the jury."¹⁵⁰ Yet the court also undertook its own analysis of the reasonableness of the association's actions.¹⁵¹ The court began with familiar rhetoric, noting the "presumption of validity" generally afforded to CC&Rs, absent a showing that, as established in *Nahrstedt*, "they are wholly arbitrary, violate a fundamental public policy or impose a burden on the use of affected land that far outweighs any benefit."¹⁵² Along similar lines, the court afforded substantial weight to the decision of the association's committee to deny the installation.¹⁵³

However, the court also conducted an inquiry into the limitations on a community association's authority to regulate solar devices set forth in California's solar access law,¹⁵⁴ demonstrating that courts will pay close attention to these laws in determining how they impact an analysis of a traditional homeowner-community association dispute. California's residential solar access law allows for community associations to impose "reasonable restrictions on solar energy systems. . . . that do not significantly increase the cost of the system or significantly decrease its efficiency or specified performance, or that allow for an alternative system of comparable cost, efficiency, and energy conservation benefits."¹⁵⁵ In 2004, California went the extra

145. *Id.* at 171.

146. *Id.* at 170-71.

147. *Id.* at 172.

148. *Id.* at 173.

149. *Id.* at 175.

150. *Id.* at 176 (citations omitted).

151. *Id.* at 177-79.

152. *Id.* at 177 (quoting *Nahrstedt v. Lakeside Vill. Condo. Ass'n*, 878 P.2d 1275, 1287 (Cal. 1994)).

153. *Id.* at 178 ("The CC & R's provide that the approval or disapproval of applications for improvements 'shall be in the sole and absolute discretion of the [ACC] and may be based upon such aesthetic considerations as the [ACC] determines to be appropriate.'").

154. *Id.* at 177-79.

155. CAL. CIV. CODE § 714(b) (West 2012).

mile and amended its statute to actually define, via reference to numerical valuations, what is meant by “significantly increase cost” and decrease efficiency.¹⁵⁶ The statute states that restrictions on photovoltaic systems cannot decrease the system’s efficiency by more than twenty percent or increase its cost by more than \$2000.¹⁵⁷ The nail in the coffin for the homeowner in *Tesoro* was expert testimony indicating that solar energy systems permitted by the association were comparable to the one installed by the homeowner in terms of efficiency and cost.¹⁵⁸ The court cited the expert’s findings that an alternative system would only decrease efficiency by fourteen percent and would actually be cheaper.¹⁵⁹

There is a fundamental tension in cases such as *Tesoro* between courts wanting to fall back on old habits and accord deference to community associations, and solar access laws that seem to be pulling them in the other direction. The following section describes concrete ways by which state legislatures can construct solar access laws that effectively protect homeowners—and what role courts can play in the process.

V. LESSONS FOR POLICYMAKERS

When it comes to residential solar access laws, policymakers have several models from which to choose. They can opt for a broad, ministerial approach like that of Oregon, though it remains to be seen how such a law interacts with CC&Rs in addition to whether it can withstand scrutiny under the Contract Clause.¹⁶⁰ By far and away the most popular form involves exceptions for CC&Rs that do not “unduly restrict” solar devices or that impose “reasonable restrictions.”¹⁶¹ Some states, such as California, take the next step and create guidelines as to what constitutes a reasonable restriction.¹⁶² Finally, a handful of state statutes do not utilize a “reasonableness” standard but rather establish themselves the precise ways in which community associations may regulate solar devices.¹⁶³

156. 2004 Cal. Legis. Serv. ch. 789 (West) (“This bill would redefine the term ‘significantly’ with regard to the restrictions imposed on solar domestic water heating systems or swimming pool heating systems and photovoltaic systems, as specified.”).

157. CIV. § 714(d)(1)(A)-(B).

158. *Tesoro*, 133 Cal. Rptr. 3d at 178-79.

159. *Id.*

160. *See supra* Part III.B (discussing OR. REV. STAT. § 227.505 (2012)).

161. *See supra* Part III.A (discussing the various types of state solar access laws).

162. CIV. § 714(d).

163. *See infra* Appendix A. Three states have adopted a “reasonable-free” approach: Texas, Hawaii, and New Jersey. New Jersey’s statute, for example, reads as follows:

b. An association may adopt rules to regulate the installation and maintenance of solar collectors on those roofs as specified in subsection a. of this section, in accordance with subsection c. of this section, and as follows: (1) The qualifica-

This section identifies four essential attributes of a solar access law that effectively protects the rights of homeowners in CIDs. A common theme connects them all: States should craft laws that divest the courts, to the greatest extent possible, of their discretionary power in analyzing the “reasonableness” of a community association’s covenants, conditions, and restrictions pertaining to solar energy use. Not only will this help curb the broad judicial deference afforded to community associations, but it will also serve to guide both residents *and* community associations in helping them establish who has what rights in the realm of residential solar installations.

A. Specify the Scope

Legislators must make absolutely clear that the provisions of a solar access law apply to *all* association governed communities and their CC&Rs. The importance of this is illustrated in the evolution of Florida’s solar access law.¹⁶⁴ The statute as originally enacted read as follows: “[T]he adoption of an ordinance by a governing body, as those terms are defined in this chapter, which prohibits or has the effect of prohibiting the installation of solar collectors, clotheslines, or other energy devices based on renewable resources is expressly prohibited.”¹⁶⁵

In 1991, John Taylor installed a rooftop solar energy system on his Palm Beach County home.¹⁶⁶ His community association brought suit seeking to require Taylor to remove the device.¹⁶⁷ The Fourth District Court of Appeals held that the above-cited statute did not apply to community associations.¹⁶⁸ Another statute defined “governing bodies” as political entities; in the court’s view, community associations

tions, certification and insurance requirements of personnel or contractors who may install the solar collectors; (2) The location where solar collectors may be placed on roofs; (3) The concealment of solar collectors’ supportive structures, fixtures and piping; (4) The color harmonization of solar collectors with the colors of structures or landscaping in the development; and (5) The aggregate size or coverage or total number of solar collectors ... (1) An association shall not adopt and shall not enforce any rule related to the installation or maintenance of solar collectors, if compliance with a rule or rules would increase the solar collectors’ installation or maintenance costs by an amount which is estimated to be greater than 10 percent of the total cost of the initial installation of the solar collectors, including the costs of labor and equipment. (2) An association shall not adopt and shall not enforce any rule related to the installation or maintenance of solar collectors, if compliance with such rules inhibits the solar collectors from functioning at their intended maximum efficiency.

N.J. STAT. ANN. § 45:22A-48.2b.-c. (West 2012). There is no reference to reasonableness in the statute. Instead, the state lays out the ways in which solar CC&Rs may regulate solar devices and the relevant criteria to assess compliance (a cost and efficiency standard).

164. FLA. STAT. § 163.04 (2012).

165. *Id.* § 163.04 (1989).

166. Taylor v. Ridge at the Bluffs Homeowners Ass’n, 579 So. 2d 895, 896 (Fla. 4th DCA 1991).

167. *Id.*

168. *Id.* at 896-97.

did not fit under this definition.¹⁶⁹ The original statute did not clearly identify whether it applied to community associations. It should come as no surprise at this point that in the wake of this uncertainty, the court defaulted to an association-friendly interpretation that protected the enforceability of CC&Rs.¹⁷⁰

One year later, Florida responded by inserting an additional provision in the statute, which read:

*No deed restrictions, covenants, or similar binding agreements running with the land shall prohibit or have the effect of prohibiting solar collectors, clotheslines, or other energy devices based on renewable resources from being installed on buildings erected on the lots or parcels covered by the deed restrictions, covenants, or binding agreements. A property owner may not be denied permission to install solar collectors or other energy devices based on renewable resources by any entity granted the power or right in any deed restriction, covenant, or similar binding agreement to approve, forbid, control, or direct alteration of property with respect to residential dwellings not exceeding three stories in height.*¹⁷¹

In 2008, the Florida legislature added additional protection for homeowners in CIDs by replacing the phrase “not exceeding three stories in height” with “within the boundaries of a condominium unit.”¹⁷²

B. Define “Reasonable” Restrictions as Narrowly as Possible Through References to Numerical Valuations of Cost and Efficiency

As previously discussed, statutes that utilize the term “reasonableness” in defining the permitted means by which a community association may regulate the installation and placement of solar panels might have an advantage if subjected to a challenge under the Contract Clause.¹⁷³ However, whether the statute uses “reasonableness,” “effectively prohibits,” “unduly interferes with,” et cetera, it is critically important that the statute goes on to define with specificity what this term really means. Doing so serves to limit the potential interpretations an association board or court can come up with on its own. The ideal means by which to define these terms is through reference to cost and efficiency. Reasonable restrictions ought to be defined as those that do not potentially increase the cost of installation

169. § 163.3164 (1989); *Taylor*, 579 So. 2d at 897.

170. *See Taylor*, 579 So. 2d at 896-97.

171. Act effective Oct. 1, 1992, ch. 92-89, § 1(2), 1992 Fla. Laws 845, 845-46 (emphasis added) (codified as amended at § 163.04 (1992)).

172. § 163.04(2) (2012) (“A property owner may not be denied permission to install solar collectors or other energy devices by any entity granted the power or right in any deed restriction, covenant, declaration, or similar binding agreement to approve, forbid, control, or direct alteration of property with respect to residential dwellings and *within the boundaries of a condominium unit.*” (emphasis added)).

173. *See supra* Part III.A.

or decrease the efficiency of operation more than a specified percentage, ideally something along the lines of ten or fifteen percent. While a handful of states already maintain such provisions,¹⁷⁴ the vast majority of residential solar access laws do not. Statutes should strive to specify a numerical value so as to take this determination out of the hands of courts and association boards.

Consider, for example, Arizona's solar access law:

A. Notwithstanding any provision in the community documents, an association shall not prohibit the installation or use of a solar energy device

B. An association may adopt reasonable rules regarding the placement of a solar energy device if those rules do not prevent the installation, impair the functioning of the device or restrict its use or adversely affect the cost or efficiency of the device.

C. Notwithstanding any provision of the community documents, the court shall award reasonable attorney fees and costs to any party who substantially prevails in an action against the board of directors of the association for a violation of this section.¹⁷⁵

This is not a bad law by any means, as it provides *some* guidance as to what constitutes reasonableness through a reference to cost and efficiency. However, by not defining efficiency and cost with a reference to specific numerical values, the statute leaves too much discretion in the hands of courts and association boards. Is a thirty percent increase in cost reasonable? What about fifty percent? The deference likely to be accorded to a community association's decision in such a situation has (hopefully) been established at this point.

Instead of making any reference to "reasonableness" and thus instilling a reviewing court or community association with some inkling of discretion, no matter how small, states might alternatively choose to enumerate via statute precisely what sort of restrictions or prohibitions a community association may enforce. Texas' solar access law provides an excellent example of such specificity. Passed in 2011, the statute reads, "[e]xcept as otherwise provided by [s]ubsection (d), a property owners' association may not include or enforce a provision in a dedicatory instrument that prohibits or restricts a property owner from installing a solar energy device."¹⁷⁶ Subsection (d) specifies how

174. See CAL. CIV. CODE § 714(d) (West 2012); HAW. REV. STAT. §196-7(b) (2012) ("Every private entity shall adopt rules by December 31, 2006, that provide for the placement of solar energy devices, and revise those rules as necessary by July 1, 2011. The rules shall facilitate the placement of solar energy devices and shall not impose conditions or restrictions that render the device more than twenty-five per cent less efficient or increase the cost of installation, maintenance, and removal of the device by more than fifteen per cent.").

175. ARIZ. REV. STAT. ANN. § 33-1816 (2012).

176. TEX. PROP. CODE ANN. § 202.010(b) (West 2012).

a community may regulate a solar device.¹⁷⁷ Enforceable restrictions include: height, slope, and color requirements as well as the requirement that the homeowner seek approval from an association board.¹⁷⁸ However, the board may not withhold approval if the homeowner complies with the other requirements of subsection (d) “unless the association . . . determines in writing that placement of the device as proposed by the property owner constitutes a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities.”¹⁷⁹

C. Eliminate the Ability of Community Associations to Restrict Solar Devices on Solely Aesthetic Grounds

While states may choose to allow community associations to continue to restrict solar panels in certain ways, restrictions based *solely* on aesthetic justifications should be removed from that calculus. A 2007 survey found that fifty-nine percent of CID residents believe their community association should have the right to restrict the siting and use of solar devices on aesthetic grounds.¹⁸⁰ Yet as one commentator noted, “[i]n this situation the residential majority is just plain wrong.”¹⁸¹

Although some CID residents may take comfort in the fact that every house on the street is white with fuchsia trim and a white picket fence, ensuring uniformity should not be a viable justification for prohibiting solar devices considering the substantial economic and environmental benefits associated with solar energy. Moreover, while some consider solar devices an eyesore, others may find them aesthetically pleasing or, at the very least, minimally distracting. Residents may believe that the aesthetic restrictions imposed by their community associations are protecting their property values, but there is limited data to support this claim.¹⁸² In the absence of a more concrete justification, states should seek to limit the power of community associations to restrict the solar rights of homeowners on aesthetic grounds alone. The Texas statute previously cited sets a good example by requiring an association to show that a homeowner’s solar device causes “unreasonable discomfort or annoyance to persons of ordinary sensibilities.”¹⁸³

Moreover, when it comes to aesthetic-based CC&Rs affecting solar devices, courts have once again demonstrated they will carefully con-

177. *Id.* § 202.010(d).

178. *Id.* § 202.010(d)(5).

179. *Id.* § 202.010(e).

180. ZOGBY INT’L, *supra* note 48, at 19.

181. Caffrey, *supra* note 5, at 722.

182. *See supra* Part II.B (regarding the effect of CIDs on property values).

183. PROP. § 202.010(e).

sider whether any applicable solar access law has addressed the legitimacy of such restrictions. To return once more to *Tesoro*, the court noted that when associations consider applications for solar projects, “[n]othing in the language of section 714 [of the California Solar Rights Act] prohibits the consideration of aesthetic impacts.”¹⁸⁴ The court also cited language from California’s solar access law indicating the legislature intended applications for solar projects to be processed and approved according to the same standards and procedures as any other application for an architectural modification.¹⁸⁵ Had California’s law contained a measure prohibiting aesthetic restrictions from being the sole basis upon which a solar application is denied, the court would have had to reconsider its analysis.

D. Affirmative Statement of Public Policy

Solar access laws should ideally leave little doubt as to their intent. One should not have to search through legislative history to find an affirmative declaration that in passing this law, State X intends to promote the residential use of solar energy systems and the removal of all impediments and obstacles to this extent. Once again, the purpose here is to provide a clear statement of intent to any potential reviewing body. States should endeavor to equip courts with as many tools as possible by which to protect the rights of homeowners.

California’s solar access law has an exemplary provision:

(b) This section does not apply to provisions that impose reasonable restrictions on solar energy systems. However, it is the policy of the state to promote and encourage the use of solar energy systems and to remove obstacles thereto. Accordingly, reasonable restrictions on a solar energy system are those restrictions that do not significantly increase the cost of the system or significantly decrease its efficiency or specified performance, or that allow for an alternative system of comparable cost, efficiency, and energy conservation benefits.¹⁸⁶

The California legislature leaves little doubt as to the statute’s intent. The importance of incorporating a statement of policy into the statute itself will become clearer in the next subsection.

E. A Role for the Courts—Deference to Solar Access Laws and Tapping into the “Public Policy” Exception

Where states take the advice of this Note and utilize numerical valuations to define reasonable restrictions, one can envision cases

184. *Tesoro Del Valle Master Homeowners Ass’n v. Griffin*, 133 Cal. Rptr. 3d 167, 178 (Cal. Ct. App. 2011).

185. *Id.*

186. CAL. CIV. CODE § 714(b) (West 2012).

boiling down to “battles of the experts,” or in other words, whether a particular deed restriction is affecting the cost and performance of a solar device by more or less than what is specified in the statute. In such a situation, will courts side with the association and afford them their usual deference? Or will they sympathize with homeowners seeking protection under solar access laws? Courts are needed in these and similar situations to lay down strong precedent in favor of homeowners and residential access to solar energy. Where statutes fall short in fully enumerating the solar rights of homeowners, or where there is a unique factual scenario not contemplated by the legislature, courts can fall back on a potentially powerful tool, should they choose to do so—the public policy exception.

Recall that in *Nahrstedt*, the court established three potential lines of reasoning through which a reviewing court might invalidate a particular covenant, condition, or restriction pertaining to real property.¹⁸⁷ The first of these is the so-called public policy exception: a court may decline to enforce a deed restriction that is shown to be patently in violation of public policy.¹⁸⁸ Naturally, this sort of inquiry provides a lot of room for a court to draw its own conclusions. Yet the mere existence of a statute addressing residential solar access rights *should* provide evidence that association restrictions affecting the use and/or placement of a solar device are not in accordance with public policy—even where said statute does not clearly identify the state’s policy with regard to solar energy.

In the 2003 case of *Garden Lakes Community Ass’n v. Madigan*,¹⁸⁹ homeowners in an Arizona CID installed a solar energy generation system on their home.¹⁹⁰ In doing so, they failed to comply with a number of the community’s CC&Rs, including aesthetic requirements and a requirement that they seek prior approval from the association board.¹⁹¹ However, the court found in favor of the homeowners, holding that the community’s CC&Rs “effectively prohibited” the homeowners from installing a solar device within the meaning of Arizona’s solar access law.¹⁹² Particularly noteworthy is that the court invoked the public policy exception in support of its holding.¹⁹³ The court cited to *Nahrstedt* in stating that the present situation was distinguishable in that “no state law established a public policy preference for allowing homeowners to keep animals, have rooftop antennas, or store old vehicles. In contrast, here we must consider the application of a spe-

187. *Nahrstedt v. Lakeside Vill. Condo. Ass’n*, 878 P.2d 1275, 1286-87 (Cal. 1994).

188. *Id.* at 1286.

189. 62 P.3d 983 (Ariz. Ct. App. 2003).

190. *Id.* at 984.

191. *Id.*

192. *Id.* at 988.

193. *Id.* at 988-89.

cific statute that nullifies enforcement of deed restrictions that effectively prohibit the installation and use of SEDs.”¹⁹⁴

Furthermore, the court came to its decision in spite of the fact that Arizona’s solar rights law¹⁹⁵ *did not* contain an affirmative statement of public policy.¹⁹⁶ Fortunately for the homeowners, the court made a substantial inquiry into the policy behind the statute, utilizing “the statute’s context, language, subject matter, historical background, effects and consequences, spirit and purpose.”¹⁹⁷ Yet as mentioned previously, there is fierce debate within the judicial community over how much weight to afford legislative history and intent, among various other factors, in interpreting statutes.¹⁹⁸ This serves to again highlight the significance of state legislatures including such an affirmative statement of public policy in their solar access laws.

VI. CONCLUSION

Although economic costs are often cited as the greatest barrier to the proliferation of solar energy in the United States, legal constraints are often overlooked. As one commentator recently noted, “[t]he potential renewable energy from residential solar use and the potential legal barriers to utilizing that energy are staggering.”¹⁹⁹ Uncertainty regarding the legality of a solar installation has the capacity to derail many a potential project.²⁰⁰ Legal fees are all too often another cost to be borne by citizens who are forced into court to defend their installation of a solar device.²⁰¹ Furthermore, while the cost and efficiency of solar energy is largely determined by the mar-

194. *Id.* at 989 (internal citation omitted) (substituting “SEDs” for “Solar Energy Devices”).

195. The statute at issue in the case was ARIZ. REV. STAT. ANN. § 33-439 (2003). The Arizona statute cited above, ARIZ. REV. STAT. ANN. § 33-1816, was passed in 2007 and, in fact, incorporated some of the “lessons” learned from *Garden Lakes*. This included replacing the phrase “effectively prohibit” with “shall not prohibit.” § 33-1816(A). However, the new statute still allowed associations to impose “reasonable rules”—potentially trading one weasel phrase for another—although it gives some guidance as to how those rules may operate. § 33-1816(B).

196. § 33-439.

197. *Garden Lakes*, 62 P.3d at 986.

198. *C.f.* *Zedner v. United States*, 547 U.S. 489, 511 (2006) (Scalia, J., concurring) (“Because the use of legislative history is illegitimate and ill advised in the interpretation of any statute—and especially a statute that is clear on its face—I do not join this portion of the Court’s opinion.”); Robin Kundis Craig, *The Stevens/Scalia Principle and Why It Matters: Statutory Conversations and a Cultural Critique of the Strict Plain Meaning Approach*, 79 TUL. L. REV. 955, 958 (2005) (“It ought to be an uncontroversial proposition that the evolution of . . . federal statutes that have evolved over long periods of time, should be relevant to the current ‘plain meaning’ of their provisions.”).

199. Caffrey, *supra* note 5, at 725.

200. KETTLES, *supra* note 11, at 7.

201. *See Garden Lakes*, 62 P.3d at 986; Tesoro Del Valle Master Homeowners Ass’n v. Griffin, 133 Cal. Rptr. 3d 167, 178 (Cal. Ct. App. 2011); Palos Verdes Homes Ass’n v. Rodman, 227 Cal. Rptr. 81 (Cal. Ct. App. 1986).

ketplace and the pace of technological development, substantial control can be exerted over the legal regulation of solar energy.

Although it might be argued that community associations are themselves “democratic”²⁰² organizations, and residents are generally capable of changing the rules from within, in practice, this can prove challenging. Changes to established CC&Rs often require a supermajority of homeowners.²⁰³ Moreover, homeowners in CIDs are frequently apathetic when it comes to participating in their community governments.²⁰⁴ In one study, “most people surveyed had not only never attended a meeting but knew neither who is on the board nor the issues facing their neighborhood association.”²⁰⁵

Yet not all common interest developments are resistant to the idea of solar energy; in fact, some are outright embracing it. All of the ninety-plus homes in the aptly named Armory Park Del Sol in Tucson, Arizona were built with solar water heaters and electrical systems.²⁰⁶ As a result, residents pay about \$300 *per year* in electric bills, despite Arizona’s desert climate.²⁰⁷ Similarly, twenty percent of the homes in the solar-friendly community of Del Sur in San Diego, California are equipped with solar electric systems.²⁰⁸ Community associations, via their assessment fees and communal governance, are actually in a position to be pioneers in the realm of residential solar energy use—if it is something that they choose to prioritize. However, communities like Armory Park Del Sol and Del Sur are currently the exception rather than the rule.

Covenants, conditions, and restrictions imposed by communities in times past were frequently intended to achieve a purpose most would consider insidious today. Consider, for example, the restrictive covenants enacted by communities in the mid-20th century designed to prevent African Americans and other minority groups from owning property. Perhaps someday future generations will view the efforts of community associations to restrict renewable energy technology with similar disdain. Until then, if states are serious about ushering in an era of renewable energy, they must take care to craft their statutes in a way that clearly reflects this intent. If legislatures effectuate good laws that force the hand of courts, so to speak, the path to widespread residential solar use might just get a little bit brighter.

202. See Alexander, *supra* note 54, at 147 (describing CIDs as an attempt to “realize democracy through private ordering”).

203. MCKENZIE, *supra* note 33, at 147.

204. See Alexander, *supra* note 54, at 158-60.

205. *Id.* at 159. The author also points out the parallels between general political apathy in the United States and the apathy within CIDs. *Id.* at 148-63.

206. Tamara Lytle, *Harvest the Green*, COMMON GROUND, July-Aug. 2009, at 23.

207. *Id.*

208. *Id.* at 26.

VII. APPENDIX A:
HOW STATE SOLAR ACCESS LAWS ADDRESS CC&RS²⁰⁹

States with Solar Access Laws that Address CC&Rs (21)	“Reasonable” Restrictions Allowed (10)	Specifies How Restrictions can Operate (No Use of Reasonableness) (3)	May not “Effectively Prohibit” or “Unduly Restrict” (8)
Colorado Wisconsin New Mexico Florida Texas Louisiana California Nevada Utah Illinois Indiana West Virginia North Carolina Virginia Delaware New Jersey Massachusetts Vermont Maryland Washington Hawaii	Louisiana California Nevada Utah (but only plat renewal or approval) Indiana Virginia Maryland Delaware Massachusetts Washington	Texas New Jersey Hawaii	Wisconsin Colorado New Mexico Illinois West Virginia North Carolina Vermont Florida

*Oregon’s solar access law, discussed in Part III.B, is not included on the table as it does not refer specifically to CC&Rs.

209. Table compiled utilizing *Database of State Incentives for Renewables & Efficiency*, DSIRE, <http://www.dsireusa.org> (last visited July 6, 2013).

