REPORT OF THE UTILITY REVIEW COMMITTEE

TO THE

1983 GENERAL ASSEMBLY

SECOND REGULAR SESSION

June 1984

North Carolina General Assembly

Utility Review Committee

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June 14, 1984

TO THE MEMBERS OF THE 1983 SESSION OF THE
GENERAL ASSEMBLY, SECOND REGULAR SESSION

Pursuant to Resolution 78 of the Session Laws of 1979, and Section 61, Chapter 1127 of the Session Laws of 1981, the Utility Review Committee herewith submits its report to the 1983 General Assembly, Second Regular Session.

This report contains the findings and recommendations of the Utility Review Committee concerning competition in intrastate long distance telecommunications services, solar access legislation, and electric utility fuel charge adjustments.

Sen. Joseph E. Johnson
Senate Co-Chairman

Rep. J. P. Huskins
House Co-Chairman

Sen. J. J. Harrington

Rep. George W. Miller, Jr.

Sen. W. Craig Lawing

Rep. Mary P. Seymour

MEMBERS OF THE UTILITY REVIEW COMMITTEE

Senator Joseph E. Johnson, Cochairman

Representative J. P. Huskins, Cochairman

Senator J. J. Harrington

Senator W. Craig Lawing

Representative George W. Miller, Jr.

Representative Mary P. Seymour

Steven J. Rose, Legal Counsel to the Committee

Jane Holliday, Clerk to the Committee

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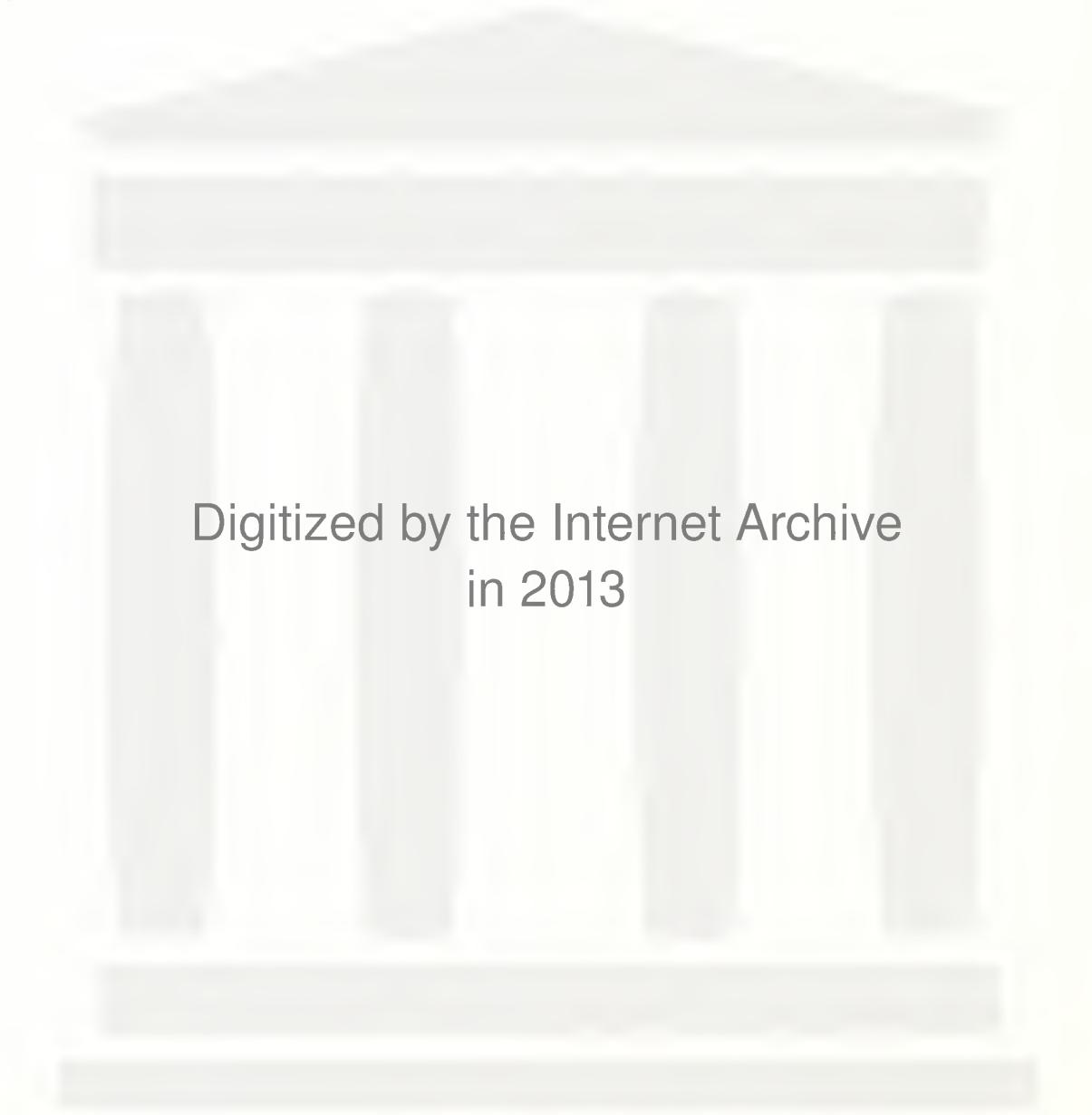

BACKGROUND, AUTHORITY, AND PURPOSE OF THE UTILITY REVIEW COMMITTEE

The Utility Review Committee (URC) was created in 1975 as a permanent committee of the General Assembly with an initial term of five years expiring June 30, 1980. Resolution 100 (S.R. 549) of the Session Laws of 1975. In 1979 the General Assembly extended the term of the URC until June 30, 1985. Resolution 78 (H.R. 1377) of the Session Laws of 1979. These resolutions were later confirmed and re-enacted by reference in Section 61, Chapter 1127 of the Session Laws of 1981, with all acts done under their authority being ratified.

The URC is a joint committee of the General Assembly with three members each from the Senate and the House. Its general purpose is to evaluate the actions of the State Utilities Commission and the Public Staff, analyze the operations of the utility companies operating in North Carolina, and make periodic reports and recommendations to the General Assembly. Sections 1 and 6, Resolution 78 (H.R. 1377) of the Session Laws of 1979. Pursuant to that resolution and Section 61, Chapter 1127 of the Session Laws of 1981, the URC may exercise the following powers:

(1) Review the interim and final orders of the State Utilities Commission to the end that members of

the General Assembly may better judge whether they serve the best interest of the citizens of North Carolina, individual and corporate;

(2) Review the programs, projects, sources and amounts of income, performance, and accomplishments of the utility companies doing business in North Carolina to determine whether expenditures plowed back into the rate structure were in all cases appropriate and necessary;

(3) Inquire into the role of the State Utilities Commission, the Public Staff, and the utility companies in the development of alternate sources of energy;

(4) Inquire into the individual and collective effort of the utility companies to encourage the conservation of energy thereby reducing requirements for additional generating facilities;

(5) Submit evaluations to the General Assembly, from time to time, of the performance of the State Utilities Commission, the Public Staff, and the various utilities operating in the State.

In addition to those broad continuing assignments, the General Assembly from time to time requests the URC to undertake specific assignments. (See pages 5, 11, and 17 of this report.) The purpose of this report is to fulfill certain specific requests of the General Assembly, as well as to fulfill the Committee's general and on-going

obligation to provide information to the General Assembly relating to public utilities operating in the state.

COMPETITION IN INTRASTATE LONG DISTANCE TELECOMMUNICATIONS SERVICES

Recommendation of the Utility Review Committee

After extensive testimony and study of the issue of intrastate competition in long distance telecommunications services, including a thorough review of House Bill 1365, the Utility Review Committee concluded that intrastate competition should be permitted in North Carolina and the committee endorses the concept of such competition as embodied in Committee Substitute for House Bill 1365 which passed the House during the First Regular Session of the 1983 General Assembly (Appendix A). In making this recommendation, the committee does not foreclose the possibility of further refinement of House Bill 1365 as it proceeds through the legislative process during the 1984 Legislative Session.

History

House Bill 1365 was introduced in June 1983 during the First Regular Session of the 1983 General Assembly. As originally introduced (Appendix B), the bill amended G.S. 62-2 by adding language which stated that "competitive offerings of certain types of telephone and

telecommunications services are now found to be in the public interest." By further amendment to G.S. 62-2 and by amendment to G.S. 62-110, the bill authorized the Utilities Commission to issue certificates for the offering of long distance services, even though they might be in competition with previously certified carriers. The stated criteria were that the person seeking the certificate be "fit, capable, and financially able to render such service, and that such additional service is required to serve the public interest effectively and adequately."

In order to permit competitive offerings of intrastate long distance telecommunications services, it is necessary to amend Chapter 62 since the Supreme Court of North Carolina has construed it to prohibit more than a single provider of telephone services in any given service area. Utilities Commission v. Carolina Telephone and Telegraph Co., 267 N.C. 257 (1966). See also Utilities Commission v. National Merchandising Corp., 288 N.C. 715 (1975); Utilities Commission v. General Telephone Co., 281 N.C. 318 (1972). As recently as June 1, 1984, the North Carolina Utilities Commission denied an application to provide intrastate telecommunications services on a competitive basis based upon this interpretation of Chapter 62. See In the Matter of Application of Telecommunications Systems, Inc., Docket No. P-133.

Section 2 of the bill defines long distance services as service between two or more central offices that were not

connected on July 1, 1983 by any extended area service, local measured service, or other local calling arrangement.

In its original form, the bill also amended G.S. 62-133 by providing that in regulating the rates charged by telephone companies for the provision of access to the facilities of other telephone companies, "the Commission shall price such access in accordance with allocation methods, rates, and structures utilized for the pricing of such access for interstate long-distance services unless, after detailed findings, the Commission concludes such allocation methods, rates, and structures are unjust and unreasonable." As a practical matter, this language meant that in most cases the Commission was bound to mirror the access charge method of long distance pricing mandated by the Federal Communications Commission for interstate long-distance services.

The bill also amends G.S. 62-140 by adding a new subsection (d) which requires interconnection between telephone companies and provides that if they fail to agree on the terms of interconnection the Utilities Commission, on the motion of either party, will fix and regulate the terms on the basis of "fair and reasonable charges for such interconnection."

The bill came before the House Public Utilities Committee and, after extensive public comment and discussion by the Committee, a committee substitute was adopted and sent to the floor of the House, where it was passed (Appendix A).

The committee substitute made substantive changes in the bill. It changed Section 1 so that the amendment to G.S. 62-2 now states that competitive offerings of telephone services "may be in the public interest". In Section 2 of the bill, which amends G.S. 62-110, it added language to the criteria for issuance of a certificate to provide long distance services which requires that the Utilities Commission, in reaching a decision on the issuance of a certificate, "shall consider the impact on the local exchange customers." This language is designed to allow the Utilities Commission to determine, on a case by case basis, that there will not be an adverse financial impact on the local exchange customers because of long distance competition which would outweigh the benefits of the competition.

Section 3 of the bill, which mandated that the Utilities Commission mirror the FCC access charge structure, was changed so that it now permits the Utilities Commission to adopt such pricing, but does not require it.

Finally, the effective date of the legislation was changed from January 1, 1984 to July 1, 1984.

At the time the bill was under discussion in the House Public Utilities Committee, members of the committee expressed concern that the bill not become law without some additional time to study its effect. Accordingly, the sponsor of the bill, Representative George W. Miller, Jr., agreed that if the bill was reported favorably by the House Committee and adopted by the House it would not receive

final action by the Senate during the First Regular Session. This would allow detailed study of the effects of long distance competition in North Carolina during the interim period between the end of the First Regular Session and the beginning of the Second Regular Session in June 1984. It was agreed that the Utility Review Committee, which was already looking at the changes in telecommunications (see the report of the Utility Review Committee to the Governor and the 1983 General Assembly, pages 20-21) would conduct the contemplated review. This assertion was repeated on the floor of the House during the debate on the bill. In accordance with this agreement, the bill was sent to the Senate and referred to the Senate Committee on Special Ways and Means. No further action was taken on the bill prior to the adjournment of the First Regular Session.

The Utility Review Committee has considered the subject of telecommunications in general, and House Bill 1365 in particular, during four separate meetings occurring in September and November of 1983, and April and May of 1984.

Proceedings before the Utility Review Committee

The September 29, 1983 meeting of the Utility Review Committee was devoted to an overview of changes in the telecommunications industry, especially in light of the divestiture of the American Telephone and Telegraph Company's local operating companies, and the changes in

regulatory direction favoring competition as a result of actions by the Federal Communications Commission. The Committee reviewed the AT&T divestiture case with particular attention being paid to the mechanics of telecommunications after divestiture, and specifically the interrelationship between the long distance carriers and the local Bell operating companies. The committee was also briefed on all bills pertaining to telecommunications which had been introduced in the 1983 General Assembly.

The November 23, 1983 meeting of the committee was also substantially devoted to telecommunications, but this time with far more focus on House Bill 1365. The committee heard speakers representing competitive long distance companies, independent certificated telephone companies, telephone cooperatives, the North Carolina Textile Manufacturers Association, the Public Staff and the Attorney General. There was general support for the bill from competitive long distance companies and the certificated carriers. The representative of the rural telephone companies expressed concern about the effect of deregulation on the rural telephone users, but did not suggest any alternates or amendments to House Bill 1365. The Public Staff and the Attorney General expressed concern about the impact of competitive long distance service on local rates, but found the Committee Substitute for House Bill 1365 acceptable in view of the discretion it places in the Utilities Commission.

The meeting of April 27, 1984, was devoted entirely to House Bill 1365. The purpose of the meeting was to bring the committee up-to-date on what was happening in telecommunications on the federal level, what was going on in other states regarding competition, and to allow a final public hearing on the bill. Approximately fifty people attended the meeting, representing a wide variety of interests.

The committee counsel briefed the committee once again on House Bill 1365 and brought the committee up-to-date on activities at the federal level and in North Carolina. In addition, he reviewed activities in other states relating to intrastate telephone competition.

While the types of competition vary from state to state, some type of competition with monopoly telephone companies has been permitted in approximately thirteen states. There is, understandably, much activity in this area in other states and it can be expected that the number of states with competition situations will increase, as will the types of competition. It was counsel's opinion that it would take approximately two more years before a clear picture emerges on what is happening in each state. Counsel pointed out to the committee that, if House Bill 1365 is passed, it would place the Utilities Commission of North Carolina in the position of having discretion as to what types of competition would be permitted.

The committee then heard from six speakers, representing various certificated telephone companies in North

Carolina and competitor long distance telephone companies. All of the speakers supported passage of House Bill 1365. Many of them commented favorably on the broad discretion which the bill would give to the Utilities Commission to regulate this competition. There were some suggestions for changes. The speaker on behalf of AT&T Communications, while supporting the bill, expressed a desire to have it include stipulations mandating equal treatment, that is, uniform regulations and conditions, for all interexchange carriers. On the other hand, the representative of GTE-Sprint suggested an amendment to the bill which would grant authority to the Utilities Commission to exempt some long distance carriers from some aspects of regulation, when and if the Commission finds this to be in the public's interest.

At the conclusion of the public hearing, the committee voted to recommend the passage of the Committee Substitute for House Bill 1365 which had passed the House during the First Regular Session. It was understood, however, that this was an approval in concept and not intended to preclude further amendments to the bill along the lines of those discussed at this particular meeting. However, it must also be stressed, that the committee was not endorsing the concept of those amendments. It was merely leaving the door open for further discussion and debate, most likely taking place when the Legislature convenes for the Second Regular Session of the 1983 General Assembly.

At its meeting on May 22, 1984, the Utility Review Committee briefly discussed House Bill 1365 once again. Again, there was discussion of possible amendments to the bill, however, none were offered. It was agreed that the recommendation voted upon at the April 27 meeting would go forward and any action on proposed amendments would take place during the 1984 Legislative Session.

SOLAR ACCESS LEGISLATION

Recommendation of the Utility Review Committee

The Utility Review Committee recommends that the legislation attached to this report as Appendix C be passed by the General Assembly. This legislation comprises that portion of the solar access legislation contained in the Report of the Governor's Task Force on Solar Law relating to the drafting and recording of voluntary agreements for solar access easements between private parties, incorporating changes suggested during the Utility Review Committee's study of the proposed legislation.

The fact that the committee has declined to endorse certain other portions of the solar access legislation should not be taken as being a statement against that legislation. Rather, the committee felt that the issues involved in the remaining portions of that legislation were too complex to be considered during the time remaining prior to the short session. (See pages 14-16 of this report.)

History

In April 1982, Governor Hunt appointed a Governor's Task Force on Solar Law and asked it to identify institutional barriers to the development of solar energy and to suggest ways the state could encourage the development of solar and other alternative energy resources in North

Carolina. The Task Force issued its report in January 1984. The report contains suggested legislation in the area of solar access, as well as in other areas.

Anticipating the report of the Task Force, Senate Joint Resolution 670 was filed in July 1983. This resolution called for the Legislative Research Commission to examine the report and "seek to identify administrative, regulatory and legislative actions to build a foundation for solar and other economical sources of energy in North Carolina's energy future." Chapter 905 of the 1983 Session Laws, which authorizes the studies to be undertaken by the Legislative Research Commission, provided in Section 41 that solar law would be studied under the guidelines of SJR 670 with authorization to report to the 1984 Session of the General Assembly or to the 1985 General Assembly. However, the Commission later determined there were insufficient funds to make all of the studies it was authorized to make and requested the Utility Review Committee to undertake the study contemplated in SJR 670 (Appendix D).

At its meeting of November 23, 1983, the Utility Review Committee agreed to undertake this study as requested by the Legislative Research Commission. By agreement with the Administration and the chairman of the Task Force, the Utility Review Committee limited its review to those Task Force recommendations dealing with solar access easements and land use regulation. The matter was considered at three subsequent meetings in February, March and May of 1984.

Proceedings Before the Utility Review Committee

At the February 10, 1984 meeting of the Utility Review Committee, the report of the Task Force was reviewed by its chairman, Walter E. Daniels, with emphasis being placed on those portions concerning solar access and related land use regulations. In addition, the committee heard from staff of the Energy Division of the Department of Commerce on the general subject of solar access and related design of buildings and their location. The specific legislative recommendations concerning solar access easements and land use regulation, which appear in the Task Force report at pages 84-103 (Appendix E), were reviewed by Mr. Richard Ducker, Assistant Director of the Institute of Government in Chapel Hill and the technical advisor to the Task Force for the recommended legislation. A further review of the legislation was given by committee counsel who also presented a written report to the committee (Appendix F).

Generally, the substantive portions of the legislation proposed by the Task Force fall into three areas. Section 2 deals with the creation of solar energy easements between private individuals. Section 3 grants zoning, subdivision regulation, and general ordinance making authority to municipalities and counties for the purpose of protecting solar access and promoting the use of solar energy. Sections 4 and 5 grant to municipalities and to the State's Department of Transportation the authority to maintain

vegetation in public rights of way in such a manner as to protect solar access for adjoining lots.

The committee continued its review of the proposed legislation at its meeting on March 9, 1984. At this meeting it received a report on activities in other states relating to legislation protecting solar access (Appendix G).

In the substantive discussion which took place during this meeting, it became apparent that there was great concern on the part of committee members with proposed G.S. 113B-32 which rendered void and unenforceable any private land use covenant or restriction which tended to have the effect of prohibiting "reasonably cited and designed solar energy systems from being installed." Ultimately, the Administration and the chairman of the Task Force agreed to withdraw this section from the proposed legislation.

There was also concern about the definition of a solar energy system as contained in the proposed legislation since the Task Force report indicated an intent to include passive solar design features as part of the definition of a solar energy system. (Report of the Governor's Task Force on Solar Law, pages 15-16, 23-24, 32-38, 91.) It appeared that the definition contained in the proposed legislation would not be adequate to accomplish this intent. It was agreed by the Committee, the Administration, and the Task Force chairman, that the definition should be redrawn to accomplish the inclusion of passive solar devices.

Finally, concern was expressed by committee members about Sections 4 and 5 of the proposed legislation which granted authority to municipalities and the State Department of Transportation to trim street trees to insure solar access for adjoining properties. The problem involves the somewhat complex policy decision of whether solar access is more advantageous than shade. During the course of discussion, the chairman of the Task Force, Mr. Daniel, acknowledged that these sections would require further consideration and possibly some changes. Accordingly, they were withdrawn from consideration at this time.

At the conclusion of this meeting, it was decided by the committee that the proponents of the legislation should redraft it in accordance with the discussion which had taken place at the meeting, and, that the redrafted legislation should be forwarded by committee counsel to the following organizations for their comments:

The Real Estate Section of the N.C. Bar Association

The North Carolina Land Title Association

The University of North Carolina School of Law

Duke University School of Law

Campbell University School of Law

Wake Forest University School of Law

North Carolina Central University School of Law

The redrafted legislation was forwarded to each of these organizations for comment and the matter was taken up once more at the meeting of May 22, 1984. Committee counsel

reviewed for the committee the responses to the survey of the law schools, the Real Estate Section of the Bar Association, and the North Carolina Land Title Association. A copy of counsel's memorandum outlining these comments is attached to this report as Appendix H.

As the responses to the survey were received by committee counsel, he had forwarded them to the Administration, therefore the Administration was ready at the meeting with proposed changes to the legislation incorporating many of the suggestions coming out of the survey. Most of the suggested changes had to do with Section 2 of the bill, dealing with the creation of solar access easements between private individuals. However, during the course of discussion in the committee, it became apparent that there were still many policy questions to be resolved concerning those portions of the proposed legislation which granted regulatory authority to local governments in the areas of zoning, land use, and other police powers intended to promote solar energy. As a result of this discussion, the committee ultimately voted to recommend only those portions of the legislation which dealt with the creation of private solar access easements. This was not a rejection of the portions of the legislation granting regulatory authority to local governments, but rather took into account the fact that the committee was in its last meeting prior to the beginning of the Short Session of the Legislature and there was simply not enough time to develop the policy issues more fully.

The legislation which the committee was able to recommend at this time is Appendix C of this report.

ELECTRIC UTILITY FUEL CHARGE ADJUSTMENTS

In June 1982, during the Second Regular Session of the 1981 General Assembly, Chapter 1197 was enacted. This legislation made substantive changes in electric utility fuel charge adjustments and in construction work in progress. (See the Report of the Utility Review Committee to the Governor and the 1983 General Assembly, pages 6-9.) Section 4 of Chapter 1197 required the Utilities Commission, with public notice and a public hearing, to investigate "the present and future need and justification for electric utility fuel charge adjustments as provided for in this act," with the requirement that it report its findings and recommendations to the Governor and the Utility Review Committee on or before the convening date of the Second Regular Session of the 1983 General Assembly. That report was forwarded to the members of the committee on May 8, 1984 and its receipt was acknowledged at the Utility Review Committee meeting of May 22, 1984.

In summary, the report concluded that the need and justification for electric utility fuel charge adjustments is not as great as it had been in the past since fuel prices are more stable now, but that there remains a need and justification for having such a statute and procedures in place since fuel prices could become more volatile in the future. There had been very little activity under G.S.

62-133.2 since its passage and, in fact, the Utilities Commission had only issued its order setting up revised rules on fuel charge adjustments on May 1, 1984. Due to the lack of experience under the new statute, the Utilities Commission had no recommendations to offer at this time.

In view of this, the Utility Review Committee felt there is no need to take any action on the Utilities Commission report at this time. However, the Committee would continue to stay abreast of developments in this area.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1983

H 2

HOUSE BILL 1365
Committee Substitute Favorable 7/7/83

Short Title: Utilities Comm. Am.'s (Public)

Sponsors: Representative

Referred to: Public Utilities.

June 27, 1983

A BILL TO BE ENTITLED

AN ACT TO AMEND THE POWERS AND DUTIES OF THE UTILITIES COMMISSION.

The General Assembly of North Carolina enacts:

Section 1. G.S. 62-2 is amended by adding a new paragraph at the end of the present section to read:

"Because of technological changes in the equipment and facilities now available and needed to provide telephone and telecommunications services, changes in regulatory policies by the federal government, and changes resulting from the court-ordered divestiture of the American Telephone and Telegraph Company, competitive offerings of certain types of telephone and telecommunications services may be in the public interest. Consequently, authority shall be vested in the North Carolina Utilities Commission to allow competitive offerings of long distance services by public utilities defined in G.S. 62-3(23)a.6. and certified in accordance with the provisions of G.S. 62-110."

Sec. 2. G.S. 62-110 is amended by adding two new paragraphs at the end of the existing paragraph to read:

"The Commission shall be authorized to issue a certificate to any person applying to the Commission to offer long distance services as a public utility as defined in G.S. 62-3(23)a.6., provided that such person is found to be fit, capable, and financially able to render such service, and that such additional service is required to serve the public interest effectively and adequately; provided further, that in such cases the Commission shall consider the impact on the local exchange customers.

For purposes of this section, long distance services shall include the transmission of messages or other communications between two or more central offices wherein such central offices are not connected on July 1, 1983, by any extended area service, local measured service, or other local calling arrangement."

Sec. 3. G.S. 62-133 is amended by adding a new subsection (i) to read:

"(i) In the regulation of rates charged by a public utility as defined in G.S. 62-3(23)a.6. for the provision of access to the facilities of any other like public utility, the Commission may consider allocation methods, rates, and structures utilized for the pricing of such access for interstate long-distance services."

Sec. 4. G.S. 62-140 is amended by adding a new subsection (d) to read:

"(d) No public utility as defined in G.S. 62-3(23)a.6. shall refuse to interconnect with any other like public utility; provided, however, that should said public utilities fail to agree on the terms of such interconnection, the Utilities

Commission on motion of either public utility, shall fix and regulate the terms of such interconnection on the basis of fair and reasonable charges for such interconnection."

Sec. 5. This act shall become effective July 1, 1984.

APPENDIX B

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1983

H 1

HOUSE BILL 1365

Short Title: Utilities Comm. Am.'s (Public)

Sponsors: Representative Miller.

Referred to: Public Utilities.

June 27, 1983

A BILL TO BE ENTITLED

AN ACT TO AMEND THE POWERS AND DUTIES OF THE UTILITIES COMMISSION.

The General Assembly of North Carolina enacts:

Section 1. G.S. 62-2 is amended by adding a new paragraph at the end of the present section to read:

"Because of technological changes in the equipment and facilities now available and needed to provide telephone and telecommunications services, changes in regulatory policies by the federal government, and changes resulting from the court-ordered divestiture of the American Telephone and Telegraph Company, competitive offerings of certain types of telephone and telecommunications services are now found to be in the public interest. Consequently, authority shall be vested in the North Carolina Utilities Commission to allow competitive offerings of long distance services by public utilities defined in G.S. 62-3(23)a.6. and certified in accordance with the provisions of G.S. 62-110."

Sec. 2. G.S. 62-110 is amended by adding two new paragraphs at the end of the existing paragraph to read:

"The Commission shall be authorized to issue a certificate to any person applying to the Commission to offer long distance services as a public utility as defined in G.S. 62-3(23)a.6., provided that such person is found to be fit, capable, and financially able to render such service, and that such additional service is required to serve the public interest effectively and adequately.

For purposes of this section, long distance services shall include the transmission of messages or other communications between two or more central offices wherein such central offices are not connected on July 1, 1983, by any extended area service, local measured service, or other local calling arrangement."

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Sec. 4. G.S. 62-140 is amended by adding a new subsection (d) to read:

"(d) No public utility as defined in G.S. 62-3(23)a.6. shall refuse to interconnect with any other like public utility; provided, however, that should said public utilities fail to

agree on the terms of such interconnection, the Utilities Commission on motion of either public utility, shall fix and regulate the terms of such interconnection on the basis of fair and reasonable charges for such interconnection."

Sec. 5. This act shall become effective January 1, 1984.

SESSION 19 83 Short Title: Solar Energy Easements Act

INTRODUCED BY: *

Referred to:

A BILL TO BE ENTITLED

AN ACT TO PROMOTE AND ENCOURAGE THE CONSERVATION OF ENERGY BY AUTHORIZING SOLAR ENERGY EASEMENTS.

The General Assembly of North Carolina enacts:

Section 1. Diminishing supplies of nonrenewable energy resources threaten the physical and economic well-being of the citizens of North Carolina who presently rely on such resources to maintain their homes, businesses, industries, and institutions. Solar energy systems hold great promise for the future energy needs of North Carolina. The unsettled state of the law regarding the right to use sunlight discourages capital investment in solar energy systems and unless the law on solar access rights is clarified, the use of solar energy systems will remain limited. It is therefore declared to be the policy of the State of North Carolina to encourage the use of solar energy and to remove legal impediments which discourage its use while providing for the protection of individual property rights, thereby promoting the public health, safety, and welfare; and to promote the use of solar energy systems by recognizing the right of individuals to negotiate solar energy easements.

Sec. 2. Chapter 113B of the North Carolina General Statutes is hereby amended by adding thereto a new Article 3,

G.S. Sec. 113B-30 through G.S. Sec. 113B-37, to read as follows:

"ARTICLE 3, SOLAR ENERGY EASEMENTS ACT"

Sec. 113B-30. Short title. The title of this Article shall be known as the "Solar Energy Easements Act."

Sec. 113B-31. Definition. The following terms, where used in this Article, shall have the following meanings, except where the context clearly indicates a different meaning.

(a) "Solar energy system" means any device, element, structural design feature of a building, or a combination of these, whether active or passive in nature, that relies upon direct sunlight as an energy source, including but not limited to any material, substance, or device which collects such energy for use in the heating and cooling of a structure or building (including those that take advantage of passive or natural heating and cooling opportunities offered by the configuration of a lot or the siting or design of a structure); the heating or pumping of water; industrial, commercial, agricultural or horticultural processes; or the generation of electricity.

(b) "Solar energy easement" means a right, expressed as an easement, restrictive covenant, restriction, covenant, promise, or condition contained in any deed, contract, or other written instrument executed by or on behalf of any land owner

or user for the purpose of assuring adequate access to direct sunlight for solar energy systems.

Sec. 113B-32. Solar energy easements. A solar energy easement is an interest in real property and shall be created in writing. Unless the instrument creating it provides otherwise, a solar energy easement shall be deemed to include an express easement for light and air of the same extent and subject to the same terms. However, no implied or prescriptive solar access easement for solar energy or for light and air shall be created or implied pursuant to this Article or any other law.

Sec. 113B-33. Appurtenant; privity of estate; termination. A solar energy easement shall be appurtenant to and run with the real properties benefited and burdened by such an easement.

Sec. 113B-34. Contents.

(a) Any instrument creating a solar energy easement shall include, but the contents shall not be limited to:

(1) A description of the real property benefiting from the solar energy easement, and a description of the real property or properties subject to the solar energy easement, and

(2) A description of the extent of the solar easement which is sufficiently certain to allow the owner or owners of the real property subject to the easement to ascertain the extent of the

easement. Such description may be made by describing:

(A) The vertical and horizontal angles, expressed in degrees, at which the solar energy easement extends over the real property or properties subject to the easement, and the reference point or points from which those angles are to be measured;

(B) The height over the property or properties above which the solar easement extends, and the reference point or points from which those elevations are established;

(C) A prohibited shadow pattern; or

(D) The hours of the day and the times of the year during which a specified surface will not be shaded.

(b) Any instrument creating a solar energy easement may include:

(1) Any terms or conditions under which a solar energy easement is granted, may be terminated, or may be revised;

(2) Any compensation to the owner or owners of the property or properties subject to the solar easement for granting the easement, for maintaining the easement area, or for both;

(3) Any compensation to the owner of property benefiting from the solar easement for interference with his enjoyment of the solar easement;

(4) Any provision assigning responsibility for initially removing obstructions from the easement space;

(5) Any provision allowing the owner of property benefiting from the solar energy easement, or his agent, to enter the property or properties subject to the easement in a reasonable manner and at reasonable times after reasonable notice to trim vegetation or remove other obstructions in the easement space; and

(6) Any other provisions necessary or desirable to effect the purpose of the instrument.

Sec. 113B-35. Existing solar energy easements. This Article shall not be construed to make unenforceable any easement, restriction, restrictive covenant, covenant, promise, or condition designed for the purpose of ensuring adequate access to direct sunlight for solar energy systems which does not comply with the requirements of this Article and was executed prior to the effective date of this Act.

Sec. 113B-36. Public recording of easements. Solar energy easements shall be subject to the provisions of G.S. 47-18 and G.S. 47-27.

Sec. 113B-37. Remedies for interference with solar energy easements. In any action for interference with a solar energy easement, if the instrument creating the easement does not specify any appropriate and applicable remedies, the court may choose one or more remedies including, but not limited to the following:

(a) An injunction against the interference; or

(b) Actual damages as measured by increased charges for supplemental energy, the unamortized installation and capital cost of the solar energy system, and/or the cost of additional equipment necessary to supply sufficient energy:

(1) From the time interference began until the actual or expected cessation of the interference; or

(2) If the interference is not expected to cease, in a lump sum representing the present value of the damages for the time the interference began until the normally expected end of the useful life of the solar energy system whose function was interfered with.

STATE OF NORTH CAROLINA
LEGISLATIVE RESEARCH COMMISSION
STATE LEGISLATIVE BUILDING
RALEIGH 27611

September 28, 1983

Senator Joseph E. Johnson, Cochairman
Utility Review Committee
Box 750
Raleigh, North Carolina 27602

Representative J. P. Huskins, Cochairman
Utility Review Committee
P.O. Box 1071
Statesville, North Carolina 28677

Dear Cochairmen:

By Chapter 905 (House Bill 1142) the General Assembly authorized the Legislative Research Commission to study solar law employing in its discretion the guidelines contained in Senate Bill 670. The Commission has determined that because of insufficient funds it is unable to make all of the studies which it is authorized to make.

The Commission has noted the role of the Utility Review Committee in reviewing the work of the Utilities Commission and regulation of the utilities companies doing business in this State. Because of the Commission's insufficient funds, your Committee's permanent role of review of utility law and the proximity and mutually dependent natures of solar law and utility law and regulation, the Legislative Research Commission would respectfully request that the Utility Review

Committee undertake the review, insofar as possible and feasible, of solar law contemplated in Senate Bill 670.

Respectfully,

W. Craig Lawing
Cochairman

Liston B. Ramsey
Cochairman

Copy to: Senator Russell Walker
Mr. Steve Rose

PART FOUR: PROPOSED LEGISLATION AND COMMENTARY

1. a. Solar Access and Land Use

AN ACT TO PROMOTE AND ENCOURAGE THE CONSERVATION OF ENERGY BY AUTHORIZING SOLAR ENERGY EASEMENTS AND ENABLING CITIES AND COUNTIES TO ADOPT REGULATIONS ENSURING DIRECT ACCESS TO SUNLIGHT FOR SOLAR ENERGY SYSTEMS.

The General Assembly of North Carolina enacts:

Section 1. Diminishing supplies of nonrenewable energy resources threaten the physical and economic well-being of the citizens of North Carolina who presently rely on such resources to maintain their homes, businesses, industries, and institutions. Solar energy systems hold great promise for the future energy needs of North Carolina. The unsettled state of the law regarding the right to use sunlight discourages capital investment in solar energy systems and unless the law on solar access rights is clarified, the use of solar energy systems will remain limited. It is therefore declared to be the policy of the State of North Carolina to encourage the use of solar energy and to remove legal impediments which discourage its use while providing for the protection of individual property rights, thereby promoting the public health, safety, and welfare; and to promote the use of solar energy systems by recognizing the right of individuals to negotiate solar energy easements and by encouraging and clarifying the authority of local governments to employ existing land use regulatory powers for protecting access rights to the sun.

Section 2. Chapter 113B of the North Carolina General Statutes is hereby amended by adding thereto a new Article 3, G.S. Sec. 113B-30 through G.S. Sec. 113B-38, to read as follows:

"ARTICLE 3. Solar Energy Easements Act"

Sec. 113B-30. Short title. The title of this Article shall be known as the "Solar Energy Easements Act."

Sec. 113B-31. Definition. The following terms, where used in this Article, shall have the following meanings, except where the context clearly indicates a different meaning.

(a) "Solar energy system" means any device, element, or combination of elements or devices that rely upon direct sunlight as an energy source, including but not limited to any material, substance, or device which collects and stores sunlight for use in the heating or cooling of a structure or building; the heating or

pumping of water; industrial, commercial, agricultural, or horticultural processes; or the generation of electricity.

(b) "Solar energy easement" means a right, expressed as an easement, restrictive covenant, restriction, covenant, promise, or condition contained in any deed, contract, or other written instrument executed by or on behalf of any land owner or user for the purpose of assuring adequate access to direct sunlight for solar energy systems.

Sec. 113B-32. Prohibited covenants and restrictions. Any deed restriction, covenant or similar binding agreement in a document conveying an interest in real property that prohibits or has the effect of prohibiting reasonably sited and designed solar energy systems from being installed on the conveyed property is against public policy and is void and unenforceable. This section shall not apply to conservation and preservation agreements that are subject to the provisions of Article 4 of Chapter 121 of the North Carolina General Statutes.

Sec. 113B-33. Solar energy easements. A solar energy easement is an interest in real property and shall be created in writing. Nothing in this Article shall be deemed to create or authorize the creation of an implied easement or a prescriptive easement.

Sec. 113B-34. Appurtenant; privity of estate; termination.

(a) A solar energy easement shall be appurtenant to and run with the real properties benefited and burdened by such an easement. No solar energy easement shall be unenforceable on account of lack of privity of estate or lack of privity of contract.

(b) A solar energy easement shall constitute a perpetual easement, except that such an easement may terminate.

(1) Upon terms and conditions stated therein;

(2) By court decree when conditions have changed materially or the easement has been abandoned; or

(3) At any time by agreement of all parties to the instrument creating the easement or their successors in interest.

Sec. 113B-35. Contents.

(a) Any instrument creating a solar energy easement shall include, but the contents shall not be limited to:

(1) A description of the real property benefiting from the solar energy easement, and a description of the real property or properties subject to the solar energy easement.

(2) A description of the extent of the solar easement which is sufficiently certain to allow the owner or owners of the real property subject to the easement to ascertain the extent of the easement. Such description may be made by describing:

(A) The vertical and horizontal angles, expressed in degrees, at which the solar energy easement extends over the real property or properties subject to the easement, and the point or points from which those angles are to be measured;

(B) The height over the property or properties above which the solar easement extends, and the reference point or points from which those elevations are established;

(C) A prohibited shadow pattern; or

(D) The hours of the day and the times of the year during which a specified surface will not be shaded.

(b) Any instrument creating a solar energy easement may include:

(1) Any terms or conditions under which a solar energy easement is granted may be terminated, or may be revised;

(2) Any compensation to the owner or owners of the property or properties subject to the

solar easement for granting the easement, for maintaining the easement area, or for both;

(3) Any compensation to the owner of property benefiting from the solar easement for interference with his enjoyment of the solar easement;

(4) Any provision assigning responsibility for initially removing obstructions from the easement space;

(5) Any provision allowing the owner of property benefiting from the solar energy easement, or his agent, to enter the property or properties subject to the easement in a reasonable manner and at reasonable times after reasonable notice to trim vegetation or remove other obstructions in the easement space; and

(6) Any other provisions necessary or desirable to effect the purpose of the instrument.

Sec. 113B-36. Existing solar energy easements. This Article shall not be construed to make unenforceable any easement, restriction, restrictive covenant, covenant, promise, or condition designed for the purpose of ensuring adequate access to direct sunlight for solar energy systems which does not comply with the requirements of this Article and was executed prior to the effective date of this Act.

Sec. 113B-37. Public recording of easements. Solar energy easements may be recorded and shall be subject to the provisions of G.S. 47-18 and G.S. 47-27.

Sec. 113B-38. Remedies for interference with solar energy easements. In any action for interference with a solar energy easement, if the instrument creating the easement does not specify any appropriate and applicable remedies, the court may choose one or more remedies including, but not limited to, the following:

(a) An injunction against the interference; or

(b) Actual damages as measured by increased charges for supplemental energy, the amortized installation and capital cost of the solar energy system, and/or the cost of additional equipment necessary to supply sufficient energy:

(1) From the time interference began until the actual or expected cessation of the interference; or

(2) If the interference is not expected to cease, in a lump sum representing the present value of the damages from the time the interference began until the normally expected end of the useful life of the solar energy system whose function was interfered with.

Sec. 3. Article 19 of Chapter 160A of the North Carolina General Statutes is hereby amended by adding thereto a new Part 9, G.S. Section 160A-459.1 to G.S. Section 160A-459.2 to read as follows:

"Part 9. Energy Conservation and Solar Energy

Sec. 160A-459.1. Encouraging energy conservation and providing for solar access in land use regulations. Any city or county is authorized to encourage energy conservation and the use of solar energy, and to protect access to direct sunlight for solar energy systems in land use regulations adopted and amended pursuant to this Article, and for such purposes, in addition to other authority granted by law, may engage in the following activities:

(1) Regulation of the height, location, setback and orientation of structures;

(2) Adoption of ordinance provisions modifying accessory use provisions, setback and yard requirements, height restrictions, nonconforming use limitations or other land use provisions that inhibit the construction and use of solar energy systems.

(3) Regulation of the height, type and location of vegetation;

(4) Requiring, as a condition for the issuance of a special use permit, conditional use permit, special exception, or building permit, that access to direct sunlight be protected.

(5) Provisions of incentives to encourage developers to use solar energy and energy-efficient design in planning developments;

(6) Regulation of the orientation of new streets and lots;

(7) Requiring, as a condition to subdivision plat approval, that the applicant establish solar energy easements so that solar energy systems that later may be located on each parcel for which subdivision approval is sought, and for which a solar energy system is feasible, shall have access to direct sunlight across other parcels within the subdivision, provided that the subdivision control ordinance specifies the following:

(a) The classes of subdivision for which easements will be required; and

(b) The terms of the easements required.

Sec. 160A-459.2. Definitions. The following terms where used in this Part shall have the following meanings, except where the context clearly indicates a different meaning:

(a) "Land use regulations" means

(i) any land subdivision, zoning, or other ordinance prepared, adopted, or amended pursuant to this Article, Article 18 of North Carolina General Statutes Chapter 153A, or to any local act enabling a city or county to adopt these or ordinances with similar purposes; or

(ii) any ordinance prepared, adopted, or amended pursuant to Section 174 of North Carolina General Statutes Chapter 160A or to Section 121 of North Carolina General Statutes Chapter 153A.

(b) "Solar energy system" means a solar energy system as defined in G.S. Sec. 113B-31 (a).

(c) "Solar energy easement" means a solar energy easement as defined in G.S. Sec. 113B-31(b).

Sec.4. Subsection (a) of G.S. 160A-296 is hereby amended by inserting following existing paragraph (8) a new paragraph (9) to read as follows:

(9) The power to regulate the selection and location of plantings and to trim or remove vegetation within street rights-of-way so that solar systems located, or that later may be located, on adjacent property shall have access to direct sunlight.

Sec. 5. Paragraph (9) of G.S. 136-18 is hereby amended by inserting between the first semicolon and the word "to" the words "to regulate the selection and location of plantings and to trim or remove vegetation within the highway right-of-way so that solar energy systems located, or that later may be located, on adjacent property shall have access to direct sunlight."

1. b. COMMENTARY

Solar Energy Easements

Section 2 adds a new Article 3 to Chapter 113B of the North Carolina General Statutes, the "Solar Energy Easements Act." This Article recognizes solar energy easements as interest in real property and establishes basic criteria and guidelines for their creation. Explicit statutory recognition is necessary for several reasons. Express easements for light and air have generally been upheld in this country, but in contrast to the English common law's doctrine of ancient lights, American courts have held that such easements may not be created by prescription or implication. North Carolina appears to follow the American common law rule [See Barger v. Barringer, 151 N.C. 433 (1909)], but many of the North Carolina cases that discuss such easements were decided before solar energy became an important potential energy source. Furthermore, a solar easement is intended to ensure access to direct sunlight for a solar collector while a traditional light and air easement was established typically only to prevent an unreasonable interference with sunlight. To overcome the legal uncertainty and possible judicial hostility to using easements for light and air to provide access to direct sunlight for solar energy systems, this specific statutory recognition is recommended.

The Solar Energy Easements Act includes a broad definition of solar energy systems. [See proposed N.C.G.S. Sec. 113B-31(a).] The definition is intended to encompass both active and passive solar applications as well as the generation of electricity through the use of photovoltaic cells and other technologies. It is also recognized that some solar applications may be appropriate in industrial, commercial, agricultural or horticultural processes. For example, in North Carolina, solar has been used successfully in curing tobacco, heating barns and other agricultural uses. In addition to recognizing the many uses of solar energy, the definition of a solar energy system is intended to give the parties negotiating a solar energy easement wide latitude in deciding the type and degree of protection desired without limiting such decisions. It should also be noted that the Act does not include a separate definition for solar collector. A solar collector is included as a component of a solar energy system although in most cases the parties negotiating an easement will be concerned only with providing access to direct sunlight for the solar collector.

In order to avoid any problems with the interpretation and effect of a written instrument granting a right of access to direct sunlight for a solar energy system, the definition of a solar energy easement set forth in proposed N.C.G.S. Sec. 113B-31(b) eliminates any distinctions based on the form of the instrument. Whether the instrument is cast as an easement, a restrictive covenant or in some other form, it will be treated as a solar energy easement with all the attributes of such an easement if it meets the requirements of the Act.

Section 113B-32 provides that any deed restriction, covenant or similar agreement in a document conveying an interest in real property that prohibits reasonably sited and designed solar energy systems from being installed on the conveyed property is against public policy and void and unenforceable. (Similar legislation is now in effect in Florida [Fla. Stat. Section 163.04 1981].) As private controls on land use, restrictive covenants drafted with no thought to the use of solar energy may inadvertently prohibit the installation of solar energy systems through height limitations, setback requirements, aesthetic controls and other restrictions. The consent of all or a super majority of the property owners in a subdivision is often required to overcome such restrictions and gaining such consent may be difficult and costly for a property owner desiring to install a solar energy system. The policy of the State to encourage the use of solar energy should override any deed restriction or covenant that prohibits reasonably sited and designed solar energy systems. This section attempts to balance the legitimate objectives of privately-established restrictions on the use of private property and the public interest served by encouraging the use of solar energy. Aesthetic controls and other restrictions are not voided by this section unless such restrictions result in a prohibition of any solar energy system. Under this provision, a property owner desiring to install a solar energy system will be required to design and site such a system respecting the spirit and intent of the restrictions. In some cases, this will increase the cost of the system and the amount of the additional cost may reflect on the reasonableness of the restriction. Although there is some ambiguity in this section that might invite litigation, it is hoped that the intended balancing of competing interests will guide the solar owner in the development of his plans and the architectural review committee, homeowner's association or adjacent property owner in their review of those plans. The General Assembly has previously recognized the importance of protecting historic structures and areas with special scenic and environmental qualities by the authorization of conservation and preservation agreements under

Article 4 of Chapter 121 of the North Carolina General Statutes. In instances where such agreements have been developed, the protections afforded may override the public interest in the use of solar energy, and such agreements have been specifically excluded from the prohibitions of this section.

Section 113B-33 recognizes solar energy easements as interests in real property and requires such easements to be created in writing. This section does not attempt to overrule the American common law rule that easements for light and air cannot be created by prescription. Such a limitation on the creation of solar energy easements, however, should not preclude the treatment of the shading of a solar energy system as a public or private nuisance if such treatment, either by the General Assembly or the North Carolina courts, becomes appropriate as the use of and reliance on solar energy systems becomes more widespread. [See Prah v. Maretti, 321 N.W. 2d 182 (Wisc., 1982).]

Solar energy systems require an initial capital investment with a return on that investment being realized primarily from the savings in energy costs throughout the life of the system, so the easement protecting such an investment must be fully alienable and at least extend the full useful life of the affected solar energy system. Section 113B-34 provides that such easements are appurtenant to and run with the real properties benefited and burdened by the easement to ensure that they are not construed as being solely for the personal benefit of the easement holder. Since the definition of a solar energy easement includes restrictive covenants, this section also eliminates lack of privity of estate or contract as a basis for attacking such easements. Subsection 113B-34(b) lists several generally recognized bases for the termination of an easement which are also applicable to solar energy easements.

To fall within the coverage of the Solar Energy Easements Act, Section 113B-35 requires the instrument creating the solar energy easement to include descriptions of the real properties benefited and burdened by the easement to allow the owner of the servient estate to ascertain the extent of the easement. Although several other states that have adopted legislation authorizing solar energy easements have mandated a specific form for describing the easement (See Iowa Code Sec. 564A.7; Fla. Stat. Sec. 704.07), there are several methods for describing such an easement which satisfy the reasonably certain description standard recognized by the North Carolina Courts. [See Borders v. Yarborough, 237 N.C. 540 (1953).] The methods of description listed in the Act are intended to permit the parties to such an easement as much flexibility as possible in pre-

paring the description. Factors such as local topographic conditions or the degree of protection desired may dictate the appropriate method of description. While descriptions of the properties affected and a reasonably certain description of the easement are required, subsection 113B-35 (b) contains a list of terms that the draftsman may include in a solar energy easement but that do not affect the validity of the easement. These terms serve as a guide to possible issues and problems that might arise during the life of the easement.

Several solar subdivisions have already been constructed in North Carolina, and restrictive covenants have been drafted to provide access to direct sunlight for the lots in these subdivisions. The Solar Energy Easements Act would not affect the validity of any easements or restriction providing access to direct sunlight which were executed prior to the effective date of the Act. [See proposed G.S. Section 113B-36.]

As interests in real property, solar energy easements should be recorded in the office of the register of deeds of the county where the affected lands are situated. See proposed G.S. Sec. 113B-37. Although an unrecorded easement would be enforceable against the original grantor while he owns the property subject to the easement, the easement would not be valid as against any creditor or purchaser for a valuable consideration until it was recorded in accordance with G.S. Sec. 47-27.

Finally, Section 113B-38 provides that where the easement does not specify the remedy for an interference with a solar easement, a court may grant either injunctive relief or actual damages. This section does list several factors which might be included in determining actual damages including the increased charges for supplemental energy and the unamortized installation and capital costs of the solar energy systems. Although an injunction to remove the object shading the solar energy system may be the only means to fully remedy the harm to the easement holder, the method for determination of damages set forth in the Act is intended to be used liberally to compensate the easement holder as completely as possible where injunctive relief may be inappropriate.

Solar Energy, Energy Conservation, and the Public Regulation of Land Development

Section 3 of this proposed legislation is designed to provide cities and counties with the authority to pro-

tect solar access and to promote energy conservation in their community planning activities and land development ordinances. Currently, several deficiencies in state law exist. Existing state enabling authority makes no explicit mention of solar access protection or energy conservation as permissible regulatory objectives. The subdivision control enabling legislation for cities does not refer to either. See N.C.G.S. 160A-372 and N.C.G.S. 153A-321. The current zoning enabling legislation for cities and counties does include as a zoning purpose the provision of "adequate light and air." See N.C.G.S. 160A-383 and 153A-341. This provision is common in the zoning enabling legislation of a number of states. The question of whether this language is broad enough to justify regulation on behalf of solar access has never been addressed by an appellate court in this country. However, the "adequate light and air" language has generally been regarded as suggesting primarily a public health objective rather than allowing zoning to be used as a tool for protecting solar access.

In addition the objects of regulation under current North Carolina zoning law may be inadequate for purposes of providing and protecting solar access. North Carolina zoning statutes provide for the regulation of the height and location of buildings and structures but not trees and other vegetation.

The Task Force proposes that Article 19 of Chapter 160A be amended by adding a new Part 9 to permit any city or county to establish requirements for protecting solar access, conserving energy, and encouraging the use of solar energy through any land use regulation adopted by ordinance pursuant to Article 19 of Chapter 160A (Municipalities), Article 18 of Chapter 153A (Counties), or local legislation. Part 9 is intended to be broad enabling authority for local government to encourage the use of solar energy. Several specific activities are listed as permitted regulatory activities of local government in the context of solar energy, but the list is not intended to limit the approaches that might be taken to enhance solar access.

The creation of a separate part of Article 19 is intended to focus attention on the importance of solar energy to meeting the energy needs of North Carolina and to give full authority to local governments to remove barriers to and encourage the use of solar energy systems. Although several states have chosen to mandate planning and regulatory activities related to solar energy (See Ariz. Rev. Stat. Sec. 9-461.05), the Task Force believes that the mandatory approach is inappropriate for North Carolina. Variations in the degree of political support for community involvement in planning and the regulation of land uses, development patterns, topography and climate throughout the

State dictate locally derived solutions to solar access problems.

Local governments are currently engaged in many of the permitted activities listed in proposed N.C.G.S. Sec. 160A-459.1. This section makes clear that these activities can be undertaken in the context of energy conservation and solar access enhancement and advises local governments of problems and approaches common to these matters. For example, proposed N.C.G.S. Sec. 160A-459.1(1) permits the regulation of the height, location, setback and orientation of structures for purposes of providing or protecting solar access. Zoning ordinances commonly regulate the height of buildings and establish yard and setback requirements that determine the location and orientation of structures. Translated into land planning and design objectives, these standards ensure that development occurs at the proper scale and is designed appropriately, that the character of areas already developed is preserved, and that privacy is protected. The setback and height requirements in many zoning ordinances may already offer some solar access protection. Under the proposed legislation, communities may give more explicit consideration to the siting of solar collectors and balance the requirements of solar access with the other objectives of zoning.

One relatively simple concept that may be introduced into a zoning ordinance is the notion of a solar setback. The solar setback is established for each lot so that any construction on that lot will not block whatever sunlight is needed to power a solar collector situated on a lot to the north. In contrast to other zoning setbacks, the solar setback is not measured perpendicularly from the property line. Rather it is typically measured from the northernmost point (or series of points) on the lot along the true north-south axis. New development on the lot subject to the solar setback must be sited behind and to the south of it. Solar setbacks may be calculated by referring to the minimum lot size and height requirements that apply in each zoning district, and to the degree of solar access protection the community is prepared to afford a solar owner through land use regulations.

Proposed N.C.G.S. 160A-459.1 (1) should be read together with 160A-459.1(2). Proposed N.C.G.S. 160A-459.1 (2) permits cities and counties to adopt ordinance provisions that modify accessory use provisions, setback and yard requirements, height restrictions, nonconforming use limitations, or other land use provisions that inhibit the construction or use of solar energy systems. In many communities current zoning provisions pose obstacles to the use of solar energy systems and may actually discourage use of solar energy systems inadvertently. Although the devel-

opment of solar energy systems is not a new development, ordinances are often not drafted to recognize or specifically accommodate them. Zoning height requirements may effectively limit the use of rooftop collectors. Some ordinances, intending to restrict the placement of structures and appurtenances such as fences, walls, pens, sheds in front, rear, or side year setback areas, may also restrict the placement of detached solar collectors, shade control devices, and various types of solar apparatus. Regulations limiting the extension or expansion of a nonconforming use (such as a store in a residentially-zoned district) may even prohibit the adaptation of building for solar purposes. Because of these problems of inadvertence some states have specifically preempted or invalidated local regulations that prohibit or unreasonably restrict the use of solar energy. (See Wis. Stat. 66.031; Who. Stat. 34-22-105; Conn. Gen. Stat. 7-147(f) (limitation on historic district review). This approach has not been recommended because it may have unintended impacts that can be avoided when local regulations are consciously reviewed to incorporate solar-related objectives. A blanket preemption also might be used as a basis for challenging local land use regulations in the name of solar energy. Unlike restrictive covenants which may be difficult to change, local public officials are more receptive to changes in public land use restrictions warranted by the changing needs and objectives of the community.

In addition to preempting local regulations that restrict the use of solar energy systems, some states have specifically permitted local governments to grant variances from local land use regulations when the regulation prevents or unduly restricts the use of a solar energy system. (See Neb. Rev. Stat. 66-914.) Such a provision appears to be inconsistent with North Carolina zoning law since the law allows the property owner to be granted a variance only if he can make no reasonable use of the property without the variance. (See Brough and Green, The Zoning Board of Adjustment in North Carolina, Institute of Government, U.N.C., 1978, at 19-20.) To preserve the integrity of existing variance procedures, the Task Force believes that easing the requirements for a variance is not a suitable method for encouraging the use of solar energy.

Proposed N.C.G.S. 160A-459.1(2) contemplates specific ordinance provisions that would permit flexibility in the siting of a newly-constructed solar building. The question is one of determining where the solar building is to be sited so that structures and vegetation located on neighboring properties will not shadow the collector. In some cases the optimal location for the collector (and the building upon which it is to be mounted) may be at the extreme north end of the lot. Zoning setback and yard re-

quirements, however, may prevent such a site from being used. The best solution for accommodating the owner of a solar system in such a circumstance may be to establish a special or conditional use permit procedure specifically for the siting of solar buildings. The zoning ordinance may provide that a building that depends on a solar energy system for a significant portion of its energy needs is not subject to the setback, yard, and other related requirements that apply to non-solar buildings if the solar system owner builds in conformance with whatever specific site plan is approved by the city or county as a part of the special or conditional use permit process. The solar owner may also be required to meet certain other special requirements to protect the interests of neighbors and the general public.

Land use regulations traditionally have required trees and shrubs to be planted as screens or buffers between different zoning uses, but the emphasis of zoning and subdivision regulations is on the regulation of structures and uses. Subsection (3) of proposed N.C.G.S. Sec. 160A-459.1 makes it clear that local governments can regulate the height, type and location of vegetation as part of a scheme to provide access to direct sunlight for solar energy systems. The regulation of trees and other vegetation may be the most difficult problem of providing solar access. The shade by trees may actually reduce the cooling load during the summer months, and many North Carolina communities take pride in their tree-lined streets and neighborhoods. Under subsection (3), local governments will have full authority to achieve the balance necessary to achieve both planning objectives.

Proposed N.C.G.S. 160A-459.1(4) would make it clear that a city or county may impose a reasonable solar access protection requirement upon a property owner as an ad hoc condition to any special use permit, conditional use permit, or special exception issued under a zoning ordinance. Some communities may not wish to establish a uniform system of solar access protection throughout their jurisdiction. However, they may wish to consider the solar access implications in reviewing the site plans that are presented as a part of a special use permit, conditional use permit, or special exception application. In some cases a local unit may wish to ensure that a developer does not block the solar access of a solar building on adjacent property. Where an apartment complex, industrial park, or condominium project is being developed, such authority may be used to ensure that the shading pattern in a development does not preclude the later retrofitting of the buildings for passive or active solar systems.

The new proposed legislation also suggests possibilities for communities that wish to encourage the use of solar energy systems and other energy conservation measures by offering property owners development incentives through zoning, subdivision control, and other similar ordinances. Rather than requiring good solar site design or mandating that developers incorporate solar energy systems in their buildings, a local unit of government may reward those developers who provide special features in their developments by choice. Proposed N.C.G.S. 160A-459.1(5) declares that cities and counties may provide "incentives to encourage developers to use solar energy and energy-efficient design in planning developments." Local governments have experimented with providing incentives such as density bonuses and design flexibility to developers that provide certain amenities desired by the community. This subsection recognizes that the provision of such incentives may be a valid means of achieving an increased use of solar energy in a community.

Local officials should note that the proposed legislation is designed to allow incentives to be established for energy-efficient developments that do not necessarily involve solar energy. Designers are now incorporating a number of energy-saving ideas in new development. Some are designed to reduce the heating and cooling needs of new buildings. Other new development features are intended to reduce the need for vehicular transportation, thereby reducing the consumption of fuels. These and other approaches to energy conservation may merit a developer more favorable treatment under a local development ordinance.

The review of subdivision plats may provide a special opportunity for a city or county to influence the orientation of lots and buildings to the sun. Even the most simple subdivision regulations will influence the location, length, and orientation of a subdivision's streets. Many simply require new streets to connect with existing streets to continue the prevailing pattern of development. Proposed N.C.G.S. 160A-459.1(6) allows cities and counties to review the patterns of lots and streets in new subdivisions with an eye to improving the solar accessibility of building sites. For example, ensuring that streets are designed with an east-west orientation where feasible may be helpful. Thus, an east-west street orientation will generally provide maximum southern exposure for buildings whose long axes run parallel to the street and minimize shadowing problems. Even allowing side lots lines to be established along a north-south axis may enable to property owner to have more flexibility in siting a building for southern exposure.

The subdivision review process provides an opportunity for considering the solar access implications of development on an area-wide basis. Most subdivision regulations require a subdivider to establish easements for streets, utilities, and drainage ways as a condition of plat approval. Proposed N.C.G.S. 160A-459.1(7) permits local governments to require the establishment of solar energy easements for the lots in a subdivision as a condition of this approval. This provision recognizes that providing solar access to direct sunlight for building sites in a subdivision may become as important as the provision of easements for other community services and facilities and that local governments have a role in assuring such access. However, this subsection contemplates that solar access easements may be required only for those lots for which the use of a solar energy system is feasible and that the subdivider has no obligation to ensure that building sites within his subdivision are not shaded by obstructions beyond the boundaries of the subdivision. In addition, a local unit that expects subdividers to establish solar energy easements must provide in its ordinance what classes of subdivisions are subject to these requirements. A local unit may choose to apply this requirement only to subdivisions of more than a certain number of lots, or only to subdivisions with lots of less than a certain size, or only to subdivisions where it is likely that solar buildings will predominate.

Finally, the unit must make explicit the terms of the easement that it expects the subdivider to establish. These safeguards are designed to ensure that communities use this authority judiciously and only after careful thought has been given to the nature of the solar access problem and the burdens these arrangements may place on developers.

The Authority of Cities and the State to Control Trees and Other Vegetation Within Street or Highway Right-of-Way for Solar Access Purposes

North Carolina municipalities have long been authorized to construct, maintain, and regulate streets, and these activities include the power to trim, remove, and regulate trees and other vegetation within the street right-of-way for various purposes. The right of municipalities to remove trees within or adjacent to streets ("street trees") has been upheld for the purpose of providing safe and convenient use of the roadway and preventing obstructions to travel (Tate v. Greensboro, 114 N.C. 392 [1894]), widening the traveled surface of a street (Munday v. Town of Newton, 167 N.C. 656 (1814); cf. Jeffress v. City of Greenville, 154 N.C. 493 [1911]), or

abating a public nuisance (Rosenthal v. Goldsboro, 149 N.C. 128 [1908]). This paramount power of a municipality over its public streets derives regardless of who holds the fee title to the streets (Moore v. Carolina Power and Light Co., 163 N.C. 300 [1913]). This right to trim or remove trees is limited, however, if it is exercised maliciously or wantonly. (Rosenthal v. Goldsboro, supra)

The codification of municipal regulatory power over public streets in North Carolina is found in N.C.G.S. 160A-296. Although N.C.G.S. 160A-296(a) makes no explicit mention of municipal power to regulate, trim, and remove street trees, such authority can also be read to derive from the broad grant of implied power to cities in that section.

Proposed new paragraph (9) of N.C.G.S. 160A-295(a) specifically allows cities to regulate the location and selection of new trees and other vegetation planted within public streets for the purpose of protecting the solar access opportunities of adjacent properties. With this authority, cities may ensure that new vegetation in the right-of-way will not significantly shade existing solar collectors or likely locations for future collectors. Lists of permissible plantings may be developed or modified so that information concerning the size, length, and intensity of shadows cast by different species is provided and can be considered in species selection and planting location decisions.

Proposed amendments to paragraph (9) of N.C.G.S. 136-18 provide similar authority to the North Carolina Department of Transportation with respect to thoroughfares on the State Highway System under its maintenance jurisdiction.

North Carolina law also recognizes that lot owners enjoy certain rights in the streets abutting their properties. These rights include the right of ingress and egress, lateral support, and the right to light and air (Crotts v. City of Winston-Salem, 170 N.C. 24 (1915)). Property owners also enjoy certain rights in existing shade trees located in the street right-of-way abutting their properties (Brown v. Electric Co., 138 N.C. 533 (1905); Moore v. Carolina Power and Light Co., supra; Tate v. Greensboro, supra). As the North Carolina Supreme Court stated in Tate v. Greensboro, supra, at 398,"...the abutting proprietor has rights as an individual in the street in his front as contra distinguished from his rights therein as a member of the corporation or one of the public. The trees standing in the street along the sidewalk are in a restricted sense his trees." The right of an abutter to existing street trees allows him to recover damages from

any trespasser who trims or destroys those trees without the proper authorization of the city (Brown v. Electric Co., supra) or to enjoin the damaging of the trees if about to be done unnecessarily or wantonly or oppressively (Moore v. Carolina Power and Light Co., supra). The right of the property owner in abutting street trees apparently stems from the presupposition that street trees and the ornamentation and shade they provide are an inducement to purchase the abutting lot and that the property owner has the right to enhance the value of his lot by improving and caring for these trees (see Moore v. Carolina Power and Light Co., supra at 304). Although one North Carolina case discusses the right of the property owner in abutting street trees as deriving from the fact that the fee title interest of the abutter's lot extended to the center line of the street (Brown v. Electric Co., supra at 537-541), more recent cases have recognized an abutter rights without reference to the nature of the fee interest in the street (Moore v. Carolina Power and Light Co., supra; Wheeler v. Norfolk-Carolina T&T Co., 172 N.C. 9 (1916). The abutting property owner's right to street trees apparently also includes a right to trim or remove such vegetation, a right shared with the municipality. Apparently abutting property owners enjoy the right to trim or remove street trees for any legitimate purpose (such as to provide solar access for a solar collector on the abutting lot), at least to the extent that the tree-trimming or removal can be done without jeopardizing the use of the right-of-way for its other intended purposes.

As a result, if a property owner's solar collector is shaded by street trees located in the right-of-way abutting his property, he apparently has a limited right to remove the obstruction or interference with his solar access under current law. However, if a property owner's solar collector is shaded by street trees located in an area of the street right-of-way that his lot does not abut, he has no such right. If no agreement exists or can be reached with the appropriate abutting neighbor, then only a unit of government may be in a position to compel the necessary trimming or removal of the trees.

The proposed amendments to N.C.G.S. 160A-296(a) give cities explicit authority to trim or remove existing vegetation within public street rights-of-way to provide or protect solar access. The primary purpose of this provision is to establish that the protection of solar access for properties adjacent to municipal streets is an authorized public purpose for which a municipality may subject its street right-of-way. This provision is designed to allow cities the full right to trim or remove trees for solar purposes in the acquisition of any new street right-of-way that cities may accept or purchase. In addition, this is

designed to give cities the power to trim or remove trees on existing city streets that obstruct solar access to the extent permitted by law. Since abutting property owners do enjoy certain rights in existing street trees, street tree ordinances should provide a mechanism for weighing the benefits of trimming or removing street trees to provide solar access, to remove the results of infection or infestation, or to avoid potential damage or obstruction to sidewalks or the pavement from falling limbs against the abutting property owner's interest in maintaining existing shade trees.

Proposed amendments to paragraph (9) of N.C.G.S. 136-18 provide similar authority to the Department of Transportation with respect to existing street trees located along thoroughfares under its maintenance jurisdiction.

APPENDIX F

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February 10, 1984

MEMORANDUM

TO: Members of the Utility Review Committee

FROM: Steven Rose, Committee Counsel

RE: Solar Access and Land Use Legislation Proposed in Report of the Governor's Task Force on Solar Law

Introduction

This memorandum is prepared with the understanding that the Administration, through the Energy Division of the Department of Commerce, together with the chairman of the Governor's Task Force on Solar Law and the chairman of its Solar Access and Land Use Planning Committee will make a presentation of the report and a detailed presentation of the proposed solar access and land use legislation. Counsel understands from the Administration that the solar access and land use portion of the proposed legislation is the only legislation which the Utility Review Committee is being asked to consider at this time.

Summary

Sections 1 and 2 of the proposed solar access and land use legislation codify the ability of private individuals to create easements or restrictive covenants which provide for access to sunlight for solar energy systems. Generally speaking, one can create a solar easement or restrictive covenant under present North Carolina law by applying existing real property, contract, and remedies law as contained in applicable cases and statutes, and by careful draftsmanship. Therefore, portions of this bill may be viewed as clarifying the application of the law to a new area. However, some new ground is broken, which is pointed out below.

Section 1 contains a statement of legislative policy and would not be codified. Section 2 is substantive, creating new Sections 113B-30 through 113B-38 of the General Statutes, to be known as the Solar Energy Easements Act. Proposed Section 113B-30 names the act.

Proposed Section 113B-31 provides definitions of a "solar energy system" and a "solar energy easement." Subsection (a) leaves some doubt as to the applicability of this legislation to passive solar designs.

Proposed Section 113B-32 declares restrictive covenants tending to restrict solar access to be against public policy and unenforceable. This is a change in North Carolina law. There is also some ambiguity in the application of this section when it is read against the corresponding commentary found on page 92 of the report. This is discussed more fully below.

Proposed Sections 113B-33 through 113B-37 contain the "nuts and bolts" of establishing a valid solar access easement or restrictive covenant. Generally they embody established principles of common and statutory law and prudent real property draftsmanship, and apply them to solar easements. However, Section 113B-36 specifically provides that existing solar access easements and restrictive covenants are not rendered unenforceable because they do not comply with the requirements of the proposed legislation.

Section 113B-38 provides the remedies for interference with a solar energy easement, using traditional ones adapted to this particular situation.

Section 3 of the proposed legislation amends Article 19, Chapter 160A, granting zoning, subdivision regulation, and general ordinance making authority to municipalities and counties for the purpose of protecting solar access and promoting the use of solar energy.

Sections 4 and 5 grant to municipalities and to the State's Department of Transportation, respectively, the authority to maintain vegetation in rights of way in such a manner as to protect solar access for adjoining lots.

A more complete discussion of the various parts of the proposed package of solar access and land use legislation follows this summary.

Discussion

The proposed legislation is divided into five sections. It begins on page 84 of the report, and is followed by a section of commentary.

Section 1 is a general policy statement supporting the use of solar energy systems, reflecting upon the unsettled state of the law regarding solar access rights and the detrimental effects this has on the use of solar systems, and declaring it to be the public policy of the state to encourage the use of solar energy and remove legal impediments which discourage its use, while at the same time providing for the protection of individual property rights. It states an intention to recognize the rights of individuals to enter into solar energy easements and restrictive covenants and to clarify the authority of local governments to protect solar access through their land use regulatory powers. This section will normally not be codified in the General Statutes.

Section 2 of the proposed legislation amends Chapter 113B of the North Carolina General Statutes (the North Carolina Energy Policy Act of 1975) by adding a third article, the Solar Energy Easements Act.

Proposed Section 113B-31 defines two terms, "solar energy system" and "solar energy easement." The language in those two definitions is, on its face, self-explanatory except in one regard. Subsection (a), defining "solar energy system," can be read so as not to include passive solar designs in the definition of solar energy systems. Passive solar designs

would include such things as orientation of the structure on the site to obtain the maximum benefits of the winter sun and the design of roof lines or other components of the house which will expose the maximum surface to the sun. In a discussion with Richard D. Ducker, a member of the faculty of the Institute of Government and chairman of the task force's Solar Access and Land Use Planning Committee, he told me that it was the intention of the task force to include passive solar design in that definition. In that case, it is my opinion that there needs to be clarification to avoid the possibility that the use of such phraseology as "device which collects and stores sunlight for use in the heating or cooling of a structure or building," could lead to a narrow interpretation of the statute, excluding certain solar design features. One way of dealing with this might be as follows (the underlined words are the suggested additions):

> (a) "Solar energy system" means any device, element, or combination of elements or devices, <u>whether active or passive in nature</u>, that rely upon direct sunlight as an energy source, including but not limited to any material, substance, or device which collects and stores sunlight for use in the heating or cooling of a structure or building, <u>which includes those that take advantage of passive or natural heating or cooling opportunities in the configuration of a lot or the siting or design of a structure</u>; the heating or pumping of water; industrial, commercial, agricultural, or horticultural processes; or the generation of electricity.

Section 113B-32 prohibits any deed restriction, covenant or other agreement concerning real property having "the effect of prohibiting reasonably sited and designed solar energy

systems...." It finds them to be against public policy and renders them void and unenforceable. While many portions of the proposed solar easement legislation are codifications of existing case law or references to existing statutes concerning the creation and protection of interests in land, which is what a solar energy easement is, this particular part contains a significant statement of policy in that it is a restriction on the rights of individuals to control the use of their property by private agreement.

Should the committee determine that it does wish to recommend this part of the proposal, some clarification of the language may be required. Section 113B-32 says that any restriction which "has the effect of prohibiting reasonably sited and designed solar energy systems from being installed" is unenforceable. It is apparently proposed not because there are many restrictive covenants that specifically prohibit or restrict the use of solar energy systems, but rather because there are other kinds of commonly found restrictive covenants which could have the effect of doing this. For example, it is not uncommon to find restrictive covenants for subdivisions which prohibit the cutting of vegetation within so many feet of a property line, the intent being to maintain privacy screens between adjoining lot owners. A reading of the proposed statute suggests that if such a restrictive covenant existed and a property owner wished to install a solar system which was reasonably sited and designed, then the restriction concerning protection of the bordering vegetation would be overriden

without regard to the fact that there might be other reasonable methods of siting and designing the solar energy system which would not require the cutting of that vegetation. Setback requirements, another common restrictive covenant, could also be affected. On the other hand, a reading of the task force's commentary on page 92 suggests that this was not the intention of the task force. The commentary reads in part:

> Aesthetic controls and other restrictions are not voided by this section unless such restrictions result in a prohibition of any solar energy system. Under this provision, a property owner desiring to install a solar energy system will be required to design and site such a system respecting the spirit and intent of the restrictions. (Emphasis added.)

The commentary suggests that the burden is on the person desiring to use the solar energy device to attempt to site and design it in such a way as to accommodate the aesthetic controls. Assuming that the commentary reflects the intent of the task force, then it is suggested that Section 113B-32 be changed so that it would read, in part:

> Any deed restriction, covenant or similar binding agreement in a document conveying an interest in real property that prohibits or has the effect of prohibiting any reasonably sited and designed solar energy system from being installed on the conveyed property is against public policy and is void and unenforceable.

Adding the word "any"and singularizing "solar energy systems," in counsel's opinion, would conform the legislative language to the stated intent in the commentary.

As proposed by the task force, Section 113B-32 specifically does not apply to conservation and preservation agreements subject to the provisions of the Conservation and

Historic Preservation Agreement Act, Article 4 of Chapter 121 of the North Carolina General Statutes.

Section 113B-33 is simply an acknowledgement that a solar easement is an interest in real property, which it would be by application of common law, and must be created in writing as is the requirement for virtually all interests in real estate. This section also states that it is not the intention of the legislature to change the existing common law concerning implied or prescriptive easements. (The common law in North Carolina, and indeed in the majority of the jurisdictions of the United States, is that easements for light and air cannot be created by prescription or implication.) Section 113B-34 makes it clear that solar energy easements are not personal contracts affecting only the immediate parties, but that the benefits and burdens follow the ownership of the land involved. This would be the case with most properly drawn easements. This section also states that they are perpetual easements unless the easement says otherwise, a court finds that conditions have changed materially or the easement has been abandoned, or all the parties concerned agree to terminate or change the easement.

Section 113B-35 concerns the contents of a solar energy easement, requiring that it include a description of the real property benefited and burdened by the easement, and describe the extent of the easement being granted. Both of these requirements are basic to the granting of any easement or other interest in real property and the proposed legislation does not

attempt to prescribe the specific language that must be used. Subdivision (2) of Subsection (a) does provide four methods by which the extent of the solar easement may be described, but they are not exclusive.

Subsection (b) describes other provisions which may be included in such an easement. A review of them will show they are terms and conditions which parties commonly consider and often provide for in other kinds of easements.

Section 113B-36 is merely a statement that this legislation shall not be construed to make unenforceable any other kind of solar energy easement which parties may have created prior to its enactment. It should be understood by the committee that, by applying the legal principles generally applicable to creating easement interests in real property, a valid solar energy easement could be created under existing North Carolina law, provided that it did not conflict with any other enforceable easement or restriction on the property in question.

Section 113B-37 provides that solar energy easements may be recorded and are subject to G.S. 47-18 (requiring interests in real property to be in writing) and G.S. 47-27 (governing the recording of easements).

Section 113B-38 sets out the remedies which the court may apply if the instrument creating the easement does not specify "any appropriate and applicable remedies." The court is not restricted to those set out in the statute and it may choose more than one of them. Subsection (a) specifically grants injunctive authority to the court to remove an interference

with the solar energy easement. Subsection (b) describes measures of actual damages adapted from the general law of damages to the specifics of the loss of the use of a solar energy system. There is a typographical error in the second line of Subdivision (b). The word "amortized" should be "unamortized."

Section 3 of the proposed legislation adds Part 9 to Article 19 of Chapter 160A. Article 19 concerns planning and regulation of development by municipalities. Part 9 would allow counties and municipalities to exercise such authority to promote energy conservation and the use of solar energy and to protect access to sunlight. Worthy of note is that the proposed legislation grants these powers to counties through amendment of Chapter 160A, Article 19. County authority in this area is generally set out and described in Chapter 153A. Article 18 of that chapter specifically concerns county planning and regulation of development.

Many of the powers granted by the proposed legislation to cities and counties to promote solar energy and protect solar access in land use regulations are similar to those which cities and counties can already exercise, but for different reasons. There is nothing unusual in municipal ordinances regulating the "height, location (and) setback" of structures, and indeed such powers and others are contained in Section 153A-340 (counties) and Section 160A-381 (municipalities) "for the purpose of promoting health, safety, morals, or the general welfare" of the applicable community. The proposed statute

would remove any uncertainty concerning whether or not the protection of solar access and the promotion of solar energy falls within the ambit of promoting the health, safety, morals and general welfare of the community. (Some communities have already taken the position that it does.) It should be pointed out, however, that the powers are granted by the proposed legislation in a general way and are not restricted to new developments or new subdivisions. Therefore, there may be instances where existing uses might be controlled by ordinances enacted pursuant to the authority contained in the proposed legislation. An example of this would be Subsection (3) of Section 160A-459.1 which permits the municipality to regulate the "height, type and location of vegetation."

Section 160A-459.2 merely clarifies that the preceding section is granting these powers without dictating to the municipality or county where in the scheme of regulation it must include these provisions. That is, they can be included under the ordinances created pursuant to city or county authority to regulate development, or pursuant to the general ordinance making powers, the "general police power" of the governmental entity. This section further adopts the definition of "solar energy system" and "solar energy easement" specified in Section 2 of the proposed legislation, Sections 113B-31(a) and (b).

Section 4 of the proposed legislation specifically grants the power to a municipality to control the plantings and vegetation in its rights of way so as to protect the access of

property owners to direct sunlight, by adding a paragraph to the section of the General Statutes which already deals with a city's authority over its public streets, Section 160A-296. Present North Carolina case law presents a somewhat confusing assortment of authorities which recognize both the right of a municipality to control completely its public rights of way for public purposes, and that abutting property owners have an interest in the vegetation on the public right of way even though it is not on their property, to the extent that it does not interfere with the city's right to exercise control consistent with a "public purpose." The question could arise as to whether or not the protection for solar access to one piece of property is a sufficient public purpose to override the right of the abutting property owner to the shade and other protection of street vegetation. This legislation attempts to meet that question. This provision does not lay to rest the question of whether or not such control might constitute a "taking" of abutting property in some instances, possibly requiring payment of compensation to the property owner. The legislature could not adopt enforceable legislation which would prohibit the payment of compensation if a court determined it was constitutionally required under the facts of a particular case. But, this is no different a situation than that created by Section 160A-296(a)(3), which permits cities to acquire land for streets or alleys by eminent domain without a specific statement that such an acquisition results in a requirement that the city pay damages for the taking, which it must do.

Section 5 grants a similar power to control vegetation in rights of way to the Department of Transportation as would be granted to municipalities by Section 4. The same comments are applicable.

A SUMMARY COMPILATION OF

THE SOLAR ACCESS PROTECTION LEGISLATION

ADOPTED IN THE 50 STATES

March, 1984

compiled by

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SOLAR ACCESS LEGISLATION

These pages provide a brief, simple summary of the legislation in various states that explicitly governs the protection of solar access. The chart on page 3 provides statistics concerning those states with legislative provisions that reflect the most common approaches to solar access protection. For example, the chart indicates that 31 of the 50 states explicitly recognize and provide for the creation, contents, and recordation of solar easements. Sixteen (16) states explicitly provide that certain local units of government (particularly cities and counties) are authorized to use their zoning authority to protect solar access and twelve (12) states explicitly allow land subdivision ordinances to be used for this purpose. The statistics also indicate the prevalence of other less common approaches to solar access protection. The charts on pages 4 & 5 offer a state-by-state breakdown of the various approaches. The compilation is based on legislation that was adopted by the various states no later than August 1, 1983. The legislation in some states is peculiar enough to warrant some further explanation. Some of the entries on the charts are marked with footnotes that are designed to indicate what some of the peculiarities are. These notes follow on page 6.

Five states have adopted legislation that provides for the establishment of some type of permanent "solar right" by means other than by a privately-negotiated easement. In several states these rights are established by statewide fiat (California, New Mexico, and Wyoming). In other states these permanent rights are established by agencies of local government through an administrative determination (Wisconsin and Iowa). Summaries of the special legislation that has been adopted in Wisconsin, California, and New Mexico are found in the appendix.

The seventeen (17) states with no explicit solar access legislation are listed below:

Alabama	Massachusetts	Pennsylvania
Alaska	Michigan	South Carolina
Arkansas	Mississippi	South Dakota
Delaware	North Carolina	Texas
Hawaii	New Hampshire	West Virginia
Louisiana	Oklahoma	

LEGISLATIVE PROVISIONS	THE NUMBER OF STATES WITH LEGISLATION INCLUDING THESE PROVISIONS	SOUTHEASTERN STATES* WITH LEGISLATION INCLUDI THESE PROVISIONS
Provides for creation, contents, and recordation of solar easement	31	VA., MD., KY., TN., GA., FLA.
Provides for establishment of permanent "solar right" by some means other than privately-negotiated easement	5	
Provides that certain restrictive covenants which unreasonably restrict location of solar systems are void	5	FLA., MD.
Provides that zoning authority may be used to protect solar access	16	TN.
Provides that land subdivision regulatory authority may be used to protect solar access	12	
Provides that comprehensive plan for local unit must or may include a plan for protecting solar access	10	
Provides for variances or special exceptions to be granted under zoning to accomodate location of solar systems	5	
Provides that zoning regulations that unreasonably restrict location of solar systems are void	5	FLA.

* N.C., S.C., VA., MD., W.VA.

STATES WITH LEGISLATION INCLUDING THESE PROVISIONS*	Arizona	California	Colorado	Connecticut	Florida	Georgia	Idaho	Illinois	Indiana	Iowa	Kansas	Kentucky	Maine	Maryland	Minnesota	Missouri	Montana	Nebraska
Provides for creation, contents, and recordation of solar easement		O	O	O	O	O	O	O	O	O	O	O	O	O	O	O	O	O
Provides for establishment of permanent "solar right" by some means other than privately-negotiated easement		O[a]								O[b]								
Provides that certain restrictive covenants that unreasonably restrict location of solar systems are void		O			O[c]					O				O[d]				
Provides that zoning authority may be used to protect solar access	O	O	O[e]	O				O					O		O			O
Provides that land subdivision regulatory authority may be used to protect solar access		O[f]	O	O[g]	O					O			O		O			O
Provides that comprehensive plan for local unit must or may include plan for portecting solar access	O		O	O				O					O					O
Provides for variances or special exceptions to be granted under zoning to accommodate location of solar systems			O	O											O			O
Provides that zoning regulations that unreasonably restrict location of solar systems are void		O			O[h]				O									

*Footnotes appear on pp. 6-9

STATES WITH LEGISLATION INCLUDING THESE PROVISIONS	Nevada	New Jersey	New Mexico	New York	North Dakota	Ohio	Oregon	Rhode Island	Tennessee	Utah	Vermont	Virginia	Washington	Wisconsin	Wyoming
Provides for creation, contents, and recordation of solar easement	O	O	O	O	O	O	O	O	O	O		O	O	O	O
Provides for establishment of permanent "solar right" by some means other than privately-negotiated easement			O[i]											O[j]	O
Provides that certain restrictive covenants that unreasonably restrict location of solar systems are void							O								
Provides that zoning authority may be used to protect solar access			O	O			O[k]		O		O		O	O	O
Provides that land subdivision regulatory authority may be used to protect solar access							O[k]				O			O	O
Provides that comprehensive plan for local unit must or may include plan for protecting solar access							O				O		O	O	
Provides for variances or special exceptions to be granted under zoning to accommodate location of solar systems											O[l]				
Provides that zoning regulations that unreasonably restrict location of solar systems are void											O			O	

a. See summary of California Solar Shade Tree Act in appendix.

b. IOWA CODE ANN. § 564A.1-564.7 (West Supp. 1983-84). Owner of solar system may apply to a city or county "solar access regulatory board" or, if none designated by city or county, to district court acting as the board. Board must offer to grant easement if need for solar collector exists; if neighbor's airspace not obstructed by anything that would shade collector other than vegetation; if the proposed collector location minimizes the impact of the easement on development of neighboring property; and if applicant tried and failed to negotiate voluntary easement. Board must determine amount of compensation to be paid for easement and applicant may decline the offer of easement by refusing to pay.

c. FLA. STAT. § 163.04 (Supp. 1981). "No plat or subdivision plan shall be approved or renewed, nor shall the dedication of any street or other ground be accepted, if the deed restrictions, covenants, or similar bending agreements running with the land for the lots or parcels covered by the plat or subdivision 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 covered by the plat or subdivision."

d. MD. REAL PROP. CODE ANN. § 2-119 (1981). Statute provides that restrictive covenant regarding land use, which becomes effective after July 1, 1980, may not impose or act to impose unreasonable limitations on the installation of solar collector panels on the roof or exterior walls of improvements. Provision does not apply to covenants on certain "historic properties."

e. COLO. REV. STAT. § 31-23-301 (Supp. 1982). Zoning may be used for "the promotion of solar energy utilization." Also, regulations and restrictions governing "the height and location of trees and other vegetation

shall not apply to existing . . . . . trees or vegetation except for new growth on such vegetation."

f. CAL. GOV'T CODE §§ 664731. & 66475.3 (West 1983). Section 66475.3 provides that for divisions of land for which a tentative (preliminary) plat is required, cities and counties may require as condition of plat approval "the dedication of easements for the purpose of assuring that each parcel or unit in the subdivision for which approval is sought shall have the right to receive sunlight across adjacent parcels or units in the subdivision for which approval is sought for any solar energy system, provided that such ordinance contains all of the following:

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

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

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

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

g. CONN. GEN. STAT. ANN. § 8-25(b) (West Supp. 1983-84). Municipal subdivision regulations shall require applicant for subdivision plan approval to demonstrate that "he has considered, in developing the plan, using passive solar energy techniques which would not significantly increase the cost of the housing to the buyer, after tax credits, subsidies, and exemptions." These techniques include "site design techniques which maximize solar heat gain, minimize heat loss, and provide for natural ventilation during the cooling

season. The site design techniques shall include, but not be limited to: (1) house orientation; (2) street and lot layout; (3) vegetation; (4) natural and man-made topographical features; and (5) protection of solar access within the development."

h. FLA. STAT. § 163.04 (Supp. 1981). "(T)he adoption of an ordinance by a governing body . . . . . 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."

i. See summary of New Mexico Solar Rights Act in appendix.

j. See summary of Wisconsin's solar access permit legislation in appendix.

k. OR REV. STAT. §§ 227.190, 215.044 (1983). Cities and counties may adopt "solar access ordinances." Municipal ordinances "shall provide and protect to the extent feasible solar access to the south face of buildings during solar heating hours, taking into account latitude, topography, microclimate, existing development, existing vegetation, and planned uses and densities. The city council shall consider for inclusion in any solar access ordinance, but not be limited to, standards for:

(a) The orientation of new streets, lots, and parcels;

(b) The placement, height, bulk, and orientation of new buildings;

(c) The type and placement of new trees on public street rights of way and on other public property; and

(d) Planned uses and densities to conserve energy, facilitate the use of solar energy, or both."

Sec. 227.190(1) (1983).

l. VT. STAT. ANN. tit. 24, §§ 4407(2), 4407(5), 4409(e), & 4468(a) (Supp. 1983). Section 4407(2) provides that municipal zoning regulations must include standards for the granting of a conditional use permit

requiring that the proposed use shall not "adversely affect . . . . . (u)tilization of renewable energy resources." Section 4407(5) provides that municipal planning commissions may grant site plan approvals subject to conditions "protecting the utilization of renewable energy resources." Section 4409(e) provides that unless a zoning regulation specifically provides to the contrary, limitations on permissible heights of structures shall not apply to "rooftop solar collectors less than 10 feet high which are mounted on complying structures." Section 4468(a) provides that if a variance is requested for a structure that is not primarily a "renewable energy resource structure," the variance may be granted only if the variance will not "reduce access to renewable energy resources." If the variance request is for a structure that <u>is</u> primarily a "renewable energy resource structure," then Section 4468(b) provides that the variance may be granted only if the board of adjustment finds that:

"(1) It is unusually difficult or unduly expensive for the appellant to build a suitable renewable energy resource structure in conformance with the regulations; and

(2) That the hardship was not created by the appellant; and

(3) That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, substantially or permanently impair the appropriate use or development of adjacent property, reduce access to renewable energy resources, nor be detrimental to the public welfare; and

(4) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least deviation possible from the zoning regulation and from the plan."

APPENDIX

SUMMARY OF LEGISLATION IN THREE STATES

Wisconsin Two special approaches. First, local units authorized to grant solar access permit pursuant to statutory procedure. Procedure provides for notice to affected property owners, an opportunity for a hearing before a local board, and the granting of permit if certain standards are met. Permit allows owner of solar collector to sue for damages if sunlight impermissibly blocked; also entitled to injunction to require trimming of any vegetation creating impermissible interference. Impermissible interference excludes blockage by an existing structure or vegetation planted before notice of permit application given, unless local ordinance defines impermissible interference to include such vegetation. Permit conditions may include restrictions on location of collector and may require compensation of parties affected by granting of permit. Notice of permit grant must be recorded in chain of title and rights under permit run with land. WIS. STAT. ANN. § 66.031 to 66.032 (West Supp. 1983).

Other legislation gives solar system owners additional, independent protection by allowing them to rely on the zoning regulations, if any, affecting neighboring properties when solar collector installed. Owner of solar collector has right to sue for damages resulting from solar access interference if 1) interference caused by a structure built after solar collector installed and 2) structure fails to comply with any zoning height, setback, and yard restrictions in effect at

time of installation. (This holds even though zoning restrictions may have been changed by the time the interference occurs.) Provision applies statewide; no local ordinance adoption necessary. No injunctive remedies provided; provisions do not apply to solar interference caused by vegetation. WIS. STAT. ANN. § 700.40 (West Supp. 1983).

California California Solar Shade Tree Act prohibits screening of solar collectors by vegetation under certain circumstances. Provides that after installation of a solar collector, no adjacent property owner may allow vegetation to be planted or to grow so as to cast a shadow over greater than 10% of the absorption area during prime sun hours. Exempted are trees and shrubs which cast a shadow on the collector when it was installed or that cast such a shadow sometime within the first year after the collector installed. To enjoy this protection location of collector must meet certain statutory requirements. Apparently applies to both active and passive systems. Impermissible shading amounts to a public nuisance. Upon receiving verified complaint from affected solar owner alleging violation, prosecuting attorney obliged to send "abatement notice" ordering compliance within 30 days. Violation of law is criminal misdemeanor punishable by fines of up to $500 per day. Legislation applies statewide, but a local unit may adopt an ordinance exempting itself from act's coverage. CAL. PUB. RES. CODE §§ 25980-25986 (West Supp. 1983).

New Mexico Solar Rights Act grants a "solar right" to anyone who puts a solar collector to "beneficial use." Based on Western water law doctrine of "prior appropriation," solar user apparently establishes a right only to the sunlight which is not blocked at the time the collector is first beneficially used. Any building or structures existing at time "solar right" vests have a "prior right" to the space they occupy. After "solar right" vests, no new structures (vegetation is not mentioned) may impair collector's access at any time collector being beneficially used. "Solar right" must be recorded and is transferable, apparently only to those holding property interests that are subject to the "solar right." Act apparently allows cities and counties to require compliance with local zoning and other ordinances before "solar right" established. N.M. STAT. ANN. §§ 4703-1 to -5 (1978).

APPENDIX H

North Carolina General Assembly

Utility Review Committee

State Legislative Building

Raleigh 27611

TELEPHONE (919) 733-3180
ROOM 1414

May 22, 1984

MEMORANDUM

TO: Members of the Utility Review Committee

FROM: Steven Rose, Committee Counsel

RE: Proposed Legislation on Solar Easements and Access; Response to Survey of Law Schools, North Carolina Bar Association and North Carolina Land Title Association

As requested by the committee, I solicited comments on the proposed solar easement and solar access legislation from real property professors at each of the state's five law schools, the real estate section of the North Carolina Bar Association, and the North Carolina Land Title Association. Each was sent a copy of the report of the Governor's Task Force on Solar Law, together with a copy of the proposed legislation as revised after the Utility Review Committee made its suggestions.

I requested comments from each organization concerning the impact of the proposed legislation on real estate transactions. I also asked for any suggestions they might have for achieving the result of preserving solar access.

I have received responses from the following:

Professor Patrick K. Hetrick
Campbell University School of Law

Professor Joel Eichengrun
Wake Forest University School of Law

N. Bruce Boney, Jr.
General Counsel, N. C. Land Title Association

John H. Noblitt, Title Operations Manager
Chicago Title Insurance Company

Alfred G. Adams, Chairman
Real Property Section, North Carolina Bar Association

I have received no response from the University of North Carolina at Chapel Hill School of Law, Duke University School of Law, or North Carolina Central University School of Law. (I did speak to Dean Broun at UNC-CH, and he told me that Professor Caroline Bruckel, who was a member of the Governor's Task Force, would have responded had she not been seriously ill.) Of the responses I did receive, all were in writing except Professor Eichengrun's. He contacted me by telephone. Please note that Mr. Adams' response is not an official response of the Real Property Section of the North Carolina Bar Association because their next meeting was not scheduled until June 1. Mr. Noblitt's comments are at the request of Mr. Boney.

GENERAL COMMENTS

All of the written responses are attached to this memo. You will note that they were generally favorable, the feeling being that there would be no adverse impact on real estate transactions and that the legislation would make things clearer for attorneys and developers. All of this, of course, is subject to the specific comments set out below. The only response I would not characterize as generally favorable would be Mr. Boney's. His concerns are outlined in his letter.

SPECIFIC COMMENTS

Section 113B-32. Characterization of solar easements.

Noblitt: Language should be changed to <u>prohibit</u> implied or prescriptive easements.

Boney: Same suggestion.

Section 113B-33(a). Appurtenant; privity of estate.

Hetrick: Delete second sentence regarding enforcement of the easement since traditional law is clear. He feels the meaning of this sentence is unclear and it could create problems, possibly suggesting that strangers to the transaction could enforce the easement.

Section 113B-33(b). Perpetual easement; termination.

Hetrick: Suggests omission of this subsection because it raises more problems that it solves. It mentions some traditional methods of termination, but omits others. He suggests that solar energy easements should be treated like traditional easements insofar as termination is concerned.

Eichengrun: He had similar concerns. Suggests this subsection could be confusing.

Adams: Suggests additional of language to provide that if easement is never used, or has fallen into disuse for some period of time, a presumption of termination of the easement would arise.

Section 113B-34(a). Required contents of easement.

Hetrick: Feels this section is helpful because it gives guidance in a nontraditional area.

Noblitt: Feels section is well thought out, but needs to specify who will be licensed or qualified to calculate the items in subdivision (2) (description of the extent of the easement).

Section 113B-34(b). Permissive items in easement.

Hetrick: Suggests that this subsection be deleted. All of these items and many more, could be put into easement by agreement, but he does not see the need for setting them out in the statutes. He feels this adds unnecessary verbiage to the statutes.

Section 113B-36. Recording of easements.

Hetrick: Recording should be mandatory.

Adams: Same comment.

Section 113B-37. Remedies for interference with solar easement.

Eichengrun: He questions why this section is in here if you are not changing the existing common law. He also raises the question of whether the measure of damages set out in subdivision (2) of subsection (b) is for the life of the first system only or whether it includes replacements.

Regarding Sections 3 and 4 of the bill, which concern the regulatory power of municipal and county governments, the comments were as follows:

Hetrick: Sections are well drafted and should have no adverse impact on real property law or practice.

Adams: He expresses concern about reconciling the conflicting interests of green space and vegetation with the need for solar access. He is also concerned about government control over what should be decisions left to private enterprise. He expresses a further concern that a balance be maintained between the need for solar access and the fact that there is a need in some areas for buildings to be built up, rather than out.

SR:sc

CAMPBELL UNIVERSITY SCHOOL OF LAW
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TELEPHONE 919/893-4111

April 27, 1984

Steven Rose, Esq.
North Carolina General Assembly
Utility Review Committee
State Legislative Building
Room 1414
Raleigh, North Carolina 27611

Re: Proposed Legislation on Solar Easements and Access

Dear Mr. Rose:

Dean Davis has referred your letter of April 24, 1984 to me for comment.

To directly answer your question concerning the impact of the solar legislation proposed "upon real estate transactions," there is no adverse impact. The legislation would not, in my opinion, change the way that real property attorneys handle closings. It would make some things clearer for a land developer interested in solar easements.

In terms of a critique of the proposed statute, all of my comments are limited to the solar easements area. I call your attention to the following:

1. The second sentence of § 113B-33(a) is troublesome in terms of its sweep. Who can enforce the easement? What does the second sentence mean? Traditional law is clear on who can enforce the easement and should be followed. The second sentence would appear to allow complete strangers to enforce, although § 113B-33(b)(3) parrots traditional law regarding termination. I would delete the second sentence unless someone can point to a concrete instance where the language would serve a beneficial purpose.

2. Section 113B-33 might be troublesome for a number of reasons. Traditional law on the termination of easements is quite clear. This statute mentions some of the traditional methods of termination but omits others. Would

the solar easement terminate, for example, under the cessation of purpose rule? Or by merger of the dominant and servient tracts? Or by adverse use of the airspace by the owner of the servient estate? Would the easement terminate if it was not recorded and a bona fide purchaser acquired the servient estate? (Section 113-36 seems to so indicate.) Is a solar easement subject to the Marketable Title Act, Chapter 47B of the General Statutes? My suggestion would be to treat the solar easement as a traditional property law easement for purposes of termination; i.e., that it can terminate the same way that any easement can.

3. Section 113B-34(a) is helpful and gives guidance to real property practitioners in an area where the traditional law does not.

4. Section 113B-34(b) seems unnecessary insofar as real property law is concerned. Certainly, the items listed and a multitude of unlisted items could be included in such an easement. I would delete (b) as adding unnecessary verbiage to the General Statutes.

5. Section 113B-36 should be clarified to emphasize that these easements are subject to the recording act. I would rewrite this section to simply read: "Solar energy easements shall be subject to the provisions of G.S. 47-18 and G.S. 47-27." In other words, these easements must be recorded, just like any other easement.

The amendments to Chapters 160A and 153A are well drafted and will not adversely impact upon real property law or practice.

Thank you for providing me with this opportunity for input.

Sincerely,

Patrick K. Hetrick

Patrick K. Hetrick
Professor of Law

PKH/sas
cc: Dean F. Leary Davis

Lawyers Title of North Carolina, Inc.

1730 CHARLOTTE PLAZA / CHARLOTTE, N.C. 28244 / TELEPHONE 704-377-0093

N. BRUCE BONEY, JR.
PRESIDENT

CORNELIA McTROTT
CHAIRMAN OF THE BOARD

May 16, 1984

Mr. Steven Rose
Committee Counsel
Utility Review Committee
North Carolina General Assembly
State Legislative Building
Raleigh, NC 27611

Dear Mr. Rose:

Thank you very much for sending me copies of the proposed legislation concerning solar energy. I have distributed this to the executive committee of the North Carolina Land Title Association, and to various other title offices in the Charlotte area. I hope several of these will respond to your committee.

I live on the ninth floor of the Carlton Condominium in Charlotte. This is a fourteen story building and does cast a rather large shadow. The very presence of the building in Myers Park, is offensive to some of our neighbors, and I am sure if some type of easement were created by your statute, that could be utilized by people to prohibit or obstruct the creation of a high rise building in their neighborhood, it would be used, thus, I personally and as a title man, urge caution.

Be it remembered, that America has become great by the exercise of free enterprise, and too much restraint is not necessarily good. By the common law, the fee owner of the surface rights goes up to the heavens, with the right now that man can fly, to have certain air rights for navigation and other things that have come along in recent years. I would think solar energy would be in the same catagory, and that some control maybe desirable. However, I must again point out that if a high rise building is built on say, two lots, to provide homes for fifty couples, as against two couples, the use of land for maximum density in large cities is to be considered also.

I would specifically hope that the statute is written in such language as to not create any implied or prescriptive easements, but to require some type of reasonable recorded easement, if in fact that is determined to be desirable.

Yours truly,

N. B. Boney, Jr.
President

NBBJr/vg

CHICAGO TITLE INSURANCE COMPANY

1530 CHARLOTTE PLAZA, 201 SOUTH COLLEGE STREET, CHARLOTTE, NC 28244 (704) 375-0700

May 14, 1984

Mr. Steven Rose
Committee Counsel
Utility Review Committee
North Carolina General Assembly
State Legislative Building
Raleigh, NC 27611

Dear Mr. Rose:

At the request of Bruce Boney, General Counsel of the North Carolina Land Title Association, I am enumerating my comments on the proposed legislation for solar access and land use control.

Speaking generally, the purposes of the legislation are laudable and such legislation will be of increasing importance to North Carolina in the future. As a representative of the title insurance industry and as a member of the North Carolina Land Title Association, I wish to express my appreciation to your committee for giving me the opportunity to give my input into the legislative process.

Obviously, any such legislation will necessarily create further encumbrances on land titles, and, in so doing, will create an entire new area for potential title defects. It is in the best interest of the general public as well as the title industry to see that this legislation is drafted in a way which will keep such potential defects at a minimum. With this in mind, I offer two very specific suggestions which I hope you will consider.

1. Sec. 113B-32 I would urge you to beef up the second sentence. ("Nothing in this Article shall be deemed to create or authorize the creation of an implied easement or a prescriptive easement.") Obviously, the concept of an implied or prescriptive solar easement is an undesirable one. Such easements would be impossible for attorneys, surveyors or title companies to discover in a search of the public records or even in an onsite inspection, since none of these people would be qualified to identify, measure or otherwise determine solar easements. The wording of the second sentence of Sec. 113B-32 implies that such easements are not desired, but I would suggest that it be reworded to affirmatively state that implied and prescriptive solar easements are specifically prohibited by this Article. This would eliminate potential misunderstandings and

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Mr. Steven Rose
Counsel, Utility Review Committee
North Carolina General Assembly
State Legislative Building
Raleigh, NC 27611

Dear Mr. Rose:

Pursuant to your letter of April 20, 1984, and follow-up letter of May 1, 1984, I have undertaken an "unofficial" review of the proposed solar access easement and land use regluation legislation before your committee. Unfortunately my comments must remain unofficial because the Real Property Section Council has not had an opportunity to review the legislation and discuss its contents. Therefore I am not requesting a personal appearance nor do I intend for this communication to be considered the written response of the Section. I do believe that my comments at least may be beneficial to the committee as it continues its review of the proposed legislation on May 22, 1984.

I can assure you that I shall deliver copies of the proposed legislation to all Section Council members and likewise solicit the assistance of the new chairman of the Real Property Section, R. Woody Harrison, Jr. Woody takes office as the new chairman after the annual meeting of the North Carolina Bar Association in late June. I would presume that any further correspondence that you have concerning the proposed legislation should be directed to Woody. In the meantime the input which you desire will receive attention at our regularly scheduled June 1, 1984 meeting of the Real Property Section Council.

My initial response to the proposed legislation is that the legislation appears to be grounded upon a sound foundation with evident public policy and practical benefits. However, I would hope that the legislation would provide for automatic termination if the easement falls into disuse. Under Section 113B-34 (b)(1) the easement may include terms or conditions under which the solar energy easement may be terminated or revised. The prevention of an easement from becoming a perpetual encumbrance when in fact the easement has never been used or if used, has fallen into disuse, would be the proper subject matter for automatic termination. In fact, some time limitation could be inserted to raise a presumption of termination if the easement is not used for a certain period of time.

litigation in the future which might claim implied or prescriptive solar easements under some other Article of the General Statutes or under common law principles.

2. Sec. 113B-34 The required contents of written solar energy easements are well thought out, but somewhere in this Article you need to specify who will be licensed or qualified to calculate such things as prohibited shadow patterns and the hours of day and times of year a specific area will be shaded. These calculations would appear to be quite sophisticated, and presumably would require technical expertise not currently widely held in this state. It is important, therefore, to specify who is qualified to make such calculations in the legislation.

These are my two specific suggestions. I hope you will consider them at your next meeting. Again, thank you for the opportunity to offer these suggestions.

Sincerely,

CHICAGO TITLE INSURANCE COMPANY

John H. Noblitt

John H. Noblitt
Title Operations Manager

JHN:ij

Section 113B-36 dealing with public recording of the easement indicates that the easement may be recorded. Although the sentence goes on to say that it is subject to the provisions of G. S. 47-18 and G. S. 47-27, those statutes are intended to protect lien creditors and purchasers for value. I would think that due to the sophisticated nature of these easements that the easements should not be valid unless recorded. Therefore I would suggest the deletion of the word "may" and the insertion of the word "must."

I would believe that the portion of the legislation which causes me the greatest "knee-jerk" reaction is that part dealing with the authority for bodies politic to adopt land use regulations protecting solar energy systems. Although I did a law review article on proposals for statewide land planning, it may be that after living many years in the mountains of North Carolina some of the mountain prejudice toward land use regulation has rubbed off on me. Nevertheless, I believe that the underlying concept of solar access is proper. I also would hope that conflicting interests such as the necessity for green space and vegetation could be reconciled with that of providing direct access to sunlight.

Likewise I fear the concept of allowing a governmental body to require as a condition to approving a subdivision plat that solar energy easements be granted. I believe that everyone would agree that underground utility systems are beneficial but I have never seen any legislation requiring that a subdivision plat before approval must show that the utilities are underground. In other words, I fear that this portion of the legislation may be an example of further governmental control over what has historically been a decision left to private enterprise.

The rational controlling factors certainly need to be public benefit and public good as weighed against the rights of individuals. I do endorse the easement concept but I would want to look very hard at the public regulation section in order to be sure that the proper balance is struck. I am sure that some compromise can be reached between the necessity to preserve access to direct sunlight and also the idea that usable land is becoming more scarce and buildings are going up rather than spreading out.

Finally I wish to express my appreciation to you and to the Utility Review Committee in thinking to ask for a response and critique from the Real Property Section of the North Carolina Bar Association. Our Section does exceed one thousand members and I believe that we have the ability to help.

We could assist the Committee not only in the drafting arena, but also in shedding light upon the practical implications of any legislation with an impact upon real property.

Very truly yours,

Alfred G. Adams

Alfred G. Adams

AGA:blc

cc: Mr. Charles L. Fulton
Mr. E. Osborne Ayscue, Jr.
Mr. Allan B. Head
Mr. Donald C. Prentiss
Mrs. Emmett B. Haywood
Mr. R. Woody Harrison, Jr.