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Constitutionality of Section 714 of the California Solar Rights Act

Joel S. Goldman*

I

INTRODUCTION

The United States faces an energy shortage that President Carter referred to as "unprecedented" and "the moral equivalent of war." Solar energy offers at least a partial solution to the energy supply problem. Clean, safe, and inexhaustible, solar energy has been described by one commentator as the "one long-term energy resource" available to the world. Extensive solar development could decrease

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2. Id. at 561.
4. The California Legislature found that "[t]he use of solar energy systems will . . . decrease the air and water pollution which results from the use of conventional energy sources." California Solar Rights Act of 1978, ch. 1154, § 2, 1978 Cal. Stats. 392. See also ISSUES AND PROBLEMS, supra note 3, at 6; Miller, supra note 3, at 50039.
5. ISSUES AND PROBLEMS, supra note 3, at 8. Safety is a critical concern in light of the recent accident at the Three Mile Island nuclear power plant in Harrisburg, Pennsylvania and the general apprehension many people now feel about nuclear power.
6. Other sources, such as fossil fuels, are rapidly being depleted. See Palo Alto Hearings, supra note 3, at 8; ISSUES AND PROBLEMS, supra note 3, at 7; Miller, supra note 3, at 50039. Solar development would help conserve these fossil fuels. According to one expert, "If two-thirds of the 2.6 million new units projected over the next ten years [in California] used solar water heating, this would save about 14 billion cubic feet of natural gas and 1.2 billion kilowatt hours per year of electricity." Palo Alto Hearings, supra note 3, at 49 (statement of A. Hirshberg).
the United States' dependence on foreign energy sources and improve its balance of trade. Expansion of the solar collector and component industries would also provide domestic economic benefits.\(^8\)

Despite popular belief to the contrary,\(^9\) solar energy systems are now both economically and technologically feasible.\(^10\) With heating oil and gas prices rising rapidly,\(^11\) it is increasingly cost efficient to design or retrofit homes to use solar energy.\(^12\) It is estimated that seventy percent of the energy consumed by the average building consists of the low-grade heat that a solar energy system can readily provide.\(^13\) Solar energy is already widely used in Japan and Israel.\(^14\) In Ventura, California, a 254-unit community designed to utilize solar energy has realized a twenty-five percent savings in energy costs.\(^15\)

California has been in the forefront of promoting solar energy development.\(^16\) By passing the California Solar Rights Act of 1978,\(^17\) the

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9. See Palo Alto Hearings, supra note 3, at 82 (statement of Win Boone, President of Solar Cal); California Energy Trends, supra note 3, at 17; The Future of Solar Energy in California: Hearings Before the California Assembly Comm. on Resources, Land Use, and Energy, at Oakland, California 11 (Nov. 30, 1977) (testimony of S. Van Der Ryn, California State Architect) [hereinafter cited as Oakland Hearings]; 60 Minutes, vol. XI, no. 52, as broadcast over the CBS Television Network, Sept. 9, 1979, segment entitled What Energy Crisis?, produced by Paul Loewenwarter, unpublished transcript, at 19 [hereinafter cited as 60 Minutes].

10. See, e.g., Palo Alto Hearings, supra note 3, at 15-16 (statement of Dennis Hayes, World Watch Institute, Washington, D.C.); Oakland Hearings, supra note 9, at 7 (statement of S. Van Der Ryn, California State Architect). See generally 60 Minutes, supra note 9, at 14-19. See also S. Kraemer, supra note 3, at 9-30 (containing a summary of how solar energy works and the types of systems available).


12. Issues and Problems, supra note 3, at 8-9. Retrofitting refers to installing a solar energy system in a building not originally built to accommodate such a system. Proponents claim that a building designed to use solar energy can be built at no greater cost than a conventional building. See Oakland Hearings, supra note 9, at 13 (statement of S. Van Der Ryn, California State Architect). See also 60 Minutes, supra note 9, at 13.

13. S. Kraemer, supra note 3, at 7. See also Oakland Hearings, supra note 9, at 7 (testimony of S. Van Der Ryn, California State Architect). Van Der Ryn testified that an office building recently built in Sacramento using an energy efficient design will use 80% less traditional energy than a conventional building. Id. The building utilizes many energy-saving techniques in addition to solar energy.

14. S. Kraemer, supra note 3, at 7. The author reports that over two million solar water heaters have been sold in Japan.

15. 60 Minutes, supra note 9, at 16. Ventura Del Sol, designed by Jim Piper, is one of the largest solar energy projects in the world. Commentator Harry Reasoner described it as the "best example we found of solar energy working in the marketplace. ..." Id.

California Legislature significantly advanced the State's goal of "design[ing] and implement[ing] an energy policy for the future." The Act, which is a comprehensive attempt to define and protect the rights of persons who wish to install solar energy systems, overcomes three of the principal obstacles to solar development. First, promulgation of the Act itself is likely to increase public acceptance of solar energy systems as a viable source of energy. Second, the Act specifically counteracts the inhibiting factor of development cost by providing tax credits for solar installations. Finally, to address the problem of land use restrictions that could impede solar development the Act provides for the creation of solar easements, requires that subdivision maps provide opportunities for solar energy systems, and forbids local ordinances not related to public health and safety and private land use restrictions that unreasonably limit solar energy use.

This Comment focuses on section 3 of the Act, codified as section 714 of the California Civil Code, which voids any covenant, contract, deed restriction, or other private encumbrance on property that "effectively prohibits or restricts the installation or use of a solar energy system" and thus impedes the development of solar energy systems. The application of section 714 raises troublesome constitutional questions under the taking and contract clauses of the California and Federal Constitutions. This Comment explores these problems by applying constitutional tests to several fact situations in which section 714 could be applied. The Comment then discusses whether section 714 can withstand constitutional scrutiny and suggests judicial interpretation.

19. Sections 4 and 5 of the Act protect the right to receive sunlight by allowing for solar easements. CAL. CIV. CODE § 801 (West Supp. 1980); id. § 801.5. Section 6 limits the right of local governments to enact ordinances restricting use of solar energy systems. CAL. GOV'T CODE § 65850.5 (West Supp. 1980). Section 8 requires subdivision maps to provide for future passive or natural heating or cooling opportunities where feasible in order to obtain approval for the subdivision. Id. § 66473.1.
23. See id. § 65850.5. This section addresses the problem of zoning as a land-use obstacle to solar development. Constitutional challenge to the application of this section would involve questions of State and local autonomy.
27. For the complete text of § 714, see text accompanying note 50 infra.
28. See text accompanying notes 30-47 infra.
29. See text accompanying notes 51-58 infra.
tations of section 714 that would ensure both its constitutionality and its effectiveness.

II

RESTRICTIVE COVENANTS AS OBSTACLES TO SOLAR DEVELOPMENT

A restrictive covenant is a judicially enforceable promise, made by one owner of real property to another, in which the promisor agrees to refrain from doing something with his property.30 Traditionally, in order for a covenant to "run with the land," that is, to be applicable to successors in interest to the property, complex rules of privity had to be satisfied.31 These privity requirements reflected judicial hostility toward restrictive covenants, which were viewed as encumbrances that prevent land from being used in the most beneficial manner.32

Today, increased concern with land use planning and judicial recognition of the role of private agreements in assuring the marketability of land have resulted in favorable treatment of restrictive covenants by the courts.33 To avoid the harsh privity rules that applied in the past, courts now treat covenants as "equitable servitudes" or restrictions that attach to the property to which they apply.34 Thus, courts will enforce covenants by injunction against successive owners of restricted property, unless they purchased the property without notice of the restrictions.35

Aesthetic covenants, by prescribing standards from which property owners cannot deviate, restrict the rights of such owners to alter the appearance of their houses or property. Solar development may pose the very problem that such restrictions were designed to prevent. Achieving maximum solar exposure may require that solar collecting panels be visible from a neighboring house or nearby street.36

31. Stoebuck, supra note 30, at 888.
32. Id. at 886.
33. Id. Courts have been willing to consider a common plan of development in a housing subdivision as evidence of an intent to covenant. Id. at 904-05.
34. Id. at 887-89.
35. A. Miller & G. Thompson, supra note 30, at 15; Overcoming Legal Uncertainties, supra note 3, at 53.
over, solar development may require increased building height or other changes in external building appearance in violation of aesthetic covenants, thus interfering with architectural homogeneity or the general aesthetic appearance of a neighborhood.

Aesthetic covenants are most likely to be found in residential subdivision developments, where they are imposed reciprocally to preserve property values. Such developments, however, have great potential for large-scale installation of solar energy systems. For these reasons, judicial enforcement of aesthetic restrictions in residential subdivisions may severely hamper solar development.

Conflicts involving aesthetic covenants and solar energy systems have arisen in several states. At least one such conflict has reached the courts. In *Kraye v. Old Orchard Association*, the architectural review committee for a subdivision development had refused to allow a resident to install solar panels on his roof. Included in the various restrictions imposed upon lots within the subdivision was a covenant that prohibited appliances or other installations on rooftops that would be visible from neighboring property or adjacent streets. The California Superior Court Judge presiding over the case refused to enforce the covenant to the extent that it prevented the property owner from installing a solar energy system. In reaching his decision, the judge relied on the express public policy of the California Solar Rights Act of 1978 "to promote and encourage the use of solar energy systems and to remove obstacles thereto."

37. *Id.*
38. See text accompanying notes 77-82 infra.
40. *See Overcoming Legal Uncertainties, supra* note 3, at 56; *Wiley, supra* note 36, at 281. See note 15 *supra* and accompanying text.
41. *See Current Developments, 1 SOLAR L. REP. 9, 20 (1979); Schiflett & Zuckerman, Solar Heating and Cooling: State and Municipal Legal Impediments and Incentives, 18 Nat. Resources J. 313, 325 (1978); Wiley, supra note 36, at 282. Conflicts have been reported in Arizona, *Current Developments, supra*, at 9, California, Connecticut, Florida, and Maryland, *id.* at 20, and Minnesota and New York. Wiley, *supra* note 36, at 282 n.1. For example, in Maricopa County, Arizona, a homeowner in the Fountain Hills housing development sought injunctive relief against a neighbor who had installed solar panels on his roof. The claim for relief was made on the grounds that the collector violated a restrictive covenant and was "aesthetically objectionable." *Current Developments, supra*, at 9. In Montgomery Village, Maryland, an architectural review board denied permission to a homeowner to place solar panels on his roof. A restrictive covenant required the homeowner to obtain the board's approval before making any change in the exterior of his house. *Id.* at 20. *See Lawyer Wins Zoning Battle to Add Solar Heating Unit*, N.Y. Times, May 19, 1979, at 6, col. 3.
43. *Id.*, reprinted in 1 SOLAR L. REP. at 505.
44. *Id.*
In addition to aesthetic restrictions, covenants restricting the use of land are imposed for other purposes. To preserve the value of their investments, lenders may include covenants in security agreements requiring the care and maintenance of property serving as collateral for the loan. Such covenants could be invoked to prevent alterations decreasing the property's value. Subdividers may use restrictive covenants to control the number or placement of buildings on property in order to ensure the continued marketability of adjacent lots within a subdivision. Like aesthetic covenants, these limitations on property owners' abilities to alter or design their houses may have the adverse side effect of discouraging or precluding the installation of solar energy systems.

III
SECTION 714

Section 714, one of several provisions enacted to further the legislature's stated policy of promoting solar energy by removing obstacles to its use, focuses on private encumbrances on land use. Comprehensive in scope, section 714 provides in full:

Any covenant, restriction, or condition contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale of, or any interest in, real property which effectively prohibits or restricts the installation or use of a solar energy system is void and unenforceable.

This section shall not apply to provisions which impose reasonable restrictions on solar energy systems. However, it is the policy of the state to promote and encourage the use of solar energy systems and to remove obstacles thereto. Accordingly, reasonable restrictions on a solar energy system are those restrictions which do not significantly increase the cost of the system or significantly decrease its efficiency, or which allow for an alternative system of comparable cost and efficiency.

Commentators have suggested that the application of section 714 to invalidate existing covenants and other property restrictions may

46. For an example of such a covenant, see Cornelison v. Kornbluth, 15 Cal. 3d 590, 542 P.2d 981, 125 Cal. Rptr. 557 (1975).
47. See, e.g., 13 CALIFORNIA REAL ESTATE LAW AND PRACTICE § 470.100 (1976).
48. For notes 20-23 supra and accompanying text.
49. For a brief description of other provisions of the California Solar Rights Act of 1978, see notes 19-24 supra and accompanying text.
51. Application of § 714 to prevent the enforcement of subsequent covenants which unduly interfere with solar energy development raises no constitutional issue. See, e.g., Wagner, State's Exercise of Police Power as Constituting Impairment of Obligation of Private Contract in Violation of Contract Clause (Art. I § 10 cl.1) of Federal Constitution—Supreme Court Cases, Annot., 57 L. Ed. 1279 (1978). See also A. MILLER & E. THOMPSON, supra note 30, at 17. In its prospective application, § 714 is analagous to a zoning ordinance,
violate the taking clause\textsuperscript{52} or the contract clause\textsuperscript{53} of the California and the Federal Constitutions.\textsuperscript{54} The language of an early version of section 714 indicates that the legislature was concerned about constitutional problems arising from retrospective application of the section.\textsuperscript{55} Furthermore, in \textit{Kraye v. Old Orchard Association},\textsuperscript{56} the trial court’s reliance on public policy as a basis for its refusal to enforce a restrictive covenant that inhibited solar development may have stemmed from a desire on the part of the court to avoid addressing anticipated constitutional problems with section 714.\textsuperscript{57} In light of the growing number of conflicts between existing restrictive covenants and solar development,\textsuperscript{58} however, it seems unlikely that section 714 will continue in force without challenge for much longer.

The constitutionality of section 714 as applied to existing covenants is important in ensuring the increased use of solar energy. In addition to removing legal barriers to solar development created by restrictive covenants,\textsuperscript{59} the section may alleviate consumer prejudice against solar development. Where consumers are unaware of, or un-

\begin{footnotesize}
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\item It is estimated that 2.6 million new housing units will be built within the next 10 years. \textit{Palo Alto Hearings}, supra note 3, at 49. According to \textit{60 Minutes}, supra note 19, at 14, one-half of all the houses that will be standing in the year 2000 have not yet been built. In light of these projections, there is potential for § 714’s prospective application, in conjunction with the other facets of the California Solar Rights Act of 1978, supra note 9, to increase substantially the use of solar energy systems in California homes.
\item 52. U.S. CONST. amend. V states in pertinent part: “[N]or shall private property be taken for public use, without just compensation.” CAL. CONST. art. I, § 14 states: “Private property shall not be taken or damaged for public use without just compensation having first been made . . . .”
\item 55. The bill provided in part: “This section shall apply retrospectively, as well as prospectively, to the extent that it may Constitutionally so apply.” A.B. 3250, Cal. Reg. Sess. § 1 (1978). This language was deleted on August 14, 1978 when the bill was sent to the Senate.
\item 57. According to John Wiley, who contributed to the briefs of the plaintiffs and the State Attorney General as amicus curiae in the \textit{Kraye} case, Wiley, supra note 36, at 297 n.58, an alternative explanation for the trial court’s failure to address § 714 is that neither the pleadings nor the oral argument contained reference to that section, since it was enacted by the legislature during the trial. Rather, they relied on public policy arguments. Interview with John Wiley in Berkeley, Ca. (Feb. 25, 1980).
\item 58. See note 41 supra.
\item 59. See Part II supra.
\end{itemize}
\end{footnotesize}
certain about, the immediate viability of solar development,\textsuperscript{60} the removal of any perceived obstacle or potential conflict may be crucial to their willingness to invest in solar energy. If the courts refuse effect to section 714 on constitutional grounds, consumers are likely to continue to be hesitant or reluctant to install solar systems.

For these reasons, the invalidation of a major piece of prosolar legislation such as section 714 would be a crushing blow to proponents of solar development in California. Its defeat might also indirectly hamper similar legislative efforts in other states. Thus, the determination of whether section 714 is constitutional may affect the further immediate development of solar energy not only in California, but in the rest of the United States as well.

As noted in Section II of this Comment, conflicts between private land use restrictions and solar development have already occurred.\textsuperscript{61} With continued growth in solar energy use, the need for judicial resolution of such conflicts will arise with increasing frequency. Absent provisions like section 714 of the California Solar Rights Act, courts may be left with little choice but to resolve such disputes in favor of otherwise valid land use restrictions,\textsuperscript{62} with the overall effect of curtailing solar development.

IV

CONSTITUTIONALITY OF SECTION 714 UNDER THE TAKING AND CONTRACT CLAUSES

In the majority of states,\textsuperscript{63} including California,\textsuperscript{64} courts treat cov-

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\item \textsuperscript{60} Palo Alto Hearings, supra note 3, at 82. See also id. at 67; California Energy Trends, supra note 3, at 17; 60 Minutes, supra note 9, at 19.
\item \textsuperscript{61} See notes 41-45 and accompanying text.
\item \textsuperscript{62} See text accompanying note 33 supra. See generally Wiley, supra note 36; Comment, supra note 3. See also A. Miller & G. Thompson, supra note 30, at 17. This Comment assumes that, as the above articles indicate, these covenants would be enforceable absent a provision such as § 714. If the covenant with which the legislation interfered was unenforceable anyway, no harm would result from the legislation and no constitutional deprivation could be asserted.
\item In Wiley, supra note 36 and Comment, supra note 3, Wiley argues persuasively that a law such as § 714 is necessary to remove the covenants as a barrier to solar development. He concludes that a legislative solution is the only means of resolving conflicts between private land use controls and solar development. He cites as an example of conflict, Kraye v. Old Orchard Ass'n, No. C 209 453 (Cal. Super. Ct. Los Angeles County, Feb. 28, 1979), reprinted in 1 Solar L. Rep. 503 (1979). During oral argument, the judge indicated he would not invalidate the covenant on public policy grounds. Prior to his decision, however, § 714 was passed, and the judge voided the covenant to the extent it prevented the solar installation. Wiley, supra note 36, at 297.
\end{itemize}
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enants as property.65 Thus, in these jurisdictions, the fifth and fourteenth amendments to the Federal Constitution and similar provisions in state constitutions, which require the government to pay compensation when it takes private property, would be applicable to covenants.

In *Southern California Edison Co. v. Bourgerie*,66 the California Supreme Court held that a restrictive covenant constituted property

65. A conceptual problem arises here: If the covenant is a property interest, should it be considered as separate from or part of the total property interest of the land owner? If a covenant is treated as a separate property interest, the proportionate diminution in relation to the total value of the interest will be far greater than if the covenant is seen as merely part of the total bundle of property rights.

To illustrate this point, imagine a parcel of land in a subdivision that has aesthetic covenants written into its deed. The parcel is worth $99,000 without such a covenant, but the existence of the covenant raises the value to $100,000. Thus, the covenant is "worth" $1,000. Assume a law like § 714 is passed, reducing the covenant's value to $500. If one looks at the covenant as a separate piece of property, there has been a 50% diminution in value. On the other hand, if the entire property value is considered, the diminution is only 0.5%.

Treating a covenant as a separate property interest is a formalistic approach, uncalled for by any case law. Decisions subsequent to *Southern Cal. Edison Co. v. Bourgerie*, 9 Cal. 3d 169, 507 P.2d 964, 107 Cal. Rptr. 76 (1973), have not involved covenants damaged through exercise of the police power. The only support for treating a covenant as separate property appears in Note, *Legal and Policy Conflicts Between Deed Covenants and Subsequently Enacted Zoning Ordinances*, 24 Vand. L. Rev. 1031 (1971). The author does not cite any authority in support of the notion that a covenant should be treated separately from the interest in the land benefitted by the covenant.

The type of covenant involved here is clearly one that is appurtenant to the land; the covenant has no appreciable value apart from its value to the land to which its benefit runs. Thus, unlike other contractual arrangements, such as an easement, Penn v. Mahon, 260 U.S. 393 (1922), which grants the right to extract minerals beneath others' land, this is not the type of covenant that would be held in gross. Furthermore, as one leading commentator has pointed out, under a covenant-as-separate-property approach, the plaintiff might argue that the scope of the regulation defined the property interest allegedly taken. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1192-93 (1967). For example, if a regulation forbids mining on one's property, one could claim to have been wholly deprived of one's right to mine. To prevent such arguments of total destruction of property rights, which would be less likely to withstand constitutional challenge under a diminution-in-value test, Michelman advocates treating the covenant as part of the benefited property for purposes of determining whether a taking has occurred. *Id.* at 1185-87.

The Supreme Court apparently supports the notion of looking at the entire property. In *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), the Court stated that in order to determine whether a taking has occurred it must focus on the extent of the interference with rights in the parcel as a whole. *Id.* at 130-31. This does not, however, conclude the debate; *Penn Central* did not involve a covenant and *Bourgerie* provides that covennants will receive special treatment.

within the meaning of article I, section 14 of the California Constitution, and required a public utility to pay a landowner for damages resulting from violation of the covenant. In that case, a bank transferred a portion of a tract of land to defendants. The deeds to the tract, both the portion transferred and the one retained, contained restrictions to prevent their use as sites for electric transmission stations. Thereafter, the Southern California Edison Co. initiated an eminent domain proceeding to acquire the tract retained by the bank, intending to use it to construct an electric substation. The purchasers of the adjoining tract, who were joined by the utility as additional defendants in the action, claimed the right to be compensated for the violation of the building restriction.

Although Bourgerie was an eminent domain proceeding, the court's treatment of the covenant as property would be equally applicable in a suit challenging a provision like section 714 on the grounds that its impairment of a property owner's rights under a restrictive covenant exceeds the state's police power. The holding in Bourgerie does not necessarily mean that compensation will be required whenever such a regulation impairs a beneficiary's rights under a covenant. In contrast to an eminent domain proceeding, in which compensation is compelled for any taking of property, when a regulation that impairs a property interest is challenged as an invalid exercise of the police power, the courts may or may not require compensation, depending on the nature and severity of the regulation.

In contrast to the majority position described above, which treats a covenant as property, a minority of jurisdictions view a covenant as a contractual right. The court's characterization of a beneficiary's rights under a covenant will determine the constitutional basis for challenging legislation that impairs those rights. Thus, courts following the majority rule would analyze the constitutionality of a regulation like section 714, as applied to defeat an aesthetic covenant, under the taking clause. Jurisdictions espousing the minority view, however, would invoke the contract clause.

Courts have analyzed constitutional challenges under the taking

67. 9 Cal. 3d at 171, 507 P.2d at 965, 107 Cal. Rptr. at 77.
68. Id.
69. Id.
70. Id. at 172, 507 P.2d at 966, 107 Cal. Rptr. at 78. Cases decided subsequently have also involved covenants taken through eminent domain; they were not police power cases.
71. Eminent domain automatically requires compensation, whereas an exercise of the police power normally requires no compensation. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
73. See text accompanying notes 149-86 infra.
and contract clauses on a case-by-case basis. As the United States Supreme Court stated in *Euclid v. Ambler Realty Co.*, "whether the power exists to forbid a particular use of land is to be determined, not by an abstract consideration . . . but by considering it in connection with the circumstances and the locality." Thus, the constitutionality of section 714 cannot be analyzed simply by looking at the language of the statute, but requires examination in the context of specific factual settings to which it may apply.

Section 714 is most likely to be invoked in cases involving covenants that control the aesthetic appearance of houses. As noted above, aesthetic covenants that precluded the installation of solar collectors gave rise to the conflict in *Kraye v. Old Orchard Association*, and similar restrictions have been the source of other recent conflicts. Rarely are aesthetic covenants explicitly directed against solar collectors. Rather, such covenants typically prohibit the placement on rooftops of any structures, such as television antennas and air conditioners, that might change the external appearance of a house and have an adverse effect on neighborhood aesthetics. Beneficiaries of aesthetic covenants, who fear that solar panels will be unsightly and re-

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74. On the taking clause, see, e.g., Penn Central Transp. Co. v. New York, 438 U.S. 104 (1978); United States v. Caltex (Philippines), Inc., 344 U.S. 149 (1952); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). These leading cases on the taking clause all emphasize that the result depends on the particular facts of the case. See also Feld, *Supreme Court's Views as to What Constitutes "Taking" Within Meaning of Fifth Amendment's Command that Private Property not be Taken for Public Use Without Just Compensation*, Annot., 57 L. Ed. 2d 1254 (1978); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. Calif. L. Rev. 1 (1970). The Court is less emphatic in stating this principle in contract clause cases. Nevertheless, as will be discussed in the text accompanying notes 160-82 infra, determination of validity requires looking at the facts of the case to see if the measures taken by the legislature are appropriate to achieve a legitimate governmental end. *See, e.g.*, Home Bldg. & Loan Ass'n. v. Blaisdell, 290 U.S. 398 (1934).

75. 272 U.S. 365 (1926).

76. *Id.* at 388.

77. For an indication of the prevalence of such covenants, see note 39 supra and accompanying text. The control of aesthetics may be accomplished through the language of the covenant itself, or by delegating the control to an architectural review board as in *Kraye v. Old Orchard Ass'n*, No. C. 209 453 (Cal. Super. Ct. for Los Angeles County, Feb. 28, 1979), reprinted in 1 Solar L. Rep. 503 (1979).


80. According to Wiley, supra note 36, at 283, however: "Some recently written covenants impose explicit restrictions on the placement of solar collectors."

81. Such was the case in *Kraye v. Old Orchard Ass'n*, No. C 209 453 (Cal. Super. Ct. for Los Angeles County, Feb. 28, 1979), reprinted in 1 Solar L. Rep. 503 (1979) and also in the Maryland and Arizona conflicts mentioned in note 79 supra.
duce property values, may sue to prevent a neighbor bound by such a covenant from placing solar panels on his house. Where section 714 prevents enforcement of the covenant by the beneficiary, the constitutionality under the taking clause of depriving a property owner of the right to ensure his property value may be called into question.

Section 714 may also be invoked to prevent lenders from restricting homeowners' abilities to retrofit their mortgaged homes with solar energy systems. Frequently banks and savings and loan associations include in loan security agreements conditions requiring the homeowner to care for and maintain property serving as collateral for a loan. Some lenders may invoke such covenants in an attempt to prevent solar development, fearing that the system will decrease the value of the property. Since section 714 expressly applies to security agreements, it would prevent lenders from enforcing such agreements to prevent solar development. The application of section 714 to invalidate

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82. See, e.g., Schiflett & Zuckerman, supra note 41, at 325, who state: "However efficient and nondepletive solar energy may be, one major problem can be summed up in the elusive word 'taste.' Public acceptance of the external appearance of the solar roof collector . . . will probably play a major part in the rate of development in the next few years." Even proponents of solar energy admit that "some architectural styles may be incompatible with some solar systems," A. Miller & G. Thompson, supra note 30, at 16, and that certain solar designs may be "eyesores," Solar Access, supra note 30, at 13. In testimony before the California Assembly Committee on Resources, Land Use and Energy, one solar proponent summed up her feelings on the aesthetics of solar systems by stating, "We hope that in the rush to accommodate solar power, we don't allow ugliness to take over, because some solar power installations are really pretty gross." Palo Alto Hearings, supra note 3, at 159 (testimony of E. Pearson, member of the California State Water Commission).

On the other hand, it is clear that solar systems need not be ugly. See A. Miller & G. Thompson, supra note 30, at 14; Wiley, supra note 36, at 292 n.46. As one author has noted, "Although there are systems made out of beer cans and other scrap materials that could be considered unsightly, numerous designs prove that solar systems can suit public tastes." A. Miller & G. Thompson, supra note 30, at 19-20. As long as the designer is concerned with aesthetics, there is no reason for solar systems to be ugly, regardless of the architectural style of the building in which they are being installed. Interview with David Batchelder, designer and builder of solar homes, in Berkeley, Cal. (Oct. 28, 1979). A recent segment of the popular television show, 60 Minutes, graphically illustrated this point. Viewers were shown a variety of attractive solar energy systems in homes ranging from a large modern development, Ventura Del Sol, to a stately forty-plus year old house in Coral Gables, Florida, which had a solar system installed in 1938. 60 Minutes, supra note 9.

83. See text accompanying notes 63-71 supra. In minority jurisdictions, where covenants are viewed as bestowing contractual rather than property rights, the constitutional challenge would instead be brought under the contract clause. See text accompanying notes 72-73 supra.

84. See notes 89-148 infra and accompanying text.

85. See note 46 supra and accompanying text.

86. A survey of lenders indicated that one in six believed such a system would reduce the home's value. A. Miller & G. Thompson, supra note 30, at 77. Financing institutions generally have displayed little enthusiasm for solar energy systems. For a treatment of the difficulties of obtaining financing to construct new houses or to retrofit existing homes with solar energy, see S. Kraemer, supra note 3, at 291-98 (1978); A. Miller & G. Thompson, supra note 30, at 76-83 (1977). California Energy Trends, supra note 3.

87. See text accompanying note 50 supra.
private financing arrangements may elicit constitutional challenges under the contract clause.  

**A. Applying Section 714 to Void an Aesthetic Covenant: Constitutionality Under the Federal and California Taking Clauses**

The fifth amendment to the Federal Constitution states: "[N]or shall private property be taken for public use, without just compensation." The language of the California Constitution would seem to afford somewhat broader protection, providing in relevant part: "Private property shall not be taken or damaged for public use without just compensation having first been made" (emphasis added). In practice, however, there is no significant difference in courts' applications of the two clauses. The "or damaged" provision was added to the California Constitution in 1879, at a time when the United States Supreme Court recognized a compensable taking only where one's land had been physically invaded. But, since Pennsylvania Coal Co. v. Mahon, the Supreme Court has held that a regulation that decreases property values can constitute a taking. Thus, under both state and federal law, compensation may be required if property is damaged. Nor have courts applied the "or damaged" provision of the California constitution to impose a lower threshold of damage requiring compensation. For purposes of this analysis, then, the law of California and the United States concerning governmental takings of property can be treated as the same.

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88. See text accompanying notes 149-86 infra.
89. U.S. CONST. amend. V (applied to the states via amend. XIV).
92. 260 U.S. 393 (1922).
93. For example, the destruction of property values in the case of Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal. 2d 515; 370 P.2d 342, 20 Cal. Rptr. 638 (1962), was as extreme as in the United States Supreme Court cases discussed in text accompanying notes 96-120 infra. See also HFH, LTD. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), cert. denied, 425 U.S. 904 (1976); Reynolds v. Barret, 12 Cal. 2d 244, 250, 83 P.2d 29, 32 (1938); People v. Associated Oil Co., 211 Cal. 93, 100, 294 P. 717, 721 (1930); Zahn v. Bd. of Pub. Works, 195 Cal. 497, 512, 234 P. 388, 394 (1925).
Early American courts accorded great deference to legislatures, holding that an unconstitutional taking had occurred only when property was physically invaded. Any governmental regulation that the courts viewed as an exercise of the police power was held not to constitute a taking. A major transition in judicial approach to due process claims occurred in 1922, when Justice Holmes developed the diminution-in-value test in *Pennsylvania Coal Co. v. Mahon*. While recognizing the government's need to take action that might diminish the value of privately owned property, the Court declared that there were limits to such action. Accordingly, the Court held that where the diminution in value reached a certain magnitude, governmental action could be sustained only if compensation were paid. Under Holmes' test, whether a taking has occurred depends largely on the facts of the individual case. Thus, it is difficult to predict the outcome of a challenge under the taking clause given any particular set of facts.

While there is no pattern of decisions that allows accurate prediction of outcomes, in numerous cases, courts have upheld govern-


95. See Hadacheck v. Sebastian, 239 U.S. 394 (1915), where no taking was found despite diminution in property value from $800,000 to $60,000. See also Walls v. Midland Carbon Co., 254 U.S. 300 (1920); Reinman v. City of Little Rock, 237 U.S. 171 (1915); Mugler v. Kansas, 123 U.S. 623 (1887).

There is no precise definition of the police power; various courts have attempted to make this somewhat nebulous concept clearer, but there are nearly as many definitions as there are cases. For two recent California decisions that illustrate the difficulty one has in trying to discern a precise definition of police power from the cases, see People v. K. Sakai Co., 56 Cal. App. 3d 531, 535, 128 Cal. Rptr. 536, 538 (1976) ("The police power has long been described as the inherent power of a body politic to enact and enforce laws for the promotion of the general welfare."); *In re Quinn*, 35 Cal. App. 3d 473, 486, 110 Cal. Rptr. 881, 890 (1973) ("The police power is the power to govern. It is the inherent reserved power of the state to subject individual rights to reasonable regulation in the interests of the general welfare.").


97. 260 U.S. 393, 413 (1922).

98. Id. at 413.

99. Id.


102. One commentator has noted that "the predominant characteristic of this area of law is a welter of confusing and apparently incompatible results," Sax #1, supra note 94, at 37, and that it is thus extremely "resistant to analytical efforts." Sax #2, supra note 94, at 149. See also Feld, supra note 74, at 1259; Van Alstyne, supra note 74, at 2. See generally
mental action as constitutional despite severe economic harm to private property. Where they have determined that a challenged governmental regulation is reasonably related to the promotion of the general welfare, the United States Supreme Court and the California courts have consistently refused to find that a resulting diminution in property value constitutes a taking. Thus, although courts continue to consider economic loss as a factor in determining whether there has been a taking, as one commentator has noted, "It is beyond question today that well-recognized property values may be substantially impaired by certain kinds of governmental action without payment of compensation of any kind."

Because judicial application of the taking clause has produced no well defined rules or patterns, analysis of the constitutionality of a particular regulation under that constitutional provision must necessarily be limited. Despite this impediment, examination of section 714's constitutionality may be undertaken in two ways, either of which may be useful as a basis for suggesting how judges should interpret the provision and how the legislature might alter its language. The first method of analysis requires consideration of prior cases decided under the taking clause and any analogy that may be discerned between the factual circumstances of those cases and the application of section 714 to void restrictive covenants. A second type of inquiry is the examination of any language in prior cases setting forth the various tests or rules that the courts purported to apply, with a view toward how these different tests might be applied to section 714.

The Taking Issue, supra note 94, at 195-211, for a summary of the leading theories of the leading commentators on the taking clause.


105. See, e.g., The Taking Issue, supra note 94, at 209-10; Michelman, supra note 65, at 1191; Van Alstyne, supra note 74, at 10.

106. Van Alstyne, supra note 91, at 778. See also The Taking Issue, supra note 94, at 208-10; Michelman, supra note 65, at 1191.
2. Analogy to Prior Cases

The types of land use regulations that typically give rise to taking clause challenges can be characterized as follows: those eliminating future uses of property that may significantly increase its value, those depriving the owner of an existing profitable use, and those requiring a property owner to take affirmative action to correct conditions on his property that, while not inherently noxious, may threaten a competing public interest. In *Euclid v. Ambler Realty Co.*, a zoning ordinance prohibited commercial development of a landowner’s property, thus greatly reducing its value. In that landmark case, the Supreme Court held that no compensation was required for this diminution in value, since the regulation was within the state’s police power. Similarly, in *Penn Central Transportation Co. v. New York City*, the Supreme Court recently held that a property owner could be deprived by law of the right to develop valuable air space above a building, when the government determined that the restriction was in the public interest. Nor did the California Court of Appeal find a taking where a regulation serving the public interest prevented the filling of the San Francisco Bay, despite the severe economic harm incurred by a shoreline property owner resulting from the loss of his anticipated right to fill. Section 714 is somewhat analogous to the land use restrictions upheld in these cases, since it precludes property owners’ future exercise of their right to enforce restrictive covenants, and as a result may cause diminution in property value.

Cases in which courts have upheld regulations preventing property owners from continuing existing profitable uses include *Goldblatt v. Town of Hempstead* and *Consolidated Rock Products Co. v. City of Los Angeles*. In *Goldblatt*, an ordinance prevented the plaintiff from continuing his sand and gravel excavations because these operations were believed to be detrimental to community well-being. The Supreme Court held that the regulation was constitutional although it significantly reduced the value of the plaintiff’s property. Similarly, in *Consolidated Rock*, the California Supreme Court held that a munici-

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108. Id. at 388.
110. Id. at 138. In that case, the public interest was in preserving New York City’s Grand Central Station as a landmark.
114. 360 U.S. at 595.
115. Id. at 594.
principal ordinance forbidding rock and gravel operations in a district in which the plaintiff was already conducting such operations did not require compensation despite severe economic harm to the plaintiff.116 As with regulations depriving an owner of future uses of property, a loose analogy may be drawn between section 714 and regulations that impair an existing use, since under section 714 the beneficiary of an aesthetic covenant who in the past has been able to enforce the restriction may now be prevented from continuing to do so.

In Miller v. Schoene,117 a property owner challenged a state law requiring him to cut down any red cedar tree growing on his land if it was infected with a certain communicable plant disease and was located within two miles of any apple orchard.118 Although harmless to cedar trees, the disease that the legislature sought to eradicate was highly destructive to apple trees, which could contract the disease from nearby infected cedars.119 The Supreme Court held that Virginia could require the landowner to chop down his valuable cedar trees without paying him compensation, stating: "When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public."120 While there are no California cases requiring an act that results in a property loss of the magnitude incurred by the plaintiff in Miller, a California appellate court has upheld an ordinance requiring a property owner to correct, at his own expense, conditions on his property that are harmful to the public.121

Of the three types of land use restrictions most commonly challenged under the taking clause, the voiding of an aesthetic covenant under section 714 is most closely analogous to the ordinance upheld in Miller.122 Both the aesthetic covenant voided by section 714 and the cedar trees required to be destroyed under the Virginia law constitute beneficial property interests that are neither undesirable nor inherently harmful. Both the law challenged in Miller and section 714 involved competing incompatible uses of land and legislative determinations

116. 57 Cal. 2d at 530, 370 P.2d at 351, 20 Cal. Rptr. at 647.
117. 276 U.S. 272 (1928).
118. Id. at 277.
119. Id. at 278.
120. Id. at 279.
121. People v. Green, 264 Cal. App. 2d 774, 70 Cal. Rptr. 818 (1968). In Green, the property owner was required to correct dangerous conditions caused by excavations on his property. In dicta, the court stated that a property owner can be required to make changes to accommodate the welfare of his neighbors (e.g., remove weeds). Id. at 778, 70 Cal. Rptr. at 820. See also Van Alstyne, supra note 74, at 49.
that the public interest will best be served by according preferential status to one such use to the detriment of the other.

3. Tests Applied by the Courts

The cases discussed above indicate that, regardless of which type of regulation has been challenged under the taking clause, the courts will allow the government to inflict severe harm to property rights where necessary to further the public interest.\(^\text{123}\) In determining whether considerations of public welfare justify regulations that impair the interests of private property owners, the courts have relied on four different tests,\(^\text{124}\) often applying more than one test in the same case.\(^\text{125}\) The constitutionality of section 714, as applied to void an aesthetic covenant, can be analyzed under each of the following tests.

The physical-invasion test requires compensation only if property has been physically invaded,\(^\text{126}\) for example, where one's airspace has been invaded by low-flying airplanes.\(^\text{127}\) Since voiding a covenant involves no physical invasion, under this test the voiding of an aesthetic restriction under section 714 would be upheld.

The nuisance test requires no compensation, regardless of the extent of harm, if the regulation causing the harm was designed to restrain a noxious use. Noxious uses are not limited to those that might constitute a nuisance at common law, but rather may include any use that the legislature determines is harmful to others.\(^\text{128}\) While the enforcement of an aesthetic covenant that impedes the installment of a solar energy system certainly was not a nuisance at common law, nonetheless it may be characterized as a noxious use to the extent that it interferes with express public policy.

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123. There are many examples of unsuccessful taking clause challenges in areas other than land use regulation. See, e.g., Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (law forbidding racial discrimination in hotels and restaurants); United States v. Darby, 312 U.S. 100 (1940) (upholding law establishing minimum wages); Nebbia v. New York, 291 U.S. 502 (1934) (upholding a regulation setting maximum milk prices). See Van Alstyne, supra note 74, at 4-5.

124. For a summary and analysis of the tests used, see The Taking Issue, supra note 94, 236-317; Michelman, supra note 65, at 1183-1214. See also Harris, Environmental Regulations, Zoning, and Withheld Municipal Services: Takings of Property by Multi-Government Action, 25 U. FLA. L. REV. 635 (1973); Sax #1, supra note 94.

125. See, e.g., Michelman, supra note 65.

126. The test is still in use. See, e.g., Griggs v. Allegheny County, 369 U.S. 84 (1962). Although the test was once the sole test invoked, it now represents only a threshold question. Although physical invasion, once found, is determinative, in the absence of physical invasion other tests will be applied. See Metzger, supra note 96, at 809-10.


Applying the nuisance test in *Goldblatt*, the Supreme Court stated: "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot in any just sense, be deemed a taking."129 Moreover, the California Supreme Court has noted that "[o]nce an undoubted menace to public health, safety, or morals is shown, the method of protection may be drastic."130

Two leading scholars have offered their own variations of the nuisance theory. Professor Michelman takes a utilitarian approach, asserting that a governmental regulation or action may severely burden an individual without requiring compensation so long as that regulation is unavoidable in protecting the long-term, general well-being of society.131 Professor Sax adopts what he refers to as a "spillover test."132 According to Sax, where a use of property has spillover effects that conflict with other uses of property, the government may intercede and curtail that use without paying compensation.133

Under both the Michelman utilitarian test and the Sax spillover test, section 714 is constitutional. Arguably section 714 is necessary to the long-term, general well-being of California citizens. By promoting increased use of solar energy, it will lessen the impact of future energy supply problems and reduce the country's dependence on foreign sources of fuel. For these reasons, it meets the utilitarian standard. Although enforcing an aesthetic covenant does not constitute a use of the beneficiary's land, it can be characterized as a use of the property right occasioned by the covenant itself. Moreover, the interference with solar development resulting from enforcement of the covenant may be described as a spillover effect of that use. Thus, the application of section 714 to void such a covenant is valid under the Sax approach as well.

Under the diminution-in-value test, the constitutionality of a regulation depends upon the extent of harm it causes.134 Refusing effect to an aesthetic covenant under section 714 would likely be upheld under this test. In light of earlier cases, in which courts have upheld regula-

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132. Sax #2, *supra* note 94.
133. *Id.* at 154-55.
134. Like the test for physical invasion, this is merely a threshold test. See text accompanying note 104-06 *supra*. If the harm to the plaintiff's interest is severe enough, other factors will be considered. Slight harm ends the inquiry. According to Michelman, *supra* note 65, at 1191, the diminution-in-value test by itself may be determinative in cases where there is neither a physical invasion nor a restriction of an activity deemed harmful to the general well-being of society. Thus, the test is most often used when a regulation is directed against an "innocent" use of property.
tions that resulted in substantial reductions in value,\textsuperscript{135} it is improbable that they would require compensation for the relatively slight reduction in property value incurred by the neighbor of a landowner who installs a solar energy system.\textsuperscript{136}

Moreover, the reasonableness clause of section 714 further ensures that damage to beneficiaries’ property will be insubstantial. Under section 714, courts will enforce “reasonable restrictions,” which are defined as those that will not “significantly increase the cost of the system or significantly decrease its efficiency, or which allow for an alternative system of comparable cost and efficiency.”\textsuperscript{137} This provision could be applied to allow the beneficiary of an aesthetic covenant to require his neighbor to install a solar energy system that will have minimal detrimental impact, assuming the availability of such a system at a cost comparable to any system the neighbor might propose. Likewise, in a subdivision development with an architectural review board, the board could approve certain solar designs that are the least offensive aesthetically.

Under the balancing approach, although the test is imprecise,\textsuperscript{138} courts have purported to weigh the harm incurred by property owners as a result of governmental action against the benefit such action produces for society.\textsuperscript{139} In a few instances, where the public interest was especially great, courts have upheld regulations without examining the extent of harm to the individual challenging the regulation.\textsuperscript{140} Although the public interest in solar development may not be sufficiently compelling to foreclose all consideration of the harm incurred by the beneficiary of an aesthetic covenant voided under section 714, under

\begin{footnotes}
\item[136] In The Taking Issue, supra note 94, at 208, the author states that a survey indicated that courts usually will not find a “taking” until the loss equals two-thirds the value of the property damaged.
\item[137] CAL. CIV. CODE § 714 (West Supp. 1980). See text accompanying note 50 supra. According to Van Alstyne, “The judicial calculus involved in the balancing process is described in a variety of unilluminating ways.” Van Alstyne, supra note 74, at 39. Another commentator notes, “The balancing test involves so few theoretical elements that the court often merely repeats cliches.” The Taking Issue, supra note 94, at 139.
\item[138] It is often difficult to differentiate between preventing a public harm and attaining a public good. Michelman, supra note 65, at 1197.
\end{footnotes}
the balancing approach, section 714 nevertheless is constitutional. Although the public interest in promoting solar energy is undeniably substantial, as noted above, the harm to the beneficiary from refusing to enforce an aesthetic covenant is likely to be slight.

An additional requirement that the courts repeatedly have articulated in taking clause cases is that the application of the regulation be reasonable and necessary to achieve the legislative goal. Although this language may be little more than a doctrinal formulation of the courts' conclusions concerning the validity of challenged regulations or, alternatively, a restatement of the balancing test described above, it is likely that the California Legislature was responding to this language when it incorporated the "reasonable restrictions" exemption into section 714. This exemption first appeared in an early version of the Act, in which it applied only to aesthetic restrictions. By narrowly defining "reasonable restrictions" to include only those that would increase neither the cost nor the efficiency of proposed solar development, however, the legislature for the most part precluded any balancing of conflicting interests and effectively established a statutory preference for solar development over preservation of neighborhood aesthetics. Later versions of the statute, without altering the definition of "reasonable restrictions" to broaden the scope of the exemption from section 714, applied the exemption to all types of private land use restrictions, nonaesthetic as well as aesthetic. Thus, under section 714 as currently drafted, if enforcement of a restriction would require installation of a solar system slightly more costly or less efficient than the one proposed by the property owner, the restriction is not "reasonable"

141. See text accompanying notes 1-15 supra. Also note that the balancing test must weigh society's interest, and not the interest of the individual person seeking to install a solar system. Absent a general societal interest, the rights of that individual would be subordinate to his neighbor's rights to enforce the covenant to which he explicitly agreed.

142. See, e.g., Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), setting forth the "classic statement of the rule" and noting its continued validity. "To justify the State in ... interposing its authority in behalf of the public, it must appear ... that the means are reasonably necessary for the accomplishment of the purpose ... ." Id. at 594-95. See also Agricultural Labor Relations Bd. v. Superior Court, 16 Cal. 3d 392, 410, 546 P.2d 687, 698, 128 Cal. Rptr. 183, 194 (1976).

143. The legislative history indicates that the drafters of the statute were aware of possible constitutional problems when they formulated the language of § 714. See note 55 supra and accompanying text.

144. A.B. 3250, Cal. Reg. Sess., as amended May 2, 1978. The bill provided that This section shall not apply to provisions which impose only reasonable aesthetic limitations. However, it is the strong policy of this state to promote the increased use of solar devices and to remove any direct or indirect obstacles thereto. Accordingly, aesthetic restrictions shall be valid only if they allow alternative devices or placements that do not unreasonably increase the costs of installation or unreasonably diminish the effectiveness of solar energy systems in relation to the relative importance of the aesthetic benefits to be obtained.

Id. (emphasis added).

within the meaning of the statute and therefore must be refused effect. In this way, section 714 overrides the interests underlying restrictive covenants, even those that may be more compelling than neighborhood aesthetics.\textsuperscript{146} It is not clear that the legislature intended this result. Moreover, favoring solar development over all interests that private property owners seek to protect through the use of restrictive covenants\textsuperscript{147} without considering the importance of such interests on a case by case basis may be neither wise nor constitutionally permissible.

Section 714 flatly states that restrictions limiting or prohibiting installation of solar energy systems are void. Removing barriers to solar development will not in all cases require voiding restrictive covenants in their entirety. Instead, the purposes of section 714 may be served by refusing effect to restrictions only to the extent that they actually interfere with solar development. Voiding covenants in toto where a partial nullification would effectively eliminate barriers to solar development arguably violates the "reasonable and necessary" requirement frequently repeated by courts in taking clause cases. The overbreadth doctrine, under which courts have refused effect to regulations that are broader than necessary to achieve governmental objectives, has been invoked only in limited contexts, usually to invalidate regulations challenged under the first amendment.\textsuperscript{148} While the overly broad scope of section 714 is not itself sufficient grounds for holding the provision unconstitutional, it may result in the failure of a particular application of

\textsuperscript{146} Examples would be a policy limiting development density in a residential subdivision in order to ensure that the community's supply of essential resources, such as water, sewage treatment facilities, and utilities services, is not overburdened; or a policy of minimizing geologic hazard by requiring siting of structures on hilltops rather than steep side slopes. The need to promote solar development might conflict with these policies, for example, where a proposed multiple unit solar system would be most efficient if implemented in a project with more units than allowed by the density restriction; or where building on a slope, though prohibited by the geologic restriction, would provide greater solar exposure.

\textsuperscript{147} A similar stance, favoring solar development over policies implemented through zoning restrictions, can be discerned from a literal reading of § 6 of the Act. California Solar Rights Act of 1978, § 6, \textit{CAL. GOV'T CODE} § 65850.5 (West Supp. 1980).

\textsuperscript{148} Courts have invalidated legislation that "broadly forbid[s] conduct or activities which are protected by the . . . Constitution." Coates v. City of Cincinnati, 402 U.S. 611, 616 (1970) (opinion of Black, J.) Where a statute prohibits both harmful and nonharmful conduct, however, it will generally be upheld. \textit{See}, e.g., Williamson v. Lee Optical Co., 348 U.S. 483, 487 (1955). It is only in the limited area of first amendment rights that courts consistently overturn statutes challenged as overbroad on the theory that "the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes." Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). \textit{Cf.} Aptheker v. Secretary of State, 378 U.S. 500, 517 (1964) (invalidating on overbreadth grounds legislation denying right to travel in violation of fifth amendment right to liberty, noting that "freedom of travel is a constitutional liberty closely related to rights of free speech and association"). Thus, courts considering a challenge to § 714 under the taking or contract clauses are unlikely to invoke the doctrine of overbreadth and invalidate legislation on its face.
the section to meet the balancing test described above. Voiding a covenant in its entirety may cause significantly greater harm to beneficiaries than partial nullification, and thereby affect the balance between such harms and the benefits derived from application of the provision. For the same reason, section 714's overbreadth may result in its failure to meet the diminution in value test.

B. Applying Section 714 to Void a Security Agreement Restriction: Constitutionality Under the Contract Clause

The language of the contract clause of the United States Constitution "appears unambiguously absolute." It reads: "No State shall . . . pass any. . . Law impairing the Obligation of Contracts." On its face, the contract clause appears to protect individuals' rights under private contractual arrangements by forbidding states from passing legislation that would release parties from their contractual obligations. But, as construed by the Supreme Court, "[t]he Clause is not . . . the Draconian provision that its words might seem to imply." Since at least the beginning of this century, the Court has recognized that "literalism in the construction of the contract clause . . . would make it destructive of the public interest by depriving the State of its prerogative of self protection." The Court thus has consistently held that private contractual rights cannot stand in the way of legislation necessary to protect the general welfare of the state.

The contract clauses in the California and Federal Constitutions are virtually identical, and the California courts have followed the Supreme Court's contract clause analyses, often favorably quoting

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It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.

Id. See also note 95 infra.
155. Cal. Const. art. I, § 9, provides that "[a] . . . law impairing the obligation of contracts may not be passed."
This Comment will treat the interpretation of the contract clause by the California courts and United States Supreme Court as the same.

The Supreme Court has consistently applied the test established in *Home Building and Loan Association v. Blaisdell* in determining whether statutes violate the contract clause. In *Blaisdell*, the Court considered a Minnesota law that had been enacted during the great depression, which extended the period of redemption for mortgage foreclosure sales. The plaintiff was a lender, who sought to challenge the state law as an unconstitutional alteration of a contractual agreement. The Court upheld the statute, declaring that legislative action addressed "to a legitimate end" and including measures that "are reasonable and appropriate to that end" is valid, even though it may directly or indirectly affect existing contracts. Since mortgage closures were a severe problem during the depression, and since the statute was designed to alleviate the problem in a reasonable manner, the Court held that the statute did not violate the contract clause.

The Court has deferred to legislatures' determinations that state action is reasonable and necessary. In reviewing legislation challenged under the contract clause, the Court has applied a threshold test under which it examines the severity of the alleged impairment to contractual relationships. Thus, if the impairment of contractual obligations is minimal, the inquiry ends at this first stage.

By 1965, the contract clause had fallen into disfavor and was not applied by the Supreme Court again until 1977. In two recent

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159. 290 U.S. 398 (1934). For a general summary of the Supreme Court's use of the contract clause, see Wagner, supra note 51.


161. The Minnesota Mortgage Moratorium Law, Ch. 339, Laws of Minn. (1933).

162. 290 U.S. at 415-16.

163. *Id.* at 404.

164. *Id.* at 438.

165. *Id.* at 444-48.


168. *Id.* at 245.

169. *See id.* at 241 (Supreme Court concedes that the contract clause had "receded into comparative desuetude" of late).

decisions, *United States Trust Co. v. New Jersey* \(^{171}\) and *Allied Structural Steel Co. v. Spannaus*, \(^{172}\) the Court has made it clear that it does not consider the contract clause a "dead letter." \(^{173}\) In both cases, the Court struck down state laws challenged under the contract clause.

*United States Trust* involved the legislative repeal of a statutory covenant that prevented subsidization of passenger rail transportation with revenues and reserves pledged by the New York/New Jersey Port Authority as security for consolidated bonds. \(^{174}\) In 1974, the state legislatures of New Jersey and New York concurrently enacted a repeal of the covenant, allowing the Port Authority to use bridge and auto tolls for the development of new mass transit facilities. \(^{175}\) Bond holders challenged the repeal as abrogating their rights under the contract with the Port Authority. \(^{176}\)

In *Spannaus*, private employers challenged a Minnesota law subjecting them to a pension fund charge if they terminated a pension benefit plan or closed an office located within the state. \(^{177}\) Under the statute, the plaintiff company was required to finance full pensions for all employees who had worked for the company for at least ten years, without regard to whether such persons would have been entitled to these benefits under the company's pension plan. \(^{178}\)

In both cases, the Court, relying on the test set forth in *Blaisdell*, denied effect to the challenged statutes. Under *Blaisdell*, legislation does not violate the contract clause if its purpose is to protect a basic social interest, the relief is appropriately tailored to protect that interest, and the imposed conditions are reasonable and necessary to achieve the state objective. \(^{179}\) In *United States Trust*, the Court found the repeal of the covenant "neither necessary to achieve the plan [for encouraging users of private automobiles to shift to public transportation] nor reasonable in light of the circumstances." \(^{180}\) The Court declared that "a state is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally." \(^{181}\) In *Spannaus*, the Court found the severe disruption of contractual expectations caused by the legislation unjustified since the

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173. *Id.* at 241.
174. 431 U.S. at 3.
175. *Id.* at 3, 14.
176. *Id.* at 3, 17-21.
177. 438 U.S. at 238-40.
178. *Id.* at 238.
180. 431 U.S. at 29.
181. *Id.* at 30-31.
state had failed to demonstrate that the statute was "even purportedly enacted to deal with a broad, generalized economic or social problem."\(^\text{182}\)

Under the standards applied by *United States Trust* and *Spannaus*, the application of section 714 to restrictive provisions in security agreements is constitutional. The California legislature enacted section 714 to rectify a social problem in accordance with an established policy.\(^\text{183}\) In upholding legislation against contract clause challenges, the Court on occasion has considered the presence of physical or economic emergencies justifying the legislative action.\(^\text{184}\) Section 714 is similarly warranted as a legislative response to the current national energy supply problem.\(^\text{185}\)

As the *Blaisdell* court stated: "The state power may be addressed directly to the prevention of the enforcement of contracts only when these are of a sort which the legislature in its discretion may denounce as being in themselves hostile to public morals, or public health, safety or welfare. . . ."\(^\text{186}\) Where the legislature has found that private covenants create obstacles to development of solar energy, which it has determined to be in the public interest, the voiding of those restrictions is necessary to serve that interest. As with aesthetic covenants, voiding a restriction in a security agreement is reasonable if the restriction is void only to the extent it interferes with solar development. In contrast, voiding such a restriction entirely, so as to deprive a lender of all rights to require the maintenance of property, would be an unreasonable application of section 714.

C. *The Constitutionality of Section 714 as Applied in Certain Extreme Hypotheticals*

Although application of section 714 to conventional aesthetic covenants or security agreements of the type already described\(^\text{187}\) appears to raise no serious constitutional problems, constitutional objections may nevertheless preclude its application to other kinds of restrictions. Section 714 may be applied to void restrictions designed to implement policies more compelling than neighborhood aesthetics. Or, by invalidating aesthetic restrictions, it may in rare instances permit installation of solar equipment that will cause extreme degradation of the aesthetic character of a community. Finally, section 714 may be applied to void

\(^{182}\) 438 U.S. at 250. These two recent contract clause cases indicate that judicial deference to legislative discretion is not absolute.

\(^{183}\) Ch. 1154, § 2, 1978 Cal. Stats. 392.

\(^{184}\) See Wagner, *supra* note 51, at 1289.

\(^{185}\) See note 1 *supra* and accompanying text.

\(^{186}\) 290 U.S. 398, 438 (1934).

\(^{187}\) See notes 36-47 *supra* and accompanying text.
a covenant that, while restricting installation of a particular proposed solar energy system, does not pose any substantial barrier to solar development. Because, literally read, section 714 flatly disallows enforcement of any restrictions that will increase the cost or decrease the efficiency of a proposed solar system, courts are precluded from balancing the benefits of proposed solar development with the policies underlying such restrictions or the harm that may result from failure to enforce them. This section of the Comment will explore the application of section 714 to three hypotheticals illustrating fact situations in which its application could be held unconstitutional.

Section 714 could be applied to void a covenant that, by limiting construction to the most level areas of a steeply sloping lot, ensured against the hazards of geologic instability. If a solar system on a house constructed on the buildable area of the lot could not be designed to achieve the same degree of efficiency as one constructed on the restricted portion, the covenant could not be considered reasonable under section 714, since it would not “allow for an alternative system of comparable... efficiency.” Building on the restricted portion of the lot might result in grave geologic hazards that could affect the restricted lot and surrounding lots. The potential harm that could result if such construction caused a landslide could not be considered by a court applying section 714. Once the owner of the lot established that the covenant would preclude construction of a proposed solar energy project and that any alternative project would be less efficient, the covenant would be unenforceable under the statute.

If the damage threatened by construction on the restricted part of the lot were extreme and the risk of such damage sufficiently great, the resulting diminution in the value of surrounding properties might be substantial enough to support a claim under the taking clause. Ap-

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188. See note 50 supra and accompanying text.
189. Covenants of this type are not limited to private agreements between individuals. The California Coastal Commission, for example, often requires some applicants for development permits to enter agreements with the Commission restricting the use of their land as a condition for receipt of a permit. See, e.g., California Coastal Commission, Statewide Interpretive Guidelines 25, 28-31. The Commission imposes such restrictions on behalf of the State to effectuate a variety of Coastal Act policies, including ensuring public access to the coast, providing low and moderate income housing opportunities in coastal communities, and minimizing geologic hazards in coastal mountain areas. Id. California Coastal Commission, South Coast Regional Interpretive Guidelines for Malibu-Santa Monica Mountains 5.
191. In addition to the harm of threatened geologic damage to surrounding lots, building on geologically unstable land may pose a threat to public resources in the form of a drain on public monies in the event a slide occurs if the covenantor or surrounding landowners are eligible for disaster relief funds.
192. For a discussion of the diminution-in-value test, see text accompanying notes 134-35 supra.
plying the balancing test, a court might find that the harm to surrounding property owners posed by the threat of geologic damage to their properties exceeded the marginal advantage derived by allowing construction of the more efficient solar system on this lot. If, in addition, the policy of ensuring geologic stability were viewed by the court as comparable in importance to the policy favoring solar development, under the balancing test the court could refuse effect to section 714 under the taking clause.

By enacting section 714, the legislature demonstrated a policy favoring the promotion of solar development over preservation of neighborhood aesthetics. Nevertheless, section 714 could have undesirable results if it were applied to circumvent every aesthetic restriction that hampers a solar installation. For example, a homeowner, bound by an aesthetic covenant might prefer to install a do-it-yourself solar energy system¹ using beer cans as reflectors¹ rather than purchasing a commercially manufactured system. Strict construction of the statutory language of section 714 would enable the owner to circumvent an aesthetic covenant that otherwise would prevent installation of a solar system that is an undisputed eyesore. Arguably the application of section 714 to allow construction of such a system would be unconstitutional. Although the diminution in value to the beneficiary’s property from allowing the beer can collector would not likely be sufficiently great to constitute a taking, the strict application of section 714 to void the restriction precludes courts from balancing the interests underlying the restriction against the public interest in solar development.¹⁵

Even if the application of section 714 in such a situation were upheld as constitutional, it might be unwise. Encouraging the construction of such visually obtrusive make-shift systems might hinder rather than promote solar development. Such systems are likely to perpetuate the impression that solar panels are generally unaesthetic, and discourage rather than encourage the installation of solar energy systems.

Another common type of land use restriction to which section 714 conceivably could be applied is a covenant limiting the use of a lot a single-family dwelling.¹⁶ A covenant limiting the use of a lot to a single-family dwelling would have the effect of preventing construction of a solar energy system designed for multifamily dwelling units or commercial buildings. An owner of undeveloped land subject to such a

¹³. This possibility is mentioned in A. MILLER & G. THOMPSON, supra note 30, at 19.
¹⁴. S. KRAEMER, supra note 3, at 14.
¹⁵. The interests underlying the restriction may be public as well as private. See note 189 supra.
¹⁶. Consigny & Zile, Use of Restrictive Covenants in a Rapidly Urbanizing Area, Part I, 1958 Wis. L. Rev. 612, 616-20 (1958), report that 59% of the subdivisions surveyed had “restrictions on building types, notably single family dwellings only.”
restriction might attempt to circumvent the covenant by constructing a multifamily dwelling or a commercial building heated with solar energy. It seems unlikely that the legislature intended section 714 to be used to avoid compliance with valid land use restrictions of this type. If voiding such restrictions was necessary to support solar development, there is little question that the legislature could do so without being required to pay compensation, despite the substantial damage that could result. Such a restriction would not create any substantial barrier to solar development, however, since it would not preclude the installation of a solar system designed for the intended use of the property—namely, a single-family home. Thus, voiding restrictions of this type is unnecessary to achieve the legislative goal of promoting solar development. The benefit from any additional solar development projects that might result from voiding such restrictions would be marginal, in comparison to the substantial disruption of community planning efforts in private developments that would occur if such agreements were allowed to be circumvented. Under a balancing test, section 714 could not constitutionally be given effect to void covenants of this type.

V

SOLUTIONS TO POSSIBLE CONSTITUTIONAL PROBLEMS ARISING FROM APPLICATION OF SECTION 714

Although the voiding of restrictions to which section 714 typically will be applied is constitutional, the extreme hypotheticals indicate that literal application of the section may in some instances violate the taking clause. That section 714 may have unconstitutional applications does not mean that the courts should refuse it effect, however. Rather, by adhering to longstanding principles of constitutional adjudication, courts should construe section 714 to find it constitutional, if it is reasonably susceptible to such a construction. Specifically, where possible, courts should avoid applying section 714 to permit circumvention of restrictions that will result in severe detriment to beneficiaries. To the extent that the reasonableness clause of section 714, by precluding

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197. The legislature was aware of potential constitutional problems that the statute might raise. See note 55 supra and accompanying text.
198. A regulation must be reasonable and necessary to avoid violating the taking clause. See text accompanying notes 142-43 supra.
199. See notes 89-186 and accompanying text. It is assumed that § 714 will be limited so as to void restrictions only to the extent they interfere with solar systems.
balancing of such detriments against the interest in solar development, requires an application of the provision that is unconstitutional, the courts should sever the statutory definition of reasonableness and continue to give effect to the other clauses of the provision.

Undeniably, the public interest in removing obstacles to the development of solar energy is great. In enacting section 714, though the legislature intended to eliminate major obstacles to solar development, it probably did not foresee the application of the provision to restrictions like those described in the extreme hypotheticals. It is unlikely that the legislature meant section 714 to allow individuals to circumvent restrictions like single-family dwelling limitations regardless of the consequences. Courts could construe section 714 not to apply to such restrictions, which limit solar development only incidentally by limiting the use of property. Arguably such restrictions are not prohibited under section 714, at least where they do not have the effect of precluding installation of any solar system. Since a single-family dwelling limitation, for example, does not preclude installation of a solar system designed for a single-family home, this type of restriction is not one that "effectively prohibits or restricts the installation or use of a solar energy system" within the meaning of section 714.

In some instances, the voiding of private restrictions that cannot be excluded from the reach of section 714 by any sound principles of statutory construction will have consequences not intended by the legislature. If the drafters of section 714 had not defined "reasonable restrictions" so narrowly, to include only those not significantly increasing the cost or decreasing the efficiency of a proposed system, the courts could have invoked the exemption for "reasonable restrictions" to avoid applying the statute where hardship or other unintended consequences would result. For example, a court could determine that a restriction preventing installation of a beer can collector but allowing a more conventional solar system was a "reasonable restriction" and therefore enforceable under the statute. Since a more conventional system is likely to cost significantly more than a do-it-yourself beer can model, however, such a restriction would fail under section 714 as currently drafted.

In order to avoid refusing effect to section 714 on constitutional grounds where it would require voiding restrictions that are reasonable, the courts can take two approaches in interpreting the reasonableness clause. First, the courts could find that the legislature intended the statutory definition of "reasonable restrictions" to apply only to aesthetic restrictions. This theory proceeds from the view that the narrow definition of "reasonable restrictions" precludes balancing the policies un-

201. See note 197 supra.
underlying private restrictions with the policy of promoting solar development. Although arguably it makes sense to preclude balancing purely aesthetic considerations against the need to develop solar energy, it is doubtful that the legislature intended to leave no room for balancing where more compelling policies are involved. Thus, the court could simply refuse to apply the statutory definition of reasonable restrictions in cases involving non-aesthetic restrictions. An earlier version of the statute did limit the reasonableness test to aesthetic restrictions, however, and since the legislature chose to expand the applicability of that test to all restrictions interfering with solar development, a court would be on questionable ground in holding to the contrary. Since the legislative history does not support this interpretation of section 714, it should not be invoked by the courts even though it might save the statute from an unconstitutional application in some instances.

A second and better approach available to the courts is to invoke the doctrine of severability. The California courts have in some cases upheld provisions of a statute despite the unconstitutionality of other provisions of the same statute, stating that the unconstitutional provisions are “severable” from and therefore not fatal to the remainder of the legislation.202 As long as a provision is not so intertwined with the rest of the statute that it is impossible to give effect to the statute without the provision in question, severance is proper.203 Also under the rubric of severability, the courts have sustained a constitutional application of a statutory provision that in a different factual setting has been held unconstitutional.204 Even where the provision is susceptible to unconstitutional applications, as long as there is no danger that selective application of the provision will result in a “fog of uncertainty”


204. See, e.g., Franklin Life Ins. Co. v. State Bd. of Equalization, 63 Cal. 2d 222, 404 P.2d 477, 45 Cal. Rptr. 869 (1965) (retaliatory tax statute, challenged as in violation of California constitutional provision limiting taxes on foreign insurance companies except those from States that discriminate against California insurers, held constitutional as applied to foreign insurer from discriminatory State; such application held severable from application to insurers from nondiscriminatory States). But cf. Castro v. California, 2 Cal. 3d 223, 466 P.2d 244, 85 Cal. Rptr. 20 (1970) (refusing to sever application of State constitutional provision found unconstitutional under Federal Constitution as applied in Los Angeles County from applications of same provision in other geographical locations on grounds that provision, which conditioned right to vote in state-wide elections on English literacy, would be unconstitutional in any location).
or have an inhibitory effect on the exercise of fundamental constitutional rights, the California courts will not declare the provision invalid on its face.\textsuperscript{205} Severability of either type will not be invoked, however, where limited application of the statute or provision in question would frustrate the legislative design.\textsuperscript{206}

In order to achieve the legislative goal of promoting solar development, the courts should sever the definition of reasonable restrictions from the rest of section 714 where the application of that definition would be unconstitutional. In such instances, courts could apply the reasonable restrictions exemption, but make their own determination of whether the restrictions in question are reasonable, without regard to the statutory definition. Because judicial determination of reasonableness is feasible, section 714 can be given effect without the statutory definition of reasonable restrictions.

Even though there are some instances in which the statutory definition of reasonable restrictions cannot constitutionally be given effect, the courts should continue to apply that provision of section 714 in other factual settings. It is unlikely that uncertainty about the applicability of this portion of the legislation will have a significant effect on property owners' behavior in entering private restrictive agreements, especially if the courts void such covenants only to the extent they interfere with solar development. Moreover, the severability clause of the California Solar Rights Act\textsuperscript{207} indicates that the legislature intended that the provisions of the statute be enforced to as great an extent as constitutionally permissible.

The definition of reasonable restrictions is severable from the rest of section 714. Section 714 can be applied without the definition, leaving the courts to determine what restrictions are reasonable.\textsuperscript{208} Thus, the courts could give effect to a restriction that precluded installation of beer can collectors. So long as the restriction did not prohibit installation of a less visually obtrusive system, it could be upheld as reasonable despite the added expense of more conventional solar equipment. The courts could continue to apply the statutory definition of reasonable restrictions in cases involving ordinary aesthetic restrictions, where its application would raise no constitutional problems. Severing the defi-
nition of reasonable restrictions where it would result in an unconstitu-
tional application of section 714 leaves the court with the necessary latitude to apply the provision in a fair, practical, and constitutional manner.

VII
CONCLUSION

While the development of solar energy is critical to the resolution of the Nation's energy supply problem, many obstacles stand in its way. Section 714 is the first attempt by a state legislature to remove the ob-
stacles posed by private restrictions on property. In addition to its im-
mediate importance in facilitating solar development in California, the future of section 714 may affect solar development nationwide. Cali-
fornia has been among the leaders in solar development, and a judicial declaration that section 714 is unconstitutional would be a tremendous blow to solar proponents in other states seeking to enact similar legisla-
tion.

Section 714 should not, and most likely will not, be struck down by the courts because careless drafting renders it unconstitutional in certain applications. In considering challenges to state laws under the taking and contract clauses, courts go to great lengths to defer to legis-
lative determinations. Moreover, courts can interpret section 714 to make it constitutional, workable, and fair. Section 714 should be inter-
preted to void property restrictions only to the extent that they impede installation or use of solar energy systems. Where the statutory lan-
guage and legislative history support such a construction, courts should find section 714 inapplicable to restrictions, such as single family dwell-
ing limitations, that restrict solar installations only incidentally and do not frustrate the legislative goal of promoting solar development. In the few instances where an unconstitutional application of section 714 cannot be avoided through statutory construction, the courts should strike down the legislative definition of reasonable restriction and leave the rest of the provision intact. If it is carefully interpreted and applied by the courts, section 714 can serve as a model for removing significant barriers to solar development in a manner that is both reasonable and constitutional.