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# Bringing Solar Energy to the Planned Community

A Handbook on Rooftop Solar Systems  
and Private Land Use Restrictions

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*Capturing the sun's warmth can help us to turn down the Earth's temperature.  
-President Bill Clinton, Address to the United Nations Special Session  
on Environment and Development, June 1997*

With these words, President Clinton launched the “Million Solar Roofs” Initiative, a cooperative venture between government and the private sector to grow the demand for solar energy technologies. The centerpiece of the MSR Initiative is the installation of one million solar energy systems (photovoltaic, solar water heating, solar space heating) on America’s homes, businesses, and public buildings by the year 2010. Realization of this goal will yield significant economic and environmental benefits, including:

the reduction of emissions of pollutants responsible for acid rain, smog, climate change and other harmful health and environmental effects;

the creation of jobs in a high-skilled, high-paying technology sector;

the improved capability of communities to withstand and recover from natural catastrophes by providing a resilient source of electricity;

increasing our Nation’s fuel diversity, lessening vulnerability to price spikes and supply interruptions from imported sources of energy; and

enhancing the competitiveness of the U.S. solar industry by increasing capacity and bringing down the cost of production.

The MSR Initiative complements various federal and state-level incentive programs intended to accelerate the commercialization of solar energy. These programs include:

*net metering laws or rules* which allow eligible PV owners to interconnect to their local utility and record consumption in such a way that the meter spins forward when electricity is flowing from the utility into the building, and spins backward when power is flowing from the building to the utility. At the end of the billing period, the customer is charged for the “net” energy consumed, or is paid for the “net” energy produced.<sup>1</sup>

*renewable portfolio standards* have been enacted by several states and are under consideration as part of federal efforts to restructure the electric industry. The RPS is designed to encourage the use of renewable energy, either by setting minimum targets for the production of electricity generated from renewable sources; or alternatively, by requiring that all retail suppliers of electricity develop supply portfolios that include a certain percentage of renewable content.<sup>2</sup>

*system benefit charges* are collected based on electricity consumption and appear as a line-item charge on each electricity consumer’s bill in those states where they have been enacted. The funds

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thus collected can be used to fund a variety of programs for solar and other renewable technologies, as well as for energy efficiency improvements.

*buydown programs* which offer financial incentives to “buy down” the relatively high up-front costs faced by potential purchasers of emerging renewable energy technologies. Direct market incentives will generate growth for such technologies, which, in turn, will stimulate private capital investment in manufacturing and installation capacity. At these higher production levels, the costs for renewable technologies are expected to decline, lessening and eventually eliminating the need for market incentives;<sup>3</sup> and

*tax incentives* of various types.<sup>4</sup>

The implementation of these types of programs and incentives will play an important role in meeting President Clinton’s ambitious target of installing one million new solar systems by the year 2010. In addition, efforts to eliminate the various barriers to the purchase, installation and use of solar systems must continue in order for the one million system goal to be exceeded.

Due to the very attractive economics which can be achieved when a solar system is financed through a mortgage, a key focus for the solar industry is the ever-growing market for single family housing.<sup>5</sup> Increasingly, residential developments are taking the form of planned communities which require a uniform and consistent appearance within the development. According to the Community Association Institute’s 1999 Factbook, a staggering 42 million Americans now live in community associations. The number of community associations has burgeoned from 10,000 in 1970 to over 200,000 today. The CAI projects a continuation of these trends, with over half of all new development in large metropolitan areas organized as community associations.<sup>6</sup>



Unfortunately, the community association has too often proven to be an inhospitable environment for growth in the use of solar energy. The problem arises in the context the association’s architectural controls, commonly found in its declaration of covenants, conditions and restrictions (CC&Rs). The developer creates these CC&Rs to ensure the uniform appearance and preserve the “curb appeal” of the project throughout its construction and build-out phase. After the development phase is completed, the responsibility for interpreting and enforcing the architectural controls is passed on to the Homeowner Association (hereafter referred to as “association” or “community association”) and its Architectural Review Committee (ARC) made up of elected members of the

community. In the hands of an overzealous ARC, CC&Rs can become a straightjacket to solar development. As one former California Supreme Court justice explains,

*A development’s rules and regulations are commonly enforced by the association’s board of directors, which holds substantial sway over the financial and property interests of its residents. Many owners may be completely unaware of such a possibility when purchasing their units. Only after they*

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*have settled down do they discover that the development declaration contains a host of intrusive restrictions affecting their daily lives.<sup>7</sup>*

The problem is not intractable, but will require a concerted effort to educate a broad range of stakeholders who can influence the acceptance of photovoltaic and solar thermal devices within the community association. Homeowners need to be made aware of CC&Rs as a potential friction point, learn how to be effective advocates for their installation before the association's ARC, and understand what the law offers them in the way of rights and remedies. Similarly, homebuilders and community associations need to be made aware of state laws that prohibit solar restrictions and of how contemporary solar technologies and configurations are often quite compatible with exterior aesthetic guidelines. It is with these needs in mind that we have constructed this Handbook.

## Table 1

### Key Players Influencing the Aesthetics of Solar Energy Systems

Each solar system will have its own distinct design configuration and visual impact. In the community association context, whether this visual impact is acceptable is not at the sole discretion of the homeowner, but will involve a number of players. Other key decision makers include:

#### The Solar Contractor:

Today, the homeowner has a wide array of systems to choose from and recommend to the homeowner. The homeowner will look to the solar contractor not only for his knowledge of systems with high performance and reliability, but also for his ability to identify systems that are pleasing to the eye. The contractor's expertise again comes into play when deciding on where to install the system so as to minimize the visual impact.

#### The Developer:

According to the Community Associations Institute, "because developers initially design and create a community, they play a unique role in the design review process." In situations where developers sell lots for others to build on (e.g., custom builders, owner builders), the developer retains design review control throughout the period in which the subdivision is "built out." This is to ensure that all development meets the developer's aesthetic standards and common design scheme. Where the developer also acts as the builder, the homeowner must convince him that the appearance of his planned solar energy system will not negatively affect the ability to sell other lots in the subdivision.

#### The Architectural Review Committee:

Usually consisting of owner-members, this group is designated by the association's board to review proposals for changes and improvements to the exterior of the property. Their decisions may or may not be based on aesthetic guidelines that are specific to solar energy systems.

#### Neighbors:

Neighbors can agitate for rejection of solar energy systems they regard as ugly. More often, however, neighbors can be recruited to support the solar installation. Experience shows that once engaged, neighbors will be eager to learn about solar energy – what it looks like, what it costs, what are its reliability and environmental advantages – and to be supportive of efforts to "green" the community.

#### Code Officials:

Code officials do not typically evaluate the appearance of residential solar energy systems. Building, electrical, or plumbing codes are generally more concerned with issues such as safety and structural integrity. However, these requirements may have an indirect bearing on the visual quality of solar systems.

#### Historic Preservation Commissions:

With increasing focus on productive re-use of urban space ("in fill"), the planned community may be created within a designated historic preservation district. Historic preservation controls seek to preserve the cultural, economic, and aesthetic values and maintain the unique architectural integrity of these areas. Consequently, the solar homeowner seeking to retrofit an existing structure, or build a new, architecturally appropriate structure will be required to obtain a "certificate of appropriateness" from the city's planning or building department. As with private design review, the homeowner's plans will be evaluated against the agency's design criteria and approved, conditionally approved, or rejected.

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## Section 2

offers an overview of the law of restrictive covenants and the myriad ways they may impact solar energy systems. The information is primarily intended to address the questions that homeowners will have about CC&Rs, but will be useful as well to the legal practitioner unfamiliar with solar systems, the law of public and private land use restrictions, or both.

## Section 3

is designed to help the homeowner navigate the Architectural Review Committee’s design approval process. We set out a “roadmap” to guide the homeowner through the steps leading up to Architectural Review Committee approval. We suggest ways to improve the prospects for reaching an amicable resolution with the Architectural Review Committee – accommodating legitimate local aesthetic and economic interests while still complying with the technical requirements of residential solar installations.

## Section 4

is entitled “When All Else Fails: Your Legal Options.” As the title implies, this portion of the Handbook explains the homeowners’ legal recourse when a compromise cannot be worked out with his association. The section covers two situations. First, we identify the legal theories potentially available when the homeowner sues the association for its refusal to approve the solar system. Second, we identify the defenses recognized by the law to an action by the association to force the homeowner to take down the system.

## Section 5

identifies several proactive strategies that can be taken by Million Solar Roof Partnerships to overcome local barriers. These strategies fall into two main categories – legislative and education – and are based on successful strategies being implemented in areas of the country where CC&R restrictions have been most acute.



## The Appendices

provide additional resource materials. Appendix B sets out several form letters and legal documents. This should be used in conjunction with the legal strategies set out in Sections 3 and 4 of the Handbook. The homeowner can customize these documents to the particular facts surrounding his interactions with the Architectural Review Committee. Appendix C is a reference guide to the state laws that have been enacted to limit the demands the association can place on solar systems through its CC&Rs. Appendix D sets out a model CC&R law that integrates the best elements of those laws now on the books. Finally, Appendix E contains contact information for organizations and individuals you may wish to consult regarding your solar plans.

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## Approach

The emphasis throughout this Handbook is in providing accurate, authoritative and practical information that the homeowner can use in seeking design approval for his system. This fills a distinct need, as relatively little has been written about the interaction of residential solar system design and the community's aesthetic review process. There is fortunately a rich body of law regarding association covenants and a gamut of land uses (e.g., satellite dishes, landscaping, swimming pools, etc.) that can be drawn from and applied to the rooftop solar problem.

Moreover, this basic legal research has been supplemented by the practical experiences of those most familiar with the effects of architectural controls on solar use. In February 2000, a telephone survey of 13 solar contractors in Arizona, California and Florida was conducted. Solar contractors and other companies who sell solar systems directly to the homeowner must work with both the prospective solar system purchaser and, in many cases, the association's approval entity in order to complete the sale and install the system consistent with the rules of the association.

Appendix A reports the summary results of their experience. This information is intended to provide an indication of how significant CC&R barriers are in practice, a sense of the range of problems encountered, and explanation of how the homeowner and their solar contractor dealt with them. This information influenced the recommendations set forth in this Handbook.

## Terminology

Before leaving this introduction, a brief word on terminology is in order. Technically speaking, CC&Rs refer to three distinct legal mechanisms – 1) conditions, 2) covenants, and 3) restrictions. “Conditions” are understood by lawyers to relate to the circumstances that may end an ownership interest (e.g., right of first refusal, dissolution of the subdivision). “Restrictions” refer to easements, liens and the like.<sup>8</sup> Neither conditions nor restrictions affect solar systems directly. As will be explained in the next section, “covenants” (also referred to as “restrictive covenants”) clearly do. Therefore, unless otherwise required by the context, the Handbook deals almost exclusively with issues surrounding anti-solar covenants.

## SECTION 2 The Law of Restrictive Covenants and your Solar System



*Every man may justly consider his home his castle and himself as the king thereof; nonetheless his sovereign fiat to use his property as he pleases must yield...where ownership is in common or cooperation with others. The benefits of condominium living and ownership demand no less. The individual ought not to be permitted to disrupt the integrity of the common scheme through his desire for change, however laudable that change might be.*

*Sterling Village Condominium, Inc. v. Breitenbach, 251 So. 2d 685 (Fla., 1971).*

This section of the Handbook offers a basic “nutshell” on the legal aspects of restrictive covenants. Restrictive covenants tied to the use of real property form one of the older and more arcane areas of the law.<sup>9</sup> Attempting to understand how such ancient principles regulate today’s solar technologies can be a daunting task for the uninitiated.

Our purpose here is to provide the homeowner with answers to the more practical issues that arise with respect to the operation of real covenants. As a first order of business, the homeowner will need to locate restrictive covenants that may govern her solar installation. We identify the legal mechanisms commonly used by developers to set out the restrictive covenants. Once the association’s covenants are uncovered, the homeowner must be able to assess whether these restrictions control her planned solar energy system and to what degree. Developing a basic familiarity with the association’s covenant terms and its enforcement process will be critical to plotting a future course of action.

### 2.1 What is a restrictive covenant?

A restrictive covenant is a promise made by one property owner to limit the use of his or her realty (land, buildings, or vegetation) so as to benefit other parties. Restrictive covenants are commonly used by planned communities to ensure that all units adhere to a common design theme, and to prevent activities deemed to be undesirable by the community at large.

In theory, restrictive covenants enhance and protect the investment of homeowners and developers by taking the uncertainty out of the nature, extent and “look” of future development within a planned community.<sup>10</sup> Architectural restrictions cover such varied aspects of the development as exterior color, window style, fence and roof material, and whether such backyard equipment as swingsets, basketball hoops and doghouses will be permitted. Restrictions on solar energy systems have become commonplace in many parts of the country.

### 2.2 How long do restrictive covenants last?

Unlike contracts, which bind only the actual parties to the agreement, restrictive covenants are said to “run with the land.”<sup>11</sup> This means that the benefits and burdens created by the restrictions are usually part of the deed or title to the property, and extend to all subsequent owners of the property. A second

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or third purchaser of a home intending to retrofit the home with a solar system may be bound by covenants agreed to by the original homeowner.

The parties may agree that the covenant will last for a certain period. Absent an explicit agreement as to duration, courts will enforce restrictive covenants for a period of time that seems reasonable under the circumstances.

### 2.3 How do restrictive covenants impact solar energy systems?

Restrictive covenants may prohibit outright the use of solar energy systems within the community association. More commonly, restrictive covenants will indirectly affect the solar system by adding to the system cost or by impairing its efficiency. For example, the association may require that the collector array be hidden from view for aesthetic reasons. The cost of latticework or other screening materials must be factored into the overall project cost. More importantly, this same requirement may block access to sunlight. In another example, the association may require that the solar system be located on a roof area facing east or west for aesthetic reasons, despite the availability of a south facing roof surface which would provide the best solar system performance.

### 2.4 Where should I look to determine if my property is controlled by restrictive covenants?

A restrictive covenant can be created in one of several ways – not always obvious – and the homeowner seeking to install a solar system must exercise great care. The purchaser of a *new* home intending to install a solar system should investigate the following:

*your deed:* Restrictive covenants are most often created in the deed conveying the property. The deed may set out the restrictions, or will reference those spelled out in the building plan for the development. Well-drafted deeds will also set out the developer's commitment to insert the same covenants in all conveyances of land within the common development.

*the recorded plan:* A common practice is for developers to file with the local Office of the Recorder a plan (plat or map) depicting the general development scheme. As noted above, these plans may set out in detail the restrictions to which all lots are bound.

*your neighbors' deeds:* Under certain circumstances, the courts will enforce restrictive covenants even where the developer included the provision in some but not all deeds. The legal test is whether the restrictions are part of a general scheme or plan of development and use. A general scheme will be found where the burden of the restrictive covenants falls equally on all homeowners and where the covenants work to the mutual advantage of all lot owners.

*the declaration of covenants:* Some county recorders maintain a separate list of restrictions. This list will be updated to denote waivers, discharges, releases, or amendments to the covenants set forth in the original deed or plan.

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2.5 I am the third owner of my current house. If I did not make any covenants, am I free to put up my solar system as I see fit?

If you are not the original homeowner, you may nevertheless be bound by covenants agreed to by previous owners. In order to determine whether this is the case, you or your attorney will need to conduct a title search going back to the original platting. In some states, this search may be confined to one's own property.<sup>12</sup> Other states, however, assume the homeowner is aware of covenants placed in deeds to other parcels within the subdivision.<sup>13</sup>

2.6 I live in a condominium or housing co-operative. Do I need to be concerned about CC&Rs affecting my solar system?

Yes. Architectural controls also come up in the context of condominium developments and co-operatives. By-laws often dictate what alterations a unit owner can make to so-called "limited common areas" (i.e., porches, balconies). In many cases, condominium owners do not actually own the roofs of the building they live in, rather it is owned and maintained by the association. Issues may arise when one wishes to install a solar system on such "common property."

2.7 Do my association's CC&Rs displace zoning ordinances and the like?

No. Solar installations may also be impacted by local zoning ordinances which are not recorded in the land records of the county. Zoning ordinances are established and enforced by local governments (cities and counties), and are binding on all building-related activity (unless a variance is sought and obtained, which usually is difficult). By contrast, CC&Rs are private restrictions that are established and enforced by the community association, and apply only to the homes and buildings governed by the association.

2.8 How do CC&Rs relate to building codes?

CC&Rs are private, non-governmental restrictions on the use of private property, and usually address aesthetic considerations rather than safety issues. By contrast, most municipal governments (cities and counties) impose restrictions on the use of property pursuant to their authority to protect public health, safety and welfare. Building codes, which are designed to ensure that buildings are structurally sound and provide adequate fire protection, are a prominent example.

In general, the installation of a solar system will require a building, plumbing or electrical permit from the municipality, depending on the type of solar system. For new homes, the permit requirements will typically be integrated into the general permit covering the structure. In contrast, for retrofits, the permit will be specific to the solar system.

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You may reference the map at the following website for a better understanding of the jurisdiction of the various code and approval bodies active around the country:  
<http://sbcci.org/Codes/codes.htm>

The following information can serve as an additional guide to the various code approval agencies:

### ***Solar Swimming Pool Heating and Domestic Water Heating Systems***

Solar thermal systems typically require a plumbing permit, and may also require electrical and or building permits. Local agencies may have other approval requirements and must be consulted.

Equipment certification is intended to provide product credibility and allow standardized comparison of solar thermal systems. Certification may be mandated by state law, as is the case in Florida, or be approached voluntarily. Solar collectors and/or complete systems are certified by one or more of the following entities:

- Solar Rating & Certification Corporation.....**<http://www.solar-rating.org>
- Florida Solar Energy Center.....**<http://www.fsec.org>
- International Association of Plumbing & Mechanical Officials (IAPMO).**<http://www.iapmo.org>  
(mostly in the western United States)
- International Conference of Building Officials.....**<http://www.icbo.com>
- Southern Building Code Congress International.....**<http://www.sbcci.org>  
(mostly in the southeastern United States)
- Building Official Code Administrators International.....**<http://www.bocai.org>

### ***Photovoltaic Systems***

PV systems usually require an electrical permit, and may also require a building permit or other approval depending on the jurisdiction. Specific requirements derive from one or more of the following sets of standards:

*National Electrical Code (National Fire Protection Association)* – focuses primarily on proper system wiring and component selection. The NEC contains a special section – Article 690 – that is dedicated to PV systems. A document entitled Photovoltaic Power Systems and the National Electric Code: Suggested Practices can be downloaded in Adobe.pdf format from the following website: <http://www.sandia.gov/pv/lib.htm> This document is considered to be “state of the art” in terms of detailing the known code compliance issues affecting photovoltaics.

*Institute of Electrical and Electronics Engineers (IEEE) Standard 929-2000* – addresses the issues of power quality, equipment protection, and safety for purposes of interconnecting to the utility

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grid. IEEE 929 is intended to address basic utility safety concerns; however, the system installer must consult with the utility to determine if different or additional requirements apply.

*Underwriters Laboratory (UL) Standard 1741* – is the testing protocol designed to ensure that inverters (i.e., the equipment that converts the direct current (DC) produced by PV systems into alternating current (AC) used in homes) meet the safety standards set out in IEEE 929. Several inverter systems are now UL listed.<sup>14</sup>

In general, the area of solar energy system code compliance, particularly for photovoltaic systems, has not been fully explored or documented. It is recommended that a future effort be undertaken under the auspices of the Million Solar Roofs initiative to further advance the ability of the initiative to overcome code compliance related issues.

## 2.9 What are some of the most common provisions that could affect my ability to install a solar system?

There are almost as many distinctive sets of architectural control schemes as there are community associations. Some of these will be quite prescriptive, setting forth in elaborate detail the myriad factors affecting the visual quality of the homes' exteriors. Others will be more general, and simply provide for the review of such exterior modifications by the designated Architectural Review Committee. Some will require strict *conformity* with a general plan of development, leaving the homeowner with little discretion. Others will strive for harmony, and provide the property owner with wider latitude. Some will deal with solar systems directly; others will impact solar systems indirectly or unintentionally.

In spite of this variety, it is nonetheless possible to highlight some of the more common restrictions that bear on solar energy systems:

***Covenants requiring prior approval of architectural committee*** – These generally provide that the original construction and any modification be sanctioned by the Architectural Review Committee. Often, these provisions are vaguely written, and do not provide the homeowner a clear sense of the standards by which the solar design will be judged. In many cases, a provision requires neighboring property owners to “sign-off” on the proposed system installation. However, this sign-off may or may not be a condition of approval by the Architectural Review Committee.

***Explicit restrictions on the placement of solar equipment*** – These are often found in CC&Rs, especially in those parts of the country where solar systems are commonplace.

***Setback requirements*** – These restrict the placement of structures within a certain distance of the street and property lines. When applied to neighboring property, these provisions can actually work to the advantage of the solar homeowner by preventing shading and other interference with sunlight. However, these provisions can also be detrimental to ground mounted solar installations (i.e., not mounted on a roof) by confining the system to an area of the lot that does not receive adequate sunlight.

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**Height restrictions** – These can be invoked to stop a solar rooftop system that extends above a given vertical limit.

**Restrictions on secondary buildings and structures** – These govern structures and outbuildings adjacent to the home. Such clauses may constrain a homeowner’s ability to locate solar collectors on such secondary structures as garages, sheds, pools, or cabanas. Depending on how the restriction is phrased, the solar system itself might be construed as a covered “structure.” The latter can be troublesome where the covenant limits the number of structures on any given lot.

**Restrictions concerning vegetation** – These can work in favor of or against solar development. On one hand, provisions put in place to limit the height of trees and shrubs (often to protect desirable views) offer the solar homeowner peace of mind that the solar system will not be shaded. On the other hand, the community association may have instituted restrictions that preclude the removal, reduction or cutting of trees and shrubs that shade your system.<sup>15</sup>

**Requirements that utilities be screened** – These can impede access to sunlight when applied to solar collectors and panels. Such restrictions can also increase the structural load beyond that allowed by local codes. These provisions usually originate out of a desire to ensure that oil tanks, air conditioner units, satellite dishes and the like are not observable by neighbors. Unfortunately, screening requirements may be so broadly drafted as to impact non-conspicuous solar equipment.

**Restrictions on the placement of improvements** – such as the requirement that the solar collector be mounted on a backyard-facing façade, can effectively preclude solar installation unless the homeowner is fortunate enough to have a backyard that faces due south for optimal sunlight exposure.<sup>16</sup>

**Specifications regarding roofing materials** – These may preclude building-integrated PV systems if not explicitly listed as an acceptable construction material.

**Regulations affecting piping** – These are crafted to reduce the visual impact of plumbing. These requirements could be accommodated through relatively low-cost, low-tech responses (such as camouflaging the pipes by painting them the same color as the walls and roof); others may require more expensive fixes (e.g., requiring that supply and return pipes be routed through the interior of the structure or through a “pipe chase”).

**Restrictions pertaining to architectural style** – These require that the solar system comport with the predominant style or theme of the planned development (e.g., Colonial, Tudor, modern). As these matters require a fair amount of judgment, much will depend on how rigidly these restrictions are enforced by the Architectural Review Committee.

## 2.10 Who has the right to enforce restrictive covenants?

In most cases, an Architectural Review Committee, appointed by the Association’s Board of Directors, or elected by the property owners in the Association, is responsible for enforcing the CC&R provisions. After the ARC has come to a conclusion on a specific issue, the matter may be referred to

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the entire Board of Directors for further action, which could take the form of a decision to refer the matter to legal counsel for possible action, or to assess fines in order to compel the property owner to adhere to the findings and direction of the ARC.

## SECTION 3 Obtaining Approval for Your Solar Design Concept

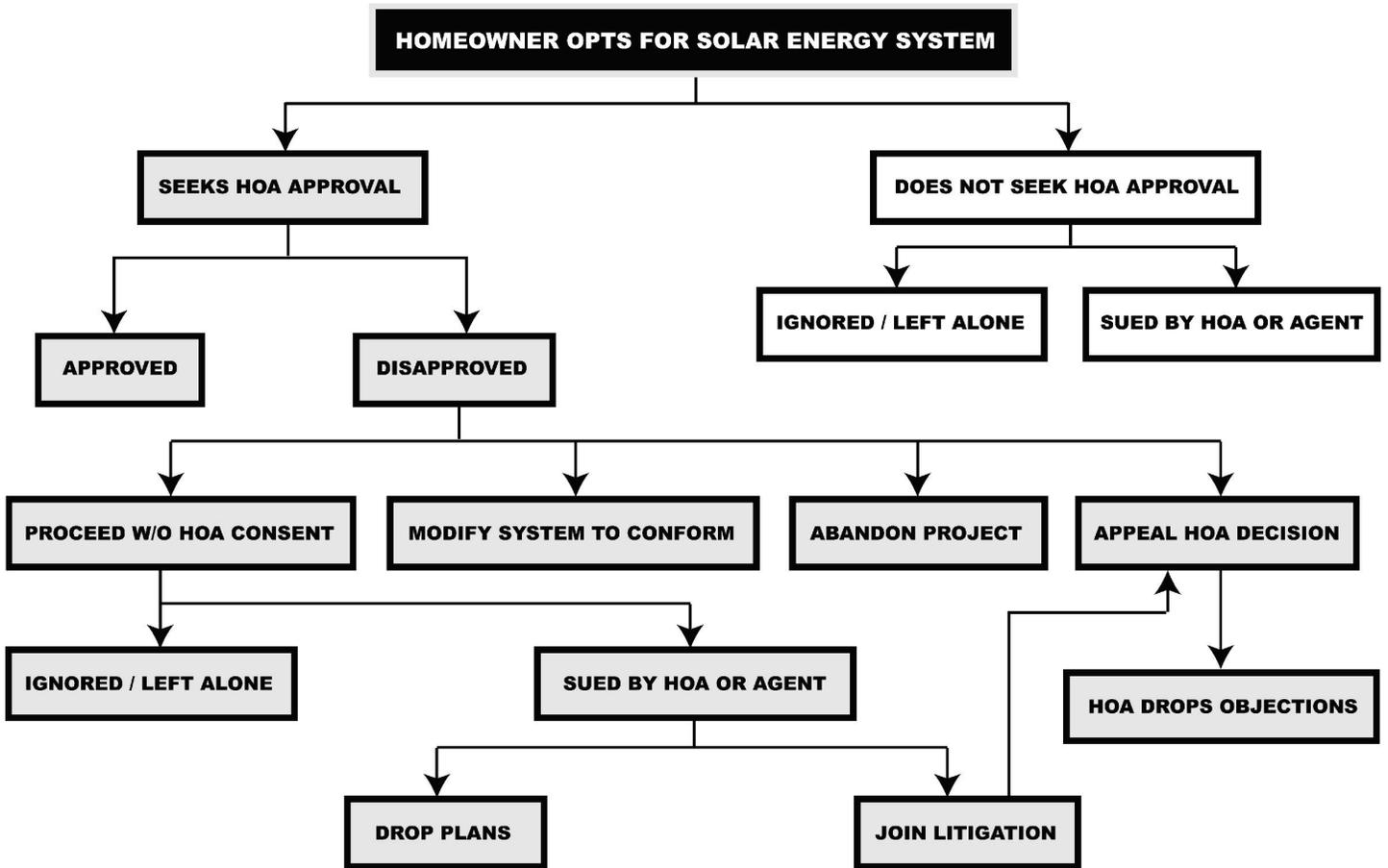


Your challenge as a homeowner will be to ensure that your planned solar system design will fit neatly, unobtrusively, and inconspicuously within the aesthetic of the community. A number of steps can, and should be taken to minimize the visual impact of the system. These steps often can be taken with little or no penalty to system energy production.

In convincing the Architectural Review Committee to approve your system design, you will often find it necessary to overcome their preconceptions of solar systems as “eyesores.” This bias may be reinforced by the recollection of poorly integrated installations that they may have seen elsewhere.

In this section, we walk you through the design approval process. As reflected in Table 2, this is not necessarily a straight path. Along the way, this manual spells out several suggestions for skillfully and successfully negotiating this process. It should be underscored that this advice is necessarily generic and should not substitute for the assistance that can be obtained from your solar system contractor, your local solar trade association, or a private attorney familiar with the circumstances surrounding your installation.

TABLE 2 SOLAR SYSTEM APPROVAL FLOWCHART



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### 3.1 General Considerations

We begin with a discussion of how to avoid and resolve **out of court** the potential conflicts that may arise with the homeowner's association over your proposed installation. Attempting to reach a reasonable accommodation with your association is often a matter of necessity. In most jurisdictions, you will be required to "exhaust your remedies" with the homeowners' association before you can seek judicial relief. In some states, such as California, you will be required to first submit your dispute to arbitration or mediation.<sup>17</sup>

Beyond these legal requirements, pursuing an out of court resolution is also often preferable. Invariably, an out of court resolution will be far less costly, time consuming and disruptive to you and your neighbors. In a survey conducted by the Community Associations Institute, nearly one-fifth of the associations responding indicated that they had been involved in a dispute with a homeowner over rule violations. By comparison, less than one-half of one percent of the associations reported being involved in a lawsuit that went to court.<sup>18</sup>

Of course, if an amicable resolution cannot be reached, you must rely on the legal system to resolve your dispute with the association. Your communications with the association and its designated representatives will form a critical part of the evidentiary record in the event that it should be necessary to pursue litigation. Therefore, it is essential that you carefully document your efforts to obtain approval for your system. To the extent possible, make sure that your communications with the Architectural Review Committee are in writing. Similarly, retain records of all communications with the Architectural Review Committee, including copies of written correspondence and summaries of telephone conversations or personal communications.

The most important advice that we can impart is that you ***be informed, preserve your options, and get involved***. The most common mistakes made by a homeowner are to install the system *before* investigating the community's restrictive covenants, and, if they pertain to solar system installations, *before* seeking approval for the installation. Indeed, a letter from the association requesting removal of the solar array is often the first inkling the homeowner gets that her solar system is subject to CC&Rs. Once that occurs, the ability to modify the system design to assuage the Architectural Review Committee has been made much more difficult. The homeowner is often forced to pursue the more costly and problematic course of voiding or modifying the CC&R.

For better or worse, the homeowner association is a microcosm of our democratic society. On the one hand, this means giving up some freedom of choice and submitting to the will of the majority. On the other hand, it also means that you have the power and ability to help shape the rules governing the community in which you live. As one expert on community association law recommends:

*What can a homeowner do in a community with standards too rigid for the owner's taste? The best course is to become involved in the community: volunteer to work with a committee, understand how and why the restrictions were adopted and how they can be changed. If*

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*necessary, become part of the community's leadership to help mount an appropriate change...Becoming a participant and voicing sound reasons for change is the most effective method to achieve that change.*<sup>19</sup>

## 3.2 Before You Purchase: Understanding the Landscape

### **ISSUE 1: Investigate the planned community's restrictive covenants, as well as the local government's zoning ordinances, comprehensive plans and building codes.**

As a prospective solar homeowner, the first step you should take is to gain an understanding of how the private land use restrictions adopted by the subdivision, and the ordinances, plans and building codes established by the local governmental authority (e.g., municipality, county) constrain your plans for a solar system. Section II of this Handbook explains where to locate and identify the more commonly adopted private restrictions.

You will need to assess whether these restrictions have a bearing on the placement and design of the system. If so, you will have to work with your system installer to determine the feasibility of making this modification, as well as the associated cost and impact on the efficiency of the solar collector(s) or photovoltaic array. It will always be easier to work these constraints into the construction plans than to make modifications after the fact.

Where the restrictions on the solar system cannot be easily accommodated, consider the options described below before abandoning your solar plans or searching for a more solar-friendly community.

### **ISSUE 2: Understand who has the power to review your solar system design and what will motivate them.**

Different issues will come up in new home purchases and those within established community associations. The principal difference between these two situations lies in who is involved and their varying motivations. It will be important to understand who the players are and how your solar plans affect *their* interests.

Chances are, as a new home purchaser you will be dealing directly with the developer or his appointed board. The developer's motivation for including solar equipment in restrictive CC&Rs is a concern that a solar system will be perceived as an eyesore by other prospective homebuyers.<sup>20</sup> The developer may also object to having to customize the home to include equipment that is not on the list of standard options.

As the development is "built out" or completed, control of the association is transferred to its owner-members. The association's board will be staffed by non-developer representatives, who in turn will

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often delegate the responsibility of devising and enforcing architectural standards to an Architectural Review Committee. In spite of what might be suggested by the title, ARC members are not required to be architects or design professionals.<sup>21</sup> These ARCs often undertake the enforcement of the CC&Rs with more attention and vigor than the developer. Their motivations may be quite distinct from those of the developer. They may be interested in how the solar system will affect their own property values, their aesthetic tastes, or their vested authority.

It will be useful to gather some intelligence about the ARC, its process and track record. How has the committee dealt with solar energy systems in the past? Has the committee strictly interpreted the association's CC&Rs, or has it taken a more flexible approach? Does it base its decisions on written guidelines, or are its decisions strictly ad hoc? Answers to these and other questions will inform you of potential pitfalls, and the arguments that are most likely to be persuasive.

### **ISSUE 3: Determine whether the state has a law which specifically addresses solar and CC&Rs.**

Twelve states have enacted laws that bar the adoption of land use regulations prohibiting or unreasonably affecting solar energy use within the planned community. These laws are summarized in Appendix C of this Handbook.

Associations are not always aware that laws banning solar restrictions exist. A letter to the association reciting the applicable law is an effective means of overcoming initial resistance. A sample letter is included in Appendix B of this Handbook.

Additionally, you will want to consult with your local solar industry advocacy groups, such as the state or regional chapters of the American Solar Energy Society (ASES) or the Solar Energy Industries Association (SEIA). Over the years, they have gained valuable insights on how to avoid and resolve disputes with the community association. They should be familiar with the provisions of your state's solar access law, and can offer you an informed opinion about its applicability to your installation. They will also offer you practical advice on using such laws to your advantage. A list of resources is provided in Appendix E of this Handbook.

### **ISSUE 4: Before You Sign the Sales Contract**

As a prospective home purchaser interested in retrofitting your home for solar, what can you do to protect yourself from a future adverse decision by the ARC? A special problem arises because, as a prospective home buyer, technically you have no "standing" under the CC&Rs to petition the ARC for approval of your solar design until you become a full-fledged association member. Here are a few options you might consider in order to minimize your future risks:

*Get an opinion from the ARC:* While it is under no obligation to respond, the ARC may nevertheless give you an informal, non-binding opinion regarding your solar plans.

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*Make the sale contingent on ARC approval:* Assuming the seller is willing to do so, you may condition the sale on ARC approval of your system. The request for design approval can be made by you or, if the ARC refuses to consider it, by the seller. You will have to consider whether you can realistically obtain a decision from the ARC before the closing date. Also, you will also want to consider the expense of developing detailed plans should they be necessary for ARC approval.

### 3.3 Negotiating with Your Association

Having completed your basic planning, you are in a good position to engage your community association. Where your investigation confirms that your system meets accepted community standards, you may request formal approval from the board or its designated review committee. It is in your best interest to have the original application as complete as possible, submitting all requested diagrams, pictures, product information etc., so the association can not reject it on the grounds that it is incomplete.

If, on the other hand, you expect to encounter problems, you will need to carefully plot your course of action. The following lays out several strategies for overcoming unreasonable aesthetic restrictions. We present strategies specific to three cases: 1) where it is unclear whether the covenant applies to your solar system; 2) where the association's architectural review committee is required to approve properly designed solar systems; and 3) where it is unmistakable that the covenant applies to your system. In fact the options laid out in this section may apply to all three situations.

#### Case 1 – Where covenants may be interpreted to restrict solar energy systems

The most straightforward approach to overcoming an ambiguous covenant is to argue that it simply does not apply to your solar installation. This strategy is most relevant in situations where the covenant does not expressly use the term “solar,” but might be argued to cover your solar system *indirectly* or *by implication* only. Because restrictive covenants are disfavored by the law – they restrict the free transfer of property – courts will interpret them quite strictly. Any ambiguity will be resolved against the homeowners' association as the party seeking to enforce the covenant.

The key here is intent. If, for example, it can be shown that the covenant was adopted to deal with satellite dishes, the courts will not extend the covenant to bar solar collectors. Or, if the restrictive covenant was imposed prior to the use of solar energy systems within your community, it can be argued that it could not have been intended to prohibit a technology that the drafters were unfamiliar with.<sup>22</sup>

One caveat. This approach can often be counterproductive to an amicable resolution, appearing to the association as though the solar homeowner is attempting to circumvent the spirit, if not the letter of the CC&Rs.

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Case 2 – Where the solar system is subject to the association’s ad hoc design review process



Associations commonly rely on an architectural review committee to consider the compatibility of new structures and improvements to the community’s aesthetic standards. For example, many covenants are patterned after Article V of FHA Form 1401. This Article prohibits any structure from being commenced, created, maintained, altered or added to any project until plans have been submitted to the association board or its designated Architectural Review Committee and approved in writing. Standards for review are quite broad, general and subjective.<sup>23</sup> The proposed project must show “a harmony of external design and location in relation to surrounding structures and topography.”<sup>24</sup>

A community association’s requirement that your solar system plans be submitted to the Architectural Review Committee is generally enforceable. However, the review must be conducted *fairly, consistently, and in good faith*. Failure by the ARC to meet these legal standards can be challenged in a court of law.<sup>25</sup>

Most importantly, you will want to know whether the Committee has any written guidelines. These guidelines should lay out the criteria by which the Committee will evaluate solar energy systems and the specific design practices that will meet them. Guidelines are extremely helpful in communicating to the homeowner the practices that are acceptable to the committee, and correspondingly, will assist the committee in carrying out its design review responsibilities in a way that is both fair and consistent.

If the ARC has no solar guidelines in place, it may be appropriate to recommend adoption of such guidelines either prior to or in conjunction with its consideration of your system. The California SEIA has developed model installation guidelines that reflect accepted industry standards. These guidelines are reproduced in Appendix B.

Case 3 – Where the solar system is covered by a specific architectural restriction

If the restrictive covenant is clear on its face, the homeowner still has several possible cards he can play to preserve the solar option. These include the following: 1) arguing that the restriction is voided by state law; 2) seeking a waiver from an otherwise valid restriction; 3) modifying the solar system to conform to the association’s architectural requirements; 4) seeking a modification of the architectural requirements to conform to the solar system; and 5) obtaining release agreements from individual members of the association. These options are discussed in turn, but do not necessarily reflect any order of preference.

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## Option 1 – Argue that the restriction is voided by state law

In many states, the law declares null and void any restrictive covenant that unreasonably restricts solar energy use. (See Appendix C) Thus, even if the association declines to exempt your solar system under Option 2, you may still have recourse under the law. The statutory bar to anti-solar CC&Rs provides you with additional leverage since what is a reasonable restriction is judged not by the *subjective* standard of your community’s Architectural Review Committee, but by the *objective* standard of the law.

In making your case to the Architectural Review Committee (and, if rejected, perhaps later to the court), it will be important to have the expert opinion of your system installer as to the impact of the restriction on your system. Obtain from your installer an estimate of the additional cost of modifying or relocating the system to comport with the restriction. Where no modification can be feasibly made, get the installer to state this in writing. Finally, get the installer’s opinion regarding the impact of the modification or relocation on the effectiveness (energy production) of the system.

## Option 2 – Seek a waiver from an otherwise valid restriction.

If the restrictive covenant is clear on its face, the homeowner may nevertheless argue that it is unreasonable *as applied* to the solar system. Thus, a requirement that utilities be screened from view might be reasonable as applied to fuel tanks, since this requirement has no affect on the operation of heating system. By contrast, a screening requirement as applied to a solar panel will be unreasonable since it will block access to essential sunlight.

The Community Association Institute’s guide for association practitioners, *Architectural Control: Design Review*, recommends the following:

*Occasionally, a case will arise where the normal application of the association’s design principles is inappropriate. In some cases, due to special circumstances or unnecessary hardship, the owner’s proposed project achieves the basic design objectives of the association’s requirements, although it varies from the design principles set forth in the association’s guidelines manual. The committee should judicially consider such cases and, if appropriate, grant variances that comply with the basic design objectives of the association’s requirements.*<sup>26</sup>

The homeowner must specifically request a waiver. A sample request for waiver form is provided in Appendix B.

### Residents of Park Fort Washington Association

A Fresno California based contractor, Solahart All Valley, sold solar swimming pool heating systems to three residents of the Park Fort Washington Homeowners Association in Fresno, CA. The contractor then sent a letter to the HOA on behalf of the homeowners asking for approval and referencing California's Solar Rights Act. Park Fort Washington denied permission to install the systems, citing its CC&Rs, which state that no "heating, ventilation, or air conditioning units" may be installed on the roof of a residence. The contractor responded by sending a second letter to Park Fort Washington, again citing the Solar Rights Act, and offering to attend a HOA Board of Directors meeting to give a presentation and answer questions about solar energy systems in general, and the proposed systems in particular.

The contractor met with representatives from the Architectural Committee, which voiced its opposition to the solar system installations, and subsequently with the entire Board of Directors, which also opposed the installations. As a concession, the contractor offered to avoid installing systems on the front of homes so as to minimize visibility from the street and from other residences. Acknowledging this concession, the association attorney nonetheless counseled that, under the CC&Rs, the Board could require the homeowners to competitively bid for solar systems. This would have been extremely burdensome to the homeowners and further delayed their installation. Moreover, it would have interfered with the ongoing relationship between the homeowner and the solar contractor.

Ultimately, all of the solar systems were installed as originally proposed, without any requirement for competitive bids. The contractor agreed to include an addendum on these and future installation contracts to the effect that owners would be obligated to maintain the systems in good fashion. The contractor further agreed that if, in the future, a home with a solar system installed by their company is foreclosed on for any reason, the contractor will assume responsibility for upkeep of the system. For their part, the architectural committee agreed to a maximum three day approval turnaround for future systems.

This case is a good illustration of the importance of active contractor involvement in the negotiation process, and a willingness on both sides to search for reasonable and creative accommodations.

### Option 3 – Modify the solar system design.

Based on your preliminary examination of applicable covenants, inquiries with the Architectural Review Committee, and consultation of your state's law on CC&Rs, you may conclude that your only viable alternative is to rework the system design. If you choose to take this tack, be sure to have in

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hand the Committee’s approval – or at least an indication that it would be approved if installed as provided in the plans – of contemplated changes **before** the installation is made.

It is not unusual for the Architectural Review Committee to insist upon changes to the solar system design **before** it will be approved. These proposed changes can often be accommodated without significantly adding to the expense of the system, and without sacrificing too much in the way of system efficiency. Where the proposed changes are more significant, it is appropriate to consider whether the association’s restrictions are impermissible under the law of your state, as discussed above.

One strategy frequently employed by solar contractors is to propose a larger system than is needed when applying for ARC approval. If the ARC then objects to the size of the system, you can then “reluctantly” agree to reduce the system to a smaller size, which is in fact the “correct” size. If there is no objection to the larger size system in your initial application, you should have no problem when you install the smaller, correctly sized system in its place.

#### Option 4 – Seek a modification of the covenant.

Where it is impractical to modify your solar system to conform to a legally valid restrictive covenant, you will have to harmonize the covenant to conform to your system.

The bylaws of your association will indicate what is required to change a restrictive covenant. You will typically need to obtain the consent of a majority of the homeowners, although in rare cases a super-majority or unanimous consent will be required.<sup>27</sup> On occasion, the subdivision developer will retain the right to modify, waive or omit from subsequent sales agreements the restrictions that were contained in earlier conveyances.

#### Option 5 – Negotiate covenant release agreements with other association members.

Under this alternative, your neighbors relinquish their rights to enforce the covenant restricting your solar energy installation. Under the law, this release must be supported by some “consideration”. This means that you must provide your neighbor with something of value – such as a small payment – in exchange for the release of their legal rights to enforce the restrictive covenant.

This approach has several major drawbacks. First, as a practical matter, it may be unworkable to negotiate separate agreements with a large number of homeowners. Second, this approach adds to the cost of your system, especially if a neighbor seeks compensation that is unreasonable under the circumstances. Third, this approach fully protects you only if you have obtained agreements from all homeowners.

A model covenant release agreement can be found in Appendix B.

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### 3.4 Proceeding without Review Committee Approval

Contractors confirm that homeowners will often proceed with the installation without receiving the prior approval of the ARC. In many instances, the homeowner is simply unaware of the design review requirement until they receive a letter from the association asking that the system be taken down. In other instances, the decision to proceed without formal ARC approval is quite purposeful and deliberate. The results of this strategy appear mixed. Often, the association does not further disturb the homeowner. In other instances, however, the homeowner is asked to remove the system after having incurred substantial costs. This is common in the handful of controversies that wind up in litigation, the subject of the next section.





You have bent over backwards to work with your Architectural Review Committee. You have tried to demonstrate that your system will have minimal visual impact, even agreeing to incorporate additional measures to meet the board's objections and assure that the array will be in harmony with the rest of the structure and the surrounding neighborhood. You may have elicited the support of your immediate neighbors, who the covenants are ostensibly designed to protect. You have pointed out that your state's law expressly prohibits the very roadblocks the Architectural Review Committee is placing in the way of your solar energy system. Yet the board remains steadfast in its refusal to approve your system.

The following discussion highlights several proactive legal claims you can pursue to overcome local resistance to your system. Broadly speaking, the law has developed two distinctive types of actions and remedies – *legal and equitable*. You are probably most familiar with legal remedies, which simply involve the payment of monetary damages to compensate for the alleged harm. But the law also recognizes that, in some circumstances, monetary damages are inadequate and will instead require the litigants to take, or refrain from taking, certain actions. With respect to your solar panel, we are most interested in two equitable remedies: *declaratory judgments* and *enjoinder*.

Alternatively, you may have decided to proceed with your installation without prior approval. You may have been unaware of the Architectural Review Committee's procedural requirements. Alternatively, you may decide to proceed over its clear objections. Your homeowner's association now seeks a court order to have your system removed and for payment of fines accumulated during the time in which you were allegedly in violation of the association's rules. What are your legal defenses to such an action?

#### 4.1 The Solar Plaintiff

In this section, we describe the equitable actions you may wish to initiate. These include: 1) declaratory judgment and 2) injunction against enforcement of the covenant. These remedies are not mutually exclusive; you will often want to raise them together.

##### 4.1.1 Obtain Declaratory Judgment

You may be locked in a stalemate with your association over whether a particular restriction applies to your solar system. As noted in Section II, terms such as "structures," "appurtenances," and "utilities" are inherently ambiguous, and whether they apply to your solar energy system is not self-evident. Alternatively, there may be some question as to whether your state's prohibition against anti-solar restrictions applies to your situation. Under both circumstances, you may wish to obtain a declaratory judgment to break the impasse.

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In a declaratory action, you will ask a judge to clarify your rights and duties under the law. The court's determination will then be binding upon you and your association. A declaratory judgment can be an important means of testing the applicability, validity and enforceability of your community's restrictive covenants.

Timing is an important consideration. A declaratory judgment is most helpful *before* you have proceeded to install the system, since it will enable you to determine whether the association can enforce the restrictive covenant before any outlay of funds. On the other hand, courts will not entertain declaratory actions unless there is an "actual and genuine" dispute.<sup>28</sup> This means that you must have been denied approval by the Architectural Review Committee, or have a reasonable basis for believing that denial is imminent.

You should be aware that declaratory judgments are issued sparingly. For example, a court will not grant your request for declaratory judgment if you can obtain a final and complete determination of your rights through some other means.<sup>29</sup> In addition, depending upon the circumstances, a declaratory ruling may provide you with incomplete relief. Consider again the scenario in which your request for declaratory judgment comes after you have begun the installation. Here, a declaratory judgment will only tell you where your system stands in the eyes of the law. You will still need to halt (i.e., enjoin) the association from enforcing the restriction.

Because of the close connection between declaratory and injunctive remedies, it is wise to plead these as alternative grounds for relief. It is to injunctive remedies that we turn next.

#### 4.1.2 Enjoining Enforcement of the Covenant

An injunction is an order issued by the court directing the defendant to act, or to refrain from acting in a specified way.<sup>30</sup> In this context, you will be asking the court to block enforcement of the restrictive covenants that impact your solar plans. This is a powerful remedy that the community association is sure to heed since it is backed by the court's contempt power.

***If you live in a state that invalidates burdensome solar restrictions:*** Solar siting statutes create an independent basis to negate the community's restrictions. Your cause of action will be crafted to demonstrate that your subdivision's solar restriction is unenforceable under the laws of the state. In some states, this will require a showing that the restrictive covenant "prohibits" the use of your device.<sup>31</sup> In other states, this will involve a demonstration that the community association's rules impose "unreasonable" restrictions on your ability to locate a solar system.<sup>32</sup> In addition to whatever remedies may be spelled out in the statute, such as fines and attorneys fees,<sup>33</sup> you will ask the court to block enforcement of the covenant.

***If you live in a state which does not statutorily address solar restrictions:*** Several states have yet to enact statutes that eliminate solar restrictions. If you live in such a state, you may still bring an action

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to enjoin enforcement of the covenant based on the court's equitable powers. Your arguments to the court will closely track those made initially to the Architectural Review Committee:

**The restriction does not apply to your system:** As noted previously, courts throughout the United States will strictly interpret covenants to ensure that they relate to the conduct the association attempts to restrict.

**The Architectural Review Committee's approval was unreasonably withheld:** Oftentimes, the association's declaration of covenants will not prohibit the solar installation outright, but will instead require the homeowner to apply to an appointed Architectural Review Committee for approval.<sup>34</sup> Such approval cannot be unreasonably withheld. In determining whether denial of your system was reasonable, a court will consider, among other things, whether the review committee developed a quantifiable and objective standard,<sup>35</sup> and whether the process followed by the committee was fair.<sup>36</sup>

**The restriction violates public policy favoring solar energy:** On rare occasions, courts will set aside covenants that run counter to clear public policy.<sup>37</sup> Several legal commentaries<sup>38</sup> have suggested that solar restrictions should present such a situation. The court may find in the various federal and state laws an overriding public policy to promote solar energy. You may buttress your argument by citing solar energy's environmental, national security, and fuel diversity benefits.

The court may find in the various federal and state laws an overriding public policy to promote solar energy. Judges must balance the interests of greater utilization of renewable energy against another deeply held philosophy; namely, the view that contracts should be honored.<sup>39</sup>

## 4.2 The Solar Defendant

It is not surprising that many homeowners have little taste for litigation and the time, expense and uncertainty that come with it. Rather than abandon their plans, however, many homeowners decide to proceed with the solar installation over the Architectural Review Committee's known objection, calculating that the association will refrain from taking legal action to have the system removed. If this gamble backfires, the solar homeowner will have to assert one of the various defenses recognized by the law:

As with lawsuits that you initiate, the defenses you can assert are either *equitable* or *legal*. We begin with a discussion of the equitable remedies.

### 4.2.1 My neighbors have put up solar systems and other roof structures. It doesn't seem fair for the association to enforce the CC&R against me! [Waiver, acquiescence or estoppel]

The homeowners association may *waive* the right to enforce a restrictive covenant through its own inaction. For example, if the homeowners association stood by without protest as others put up solar

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devices, a court will not allow the association to selectively enforce the covenant against you. A court would find it reasonable for you to believe that the association had *acquiesced* to the installation of solar panels. Note that for this doctrine to apply there must have been multiple violations that the association knew of but did not contest.<sup>40</sup>

For rooftop photovoltaic systems, it may not be possible to rely on this defense, as these systems are still quite rare. On the other hand, solar thermal collectors (for water or swimming pool heating) have become a regular part of the landscape in many parts of the country, and to the extent the association has been silent as to your neighbors' systems, it is quite possible that they will be unable ("*estopped*") to enforce the covenant against you.

4.2.2 I know that my association has restrictions on exterior alterations, but they are almost never enforced. Can my solar system be singled out? [Abandonment or changed conditions]

Where there has been a dramatic change in the circumstances surrounding the creation of the covenant, a court may be reluctant to enforce it.<sup>41</sup> For example, *abandonment* occurs when the association shows such an utter disregard for the general building plan or development scheme that it would be oppressive to or unreasonable to continue to enforce it. Thus, you should be prepared to show that the association has permitted multiple and wide-ranging violations.

Alternatively, the homeowner may point to *changed conditions* outside the subdivision as warranting invalidation of the restrictive covenant. This is usually applied in the context of the transformation of the surrounding neighborhood from residential to commercial. It will take some creativity to craft an argument that changed circumstances warrant invalidation of an anti-solar covenant. It may not be enough to point to rising energy costs or the need to rely on more sustainable forms of energy, particularly if continued enforcement has some value to the other owners within the subdivision.

4.2.3 But nobody complained when my system was being installed. Can they make me take it down? [Equitable doctrine of laches]

What if the association's objections first surfaced after your system was installed? Under the doctrine of *laches*, the association may have lost its right to enforce the covenant. In granting this equitable remedy, courts will balance the relative hardship of the parties.<sup>42</sup>

On the one side, the court will weigh the harm that would be caused to you by requiring a removal of the solar panel. Your case can be strengthened if it appears that the solar panel is a permanent fixture, and that it will require considerable time and expense to return your home to its former state. You should also stress other economic factors (the cost of energy alternatives, the "salvage value" for solar panels and other system components), and non-economic factors.

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On the other side, the court will look at the harm to the association if it is required to “suffer” the presence of your solar system. The court will also examine whether the association can be made whole through an action for damages.<sup>43</sup>

***Garden Lakes Community Association v. William Madigan, et al., Maricopa County Superior Court CV1997-04796***

In 1997, two homeowners residing in a planned community governed by the Garden Lakes Community Association installed solar swimming pool heating systems without the approval of the association’s architectural review committee. The homeowner’s applications seeking permission to install the systems were not granted based upon the Association’s Codes, Covenants, and Restrictions (CC&R’s) which were interpreted in such a way as to place restrictions on the systems that were costly or impossible to comply with.

Initially, the association insisted that the system should be ground mounted. However, since there was not enough room in the yard for the system, the association stated that their guidelines would allow the system if it was installed flush with the “plane” of the roof. According to the association’s definition, this meant that the system must be flush with the roofing underlayment, or set into the roof, but would not deem acceptable a system that was mounted on top of the roofing tiles to be acceptable. Installing the system in this manner would require the homeowner to remove all of the roofing tiles over the area where the system would be located, re-roof with asphalt roll roofing, install the system and replace the roofing tiles around the collectors. Not only would this have been prohibitively expensive, but it would have also voided the homebuilders warranty on the roof.

The association also stated that they would allow the system if it were installed on the patio roof. Since the existing patio roof was not nearly large enough, they insisted that a new one should be built. This would have been an expensive option due to the location of the swimming pool. Since portion of the patio roof would cover the swimming pool, posts for support of the structure would have been located in the pool.

A consultant was hired by the association to come up with alternative methods of installation and solar heating the swimming pool. He claimed that the homeowners had other options for installing the collectors and heating the pool. He suggested the following: installing the collectors on the south facing wall of the house, installing the collectors on the south facing block wall of the property, collecting heat by placing plastic tubing in the “cool deck” surrounding the pool, and shielding the collectors on the roof from view.

According to the solar energy experts who testified on behalf of the homeowners, these options were not practical. There was not enough room on the south face of the house to install the collectors without covering the windows and installing the system on the south face of the block wall would have violated the homeowners association's CC&Rs since the panels could still be seen from neighboring properties. The ideal of installing plastic tubing in the cool deck would have necessitated a great deal of work to rip up the existing cool deck and re-pour the concrete with the tubing embedded. According to the solar industry experts, this would have been very expensive and would not have provided enough heat to adequately heat the pool in the winter. Finally, the designs provided by the association's consultant to shield the solar panels would also have shaded the collectors and would have been unsightly and difficult to build. A lawsuit was filed by the homeowners association, seeking to force the homeowners to remove the solar systems. In the action, the association sought a permanent injunction requiring that the homeowners remove the solar systems, and also sought to collect a \$50.00 per day fine imposed since the 1997 installation date. In answering the association, the homeowners contended that the CC&Rs were invalid under Arizona's solar rights law, which declares any covenant "effectively prohibiting" the installation or use of a solar energy device to be void and unenforceable.

After nearly three years of legal action, a Maricopa County Superior Court judge ruled in favor of the homeowners. The Judge found that the association's "guidelines combined with [its] conduct "effectively prohibited" the defendants from placing solar heating devices on their residence", contrary to the provisions of Arizona's solar rights law. This law invalidates unreasonable restrictions on the installation of solar energy devices. In addition, a jury found that the installation guidelines set by the association were not reasonable and that the suggested alternatives were not feasible. As of this writing, it is unclear whether the association will pursue an appeal.

#### 4.2.4 My association is seeking a court order to make me remove my system. What protection does my state's solar rights law afford?

State solar rights laws can be used by the solar homeowner not only as a "sword" but as a "shield" as well. As discussed in Section 4.1.2, the state solar rights law can be cited to void an unreasonable restriction on your solar system. As is illustrated in the Garden Lakes Community Association case (see side panel), the solar rights law can also be asserted by the homeowner to block the association's efforts to force removal of the system.



This Handbook has attempted to outline the issue of overly restrictive CC&Rs from a number of perspectives. This section will set forth suggested courses of action which can be pursued by MSR Partnerships and others in their efforts to alleviate these types of obstacles. The recommendations can be summarized in two broad categories: Legislation and Education.

#### A. Legislation: Adoption of Effective State Solar Rights Laws

Most states have chosen to address CC&R-related barriers by adopting laws designed to limit the scope of private restrictions on solar system installations. These state laws are summarized in Appendix C. According to system contractors and installers, these laws have played a key role in enabling the installation of solar systems in situations where CC&R-related barriers might otherwise have prevented solar energy applications.

Appendix D contains the text of a model law limiting the scope of private restrictions on solar system installations. This model integrates the most effective elements of the various existing laws from around the country. In those states which have no such laws on the books, or in those where the existing laws are not worded effectively enough to prevent their circumvention, this model law represents a potential solution to the problem of CC&R-related barriers.

Our analysis of existing state laws suggests that to be effective, state solar rights laws must:

broadly specify the types of private agreements covered by the statute;

preempt local zoning ordinances which unreasonably restrict solar energy systems;

appropriately balance the public interest in promoting solar energy, with the legitimate private interest in protecting property values;

offer a clear, objective, and quantifiable standard for what constitutes an unreasonable restriction on solar energy systems (i.e., when does the solar restriction “go too far”); and

define the types of structures covered by the law (e.g., single family residential, commercial, multi-family dwellings).

#### B. Education: Outreach Campaign Involving Local Homeowner Associations, Builders and Developers

After legislation, the next most effective means of addressing CC&R issues in a state or region is through the education of those groups most likely to be involved in the dissemination and enforcement

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of CC&Rs: the building community and the homeowner (or business owner) association community. As detailed earlier, in many instances a “boilerplate” CC&R document is customized by a law firm for a builder/developer for use in a new development, and in some instances the language contained in these documents may not be in concert with existing state law in regards to how solar energy systems are treated. Likewise, HOAs may rely on older CC&Rs which pre-date the passage of state laws addressing restrictive CC&Rs. Finally, many HOAs and builder/developers may be completely unaware of the existence of laws addressing CC&Rs, or may have formed incorrect opinions about the appearance of solar systems, or how judicious placement of the equipment can mitigate concerns about appearance.

One way of addressing these types of issues is through a targeted education campaign. Through a US Department of Energy Solar Buildings Program contract administered by the National Renewable Energy Laboratories, several useful documents have been developed which are generic and can be utilized by MSR partners or other stakeholders for this purpose. These documents are available for download in Adobe .pdf format at the following website:

<http://www.eren.doe.gov/solarbuildings>

The first document, entitled CC&R Brochure Parts I & II is a generic brochure which speaks to the value of solar energy systems in general.

The second document sets forth several “Installation Guidelines” which have been developed by the solar industry to mitigate concerns about the appearance of solar systems.

The third, fourth, and fifth documents address the specifics of California, Florida and Arizona state law as it applies to restrictive CC&Rs. These documents may be reproduced and customized to fit the needs of MSR partners and other stakeholders wishing to address the CC&R issue in any given locale.

The two main target audiences for this effort are the Community Associations Institute and the National Association of Homebuilders. Each of these organizations have state and local chapters, and have been quite open, for the most part, to disseminating information on solar and CC&Rs to their members. These organizations hold regular meetings at the local level, and are usually interested in having sponsors for those meetings who address issues of interest or concern to their members. You can locate local or regional chapters at the following addresses:

**National Association of Home Builders**..... <http://www.nahb.com>

**Community Associations Institute** ..... <http://www.caionline.org>

Acquainting HOAs and homebuilders with information on the topic of restrictive CC&Rs and communicating stakeholder interest in removing barriers to the installation of solar systems represent the first steps in a long-term effort to build acceptance of such systems.

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## APPENDICES

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**Appendix A.**

INTERVIEW RESULTS

**Appendix B.**

LEGAL FORMS

**Appendix C.**

SUMMARY OF STATE LAWS REGARDING  
SOLAR SITING RESTRICTIONS

**Appendix D.**

MODEL STATE LAW

**Appendix E.**

ADDITIONAL RESOURCES

*In February 2000, a telephone survey of 13 solar contractors in Arizona, California and Florida was completed. The contractors' business volumes ranged from small (25 systems/year) to large (1,600 systems per year). In aggregate, these companies sell nearly 4,700 systems per year, of which nearly 65% are installed in areas subject to CC&Rs.*

*Of these contractors' sales:*

*~ 265, or almost 6% were on or off-grid photovoltaic systems*

*~ 644, or nearly 14% were solar domestic water heating systems*

*The balance of approximately 3,790 were solar swimming pool heating systems*

*A series of questions soliciting information from these companies regarding their experiences with the selling process where CC&Rs are present was developed. The following observations can be made about the sales experiences of these thirteen contractors:*

80% of systems sold are installed on existing homes or buildings.

74% of systems sold are in developments/associations with pre-existing solar systems.

Overall, just over half (54%) of all homeowners are aware that they may need association approval; however, a much higher percentage of California and Arizona purchasers were aware of that need than those in Florida.

In a somewhat contradictory finding, most companies indicated that their customers learned of the need for association approval during the sales process, after being told of the need by the sales company representative.

In Arizona and California CC&Rs generally address exterior improvements of all types, and in some cases any item mounted on the roof, whereas in Florida solar systems are more often specifically addressed and/or prohibited.

When asked what percentage of homeowners inform the association of their solar system installation plans before actually having the system installed, contractors' responses ranged from 5% to 90%, with no apparent geographic bearing on the response.

**Note:** *Some associations are much more strict than others, and companies may adjust the level of attention they pay to the approval process based on the vigilance of the specific association; however, it is ultimately the responsibility of the homeowner to seek and obtain approval.*

Generally, in the west a higher percentage of homeowners (80%+) seek approval before having systems installed, whereas in Florida nearly 75% of the homeowners have their systems installed without gaining approval from their association.

No company used a contractual agreement to limit their liability in the event that the property owner runs into trouble after having a solar system installed with no prior association approval, but several companies make note of the fact on the sales contract.

In approximately 3 out of 10 cases, an association will ask for a modification to a proposed solar system installation, and of those, most (80%+) were feasible. When those modifications were made, virtually all were then approved.

In only a few cases have contractors attempted to obtain a conforming interpretation (i.e., a ruling that the proposed installation is consistent with applicable CC&Rs). In the three cases

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where one was sought, results were mixed (1 successful, 1 settled just before arbitration, 1 had to remove the system).

Only 3 of the contractors in the survey have ever attempted to get a waiver of the CC&Rs, again with mixed results (1 was successful, 1 said associations sometimes have “bent the rules,” 1 is awaiting a judicial decision).

Seven of the contractors or their customers have appealed one or more adverse decisions by associations, in the majority of cases successfully. Several respondents commented that by the time you get to this point you’ve lost a good percentage of potential purchasers because they “just don’t want the hassle.”

The respondents indicated that for the most part, neighbors of solar system purchasers were not an obstacle to the sale and installation of the system; however, some indicated that given the chance to complain, some neighbors inevitably will, usually unsuccessfully.

All of the contractors were aware of the laws in each state governing solar in associations; however, a very small percentage of prospective purchasers were aware of such a law. Virtually all of the contractors indicated that the presence of the law is a significant factor in gaining approval for systems, and one of the higher volume contractors indicated that as much as 50% of the systems they sell into certain associations would not be installed if the law was not in place.

Seven respondents say they or their customers have been involved in legal action, with the association alone typically bringing the legal action against the system owner, and in most but not all instances the system owner prevailed, albeit after considerable time and expense.

Estimates of the cost involved in appealing an adverse decision by an association run from 2 man-hours to 2 man-days, although none of the respondents actually tracked his time and expenses. Several noted that the time required varies considerably based on the need to make personal appearances, versus appeal via mail, and whether or not the system owner was a personal advocate in the process or not. Virtually all agreed that the appeal process was very time consuming, but that it is necessary to engage so that adverse precedents are avoided.

### **Conclusions:**

Homeowner associations and CC&Rs are a fact of life and must be accepted as a cost of doing business in areas which utilize them. Strong state laws make the job easier, although many associations routinely flaunt those laws, and it is up to the prospective system owner or, failing their willingness to engage, the solar contractor to pursue an approval for a solar system installation. A substantial number of prospective solar system owners simply abandon plans for installing solar as soon as a hurdle such as association approval becomes a factor, and a substantial number of the remainder lose interest once the HOA doesn’t grant immediate approval. Nevertheless, given that the planned community concept with its attendant CC&Rs is gaining momentum across the country, effective means for dealing with the associated problems are being developed, primarily by those companies “out in the trenches” selling solar systems, and by the state solar trade associations who work to pass legislation which can overcome the obstacles.

## FORM 1. SAMPLE LETTER TO ASSOCIATION

*This is the type of letter that contractors and homeowners found particularly helpful in paving the way for system approval. It is designed to call the design review committee's attention to the requirements of state law, and to the fact that the homeowner has the backing and resources of the local solar energy association.*

January 23, 1996

Mr. Smith  
XYZ Homeowners Association  
111 Main Street  
Sacramento, CA

RE: Jones Residence, 222 Oak Drive, Sacramento

Dear Mr. Smith:

I understand that the Architectural Review Committee of your association is reviewing an application to install a solar system on the Jones' residence at the above address. I would like to bring to your attention a section of California law pertaining to the rights of homeowners to install solar energy systems. The Solar Rights Act, enacted in 1978, established California's Policy of encouraging the use of solar energy systems and removed private and governmental barriers to the installation of solar energy systems. The law allows for reasonable restrictions on a solar energy system installation as long as they do not exceed the installation price by more than 20% or decrease the proposed installation's efficiency by more than 20%. Please see the enclosed copy of the law for further information.

I have also enclosed model installation guidelines for your use. As the trade association for solar energy companies in California, these guidelines were developed to fully comply with the new law while assuring consistency in installation techniques. We believe the use of these or similar guidelines will allow your association to assure that solar systems are installed appropriately in your community. If you have questions about the law or these guidelines, I would be happy to discuss them with you.

Our organization is committed to supporting the approval and installation of solar systems free from undue delays, unreasonable restrictions or arbitrary decisions. If we do find a situation where any of this is occurring, we will respond with swift and immediate litigation. However, we supported the Solar Rights Act believing that reasonable approval procedures and guidelines can facilitate homeowner association approval of their homeowners' requests for solar installations. We stand ready to assist in that effort, and urge that you contact us if we can be of further assistance.

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Sincerely,

Jim Barnes  
Executive Director

cc: Association Counsel

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## FORM 2. SOLAR SYSTEM INSTALLATION GUIDELINES

*Architectural review boards often have little or no experience in evaluating the aesthetic impacts of solar installations. The solar homeowner may find it beneficial to propose a set of objective criteria by which the committee should evaluate solar systems. Guidelines also benefit future applicants who plan projects and submit requests. The following set of guidelines, developed by Cal SEIA, reflects accepted industry practices.*

1. Solar units not mounted on the roof (ground mounted) should be installed according to the local jurisdiction's zoning "setback" requirements. Any such structure may need to be concealed from neighbors' views when reasonably possible.
2. Aluminum trim, if used and visible, may be anodized or otherwise color treated if necessary.
3. Solar collectors, whenever possible, should be installed on the plane of roof material (flush mounted).
4. Solar units must be firmly secured to the roof in accordance with local building codes.
5. All exterior plumbing lines should be painted in a color scheme consistent with the structure and materials adjacent to the pipes, i.e. pipes on walls should be painted the color of the walls while roof plumbing should be the color of the roof.
6. A sample or illustrated brochure of the proposed solar unit, which clearly depicts the unit and defines the materials used, should be submitted with the application.
7. Construction drawings for the proposed installation should be provided. They should be drawn to show the location and number of collectors, attachment to roof structure, and location of any other exterior system components.
8. Calculations should be provided showing the number and area of the collectors required.

*Source: California Solar Energy Industries Association*



FORM 3. SAMPLE COMPLAINT SEEKING DECLARATORY JUDGMENT AND FOR INJUNCTIVE RELIEF

The homeowner may request a judicial determination of his rights under the association’s CC&Rs and applicable state law. This request for declaratory judgment is coupled with a request that the association be enjoined from enforcing the association’s solar restrictions against the homeowner.

IN THE CIRCUIT COURT OF THE \_\_\_\_\_ JUDICIAL CIRCUIT,  
IN AND FOR \_\_\_\_\_ COUNTY, FLORIDA

\_\_\_\_\_, [Name] )  
Plaintiff )

)

vs. )

CASE NO. \_\_\_\_\_

)

COMPLAINT FOR DECLARATORY RELIEF

\_\_\_\_\_, [Name] )

AND INJUNCTION

Defendant )

\_\_\_\_\_ [Designation of Pleading]

Plaintiff, \_\_\_\_\_, sues defendant, \_\_\_\_\_, and alleges:

**FIRST CAUSE OF ACTION**  
(Declaratory Relief)

1. This is an action for declaratory judgment to declare certain residential restrictions invalid.
2. Plaintiff is the owner of, and resides on, property in a residential subdivision known as \_\_\_\_\_, located at \_\_\_\_\_ [address], \_\_\_\_\_ [city], \_\_\_\_\_ County, Florida and described as follows: \_\_\_\_\_ [insert legal description]. Plaintiff is, and at all times relevant to this complaint was, a member of the homeowners association known as \_\_\_\_\_. A copy of plaintiff's deed is attached and marked Exhibit \_\_\_\_\_.
3. Pursuant to the association’s Declaration of Covenants and Restrictions, recorded on \_\_\_\_\_, 19\_\_\_\_, in \_\_\_\_\_ [city], \_\_\_\_\_ [County], Florida, Defendant \_\_\_\_\_, Inc. is the incorporated association of unit owners which governs, oversees the operations of, and maintains the common areas, and enforces certain restrictions governing the use of property located in the residential subdivision known as \_\_\_\_\_, located in \_\_\_\_\_ [city], \_\_\_\_\_ County, Florida. Pursuant to the association’s Declaration of Covenants and Restrictions, defendant has standing to institute, defend, settle, or intervene in litigation, arbitration, mediation, or administrative proceedings in his own name as the real party in interest and without joining the individual owners in matters pertaining to enforcement of the governing documents.
4. Plaintiff is bound by certain conditions and restrictions contained in the CC&Rs and other governing documents for the association, copies of which are attached as Exhibits \_\_\_ through \_\_\_ (governing documents) and incorporated by reference.

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5. The governing documents provide, among other things, that \_\_\_\_ [state provisions that are relevant, such as:] “No construction, alternation, removal, relocation, repainting, demolition, addition, installation, modification, or reconstruction of an Improvement, shall be commenced or maintained until the plans and specifications therefor shall have been submitted to the Architectural Review Committee (ARC) and approved in writing by the ARC.”

5. An actual controversy has arisen and now exists between plaintiff and the association, which controversy plaintiff seeks to have adjudicated by this court under the provisions of \_\_\_\_\_ [cite applicable declaratory judgment statute or rule]. The controversy arises out of the following facts: [set forth facts providing background for dispute, such as:]

a. On \_\_\_\_, 19\_\_, and pursuant to Article \_\_ of the association’s Declaration of Covenants and Restrictions, plaintiff applied to the association’s duly designated Architectural Review Committee for approval of plans to install and maintain a solar hot water system upon its premises. Plaintiff’s written application is attached hereto as Exhibit \_\_\_\_.

b. On \_\_\_\_, 19\_\_, the Architectural Review Committee rejected plaintiff’s application, citing Article \_\_ of the association’s Declaration of Covenants and Restrictions, which states, in pertinent part: “No heating units to situate upon roof.” (See Exhibit \_\_, attached hereto).

c. On \_\_\_\_, 19\_\_, plaintiff timely appealed in writing to the Board of Directors. In his appeal, Plaintiff contended, *inter alia*, that 1) the restriction relied upon by the Architectural Review Committee does not apply to plaintiff’s solar system; and 2) that, even if the restriction does apply, it is rendered null and void by Fla. Stat. Ann. §163.04 (West 1993). This law, in effect at all times during this controversy provides, in pertinent part, that “No deed restrictions, covenants, or similar binding agreements running with the land shall prohibit or have the effect of prohibiting solar collectors...from being installed on buildings erected on the lots or parcels covered by the deed restrictions, covenants, or binding agreements.”

d. On \_\_\_\_, 19\_\_, by a vote of 2 to 1, the Board of Directors voted to affirm the decision of the Architectural Review Committee. The Board agreed with the Architectural Review Committee as to the applicability of the association’s Article \_\_ restriction to the plaintiff’s system. Moreover, the Board of Directors rejected Plaintiff’s contention that the restriction violated Florida law, “insofar as the solar collection device may be located elsewhere on the property consistent with the deed restrictions.” [Exhibit \_\_\_\_]

e. Upon information and belief, Plaintiff has applied for, and received, all \_\_\_\_ required governmental permits [*identify necessary permits*] necessary for the installation of his solar hot water system from the \_\_\_\_\_ [*identify applicable building commission*]. All other conditions precedent have been performed by Plaintiff.

6. Plaintiff desires a judicial determination of his rights and duties and a declaration as to \_\_\_\_\_ [*specify nature of relief requested, such as:*]

a. Whether Article \_\_ of Defendant association’s Declaration of Covenants and Conditions is properly construed as not applying to Plaintiff’s solar water heating system. Plaintiff would show that the phrase contained in the covenant relied on by Defendant is ambiguous, especially when considered in light of the instrument as a whole and the customs of the surrounding area at the time the instrument was drawn. Through use of written and parol evidence and evidence of intention, Plaintiff would show that

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Plaintiff is entitled to have the above mentioned phrase construed in a manner that is least onerous to Plaintiff.

b. Whether Article \_\_\_ of Defendant's Declaration of Covenants and Conditions prohibits or has the effect of prohibiting Plaintiff's solar collector within the meaning of Florida law, and is therefore rendered null and void.

7. A judicial declaration is necessary and appropriate at this time under all circumstances so that \_\_\_\_\_ [*specify, such as:*] Plaintiff may determine his rights and duties under the association's Declaration of Covenants and Conditions, as modified by Florida law, and proceed to install and maintain a solar water heating system, as proposed.

8. Plaintiff is not possessed with an adequate legal remedy for reasons that the Plaintiff's desire to utilize non-polluting and sustainable forms of energy to meet his own energy needs cannot be compensated by money damages.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment against Defendants as hereafter set forth.

**SECOND CAUSE OF ACTION**  
(Injunctive Relief)

9. Plaintiff incorporates by reference paragraphs 2 through 8 of this complaint.

10. Defendant's actions will continue to cause great and irreparable harm and this harm cannot be compensated by money damages. Plaintiff is therefore entitled to an injunction restraining Defendant from enforcing Article \_\_\_ of the association's Declaration of Covenants and Restrictions against Plaintiff's solar system.

11. As a proximate result of Defendant's unlawful withholding of approval to Plaintiff's solar hot water system, Plaintiff has been required to, and has incurred, attorney fees and costs and the Plaintiff is entitled to recover those attorney fees and costs in an amount to be proven at trial.

12. As a further proximate result of Defendants' unlawful actions, Plaintiff has incurred incidental damages in an amount to be proven at trial.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment as follows:

1. The Court issue a decree construing the restriction relating to roof-mounted heating systems as not applicable to Plaintiff solar system;
2. The restriction on Plaintiff's solar system be declared invalid and unenforceable under Florida law;
3. That this Court issue a permanent injunction restraining Defendant association from enforcing the restriction against Plaintiff's solar system; and that
4. Plaintiff be awarded reasonable attorney fees, and such other and further relief as the Court may deem proper.

Dated \_\_\_\_\_.

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[Attorney's signature]

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## LEGAL DEFENSES ASSERTED BY THE SOLAR HOMEOWNER

### FORM 4. ESTOPPEL

*This text is applicable to situations where the restriction is selectively enforced; i.e. where the association has previously permitted other solar installations in violation of the applicable CC&Rs without raising any objections.*

The \_\_\_\_\_ [title of governing board of property management association, such as: Board of Directors] of plaintiff has not enforced the covenants, conditions, and restrictions sought to be enforced against defendant as to \_\_\_\_\_ [specify structures as to which covenants, conditions, and restrictions have not been enforced, such as: solar water heating system, solar pool heating system, photovoltaic system], and other violations of the subject covenants, conditions, and restrictions. As a result, plaintiff should be estopped from enforcing the subject covenants, conditions, and restrictions against defendant.

*Adapted from: American Jurisprudence Pleading and Practice Forms*

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## FORM 5. ABANDONMENT OF RESTRICTIONS

*This text may be plead where the association has permitted repeated and obvious violations of the restrictive covenant to the point where the restriction is effectively abandoned.*

Plaintiff acquired \_\_\_\_\_ [his or her] property on \_\_\_\_\_ [date], and had actual and constructive notice of the complete abandonment of the restrictions originally pertaining to the subdivision because there were in existence on that date, and had been prior to that date, numerous violations of each and every restriction set forth in plaintiff's complaint as being restrictions applicable to the subdivision. Plaintiff, by plaintiff's silence and acquiescence, has assented to the abandonment of the restrictions of which plaintiff complains against defendants.

*Source: American Jurisprudence Pleading and Practice Forms*

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## FORM 6. PLEADING WAIVER OF RESTRICTIVE COVENANTS

*The solar homeowner may assert that the association has, through its inaction, waived its right to enforce the restriction.*

Defendant denies that the \_\_\_\_\_ [*specify conduct alleged to be in violation of covenants, conditions, and restrictions*] is in violation of the applicable covenants, conditions, and restrictions as alleged in plaintiff's complaint, but even if such conduct is in violation of the applicable covenants, conditions, and restrictions, plaintiff has waived any objection to such conduct in that \_\_\_\_\_ [*set forth in detail conduct constituting waiver of violation of applicable covenants, conditions, and restrictions*]. As a result, the subject covenants, conditions, and restrictions should not be enforced against defendant.

FORM 7. COVENANT RELEASE AGREEMENT

You may negotiate with your neighbors a release agreement whereby they relinquish their rights to enforce the covenant restricting your solar energy installation.

State of \_\_\_\_\_ } ss  
County of \_\_\_\_\_ }

RELEASE

Release executed on \_\_\_\_\_ [date], by \_\_\_\_\_, of \_\_\_\_\_ [address], \_\_\_\_\_ [city], \_\_\_\_\_ County, \_\_\_\_\_ [state], here referred to as releasor, in favor of \_\_\_\_\_, of \_\_\_\_\_ [address], \_\_\_\_\_ [city], \_\_\_\_\_ County, \_\_\_\_\_ [state], here referred to as releasee.

RECITALS

A. By deed dated, \_\_\_\_\_ Owner became the owner of certain real property in \_\_\_\_\_ [subdivision], subject to certain covenants, conditions and restrictions contained in the subdivision’s Declaration of Covenants and Restrictions, a copy of which is attached hereto as Addendum A. The subdivision’s Declaration of Covenants and Restrictions, in Article \_\_\_\_, expressly provides that: “Under no circumstances shall solar energy devices be installed, operated or maintained within the subject property.”

B. Owner wishes to install and operate a solar energy system on his property.

C. By deed dated, \_\_\_\_\_ releasor became the owner of certain real property in \_\_\_\_\_ [subdivision]. Pursuant to Article \_\_\_\_, of the Declaration of Covenants and Restrictions, as the current owner said real property, releasor is a beneficiary of the solar restrictions described in paragraph A, above. Further, releasor is authorized by all legal means possible to enforce the solar restriction.

D. In consideration of \_\_\_\_\_ Dollars (\$\_\_\_\_), paid to releasor by Owner, receipt of which is acknowledged, releasor hereby releases Owner and his heirs and assigns of and from all liabilities, obligations, claims, demands and causes of action, at law or in equity, arising out of the above-mentioned restrictive covenant.

E. This release is conditioned upon the Owner’s representation that the solar energy device will conform to the plans, attached hereto as Addendum B, and that there will be no material alterations to such plans.

In witness whereof, releasor executes this release at \_\_\_\_\_ [designate place of execution] on \_\_\_\_\_ [date].

[Signature]

[Acknowledgements]

State	Short Description	Detailed Description	Comments	Citation
Arizona	Invalidates restrictions on the installation or use of solar energy devices	"Any covenant, restriction or condition contained in any deed, contract, security agreement or other instrument affecting the transfer or sale of, or any interest in, real property which effectively prohibits the installation or use of a solar energy device . . . is void and unenforceable"; exception for sales before April 1980.	✓ 'Solar energy device' includes systems providing heating, cooling, electrical power, or mechanical power. Ariz. Rev. Stat. Ann. § 44-1761 (West 1999)	Ariz. Rev. Stat. Ann. § 33-349 (West 1999)
California	Invalidates and renders unenforceable any instrument affecting the installation or use of solar energy systems; allows provisions that impose "reasonable restrictions," which are further defined	"(a) 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 that effectively prohibits or restricts the installation or use of a solar energy system is void and unenforceable." "(b) This section shall not apply to provisions which impose reasonable restrictions on solar energy systems. . . . [R]easonable restrictions . . . are those restrictions that do not significantly increase the cost of the system or significantly decrease its efficiency or specified performance, or that allow for an alternative system of comparable cost, efficiency, and energy conservation benefits."	<ul style="list-style-type: none"> <li>✓ 'Solar energy system' currently includes only devices "for space heating or cooling, or for water heating." Cal. Civ. Code § 801.5 (West 1999). A legislative amendment would change the definition to include devices using solar energy "for electricity generation." See Senate Bill 1345 (introduced 1/10/2000).</li> <li>✓ "Significant" increase in cost or decrease in performance is defined as "exceeding 20%."</li> <li>✓ Specifies that requests for approval of solar systems shall be processed in the same manner as any other architectural modification.</li> <li>✓ Willful violation may result in penalties of up to \$1,000.</li> </ul>	Cal. Civ. Code § 714 (West 1999)
Colorado	Voids unreasonable restrictions on solar energy devices; allows provisions that impose "reasonable restrictions," which are <i>not</i> further defined	"(1) . . . [A]ny 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 solely on the basis of aesthetic considerations which effectively prohibits or restricts the installation or use of a solar energy device . . . is void and unenforceable." "(2) Subsection 1 . . . shall not apply to aesthetic provisions which impose reasonable restrictions on solar energy devices and which do not significantly increase the cost of the device."	<ul style="list-style-type: none"> <li>✓ 'Solar energy device' includes systems "for the conversion of the sun's radiant energy into thermal, chemical, mechanical, or electrical energy." Colo. Rev. Stat. § 38-32.5-100.3 (West 1999)</li> </ul>	Colo. Rev. Stat. § 38-30-168 (West 1999)

Florida	Expressly prohibits ordinances by governing bodies, or deed restrictions, covenants, or similar binding agreements that run with the land, which prohibit or have the effect of prohibiting the installation of solar collectors and other renewable energy devices	<p>“(1) . . . the adoption of an ordinance by a governing body, as those terms are defined in this chapter, which prohibits or has the effect of prohibiting the installation of solar collectors. . . . is expressly prohibited.”</p> <p>“(2) No deed restrictions, covenants, or similar bindings agreements running with the land shall prohibit or have the effect of prohibiting solar collectors . . . from being installed on buildings erected on the lots or parcels covered by the deed restrictions, covenants, or binding agreements. A property owner may not be denied permission to install solar collectors . . . by any entity granted the power or right in any deed restriction, covenant, or similar binding agreement to approve, forbid, control, or direct alteration of property with respect to residential dwellings not exceeding three stories in height. For purposes of this subsection, such entity may determine the specific location where solar collectors may be installed on the roof within an orientation to the south or within 45 [degrees] east or west of due south provided that such determination does not impair the effective operation of the solar collectors.”</p>		Fla. Stat. Ann. § 163.04 (West 1993)
Hawaii	voids any provision in a lease, instrument or contract that prohibits a person from installing a solar energy device on certain dwellings	<p>(a) Notwithstanding any law to the contrary, no person shall be prevented by any covenant, term, provision, condition, codicil, or contract, however worded, from installing a solar energy device on any single-family residential dwelling or townhouse that the person owns. Any provision in any lease, instrument, or contract contrary to the intention of this section shall be void.”</p> <p>(b) For the purposes of this section, “solar energy device” means any identifiable facility, equipment, apparatus, or the like, including a photovoltaic cell application, that is applicable to a single family residential dwelling or townhouse and makes use of solar energy for heating, cooling, or reducing the use of other types of energy dependent upon fossil fuel for generation.”</p>	<ul style="list-style-type: none"> <li>✓ Applies to PV and solar thermal systems; see subsection (b) in previous column.</li> <li>✓ Restricts contracts that <i>prohibit</i> installation of solar systems, suggesting that lesser limitations are acceptable.</li> <li>✓ Does not restrict contracts that prohibit installation on multi-family dwellings or other.</li> </ul>	Haw. Rev. Stat. Ann. § 196-7 (Michie 1992)
Indiana	Prohibits a governmental unit from adopting an ordinance that prohibits or unreasonably restricts the use of solar hot water or solar space heating systems	<p>“(8)(a) “solar energy system” means any solar collector or other solar energy device . . . [or] any structural design feature of a building, whose primary purposes is to provide for the collection, storage, and distribution of energy for space heating or cooling, or for water heating.</p> <p>(b) A unit may not adopt any ordinance which has the effect of prohibiting or unreasonably restricting the use of solar energy systems other than for the preservation or protection of the public health and safety.</p> <p>(c) This section does not apply to ordinances which impose reasonable restrictions on solar energy systems. . . . Reasonable restrictions . . . are those restrictions which: (1) do not significantly increase the cost of the system or significantly decrease its efficiency; or (2) allow for an alternative systems of comparable cost and efficiency.”</p>	<ul style="list-style-type: none"> <li>✓ Only restricts prohibitions imposed by ordinance; does not restrict prohibitions imposed by private contracts or other agreements that run with the land, such as covenants.</li> </ul>	Ind. Code Ann. § 36-7-2-8 (West 1995)

Iowa	Grants municipalities the right to issue ordinances prohibiting subdivisions from including restrictive covenants that limit the use of solar collectors	"City councils and county boards of supervisors may include in ordinances relating to subdivisions a provision prohibiting deeds for property located in new subdivisions from containing restrictive covenants that include unreasonable restrictions on the use of solar collectors."	✓ "Solar collector" means "a device or structural feature of a building that collects solar energy and that is part of a system for the collection, storage, and distribution of solar energy." Iowa Code Ann. § 564.A.2 (West 1999)	Iowa Code Ann. § 564A.8 (West 1999)
Massachusetts	Voids any provision in any real property instrument that purports to forbid or unreasonably restrict the installation or use of a solar energy system.	"Any provision in an instrument relative to the ownership or use of real property which purports to forbid or unreasonably restrict the installation or use of a solar energy system as defined in section one A of chapter forty A or the building of structures that facilitate the collection of solar energy shall be void."	✓ <i>"Solar energy system" is "a device or structural design feature, a substantial purpose of which is to provide daylight for interior lighting or provide for the collection, storage and distribution of solar energy for space heating or cooling, electricity generating, or water heating." Mass. Ann. Laws ch. 40A, § 1A (Law Co-op, 1999)</i>	Mass. Ann. Laws ch. 184, § 23C (Law Co-op, 1999)

Nevada	<p>One provision voids any covenant, restriction or condition in a deed, contract or other real property instrument that prohibits or unreasonably restricts the owner of the property from using a system for obtaining solar energy</p>	<p>“1. Any covenant, restriction or condition contained in a deed, contract or other legal instrument which affects the transfer, sale or any other interest in real property that prohibits or unreasonably restricts the owner of the property from using a system for obtaining solar energy on his property is void and unenforceable.  “2. For the purposes of this section, ‘unreasonably restricts the use of a system for obtaining solar energy’ means placing a restriction or requirement on the use of such a system which significantly decreases the efficiency or performance of the system and does not allow for the use of an alternative system at a comparable cost and with comparable efficiency and performance.”</p> <p>-- AND --</p> <p>“1. A governing body shall not adopt an ordinance, regulation or plan or take any other action that prohibits or unreasonably restricts the owner of real property from using a system for obtaining solar energy on his property.  “2. Any covenant, restriction or condition contained in a deed, contract or other legal instrument which affects the transfer, sale or any other interest in real property that prohibits or unreasonably restricts the owner of the property from using a system for obtaining solar energy on his property is void and unenforceable.  “3. For the purposes of this section, ‘unreasonably restricts the use of a system for obtaining solar energy’ means placing a restriction or requirement on the use of such a system which significantly decreases the efficiency or performance of the system and does not allow for the use of an alternative system at a comparable cost and with comparable efficiency and performance.”</p>	<p>New. Rev. Stat. Ann. § 111.239 (Michie 1995)</p> <p>-- AND --</p> <p>New. Rev. Stat. Ann. § 278.0208 (Michie 1995)</p>
Utah	<p>Specifically grants legislative bodies the right to refuse or renew any plat or subdivision plan if deed restrictions, covenants or other agreements running with the land prohibit or have the effect of prohibiting reasonably sited and designed solar collectors or other renewable resource devices</p>	<p>“(1) The legislative body, in order to protect and ensure access to sunlight for solar energy devices, may adopt regulations governing legislative subdivision development plans that relate to the use of restrictive covenants or solar easements, height restrictions, side yard and setback requirements, street and building orientation and width requirements, height and location of vegetation with respect to property boundary lines, and other permissible forms of land use controls.  “(2) The legislative body may refuse to approve or renew any plat or subdivision plan, or dedication of any street or other ground, if the deed restrictions, covenants, or similar binding agreements running with the land for the lots or parcels covered by the plat or subdivision prohibit or have the effect of prohibiting reasonably sited and designed solar collectors, clotheslines, or other energy devices based on renewable resources from being installed on buildings erected on lots or parcels covered by the plat or subdivision.”</p>	<p>Utah Code Ann. § 17-27-901 (1992)</p>

Virgin Islands	Prohibits the inclusion of unreasonable limitations upon the installation or use of a solar collector into any instrument effecting any type of real property transfer	<p>“(a) Any covenant, condition, or restriction contained in any deed, contract, mortgage, security instrument, or other instrument pertaining to a conveyance, sale or transfer of real property or interest therein which prohibits or unreasonably limits the installation or use of a solar or wind energy system shall be void and unenforceable.</p> <p>(b) A covenant, condition or restriction shall be considered ‘unreasonable’ for the purposes of this chapter if it significantly increases the cost and expense of the solar or wind energy system to its owner or user, or significantly decreases its efficiency, or otherwise effectively discourages the installation or use of a solar or wind energy system.”</p>	<p>✓ ‘Solar or wind energy system’ means any system that converts, stores, collects, protects or distributes the kinetic energy of the sun or wind into mechanical, chemical or electrical energy. V. I. Code Ann. Tit. 28, § 1003 (1999)</p>	V.I. Code Ann. Tit. 28, § 1004 (1999)
Wisconsin	One provision voids any restrictions on platted land that prevent or unduly restrict the construction and operation of solar energy systems or wind energy systems	<p>“All restrictions on platted land that prevent or unduly restrict the construction and operation of solar energy systems, as defined in s. 13.48(2)(h)1.g., or a wind energy system, as defined in s. 66.032(1)(m), are void.”</p> <p>-- AND --</p> <p>“No county, city, town or village may place any restriction, either directly or in effect, on the installation or use of a solar energy system, as defined in x. 13.48(2)(h)1.g., or a wind energy system, as defined in s. 66.032(1)(m), unless the restriction satisfies one of the following conditions:</p> <ol style="list-style-type: none"> <li>(1) Serves to preserve or protect the public health or safety.</li> <li>(2) Does not significantly increase the cost of the system or significantly decrease its efficiency.</li> <li>(3) Allows for an alternative system of comparable cost and efficiency.</li> </ol>	<p>✓ ‘Solar energy system’ means ‘equipment which directly converts and then transfers or stores solar energy into usable forms of thermal or electrical energy.’ Wis. Stat. Ann. § 13.48(2)(m)1.g (West 1994)</p>	Wis. Stat. Ann. § 236.292 (West 1994) -- AND -- Wis. Stat. Ann. § 66.031 (West 1982)

## XXX. Siting of Solar Energy Systems

- (1) It is the policy of the state to promote and encourage the use of solar energy and to remove obstacles to the use of solar energy systems.
- (2) Notwithstanding any other provision of law, the adoption of an ordinance by a governing body that effectively prohibits or unreasonably restricts the installation or use of a solar energy system is expressly prohibited.
- (3) Any covenant, restriction, or condition contained in any deed, contract, security agreement, or other instrument affecting the transfer or sale of, or any interest in, real property that effectively prohibits or unreasonably restricts the installation or use of a solar energy system is void and unenforceable.
- (4) For the purposes of this section, an ordinance or a covenant, restriction or condition effectively prohibits or unreasonably restricts the installation or use of a solar energy system if it significantly increases the cost of a solar energy system, or significantly decreases the efficiency or expected performance of a solar energy system.
- (5) For the purposes of this section:
  - (a) "Significantly" means an amount exceeding 20 percent of the cost of the system or decreasing the efficiency of the solar energy system by an amount exceeding 20 percent, as originally specified and proposed.
  - (b) "Solar energy system" means a device or structural design feature, a substantial purpose of which is to provide daylight for interior lighting, or to provide for the collection, storage, conversion, and distribution of solar energy for space heating or cooling, water heating, or electricity generation.
- (6) Whenever approval is required for the installation or use of a solar energy system, the application for approval shall be processed and approved by the appropriate approving entity in the same manner as an application for approval of an architectural modification to the property, and shall not be willfully avoided or delayed.
- (7) Any entity, other than a public entity, that willfully violates this section shall be liable to the applicant or other party for actual damages occasioned thereby, and shall pay a civil penalty to the applicant or other party in an amount not to exceed one thousand dollars (\$1,000).
- (8) In any action to enforce compliance with this section, the prevailing party shall be awarded costs and reasonable attorney's fees.

### SOLAR ENERGY RESOURCES

American Solar Energy Society  
2400 Central Avenue, Ste. G-1  
Boulder, CO 80301  
Tel: 303/443-3130  
Fax: 303/443-3212

E-mail: [ases@ases.org](mailto:ases@ases.org)

Web site:

<http://www.ases.org/about/index.html>

A national organization whose purpose is to promote the use of solar energy. Offers facts on solar energy technology, papers on policy issues, newsletters and web links to related web sites

Aurora

Web site: <http://aurora.crest.org/index.htm>

An informative web site that focuses on how renewable energy technologies work.

Energy Efficiency and Renewable Energy Network, U.S. Department of Energy

Web site: <http://www.eren.doe.gov/>

Offers information developed under a variety of federal solar energy programs, with extensive links to other renewable sources.

Florida Solar Energy Center  
1679 Clearlake Road  
Cocoa, FL 32922  
Tel: 407/638-1000  
Fax: 407/638-1010  
Web site:

[http://www.fsec.ucf.edu/~pv/index\\_t1.htm](http://www.fsec.ucf.edu/~pv/index_t1.htm)

An endeavor of the University of Central Florida, this institution dedicated to solar energy offers access to a wealth of publications, course offerings, and other resources about solar energy.

Million Solar Roofs Initiative

Web site:

<http://www.MillionSolarRoofs.org>

The website of the Dept. of Energy's Million Solar Roofs Initiative, this site offers information about the initiative, state and community partnerships, and about solar technologies.

National Center for Photovoltaics

Web site:

[http://www.nrel.gov/ncpv/ncpv\\_home.html](http://www.nrel.gov/ncpv/ncpv_home.html)

Web site features access to a virtual library, information on research and pv-related events, web links, a pv directory, and a Frequently Asked Questions site.

National Renewable Energy Laboratory

1617 Cole Blvd.

Golden, CO 80401-339.

Tel: 303/275-3000

Web site:

[http://www.nrel.gov/clean\\_energy/solar.html](http://www.nrel.gov/clean_energy/solar.html)

NREL is the laboratory of the U.S. Department of Energy that conducts research in the area of renewable energy. Web site can be referenced for general information on solar energy. Photovoltaic systems, concentrating solar systems, passive solar heating and daylighting, solar hot water, and solar process heat and space heating and cooling are all covered.

North Carolina Solar Center  
Box 7401, N.C. State University  
Raleigh, NC 27695-7401  
Tel: 919/515-3480  
Fax: 919-515-5778  
E-mail: [ncsun@ncsu.edu](mailto:ncsun@ncsu.edu)  
Web site: <http://www.ncsc.ncsu.edu>

A state clearinghouse for solar energy programs and information, including the Database of State Incentives for Renewable Energy (DSIRE), a state-by-state analysis of financial and regulatory incentives to promote renewable energy technologies.

Northeast Sustainable Energy Association  
50 Miles Street  
Greenfield, MA 01301  
Tel: 413/774-6051  
Fax: 413/774-6053  
Web site: [www.nesea.org](http://www.nesea.org)  
Email: [nesea@nesea.org](mailto:nesea@nesea.org)

A resource for information about sustainable energy technologies, and where to find these products and services in the Northeast.

Renewable Energy Policy Project -  
Center for Renewable Energy and Sustainable Technology  
1612 K St., NW, Suite 202  
Washington, DC 20006  
Web site: <http://www.repp.org>

The internet information service of the Renewable Energy Policy Project and the Center for Renewable Energy and Sustainable Technology. Provides general information on solar energy and reports pertaining to solar energy.

Sandia National Laboratories  
Web site:  
<http://www.sandia.gov/pv/pvsys.htm>

Federal laboratory provides technical assistance in order to further the commercial use of photovoltaics. Web site offers the consumer general information on photovoltaics including why they should be used, their affordability and durability, maintenance involved, and where they can be purchased.

Solar Buildings Program  
Web site:  
<http://www.eren.doe.gov/solarbuildings/program.html>

Information on U.S. DOE's program to develop solar technologies that have the potential to provide cost-competitive energy for buildings.

Solar Energy Industries Association  
1616 H. St., NW  
Washington, DC 20006  
Tel: 202/628 7745  
Fax: 202/628/7779

E-mail: [solarsklar@aol.com](mailto:solarsklar@aol.com)  
Web site: <http://www.seia.org/main.htm>

An association of solar energy manufacturers, dealers, distributors, contractors and installers. Offers information regarding solar products and services, solar energy publications, fact sheets etc.

Solar Energy Research and Education Foundation  
1616 H St., NW  
Washington, DC 20006  
E-mail: [info@seref.org](mailto:info@seref.org)  
Web site: [www.seref.org/intro.html](http://www.seref.org/intro.html)

An organization that distributes education material addressing solar energy.

Utility PhotoVoltaic Group  
1800 M Street, N.W., Suite 300  
Washington, DC 20036-5802  
Tel: 202/857-0898  
Fax: 202/223-5537  
E-mail: [upvg@ttcorp.com](mailto:upvg@ttcorp.com)  
Web site:  
<http://www.ttcorp.com/upvg/index.htm>

A group of 150 organizations. Offers general information on photovoltaics and an extensive list of solar energy related web sites.

The Urban Land Institute  
1025 Thomas Jefferson Street NW  
Washington DC 20004-2930  
Tel: 202/624-7000  
Web site: [www.uli.org](http://www.uli.org)

Provides information about the planning, design and development of real estate projects that include the creation of community associations.

## COMMUNITY ASSOCIATION RESOURCES

The American Planning Association  
122 South Michigan Ave., Suite 1600  
Chicago, IL 60603  
Tel: 312/431-9100  
Fax: 312/431-9985  
Web site: <http://www.planning.org>  
Email: [APA@planning.org](mailto:APA@planning.org)

Organized to advance the art and science of planning. Programs aimed at encouraging planning for the development of communities and environments that meet the needs of people and societies more effectively. Website includes many resources on sustainable development and smart growth.

Community Associations Institute  
1630 Duke Street  
Alexandria, VA 22314  
Tel: 703/548-8600  
Web site: [www.caionline.org](http://www.caionline.org)

Identifies best practices, establishes standards and develops innovative concepts for the creation and operation of community associations.

## ENDNOTES

<sup>1</sup> Thomas J. Starrs and Howard Wenger, "Policies to Support a Distributed Energy System" in *Expanding Markets for Photovoltaics: What To Do Next*, (Adam Serchuk and Virinder Singh, editors), Renewable Energy Policy Project, December 1998 (visited April 14, 2000) <[www.repp.org](http://www.repp.org)>

<sup>2</sup> Union of Concerned Scientists, "A Powerful Opportunity: Making Renewable Energy the Standard" (\_\_\_\_ 1999).

<sup>3</sup> Thomas J. Starrs and Vincent Schwent, "Government Buydowns for the Residential Market" in *Expanding Markets for Photovoltaics: What to Do Next*, (Adam Serchuk and Virinder Singh, editors), Renewable Energy Policy Project, December 1998 (visited April 13, 2000) <[www.repp.org](http://www.repp.org)>

<sup>4</sup> For a comprehensive treatment of existing state programs and available financial incentives, the reader should consult Chris Larsen, Henry Rogers & Larry Shirley, *National Summary Report on State Regulatory Incentives for Renewable Energy* prepared for the Interstate Renewable Energy Council by the North Carolina Solar Center. The Database of State Incentives for Renewable Energy can be found at ([www-solar.mck.ncsu.edu/regulat.html](http://www-solar.mck.ncsu.edu/regulat.html)).

<sup>5</sup> Throughout this document we use the term "community association" to broadly encompass three basic types of residential development: 1) the planned community; 2) the condominium; and 3) the cooperative. While these represent three legally distinct forms of organization, for purposes of this Handbook we are more interested in the features that they share in common. The defining characteristic of the association is that all owners automatically become members and submit to its authority over multiple aspects of life within the community. The flip side of this is the association's broad powers and duties to control the use and enjoyment of property within the community, as is reflected in the governing documents. See Brower, "Communities within the Community: Consent, Constitutionalism, and other Failures of Legal Theory in Residential Associations," 7 J. Land Use & Envtl. L. 203 (1992); Palmieri, "Bah, Humbug! Community Association Rule Enforcement", 7 Prob. & Prop. 40 (July/August 1993).

<sup>6</sup> Community Associations Institute, Factbook 1999 (<http://www.caionline.org/news/facts/fact2.html>).

<sup>7</sup> Arabian, "Condos, Cats and CC&Rs: Invasion of the Castle Common," 23 Pepp. L. Rev. 1 (1995).

<sup>8</sup> See Natelson, *LAW OF PROPERTY OWNERS ASSOCIATIONS*, (Little, Brown and Company 1988) at 58.

<sup>9</sup> Restrictive covenants appear as early as the 16<sup>th</sup> century English common law case of *The Spencer's Case*. Stoebeck, "Running Covenants: An Analytical Primer, 52 Wash. L.Rev. 861 (1977).

<sup>10</sup> Brower, "Communities within the Community: Consent, Constitutionalism, and other Failures of Legal Theory in Residential Associations," 7 J. Land Use & Envtl. L. 203 (1992); CAI Factbook at 7.

<sup>11</sup> See generally, 20 Am. Jur. 2d COVENANTS.

<sup>12</sup> e.g., New Jersey, See *Gilpin v. Jacob Ellis Realities, Inc.*, 47 NJ Super 26, 135 A.2d 204.

<sup>13</sup> e.g., Florida, See *Tolar v. Meyer*, 96 So. 2d 554.

<sup>14</sup> For an overview of how PV safety issues are addressed in codes, see Chris Larsen, Bill Brooks, and Tom Starrs "Connecting to the Grid: A Guide to PV Interconnection Issues," 3d. edition, Interstate Renewable Energy Council and North Carolina Solar Center, 2000 at 7-13. This document is available for download at the Interstate Renewable Energy Council web site, at the following link:

<http://www.irecusa.org/connect.htm>

<sup>15</sup> *Bowman v. Wintergreen Property Owners Assn.*, 250 Va. 177, 182 (1995).

<sup>16</sup> Colleen McCann Kettles, *Solar Energy and Residential Land Use Restrictions in Florida*, Law Note 1, FSEC-LN-1-82, Florida Solar Energy Center (1982); Wiley, supra note \_\_, p. \_\_\_\_.

<sup>17</sup> See California Civil Code section 1354. Arbitration and mediation are two very distinctive forms of alternative dispute resolution. In mediation, the parties engage in formal settlement discussions with a trained mediator who, as an impartial third party, attempts to broker a settlement. Arbitration is also conducted by an impartial third party; the arbitrator is empowered to render a decision on the basis of the competing positions put before her. The solar homeowner is advised to consult with an attorney on the best course to pursue.

<sup>18</sup> CAI Factbook at 11.

<sup>19</sup> Palmieri, "Bah, Humbug! Community Association Rule Enforcement," 7 Prob. & Prop. 40 (July/August 1993).

<sup>20</sup> Starrs and Wenger, supra fn. 1.

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<sup>21</sup> Jaffe, Martin and Duncan Erley, *Residential Solar Design Review: A Manual on community Architectural Controls and Solar Energy Use* (American Planning Association 1980).

<sup>22</sup> But see *Jarrett v. Valley Park*, 277 Mont. 333 (1996) (advancing technology does not, in and of itself, render ambiguous otherwise direct and clear language in restrictive covenant barring “television satellite dishes”) In the leading case of *Lake St. Louis Community Association v. Leidy*, 672 S.W.2d 381 (Mo. Ct. App. 1984), the Missouri Appellate Court established the following four rules for interpreting restrictive covenants:

1. If the language of the covenant is plain and the terms can be given their ordinary meaning, no construction is necessary.
2. When the terms of the covenant are open to interpretation, they will be strictly construed against the party seeking enforcement.
3. Restrictions will not be extended by implication.
4. Any reasonable doubt will be resolved in favor of no restriction.

<sup>23</sup> Some suggest that these standards border on the “unintelligible.” Natelson

<sup>24</sup> FHA Form 1401 (VA Form 26-8201) (rev. October 1973), Article V.

<sup>25</sup> See *Westfield Homes v. Herrick*, 229 Ill. App.3d 445 (Ill. App. Ct., 2<sup>nd</sup> Dist. 1992) (association Architectural Review Committee’s blanket prohibition of above-ground swimming pools pursuant to provisions of restrictive covenants requiring submission of plans held unreasonable).

<sup>26</sup> BYRON R. HANKE AND RICHARD S. EKIMOTO, *ARCHITECTURAL CONTROL: DESIGN REVIEW* (4<sup>TH</sup> ED.) (Community Associations Institute 1998).

<sup>27</sup> Entwisle, et.al., “Overcoming Aesthetic Restrictions on Residential Solar Collectors”, 11 *Envtl L. Rep.* 50019 (1981); 20 *Am. Jur. 2d COVENANTS* §236.

<sup>28</sup> See generally 20 *AmJur 2d Covenants* § 289.

<sup>29</sup> *Id.* At §289.

<sup>30</sup> Dobbs, *Law of Remedies*, § 2.9. (1993).

<sup>31</sup> See, e.g., *Haw. Rev. Stat. Ann.* §196-7 (Michie 1992).

<sup>32</sup> See, e.g., *Colo. Rev. Stat.* §38-30-168 (Supp. 1998).

<sup>33</sup> See, e.g., *California Solar Rights Act* §

<sup>34</sup> A good example of a prior-approval covenant is as follows:

“No owner, occupant, lessee, or lessor, or any other person may make any encroachment onto the common elements, make any exterior change, alteration, or construction (including planting), or erect, place, or post any sign, object, light or thing on the exterior of the buildings or any other common element, or on any place or thing in the condominium visible from the outside of a unit, without first obtaining the written approval of the board or its delegate. “

Hyatt and Downer (eds.), *Condominium and Homeowner Association Litigation* §2.20 (1987)

<sup>35</sup> See *Town & Country Estates Ass’n v. Slater* 227 Mont. 489 (1987) (covenant lacked design standard and Design Review Committee unable to state one).

<sup>36</sup> See *Ashelford v. Baltrusaitis*, 600 S.W. 581 2d.(Mo. App. E.D. 1980) (requiring homeowner to submit design plans to all 35 members of homeowners association, all of whom participated in review, deemed unreasonable); Nodiff, “Decision-making in the Community Association: Do the Old Rules Still Apply?” 52 *J. Mo. B.* 141 (May/June 1996).

<sup>37</sup> *Shelley v. Kraemer*, 334 U.S. 1 (1948) (racial restrictions); *Residential Communities of America v. Escondido Community Association*, 603 So. 2d 122 (Fla. 5<sup>th</sup> DCA 1992) (age restrictions); But see, *Hill v. Community of Damien of Molokai*, 911 P.2d 861 (N.M. 1996) (AIDS group home); *Hageman v. Worth*, 782 P. 2d 1072 (Wash. App. 1989) (public interest in encouraging foster home care did not override homeowners’ contractual right to enforce restrictive covenant prohibiting use of property as business); *Hotz v. Rich*, 6 Cal. Rptr.2d 219 (Cal. App. 1<sup>st</sup> Dist. 1992) (amateur radio operations).

<sup>38</sup> Wiley, “Private Land Use Controls as Barriers to Solar Development: The Need for State Legislation” 1 *Solar L.Rptr.* 281 (1979); Kettles, “Solar Energy and Residential Land Use Restrictions in Florida” (unpublished report???1982); Entwisle, et.al., “Overcoming Aesthetic Restrictions on Residential Solar Collectors,” 11 *Envtl L. Rep.* 50019 (1981).

<sup>39</sup> See Hotz, *supra.* at fn 10.

<sup>40</sup> Siles, “Method of Removing Restrictive Covenants in Illinois,” 45 *Chi.-Kent L. Rev.* 100 (1968); 20 *Am. Jur. 2d COVENANTS* §239.

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<sup>41</sup> Murphy, “Property Subject to Easements, Licenses, and Restrictions”, in FLORIDA REAL PROPERTY SALES TRANSACTIONS (Florida Bar Association 1997) at §9.23.

<sup>42</sup> *See generally* Siles at 105.

<sup>43</sup> *Finn v. Morgan Island Estates* 132 N.Y.S.2d 46; 20 Am. Jur. 2d COVENANTS §285. Wiley suggests that it may be preferable to enforce land use restrictions against solar energy systems by awarding neighbors money damages for their injury rather than allowing the injunction to issue. “The logic favoring a damage remedy...is that it would facilitate the purchase of the right to install solar collectors by homeowners from their neighbors.” Wiley at 298. One significant drawback of this approach is that “[t]he added cost of compensating aesthetic damage may discourage the homeowner from buying a solar device at all.” *Id.* At 299.