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Securing a Right to View: Broadening the Scope of Negative Easements

I. Introduction

A property owner asking \$925,000 for a home with a view on Long Island Sound successfully commanded an additional \$25,000 for the view on a clear day.¹ A lessee of space in the Empire State Building claimed a substantial loss in the value of his premises when a neighboring landowner constructed an antenna and blocked his panoramic view of the city.² The owner of an apartment building on Russian Hill in San Francisco suffered a \$54,000 diminution in fair market value when an adjacent landowner added an addition and thereby obstructed the plaintiff's second story view.³ Homes in the San Francisco Bay area, Palos Verdes, Monterey, and Newport Beach, California, command amongst the highest prices for single family residences in the United States due in large part to their scenic views of the bay and coastline.⁴ A home in Lake County, Illinois boasts of its "wonderful water views."⁵ And residents of some of the more affluent communities in New Jersey pay enormous amounts for a view of the Manhattan skyline.⁶ Throughout the United States views represent valuable property interests, and landowners and tenants recognize this by paying more to acquire them. Yet, in spite of

1. Kilborn, *New York Home Prices Surge*, N. Y. Times, June 3, 1985, at D3, col. 2.

2. *Harte v. Empire State Building Corp.*, 30 Misc. 2d 665, 219 N.Y.S.2d 391 (1961).

3. *Wolford v. Thomas*, 190 Cal. App. 3d 347, 235 Cal. Rptr. 422 (1987).

4. See R. BOYER, *PLACES RATED ALMANAC* 62 (1981); See also Adams, *Land-use Ruling May be Threat to Tough Zoning Regulations*, San Francisco Sunday Examiner and Chronicle, June 14, 1987, at B8, col. 1. See also Unique Homes 103-136 (Feb./Mar. 1989).

5. Unique Homes 254 (Feb./Mar. 1989).

6. N.Y. Times, April 2, 1989, at R50-R51.

their value in terms of dollars at the closing table, property views are not considered a right incident to the land in this country and unless acquired pursuant to an express grant or covenant, they generally aren't protected in a court of law.⁷

This Comment discusses the evolution of property view rights in the United States. It necessarily makes frequent references to the rules governing light and air because of the similarities between light, air, and view, both in characteristics and in historical treatment. Part II of this Comment defines view as a negative easement and gives background history as to English and American common-law classification of view as such. Part III gives the current state of the law with respect to treatment of view in this country and the common exceptions to the general rule. Part IV discusses the part local governments play in protecting landowners from view obstructions through the use of zoning laws and ordinances. Part V discusses the role of nuisance law as a means of further protecting landowners' view interests. Part VI considers recent developments in the land use area and their impact on rights to view. Part VII suggests that a solution to the problem of securing a right to view may be found in the enactment of nuisance legislation. This Comment concludes that the American judiciary's reluctance to protect property view interests stems from its reluctance to inhibit growth and recommends that states enact legislation which would balance society's economic interests in growth with its increasing interest in aesthetics and view preservation.

II. Background

A. *Classification of View as a Negative Easement*

View is a negative easement. Generally defined, easements constitute property interests in land in the possession of another⁸ which create a limited "use or enjoyment of the land in which the interest exists,"⁹ and which can be pro-

7. See *infra* text accompanying note 82.

8. RESTATEMENT OF PROPERTY § 450 (1944).

9. *Id.* § 450(a).

tected from interference by third parties.¹⁰ An easement does not terminate at the will of the possessor of the land,¹¹ and it does not constitute a "normal incident of a possessory land interest."¹²

One can classify easements in a variety of ways.¹³ The more common classifications include easements in gross and easements appurtenant, affirmative easements and negative easements.¹⁴ Easements in gross benefit their holders independently of any ownership or possession of land.¹⁵ An example of an easement in gross would be an easement held by a utility company¹⁶ enabling it to come onto a landowner's property to take a gas meter reading. Appurtenant easements, on the other hand, benefit their holders in connection with their use of a specific parcel of land.¹⁷ An example of an appurtenant easement would therefore include an adjacent landowner's right to use a neighbor's driveway¹⁸ to get to his house. Thus, while an easement in gross has no bearing on the easement holder's use of his property, the appurtenant easement directly benefits the easement holder in the use of his land.¹⁹

Though affirmative and negative easements constitute two types of appurtenant easements,²⁰ they differ significantly from one another.²¹ Affirmative easements allow the holder of the easement to engage in affirmative acts on the servient estate, acts in which he would not otherwise be privileged to engage.²² Thus, an affirmative easement might enable its owner to cross over a part of his neighbor's property to reach

10. *Id.* § 450(b).

11. *Id.* § 450(c).

12. R. POWELL & P. ROHAN, *POWELL ON REAL PROPERTY* § 405 (1987).

13. *Id.*

14. *Id.*

15. *Id.*

16. R. CUNNINGHAM, W. STOEUCK, & D. WHITMAN, *THE LAW OF REAL PROPERTY* § 8.2, at 440 (1984) [hereinafter CUNNINGHAM].

17. *Id.*

18. *Id.* at 440-41.

19. *Id.* at 441.

20. See W. BURBY, *REAL PROPERTY* § 23, at 64 (3d ed. 1965).

21. See R. POWELL & P. ROHAN, *supra* note 12, § 405.

22. *RESTATEMENT OF PROPERTY*, *supra* note 8, § 451.

a road abutting the neighbors land, without subjecting the easement holder to liability for trespass.²³

Negative easements, like affirmative easements, entitle the owner thereof to make use of the land burdened by the easement.²⁴ However, rather than allowing the owner of such an easement to do acts on the burdened parcel which he would not otherwise be entitled to do, negative easements give the easement holder the right to prevent the owner subject to the easement from engaging in otherwise permissible acts on his own property.²⁵ A landowner's property view interest, in this country, is classified as a negative easement because it allows the owner of the easement to prevent the owners subject to the easement from engaging in any act which might impede the easement holder's view over his neighbor's property.²⁶ Other examples of negative easements, include light, air, and lateral support.²⁷ A negative easement for light and air could prevent the owner of the servient tenement from erecting any structure that might interfere with the dominant tenement's easement right to the free flow of light and air onto his property.²⁸ Similarly, a negative easement for lateral support might deprive the owner of the servient estate of the right to excavate his land in such a way as would interfere with the dominant tenement's enjoyment of such an easement.²⁹

Generally speaking, easements can be created by express conveyance, by implication, or by prescription.³⁰ Creation of an easement by *express conveyance* usually comes in the form of a deed, and employs language either granting the easement to the transferee or reserving³¹ an easement in the trans-

23. *See Id.*

24. *Id.* § 452.

25. R. POWELL & P. ROHAN, *supra* note 12, § 405.

26. *See* RESTATEMENT OF PROPERTY, *supra* note 8, § 452.

27. *Id.*

28. *Id.* comment a.

29. *Id.* comment b.

30. R. POWELL & P. ROHAN, *supra* note 12, § 407.

31. An easement by reservation arises when a landowner in possession of two adjoining parcels attempts to convey away one plot of land and retain the other without foregoing any beneficial use he may have exercised over the servient parcel prior

feror.³² Creation of an easement in the grantor by reservation was originally rejected in the United States on the theory that one cannot have an easement in land which one owns exclusively.³³ Courts now get around this problem by explaining easements created by reservation in terms of "quasi-easements."³⁴ The idea behind the quasi-easement theory is that although the conveyor owned the property before the conveyance, he nonetheless used one part of the property to benefit some other part, and the use resulted in a "quasi-easement" which the conveyor should be entitled to reserve upon conveyance.³⁵

Easements may also be created by *implication*. Implied easements, like easements by express grant or reservation, arise in the context of the conveyance of land.³⁶ Where easements by express grant or reservation grow out of the language of the conveyance, easements by implication grow out of the circumstances surrounding the conveyance³⁷ and therefore represent the court's inference of the intention of the parties to that conveyance.³⁸ Factors frequently considered in determining whether an easement has arisen by implication include "the extent of the necessity of the easement to the claimant,"³⁹ "the manner in which the land was used prior to its conveyance,"⁴⁰ and the extent to which prior use was known to the parties.⁴¹ Thus, in the situation where A, the owner of two adjacent parcels of land, conveys away one parcel, which is completely landlocked, and retains for himself a second parcel, which abuts a highway, the courts will imply an easement of necessity from the first parcel over the second even though no express language provided for such an

to the conveyance. CUNNINGHAM, *supra* note 16, § 8.3, at 443.

32. R. POWELL & P. ROHEN, *supra* note 12, § 407.

33. *Id.*

34. *Id.*

35. *Id.*

36. CUNNINGHAM, *supra* note 16, § 8.4, at 444.

37. *Id.*

38. RESTATEMENT OF PROPERTY, *supra* note 8, § 476 comment a.

39. *Id.*

40. *Id.*

41. *Id.*

easement.

Finally, easements can arise by *prescription*.⁴² Broadly defined, prescription is "the effect of lapse of time in creating or extinguishing [a] property interest."⁴³ The early English doctrine of prescription, as enacted by statute in 1189, required that the enjoyment of property be "from time immemorial"⁴⁴ in order to create or extinguish a property interest.⁴⁵ A modification of this view of prescriptive easements arose during the middle ages⁴⁶ such that prescriptive easements came to be rationalized on the theory that a use which had existed for a long enough period of time probably originated by the grant of an easement since lost.⁴⁷ Today, most commentators parallel prescriptive easements to ownership of a possessory estate obtained by adverse possession.⁴⁸ Thus, much like interests obtained by adverse possession, prescriptive easements result from the adverse continuous and uninterrupted use of certain land for a designated period of time.⁴⁹ Use of land qualifies as adverse to the owner of some interest in land when it is hostile, wrongful as to the owner of the servient tenement, open and notorious.⁵⁰ The period for such a prescriptive acquisition is set by statute.⁵¹

Affirmative easements can arise by prescription in this country.⁵² Such an easement might result, for instance, from

42. *Id.* § 457.

43. *Id.* § 457, Introductory Note.

44. R. POWELL & P. ROHAN, *supra* note 12, § 413 n.3.

45. *See id.*

46. *See id.*

47. *Id.*

48. *See* W. BURBY, *supra* note 20, § 31, at 86. *See also* RESTATEMENT OF PROPERTY, *supra* note 8, § 457, Introductory Note. Adverse possession is a method by which one can acquire title to real property through possession for a statutorily designated period of time. To establish title in this manner the person claiming title by adverse possession must prove actual, open, notorious, exclusive, and adverse use for the time period required by state law. The primary difference between adverse possession and prescription is that adverse possession results in title to real property whereas prescription results in an easement right in real property. *See* BLACK'S LAW DICTIONARY 49 (5th ed. 1979).

49. RESTATEMENT OF PROPERTY, *supra* note 8, § 458.

50. *Id.*

51. *See* W. BURBY, *supra* note 20, § 31, at 77.

52. R. POWELL & P. ROHAN, *supra* note 12, § 413.

A's persistent, hostile, traversing of B's property to get to a nearby road.⁵³ Like their affirmative counterparts, negative easements may arise by express grant or covenant or by implication.⁵⁴ Negative easements cannot, however, arise by prescription because they do not involve the necessary wrongful activity carried out by the alleged dominant tenement against the servient tenement.⁵⁵ Therefore, even if landowner A has looked out over B's land for in excess of thirty years and now seeks to enjoin him from building in order to preserve her claimed easement of view, she will not succeed since the mere act of looking out over B's property did not constitute a wrongful act against B.⁵⁶ Stated differently, B cannot lose his right to build simply because he did not exercise that right in the past.

B. *Historical Evolution of the Easements of Light, Air and View*

Under early common law, access to light and air was looked upon as a natural right, "incident to the ownership of land."⁵⁷ Natural rights differed from easements in that natural rights inhered by law and thus came into existence by virtue of land possession alone, while easements could not arise unless specifically created,⁵⁸ regardless of their affirmative or negative character. Support for this view of light and air as natural rights came primarily from an English case heard in 1444 during the reign of Henry VI.⁵⁹ The court noted in its opinion that "if a man builds a house and stops up the light coming to my house, or causes the rain to fall from his house

53. See RESTATEMENT OF PROPERTY, *supra* note 8, § 458(b) comment g, illustration 7.

54. See *supra* text accompanying notes 32-41.

55. RESTATEMENT OF PROPERTY, *supra* note 8, § 458(b) comment e.

56. See *id.*

57. Comment, *Solar Rights: Guaranteeing a Place in the Sun*, 57 OR. L. REV. 94, 108 (1977).

58. CUNNINGHAM, *supra* note 16, § 8.1, at 439; See also RESTATEMENT OF PROPERTY, *supra* note 8, § 450(c) comment i.

59. See Comment, *supra* note 57, at 108. The English Case is cited as Y.B. Mich. 22 Hen. 6, fo. 14, pl. 23 (1444). Comment, *supra* note 57, at 108 n.54.

and so undermines my house, or does anything which injures my free tenement, I shall have the assize of nuisance."⁶⁰ By the end of the sixteenth century, English courts⁶¹ no longer classified light and air as natural rights but as negative easements.⁶² Though the courts made little mention of the right to view during this period, it appears that view may also have constituted a natural right up until the time of *Aldred's Case*⁶³ in 1611, when the court expressly held that an action in nuisance would not lie for the stopping of prospect.⁶⁴

During this same period, the English judiciary created the Doctrine of Ancient Lights. This Doctrine, based on prescription,⁶⁵ provides that the owner of two adjoining lots who has enjoyed a continuous right to the free flow of light and air from the second lot to the first, and who subsequently conveys away the second parcel, retains his right to the unobstructed flow of light and air onto his property, provided he has enjoyed this right for a period of twenty years.⁶⁶ The courts re-

60. 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 166 (5th ed. and Impression 1975) (translating from the original).

61. See *Bowery & Popes Case* 1, Leo. 168, 74 Eng. Rep. 155 (K.B. 1589) (Here, the court confers upon the landowner the right to prevent his neighbor from obstructing his light. "If it were an antient [sic] window time out of memory, etc., where the light or benefit of it ought not to be impaired by any act whatsoever; and such was the opinion of the whole court"). *Id.*

See also *supra* note 57, at 109.

62. Comment, *supra* note 57, at 109.

63. 9 Co. Rep. at fo. 57b (1611).

64. 7 W. HOLDSWORTH, *supra* note 60, at 332.

Much of the confusion as to what rights under common law constituted easements and what rights constituted natural rights stemmed from the English courts' lack of clarity in distinguishing between the two. 3 W. HOLDSWORTH, *supra* note 60, at 156. The fact that the "assize of nuisance served as the remedy for both the infringement of natural rights and of easements" furthered the confusion as to the nature of these rights. 7 W. HOLDSWORTH, *supra* note 60, at 329. The term "prospect", commonly used in early case holdings has the same meaning as the modern term "view" and the two terms may be used interchangeably. View is "the common-law right of prospect." BLACK'S LAW DICTIONARY 1406 (5th ed. 1979).

65. *Nomar v Ballard*, 60 S.E.2d 710, 714 (W. Va. 1950); See *supra* text accompanying notes 42-56 for a discussion of prescription.

66. For a discussion on the Doctrine of Ancient Light see 1A G. THOMPSON, THOMPSON ON REAL PROPERTY § 238 (1980). Because the Doctrine of Ancient Lights derives from the English law of Prescription, it is commonly referred to by American courts as "the prescriptive doctrine" or "prescription." 3 W. HOLDSWORTH, *supra*

jected such a prescriptive right to view, however, because they looked upon view as a "matter only of delight"⁶⁷ as distinguished from light and air which they classified as necessities.⁶⁸

By the time of the American Revolution, the English judiciary recognized negative easements for light, air,⁶⁹ and view⁷⁰ but differed in their approach as to the creation of the respective easements.⁷¹ Consequently, rights to light and air could arise by grant or covenant,⁷² implication,⁷³ or prescription⁷⁴ while rights to view could only arise by express grant or covenant.⁷⁵

Early American courts initially adopted the English classification of light, air, and view as negative easements.⁷⁶ They also perpetuated the English variation in the treatment of the easements of light and air, and of easements of view, by adopting the common-law doctrine of Ancient Lights and by adhering to the common-law practice of granting easements of light and air by implication. Since both the prescriptive Doc-

note 60, at 166.

67. William Aldred's Case, 9 Co. Rep. at fo. 57 b.

68. *Id.*

69. Comment, *supra* note 57, at 108; See also J. DUKEMINIER, PROPERTY 1002 (1981) (where the author acknowledges that at early common law the English courts recognized such negative easements as light, air, and support).

70. See C.J. GALE, A TREATISE ON THE LAW OF EASEMENTS 304-05 (9th ed. 1916). The author acknowledges that such a right to view may be created by express grant or covenant and that "the enforcement by a court of a covenant not to build so as to obstruct a view has been described as an extension in equity of the doctrine of negative easements." *Id.* at 305.

71. See A. REEVES, A TREATISE ON SPECIAL SUBJECTS OF THE LAW OF PROPERTY, § 205 (1904). The idea was that light and air, on the one hand, differed from view, on the other, because light and air constituted something which was perceived as being necessary while view merely constituted a thing of "pleasure or delight." *Id.* Therefore, rights to view, unlike rights to light and air, could only arise by express grant or covenant. *Id.* at 278.

72. See *supra* text accompanying notes 31-35. Covenants are agreements between landowners. They may arise out of agreements directly between the parties in question or through the incorporation of restrictions in deeds. See Comment, *supra* note 57, at 116.

73. See *supra* text and accompanying notes 36-41.

74. See *supra* text accompanying notes 42-56.

75. See A. REEVES, *supra* note 71, § 205, at 278.

76. *Id.*

trine of Ancient Lights and the theory of creating easements by implication only applied in the context of light and air, negative easements of view continued to be recognized only when created by express grant or covenant. Consequently, no action could be brought for the obstruction of a landowner's view from his premises, unless he could demonstrate that he had obtained such an easement of view by express grant or covenant.⁷⁷

III. The Common Law Today

A. *Current General Rule*

The beginning of the 18th century marked the start of the decline of the Doctrine of Ancient Lights as a viable theory for establishing easement rights to light and air in this country.⁷⁸ Today, the doctrine has been almost universally rejected in the United States.⁷⁹ Similarly, most American courts now deny an easement right to light or air by implication except in limited cases of necessity.⁸⁰

These fundamental changes in American courts' treatment of easement rights in light and air, as opposed to their English counterparts, have, in effect, placed easement rights to view on the same level as those of light and air. This is further reflected by modern American commentators' practice of lumping easement rights to light, air, and view together and in American courts' identical treatment of these rights as neg-

77. See *Harwood v. Tompkins*, 24 N.J.L. 425 (1854); See also *Parker v. Foote*, 19 Wend. 309 (N.Y. Sup. Ct. 1838); A. REEVES, *supra* note 71, § 205, at 278.

78. See *Parker v. Foote*, 19 Wend. 309 (N.Y. Sup. Ct. 1838).

79. Delaware has never fully rejected the doctrine as articulated by the judiciary of that state in *Clawson v. Primrose*, 4 Del. Ch. 643 (1873). Louisiana, a civil law jurisdiction, still allows for prescriptive rights. Comment, *supra* note 57, at 112.

80. *Harte v. Empire State Bldg. Corp.*, 30 Misc. 2d. 665, 219 N.Y.S.2d 391 (1961) (where tenant in office building suffered view loss as a result of neighboring landowner's installation of a radio antenna, court held removal of antenna not necessary for full use and enjoyment of plaintiff's premises and that inconvenience alone would not give rise to easement of view by implication); *Blumberg v. Weiss*, 129 N.J. Eq. 34, 17 A.2d 823 (1941) (court held that windows in the wall of the complainant's house overlooking the division line of the empty lot which complainant conveyed away, necessitated the free passage of light and air and would be entitled to such by virtue of an implied easement).

ative easements.⁸¹ Thus, whereas affirmative easement rights can still arise by express grant or covenant, implication or prescription, the current general rule in this country states that a right to view, like a right to light or air, can only arise by express grant or covenant⁸² or, in a minority of states, by implication.

B. *Exceptions to the General Rule*

1. *Municipality*

a. *Obstruction of View — Abutting Street*

One exception to the general rule that a right to view can only be created by express grant is the recognition of the right to view in a landowner whose property abuts a public street. Early on, American courts acknowledged the existence of certain private rights accorded to abutting landowners, rights which existed independently of any public rights in the street.⁸³ These special rights inuring to the landowner included use of the street for ingress and egress to the lot as well as rights to light and air "from the space occupied by the street."⁸⁴ Conferring such rights on an abutting landowner had the same overall effect as a voluntary grant of such rights.⁸⁵ As a result, landowners could enforce these rights by a suit in damages or by an injunction ordering a halt to con-

81. See G. THOMPSON, *supra* note 66, §§ 235-239, at 398-404; See also 3 R. POWELL & P. ROHAN, *supra* note 12, § 414(8).

82. *Glover v. Santangelo*, 70 Or. App. 689, 690 P.2d 1083 (1984); *Gladstone v. Gregory*, 95 Nev. 474, 596 P.2d 491 (1979); *Sandstrom v. Larsen*, 59 Haw. 491, 583 P.2d 971 (1978); *Alloway v. Moyer*, 275 Or. 397, 550 P.2d 1379 (1976); *King v. Kuglar*, 197 Cal. App. 2d 651, 17 Cal. Rptr. 504 (1961) (where a restrictive covenant in a property owner's deed allowed him to construct a building provided it did not exceed one story in height, the court upheld the height restriction which was created to protect view from one elevation to the next); *Taliaferro v. Salyer*, 162 Cal. App. 2d 685, 328 P.2d 799 (1958); *Irving Trust Company v. Anahama Realty Corp.*, 285 N.Y. 416, 35 N.E.2d 21 (1941). Note that the restrictions in said covenants may not be upheld if vague or indefinite.

83. 1 J. LEWIS, "ROADS AND STREETS," A TREATISE ON THE LAW OF EMINENT DOMAIN § 91(f) at 178-79 (2d. ed. 1900).

84. *Id.*

85. *Id.*

struction on the street impairing the rights.⁸⁶ Gradually, the same theory began to be applied to view rights both to and from the premises.⁸⁷ Today, most jurisdictions recognize an abutting landowner's private right to view over an abutting street or highway, but the extent and application of the right is not uniform in the various states.⁸⁸ In many cases brought on the basis of state constitutional takings provisions, the courts have held that in situations where there has been an obstruction of the view from property abutting on a public street or highway, such interference amounts to a taking of property for which compensation must be made, even though no appropriation of the abutting land itself, nor any easement therein has been made.⁸⁹ For example, in *Liddick v. Council Bluffs*,⁹⁰ landowners, whose property abutted a public street, brought an action to enjoin the city from the contemplated construction of a viaduct along and over part of the street on which they fronted. The court held that a substantial impairment of the landowners' view constituted a taking and would require compensation by the city.⁹¹ Other cases involving similar facts, have qualified these rights of light, air, and view as inuring to property owners, abutting highways and public streets, by subordinating them to the public's interest in hav-

86. See *Williams v. Los Angeles Ry.*, 150 Cal. 592, 594, 89 P. 330, 331 (1907); *Story v. New York El. R.R.*, 90 N.Y. 122 (1882). See also Comment, *supra* note 57, at 115.

87. See *Codman v. Evans*, 5 Allen 308, 311 (1880); *Dill v. School Board*, 47 N.J. Eq. 421, 20 A. 739 (1890).

88. *Brett v. City of Rehoboth*, No. 249, (Del. Sept. 22, 1986). Annotation, *Interference with View as Matter for Consideration in Eminent Domain*, 84 A.L.R.2d 348, 350 (1962). Litigation on the basis of this doctrine shows up in cases involving an individual vis a vis the state and very rarely in cases involving individuals against individuals.

89. Annotation, *Interference with View as Matter for Consideration in Eminent Domain*, 84 A.L.R.2d 348, 350 (1962). See *Flowers v. Morgantown*, 272 S.E.2d 663 (W.Va. 1980); *Anderlick v. Iowa State Hwy Comm'n*, 240 Iowa 919, 38 N.W.2d 605 (1949); *Liddick v. Council Bluffs*, 232 Iowa 197, 5 N.W.2d 361 (1942).

90. *Liddick*, 232 Iowa at 197, 5 N.W.2d at 361.

91. Note that section 18 of Article I of the Iowa Constitution, under which this action was brought, provided that "[p]rivate property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof . . .". IOWA CONST. art. I, § 18.

ing the highway or street improved.⁹² Still other jurisdictions allow landowners whose property abuts a public street to receive compensation only when some part of their land has actually been appropriated.⁹³ Regardless of these differences, the concept is significant in that it provides an exception to the otherwise rigid rules allowing for creation of a right to view in the limited circumstance of an express grant or covenant, and it tends to suggest that courts have gone too far in holding that absent such a grant or covenant no right to view exists.⁹⁴

b. *Physical Taking*

Disregarding the abutting street exception, most American courts today refuse to allow compensation for a property owner's loss of view resulting from government appropriation of land for the public use, unless such appropriation results in some actual physical taking of the complainant's land.⁹⁵ Court opinions discussing compensation for this kind of physical taking are nonetheless significant in that they generally consider the claimant's property view loss as an element of damages, provided the loss is more than nominal. In addressing the question of property devaluation as a result of view obstruction, such opinions often speak of view as though it was an actual property right running with land ownership.⁹⁶ Therefore, like the abutting street exception, many eminent

92. Annotation, *Interference with View as Matter for Consideration in Eminent Domain*, 84 A.L.R.2d 348, 350 (1962). This practice of subordination frequently justifies the court's refusal to grant relief to the injured land owner. See *Weir v. Palm Beach County*, 85 So. 2d 865 (Sup. Ct. Fla. 1956).

93. *Probasco v. Reno*, 85 Nev. 563, 459 P.2d 772 (1969).

94. See *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357 (Fla. Dist. Ct. App. 1959). *Fontainebleau* involved a suit brought by Eden Roc, a luxury hotel on Miami Beach, to obtain an injunction which would prevent the neighboring Fontainebleau Hotel from constructing an addition which it was alleged would shade the Eden Roc's pool and sunbathing areas during the peak winter tourist season. In denying relief, the court of appeals makes a substantial leap in its reasoning from its acknowledgement of the rejection of the Doctrine of Ancient lights to its complete denial of any right to "the free flow of light and air from . . . adjoining land" absent an express grant or covenant to that effect. 114 So. 2d at 359.

95. Annotation, *supra* note 92, at 360.

96. *Id.* at 352-55.

domain case holdings contradict the court's traditional hard line position restricting recognition of a landowner's right to view, and limit compensation for a subsequent loss of that view right to situations where a right to view exists by virtue of an easement.⁹⁷ In *Dennison v. State*,⁹⁸ for example, the court noted that because appropriation of a portion of the plaintiff's land for construction of a highway resulted in obstruction of the plaintiff's property view and interfered with his quiet and privacy, the market value of his land fell, and the plaintiff's loss of property view therefore merited consideration in the court's determination of damages.⁹⁹ The question which then arises is why courts implicitly recognize view as a right incident to land ownership when some physical appropriation of the plaintiff's land actually occurs and obstruction of view subsequently results, but do not generally recognize such rights if the same obstruction of view occurs absent any physical taking. Some authorities¹⁰⁰ have noted that this discrepancy stems from individual state's varied interpretations¹⁰¹ of the takings clause of the fifth amendment.

In the Supreme Court decision of *Pumpelly v. Green Bay*

97. See *infra* note 98 and accompanying text.

98. 48 Misc. 2d 778, 265 N.Y.S.2d 671 (1965), *aff'd*, 28 A.D.2d 28, 281 N.Y.S.2d 257, *aff'd*, 22 N.Y.2d 409, 239 N.E.2d 708, 293 N.Y.S.2d 68 (1968).

99. *Id.* See also *People v. Symons*, 54 Cal. 2d 855, 9 Cal Rptr. 363, 357 P.2d 451 (1960); *Crance v. State*, 205 Misc. 590, 128 N.Y.S.2d 479 (1954), *modified*, 284 A.D. 750 (1954); *Smith v. State*, 49 Misc. 2d 985, 268 N.Y.S.2d 873 (1966), *aff'd*, 29 A.D.2d 1050, 290 N.Y.S.2d 720 (1968).

100. *Pumpelly v. Green Bay Company*, 80 U.S. 166 (1871). This case dealt with damages caused by overflow of water on the plaintiff's land as a result of a dam constructed under the authorization of the State of Wisconsin and thus involved facts unrelated to impairment of view. The court found that 1) no person's property shall be taken for public use without just compensation; 2) that "under the constitutional provisions it is not necessary that the land should be absolutely taken" in order for relief to be claimed, but that "a serious interruption to the common and necessary use of property may be . . . equivalent to the taking of it . . . within the meaning of the Constitution." See *id.* at 179.

101. The Florida constitution, for example, compensates for appropriation or taking of property but case law interpreting this language construes "taking" merely to imply physical taking and construes all other non physical takings as "damnum absque injuria" and non recoverable. See *Bowden v. City of Jacksonville*, 52 Fla. 216, 42 So. 394 (1906).

Company,¹⁰² Justice Miller stated:

It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use.¹⁰³

Yet some states construe the takings clause of the fifth amendment in precisely the way that Justice Miller found so objectionable. Florida, for instance, interprets taking as an actual taking and compensates landowners accordingly in cases involving eminent domain proceedings by the state.¹⁰⁴ Thus, Justice Miller's comment articulates a reality for landowners in states which narrowly construe the meaning of a taking. So long as the government refrains from any physical taking of a property owner's land, the government need not compensate the owner, even if the government's act results in a partial or total destruction of the real property.

This scenario applies frequently with respect to property views. The typical example is a case in which the government takes property to build an aqueduct. If the government appropriates an actual part of the plaintiff's land, the government generally compensates the plaintiff for the resulting land loss as well as for such inherent damages as the obstruction of his or her property view, provided the obstruction results in a significant devaluation of the plaintiff's land. Yet, if the government builds the same aqueduct by appropriating the same amount of land on a neighboring plot not abutting the plaintiff's property, courts generally deny recovery to the plaintiff if the obstruction results in detrimental impairment of the plaintiff's property view. The irony of this second scenario is

102. 80 U.S. 166 (1871).

103. *Id.* at 177-78.

104. *See supra* text accompanying note 101.

that even if the court actually acknowledges that a substantial decrease in property value has resulted, it can nonetheless deny recovery on the basis of its definition of a taking. It would appear, then, that when a physical taking of land occurs and property view loss results, view is treated as a right which has been affected and therefore merits compensation. When no land has been taken, however, view no longer constitutes a land right and the loss need not be compensated.

This Comment does not attempt to analyze the vast topic of the takings clause of the federal constitution. It seeks merely to alert the reader to the possibility of varieties of interpretations of this clause. A broader reading of the takings clause at least affords a more favorable argument for compensation for loss of view in those cases which involve eminent domain proceedings and which do not actually result in physical entry onto the plaintiff's land. This broader reading may even suggest a "right" to view, running with land ownership, when government's physically interfere with property owner's land in such eminent domain proceedings.

2. *Spite Fence Exception*

While courts have recognized a right to view vis a vis a municipality, absent an express easement to that effect, there does not appear to be the same flexibility with respect to this general rule vis a vis another individual. In fact, spite fence rulings afford the only instance, in the context of an individual versus another individual, in which courts have deviated from their strict construction of the rule denying a right to view absent a negative easement.

A spite fence can be defined as any structure which serves no useful purpose or which serves a purpose deemed "subordinate and incidental" to the detriment suffered by the complaining landowner as a result of such structure.¹⁰⁵ Prior to 1888, American courts refused to declare the maintenance of a spite fence an actionable wrong.¹⁰⁶ Thus, even a fence

105. See R. POWELL & P. ROHAN, *supra* note 12, § 696.

106. *Id.* at 35 n.4; *Burke v. Smith*, 69 Mich. 380, 37 N.W. 838 (1888).

built "without any benefit or pleasure to [the person erecting it], but solely with the malicious motive of injuring the [adjoining owner] by shutting out his light, air, and view,"¹⁰⁷ afforded the injured landowner no cause of action.¹⁰⁸ After the decision of *Burke v. Smith*,¹⁰⁹ spite fences were condemned in the courts.¹¹⁰ Today, many American states have created spite fence statutes,¹¹¹ and those which have not generally allow for an action to curtail spite fences in the courts.¹¹² The spite fence exception proves significant because it affords a landowner, having no special easement to view, a superior right vis a vis another individual who wishes to maintain a fence which serves no useful purpose and which obstructs the complaining landowner's view. It is also significant in that it affords the landowner an action in nuisance¹¹³ against the individual who constructed the "spite fence," and thereby lends support to the possibility of a more general action in nuisance for landowners suffering losses of view.¹¹⁴

IV. Land Use Statutes

Exceptions notwithstanding, the general unwillingness of the judiciary to protect property owners' views, absent easement rights, have forced legislative and administrative bodies

107. *Racich v. Mastrovich*, 273 N.W. 660, 663 n.10 (S.D. 1937).

108. Comment, *Spite Fences and Spite Wells: Relevancy of Motive in the Relations of Adjoining Landowners*, 26 CALIF. L. REV. 691, 692 (1938).

109. 69 Mich. 380, 37 N.W. 838 (1888).

110. Comment, *supra*, note 108, at 693. See also R. POWELL & P. ROHAN, *supra* note 12, § 696.

111. Some of these include: CAL. CIV. CODE § 841.4; CONN. GEN. STAT. ANN. § 52-480, § 52-570; NY REAL PROP. ACTS. 843. See also R. POWELL & P. ROHAN, *supra* note 12, § 696.

112. *Bar Due v. Cox*, 190 P. 1056, 47 Cal. App. 713 (1920) (plaintiff brought action to abate defendant's fence, which shut off plaintiff's view from the house and obstructed the light and air thereof, to have it declared a private nuisance, and to have it removed or to have it reduced in height to not in excess of 10 ft.); *Hornsby v. Smith*, 191 Ga. 491, 13 S.E.2d 20 (1941). (plaintiff successfully brought suit against defendant for damages for the maintenance of a fence which effectively obstructed plaintiff's view and which obstructed the free passage of light and air over her property).

113. See G. THOMPSON, *supra* note 66, § 239 at 261.

114. See *infra* text accompanying notes 148-157.

to take a stronger hand in this area. Through the use of zoning laws and ordinances, municipalities throughout the various states can and do protect this right.¹¹⁵

Local ordinances and zoning laws have been utilized more and more frequently in the context of preservation of landowner's property view interests,¹¹⁶ and have met with little opposition from the judiciary when clearly and unambiguously set forth.¹¹⁷ The recognition of ordinances of this nature as a valid exercise of the state's police power follows closely on the heels of similar rulings legitimizing ordinances protecting light and air¹¹⁸ and aesthetic values.¹¹⁹

Height restrictions represent one of the means employed by state legislatures to protect views. Such height restrictions may come in the form of zoning laws or nonzoning ordinances,¹²⁰ and may serve to regulate the heights of anything ranging from buildings and fences to shrubs and trees.¹²¹ Set-

115. *Pacifica Homeowners' Assoc. v. Wesley Palms Retirement Community*, 178 Cal. App. 3d 1147, 1152, 224 Cal. Rptr. 380, 382 (1986).

116. *See Ross v. City of Rolling Hills Estates*, 192 Cal. App. 3d 370, 238 Cal. Rptr. 561 (1987); *Landmark Company, Inc. v. City and County of Denver*, 728 P.2d 1281, 1286-87 (1986).

117. *Ross*, 192 Cal. App. 3d at 375, 238 Cal. Rptr. at 563, (1987); *See also McMurry v. State Board of Medical Examiners*, 180 Cal. App. 2d 760, 766-67, 4 Cal. Rptr. 910, 914-15 (1960) (wherein the court said, "[a] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.") *Id.* at 766-67, 4 Cal. Rptr. at 913.

118. *Taliaferro v. Salyer*, 162 Cal. App. 2d 685, 691, 328 P.2d 799, 802.

119. *People v. Berlin*, 62 Misc. 2d 272 (1970); *Berman v. Parker*, 348 U.S. 26, 32-33 (1954) (wherein the court held that "[it] is within the power of the legislature to determine that the community should be beautiful as well as healthy. . .") *See also* *Polygon Corp v. City of Seattle*, 90 Wash. 2d 59, 578 P.2d 1309 (1978) (court upheld city's denial of building permit due primarily to visual environmental concerns); *Mosgrove v. Town of Federal Heights*, 190 Colo. 1, 543 P.2d 715 (1975) (court upheld ordinance requiring fencing around garbage containers of multi-resident dwellings).

120. A zoning law is a legislative regulation applying to specified districts of a city. *Black's Law Dictionary* 1450-51 (5th ed. 1979). An Ordinance is a municipal statute "governing matters not already covered by federal or state law." *Id.* at 989. Ordinances can govern such areas as zoning, building and safety. *Id.* Thus, a nonzoning ordinance represents a municipal statute not restricted to a particular section of the city.

121. *Landmark Company, Inc. v. City and County of Denver*, 728 P.2d at 1286-87.

back and bulk requirements, as well as limitations on construction in a given area, represent other common forms of zoning regulations which can also be used as a mechanism for preserving view interests.¹²²

There are two significant problems with relying on zoning laws and ordinances to protect property views. First, both are subject to modification,¹²³ and second, even if an adjoining landowner constructs a structure in violation of a building regulation which obstructs an individual's light, air, or view, the individual may not be allowed to recover damages for the interference absent an easement for light, air, or view over the adjoining land;¹²⁴ the theory being that one cannot recover damages for that to which they have no right.¹²⁵ View ordinances or ordinances specifically created to preserve landowners' property views, although not widely developed in the United States, have enjoyed growing popularity, especially in the western states where views are often seen as valuable land resources.¹²⁶ Ordinances of this sort seem to provide more sufficient protection to those concerned with preserving view rights than the more traditional kinds of ordinances and zoning laws. This is partially due to the fact that such ordinances tend to include provisions specifically limiting heights of given structures,¹²⁷ and said provisions are strictly enforced by the

122. See *Lee v. City of Monterey Park*, 173 Cal. App. 3d 798 (1985).

123. *Reichekderfer v. Quinn*, 287 U.S. 315 (1932). "Zoning regulations are not contracts by the government and may be modified. . . ." *Id.* at 323.

124. *Taliaferro v. Salyer*, 162 Cal. App. 2d 685, 328 P.2d 799 (1958).

125. *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d. 357, 359 (1959).

126. The Monterey Board of Supervisors is currently reviewing an ordinance proposal submitted by Zadd Levy on behalf of the Big Sur Coastal Program. The proposed ordinance would ban construction that would block views along a 60-mile stretch of California's Highway 1, from Carmel to San Luis Obispo. The proponents of the ordinance contend that non approval of such an ordinance may result in the loss of valuable resources including views. See Adams, *Land-use Ruling may be Threat to Tough Zoning Regulations*, San Francisco Sunday Examiner & Chron., June 14, 1987, at B-8, col. 1.

127. *Landmark Company, Inc. v. City and County of Denver*, 728 P.2d 1280 (1986) (the court upheld the city's denial of appellant's request for a building permit to construct a twenty-one story office building when the denial was based on an amendment to the city's mountain view ordinance which allowed for building height restrictions notwithstanding a landowners compliance with existing local zoning laws

cities involved. A more compelling reason, however, is the fact that most cities creating such ordinances subject the landowner, who has obstructed or poses a threat of obstructing the protected view, to some sort of review by a city review board.¹²⁸ The review not only provides a check system for the city with respect to landowners acting in contravention of the purposes of the ordinance but it also creates a right of action in the individual injured (or potentially injured) by such a landowner.¹²⁹ The nature of the cause of action thereby created in the landowner is the right to bring his complaint to the attention of the board. If the board finds that such action on the part of the offending landowner violates the view ordinance in question, either the board, or the complaining landowner, or both will be able to bring action in the courts, depending on how the ordinance is written.

V. Nuisance Law

A. Policy Considerations

Landowners have shown a desire to preserve land values by ensuring the protection of property views. They have manifested this desire by flooding courts of all jurisdictions with a myriad of law suits each year on this very subject.¹³⁰ Governments have recognized the value landowners place on property by giving careful consideration to view obstruction when

in existence at the time).

128. In *Ross v. City of Rolling Hills Estates*, 192 Cal. App. 3d 370, 238 Cal. Rptr. 561 (1987). Conformance with the objectives of a view protection ordinance requiring design reviews by the city served as the justification for the city council's refusal to grant the appellants a building permit to expand their home, even though the plans complied with local zoning codes.

129. See *Ross*, at 374-75, 238 Cal. Rptr. 562-63, n.2 at _____. In *Ross*, the view ordinance provided for review of "new developments within the various view sheds contained in the City. . . ." *Id.* at n.2. It also provided for a view preservation site inspection "[s]hould it appear that a potential view impairment [might] result from a proposed development, addition or alteration. . . ." *Id.* The ordinance further provided for a public meeting to review any complaints by aggrieved persons or any complaints reported by a city official with respect to pending development. *Id.*

130. One of the more recent cases in this area is *Ross v. City of Rolling Hills Estates*, 192 Cal. App. 3d 370, 238 Cal. Rptr. 561 (1987).

compensating individuals in eminent domain proceedings.¹³¹ They have further shown it by taking zoning laws and ordinances beyond the realm of health and welfare and into the realm of aesthetics and view preservation.¹³² They have created zoning laws and ordinances limiting building heights, tree growth, and general construction for the express purpose of protecting views and, more recently, by creating actual view ordinances.¹³³ Nonetheless, courts, with limited exception, remain steadfast in their insistence upon easement rights to view before allowing any judicial protection. The reluctance of American courts to protect property views parallels their reluctance to protect access to light and air and both stem from the courts' discomfort with impeding land development.¹³⁴ The primacy of development has, in recent years, been called into question, thus opening the door to other kinds of actions for the recognition and protection of rights to light, air, and view.

B. *Support for a Private Action in Nuisance for Obstruction of Light: A Model*

In the 1970's, with the advent of solar energy consciousness, protection of a landowner's access to light took on a new significance¹³⁵ and social values favoring absolute superiority of private development experienced a retraction.¹³⁶ Throughout the 1970's and 1980's, commentators advocated the establishment of an action in nuisance for the obstruction of sunlight.¹³⁷ The Wisconsin Supreme Court lent support to this idea in its 1982 decision of *Prah v. Marretti*.¹³⁸ In *Prah*, the owner of a solar-heated home brought an action to enjoin a

131. See *supra* text accompanying notes 98-99.

132. See *infra* text accompanying notes 155-157.

133. See *supra* text accompanying notes 126-128.

134. *Prah v. Marretti*, 108 Wis. 2d 223, 235, 321 N.W.2d 182, 189. (1982).

135. See Comment, *Obstruction of Sunlight as a Private Nuisance*, 65 CALIF. L. REV. 94, 106 (1977).

136. See *Prah*, 108 Wis. 2d at 237, 321 N.W.2d at 189.

137. See Comment *supra*, note 57, at 109. See also Comment, *supra*, note 135, at 94.

138. 108 Wis. 2d 223, 321 N.W.2d 182 (1982).

neighboring landowner from constructing a residence which would impede the plaintiff's access to unobstructed sunlight over the defendant's property. The lower court held that the plaintiff stated no claim upon which relief could be granted since the defendant's proposed construction met with all the deed restrictions and local ordinances then in existence and since the plaintiff had not obtained any easement right to sunlight. The Supreme Court of Wisconsin reversed saying that the plaintiff had stated a claim upon which relief could be granted and justified the reversal by saying that the "defendant's obstruction of the plaintiff's access to sunlight appears to fall within the Restatement's broad concept of private nuisance" ¹³⁹ The opinion of the *Prah* court is significant in that it rejects the otherwise traditional view articulated in *Fontainebleau Hotel Corp v. Forty-Five Twenty-Five, Inc.*¹⁴⁰ that the law does not recognize a right of access to light and that the law therefore excludes such a right "per se from private nuisance" ¹⁴¹ analysis.¹⁴² The *Prah* court

139. *Prah*, 108 Wis. 2d at 232, 321 N.W.2d at 187. A private nuisance is any interference with the use and enjoyment of land. "The ownership or rightful possession of land necessarily involves the right not only to the unimpaired condition of the property itself, but also to some reasonable comfort and convenience in its occupation" W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON TORTS § 87 (5th ed. 1984) [hereinafter KEETON].

A private nuisance exists where one is "injured in relation to a right which he enjoys by reason of his ownership of an interest in land." 58 Am. Jur. 2d *Private Nuisance* § 9 (1971). It is an individual wrong "arising from an unreasonable, unwarrantable, or unlawful use of one's property producing such material annoyance, inconvenience, and discomfort, or hurt that the law will presume a consequent damage." *Id.* at § 9.

The main argument against a private action in nuisance for obstruction of view, like that against a private nuisance action for obstruction of light, is that absent an easement to light or view, no recognized right has been interfered with and no action can therefore be maintained. See *Katcher v. Home Sav. & L. Ass'n.*, 245 Cal. App. 2d 425, 53 Cal. Rptr. 923 (Cal. Ct. App. 1966). The court denied plaintiff relief absent any right to light, air, and view created by easement even though plaintiff showed that his enjoyment of a "panoramic view" and "extraordinary light and air" was impeded when defendant constructed terraced homes in violation of the zoning plan then in existence. *Id.* at 427, 53 Cal. Rptr. 923.

140. 114 So. 2d 357 (Fla. Dist. Ct. App. 1959), *cert. denied*, 117 So. 2d 842 (Fla. 1960).

141. *Prah*, 108 Wis. 2d at 238 n.13, 321 N.W.2d at 190 n.12.

142. Comment, *Solar Rights and Private Nuisance Law*, 16 J. MARSHALL L. REV.

arrives at this decision by a careful evaluation of the policies supporting the view that no right of access to light exists. It finds that those policies, which include the belief that landowners should be able to use their land as they wish and the concern with promoting land development,¹⁴³ "reflect factual circumstances and social priorities that are now obsolete."¹⁴⁴

More significant than the *Prah* court's rejection of *Fontainebleau* or its reasoning for such a rejection, however, is the breadth of that rejection. The *Prah* court did not limit its refusal to adhere to the traditional rules governing rights to light by distinguishing its concern with access to sunlight as an energy source from the *Fontainebleau* court's concern with access to sunlight as a source of illumination and aesthetic beauty.¹⁴⁵ Rather, it spoke of a private nuisance action for access to light in general terms and thereby implied that it would use private nuisance law to balance competing interests of landowners in all access to sunlight situations, whether the dispute involves the shading of the complainant's swimming pool or his solar collector.¹⁴⁶

In further support of this proposition, the *Prah* court points out that sunlight has already been "protected in this country by the common-law private nuisance law, at least in the narrow context of the modern American rule invalidating spite fences," and suggests that its decision constitutes a mere extension of this law.¹⁴⁷

C. *A Private Action in Nuisance for Obstruction of View*

The same reasoning espoused by the *Prah* court¹⁴⁸ in the

435, 440 (1983).

143. Note, *Prah v. Maretti: Property Law - Obstruction of Sunlight as a Private Nuisance*, 29 WAYNE L. REV. 1449, 1452 (1983).

144. *Prah*, 108 Wis. 2d at 236, 321 N.W.2d at 189.

145. See Note, *supra* note 136, at 443.

146. *Id.*

147. *Prah*, 108 Wis. 2d at 235, 321 N.W.2d at 189.

148. See At least one other court has indicated that the law of private nuisance should apply to actions for obstructions of light. *Tenn. v. 889 Associates, Ltd.*, 127 N.H. 321, 500 A.2d 366 (1985) The plaintiff brought action in private nuisance to enjoin the planned construction of a building which would obstruct the flow of light and air to plaintiff's office building. The court denied relief based on its assertion that

context of a private action in nuisance for the obstruction of sunlight can be applied with respect to a similar action for obstruction of view. Such an action in private nuisance would allow the court to balance the utility of the conduct allegedly affecting view interests against the actual harm caused by such conduct. In considering the possibility of a private nuisance action for the obstruction of view, the question which must be addressed is how property view interests fare as contrasted with interests in light and air in this balancing. To answer this question, it is helpful to review the courts' reasons for upholding nuisance actions in the areas of light and air. One should recall that in neither the *Prah* case, which supported an action in private nuisance for light, nor in *Tenn v. 889 Associates, Ltd.*,¹⁴⁹ which supported such a nuisance action for the obstruction of light and air, did the court require, in any way, that the respective use of the light or air be a necessity in order to invoke a claim under the law of private nuisance. In this way, the law of private nuisance does not parallel the English common-law right to prescription, which only applied in cases of light and air when light and air were necessary, and did not apply in cases of view, which were considered a matter of delight.¹⁵⁰ Rather, the *Prah* and *Tenn* courts stressed the adaptability of the law of nuisance to changing times, and stated that such a doctrine serves to protect land enjoyment. The court in *Tenn* stated: "[w]e have developed a law of nuisance that protects the use and enjoyment of property when a threatened harm to the plaintiff owner can

the interference would not be an unreasonable interference but it nonetheless articulated much of the same reasoning applied by the *Prah* court with respect to an action in private nuisance for obstruction of light and air. The court stated:

Viewing the elements and concept of private nuisance . . . there is no reason in principle why the law of nuisance should not be applied to claims for the protection of a property owner's interests in light and air, and . . . we believe that considerations of policy support just such an application of nuisance concepts. We therefore hold that the law of private nuisance. . . provides the appropriate standard for passing on a property owner's claims of interference with interests in light and air.

Id. at 327, 500 A.2d 370.

149. 127 N.H. 321, 500 A.2d 366 (1985).

150. See *supra* text accompanying notes 63-66.

be said to outweigh the utility of the defendant owner's conduct to himself and to the community."¹⁵¹

Similarly, in cases involving private nuisance actions for foul odors¹⁵² and excessive light,¹⁵³ the respective courts required only that the thing claimed as a nuisance substantially "interfere with . . . the reasonable and necessary enjoyment of [plaintiff's] property"¹⁵⁴ Courts recognizing a private action for aesthetic nuisance also look at how the offending use impacts on the complainant's use and enjoyment of his or her land.¹⁵⁵ In *Foley v. Harris*,¹⁵⁶ for instance, the court said:

[t]he phrase 'use and enjoyment of land' is broad. It comprehends the pleasure, comfort, and enjoyment that a person normally derives from the occupancy of land. Freedom from discomfort and annoyance while using land, which inevitably involves an element of personal tastes and sensibilities, is often as important to a person as freedom from physical interruption with use of the land itself. The discomfort and annoyance must, however, be significant and of a kind that would be suffered by a normal person in the community.¹⁵⁷

In light of these examples, and in light of the fact that the law of private nuisance balancing has already been adopted by American courts in the context of view obstruction in the "spite fence cases,"¹⁵⁸ it would appear that a general action in private nuisance for obstruction of view would

151. *Tenn.*, 127 N.H. at 327, 500 A.2d at 370.

152. *Higgins v. Decorah Produce Co.*, 214 Iowa 276, 242 N.W. 109 (1932).

153. *Hansen v. Independent School Dist. No. 1*, 61 Idaho 109, 98 P.2d 959 (1939).

154. *Id.* at 112, 98 P.2d at 962.

155. See Coletta, *The Case for Aesthetic Nuisance: Rethinking Traditional Judicial Attitudes*, 48 OHIO ST. L.J. 151 (1987). In defining "use and enjoyment," see *Foley v. Harris*, 223 Va. 20, 28, 286 S.E.2d 186, 190-91 (1982).

156. 223 Va. 20, 286 S.E.2d 186 (1982). The Supreme Court of Virginia allowed plaintiff to enjoin the defendant from maintaining wrecked automobiles on defendant's lot since they obstructed the plaintiff's "reasonable and comfortable use of (his) property" *Id.* at 29, 286 S.E.2d at 191.

157. *Id.* at 28, 286 S.E.2d at 190-91.

158. See *supra* text accompanying notes 105-114.

prove a logical extension of the doctrine.

VI. Recent Developments Impacting on Rights to View

A. *Nollan v. California Coastal Comm'n*

In the wake of the recent Supreme Court decision of *Nollan v. California Coastal Comm'n*¹⁵⁹ and other recent developments in land use law, the need for implementing legislation to protect landowners' property view interests becomes more and more apparent. Many experts feel that these developments will greatly affect the ability of local governments to regulate land use.¹⁶⁰ Some cite *Nollan v. California Coastal Comm'n*¹⁶¹ as impacting particularly on planning. The *Nollan* case involved a beachfront homeowner who successfully challenged the Coastal Commission requirement that he grant the public an easement over a portion of his private beach as a condition of obtaining a permit to rebuild his Ventura home. One commentator articulated his belief that the ruling would inhibit any local government which "requires conditions to balance public rights and the rights of property owners."¹⁶² Other commentators see the case as having a narrower effect on local governments.¹⁶³ The question which necessarily arises is whether such a ruling, further enforcing governments' requirements to compensate landowners for takings made for the public good, will have an impact on local zoning and ordinance laws concerning view preservation. The key to answering this question is the determination of whether such regulations further the government purpose in enacting the regulation.¹⁶⁴

In *Nollan*, the Coastal Commission agreed to grant to the plaintiffs the necessary building permit to build a three bedroom house subject to the condition that the plaintiffs grant an easement which would allow the public to pass over a part

159. 107 S.Ct. 3141 (1987).

160. San Francisco Chron., June 27, 1987, at 9, col. 1.

161. *Nollan*, 107 S. Ct. 3141 (1987).

162. *Supra* note 160, at col. 2.

163. *Id.*

164. *See Nollan*, 107 S.Ct. at 3148.

of their property.¹⁶⁵ The plaintiffs argued that such a condition could only be imposed if the proposed development would cause a direct and "adverse impact on public access to the beach."¹⁶⁶ The court agreed with the plaintiffs and required that the Coastal Commission demonstrate a nexus between the nature of the exaction and a legitimate end which would justify the total prohibition of the proposed use¹⁶⁷ or, in other words, that they show that the condition substantially furthered the purposes of the original permit requirement.¹⁶⁸ The Commission alleged that the plaintiff's proposed construction would interfere with "visual access" to the beach and thus, with the desire of people driving past the Nollan's house to use the beach.¹⁶⁹ This ensuing "psychological barrier" to access would, they argued, necessitate a need for more public access, thereby justifying the easement condition.¹⁷⁰ The court dismissed the city's argument saying that they, the court, did not understand how "a requirement that people already on the beaches be able to walk across the Nollans' property [would reduce] any obstacles to viewing the beach created by the new home."¹⁷¹ The court added that it failed to see how such an easement would lower any "psychological barriers" against using the beach or remedy any extra "congestion" on the beach resulting from the Nollans' new house.¹⁷²

It does not appear that the *Nollan* decision will have a tremendous impact on ordinance and zoning laws created for the purpose of protecting property views. The ruling does not ban local governments from creating zoning laws and ordinances which result in restrictions on land use. On the contrary, the court in *Nollan* upholds governments' rights to re-

165. *Id.* at 3143.

166. *Id.*

167. Best, *New Constitutional Standards for Land Use Regulation. Portents of Nollan and First English Church*, PAC. LEGAL FOUND. 13 (July 22, 1987).

168. The purpose of the permit requirement being to promote public access to the coastline. *Nollan*, 107 S. Ct at 3146.

169. *Id.* at 3149.

170. *Id.*

171. *Id.*

172. *Id.*

strict land use through the enactment of ordinances and zoning laws provided the purposes they serve constitute legitimate functions of the police power and that the restrictions further these legitimate purposes.¹⁷³ Even in the context of open space zoning, which offers one means of achieving view obstruction protection¹⁷⁴ and where the *Nollan* decision is anticipated to impact more strongly, view preservation motives should be upheld provided they are properly articulated as among the legitimate purposes for the open space law. Finally, *Nollan* does not alter the definition of a taking as an action removing the possibility of any economically viable use of the property in question. It therefore tends to suggest that the impact of *Nollan* on local government regulations limiting land use for the purpose of preserving view interests may in fact have no greater effect than to promote a rush of law suits on the matter.¹⁷⁵ Regardless of the actual effect of *Nollan* on zoning laws and ordinances governing view protection, the court's opinion does lend support for increased legislative action in the form of public nuisance law in two ways. First, specific laws setting out a landowner's rights to action in cases involving view obstruction will tend to cut down on the anticipated rush of law suits in the land use field which specifically relate to property view disputes, thereby saving time and expense. Secondly, such legislation would reinforce, in the minds of the judiciary, local governments' already declared right to restrict land use through the enactment of ordinances and zoning laws. Theoretically, this should include a local government's right to enact statutes restricting land use for the purpose of preserving valuable property view interests, provided that the good achieved by preventing such view impairment proves disproportionately superior to the harm caused by restricting maximum land development potential.

173. *Id.* at 3146.

174. See *Ross v. Rolling Hills Estates*, 192 Cal. App. 3d 370, 238 Cal. Rptr. 561 (1987) (court upheld a city ordinance, allowing the city of Rolling Hills Estates to review new construction to protect existing property views in order to enhance open space preservation).

175. Robinson, *Property rights ruling won't have much Impact, local planners say*, Sebastopol Times, June 18, 1987, at 1, col. 1.

B. *Transferrable Development Rights*

Like *Nollan*, the advent of transferrable development rights (TDRs) increases the necessity of implementing legislation with respect to view preservation. In New York, for instance, where building heights are restricted by floor area ratios, owners of property not making full use of their air rights have begun to market them. This transferring of air rights, as it is termed, is particularly attractive where there is "substantial demand for office or residential space"¹⁷⁶ In New York City today, an owner of a land site who has not achieved his full height potential, may transfer his air rights to an adjacent lot owner across the street.¹⁷⁷ Zoning laws currently in effect then allow the transferee to lump his rights in the contiguous lot with his own rights to form one larger zoning lot for purposes of floor area ratio computation.¹⁷⁸ "A land [owner's] unbuilt development potential could thus be deployed on a contiguous site within the same zoning lot."¹⁷⁹ The potential effect of such transferral of zoning rights is that a lot owner maintaining a building which complies with all zoning laws in existence, may suddenly find that an adjacent landowner, having acquired transferrable development rights, has thereby obtained a larger zoning lot, allowing him to construct a building so large that it completely obstructs the former's light, air, and view. The inequity of all this is that the former landowner may have obtained his land at a time when TDR's were never foreseen and thus neither he nor the municipality itself ever foresaw that such a contravention of zoning height restrictions could be achieved.

VII. A Solution: Public Nuisance Legislation

In light of the growing societal recognition of the value of view and the common law's inability to secure the right to

176. Marcus, *Air Rights Transfers in New York City*, 36 LAW & CONTEMP. PROBS. 372, 373 (1971).

177. *Id.* at 374. "All lots must be in the same ownership." *Id.* at 375.

178. *See, Newport Associates, Inc. v. Solow*, 30 N.Y.2d 263, 267, 332 N.Y.S.2d 617, 620, 283 N.E.2d 600, 602 (1972).

179. MARCUS, *supra* note 176, at 373.

view, state legislatures should consider enacting a statutory public nuisance action for the unreasonable obstruction of view. Laws naming certain actions or situations as public nuisances exist in most states. Such statutes define that which constitutes an "unreasonable interference with a right common to the public" and operate such that a nuisance which interferes with an individual's exercise of a public right is actionable.¹⁸⁰ The creation of a public nuisance action for interference with view could afford landowners threatened by view obstructions a chance to have unreasonable interferences abated. A variation on this idea would be to qualify municipal zoning laws and ordinances, which restrict certain activity for the purpose of protecting view, by designating violations of such restrictions public nuisances. In California, a state statute authorizes municipal legislative bodies to prescribe that which constitutes nuisance.¹⁸¹ An example of this kind of nuisance designation is found in *Nathan v. Town of Tiburon*,¹⁸² wherein the plaintiff brought an action declaring a town ordinance, which restricted the height of trees so as not to unreasonably obstruct view and sunlight, and which designated a violation of this restriction an actionable public nuisance, unconstitutional. The Superior Court of California, County of Marin, found the ordinance constitutional and declared it a "valid enactment under § 38771 of the government code permitting the council to declare what is a nuisance."¹⁸³

A second variation would be a public nuisance statute for the obstruction of view which would also allow for a private right of action to sue under the statute.¹⁸⁴ This would prove

180. RESTATEMENT (SECOND) OF TORTS § 821B (1) (Tent. Draft No. 17, 1971). See also Comment, *supra* note 57, at 128.

181. *Burton v. Municipal Court of Los Angeles Judicial Dist. of Los Angeles County*, 68 Cal. 2d 684, 441 P.2d 281, 68 Cal. Rptr. 721 (1968). Note that the power designated under Government Code 38771 is not limited to those things within the meaning of Penal Code § 370 and Civil Code § 3479 and § 3480. See CAL. GOV'T CODE § 38771 (West 1988). See also *People v. Johnson*, 129 Cal. App. 2d 1, 277 P.2d 45 (1954).

182. *Nathan v. Tiburon*, no. 125428 of Tentative Statement of Decision. (Cal. Super. Ct. 1987).

183. *Id.* at 1.

184. See Comment, *supra* note 57, at 129 n.140.

the most satisfactory as it would avoid two of the major setbacks that often accompany public nuisance actions; first, the problem of relying on a public official to bring the nuisance action, and second, the restriction allowing private individuals to bring such an action only if the injury which the individual alleges to have suffered differs in kind from that which the public has suffered.¹⁸⁵ This second particularity of the public nuisance action is especially problematic because it requires courts to split hairs over the question of whether the injury resulting from the alleged public nuisance is more general or equally distributed, or whether it is more particular to a certain group of individuals.¹⁸⁶ Although the view obstruction suffered by one landowner as a result of construction or tree growth may, in many instances, be different from that suffered by the public, it may also be very similar. It might, therefore, prove advantageous for legislators to incorporate a provision allowing an individual the right to initiate suit in any statute granting a public nuisance action for obstruction of view.¹⁸⁷ Florida, for instance, has already incorporated such a provision in a state public nuisance statute.¹⁸⁸

VIII. Conclusion

The recognition of rights to view vis a vis a municipality, even in the limited circumstances that such rights now exist, indicates, at the very least, the American courts recognition of a societal value. This author would venture to suggest that the same values or rights which American courts appear to uphold vis a vis a municipality, should be expanded and broadened to better protect the individual. The enactment of legislation supporting a private nuisance action for the unreasonable obstruction of landowners' property views, coupled with more ef-

185. *Id.* at 129-30.

186. *See* *Kaje v. Chicago, St P., M & O Ry Co.*, 57 Minn. 422, 424, 59 N.W. 493, 493 (1894).

187. *See* Comment, *supra* at 57 at 130 (where the author makes a parallel argument for statutes dealing with obstruction of light).

188. FLA. STAT. ANN. § 60.05(1) (West 1969 & Supp. 1989).

fective local zoning and ordinance laws, would prove the most effective means of accomplishing such an objective.

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