

***1027 SHOULD THE GREAT SUNSHINE STATE OF ARIZONA DO MORE TO PROTECT SOLAR RIGHTS?**

Arizona's greatest natural resource is the sun shining on our homes every day. This sunshine is so abundant that it could provide more energy than the state's population could ever use.¹ Today, the use of solar technologies is expanding because it provides energy in a cost effective way. Solar technologies save homeowners money, reduce pollution, and most importantly, benefit Arizona's economy.² Solar panels, however, generate unique negative externalities that may stifle solar growth over time. This Comment explores Arizona's current solar proliferation policies and offers suggestions on how to adjust current laws in order to make an even bigger environmental impact on the state.

INTRODUCTION

Arizona is one of twenty-two states with solar rights laws and is relatively stringent in supporting a homeowner's solar rights.³ Property owners may provide reasonable guidelines of the placement of a solar energy device so long as the guidelines do not effectively prohibit the installation or use of the solar energy device.⁴ Several other states, however, have enacted more-stringent and more-explicit regulations regarding the types of restrictions Homeowner's Associations (HOAs) can impose on individuals.⁵ Proponents of solar energy and the use of solar energy systems argue that Arizona can do more to protect the homeowner's rights to solar access. By shifting its policy to mirror a state with more stringent restrictions, Arizona can fully support, and subsequently fully realize, the benefits of solar energy.

***1028 II. ARIZONA LAW**

In the United States, there is no common law right to sunlight.⁶ Therefore, states wishing to outline how their residents may access this resource must enact specific statutory authority in order to protect solar users' rights.⁷ These delineated powers include the homeowners' ability to install a solar energy system, and to protect their rights to the sunshine once their system has been installed in order for the system to remain operational.⁸

Two main Arizona statutes address the HOAs' ability to impose restrictions on the installation of solar energy systems on private homes.⁹ Arizona enacted its first solar rights law in 1979, aiming to be ahead of the curve on renewable energy.¹⁰ The statute generally bans HOA rules that effectively prohibit solar energy devices.¹¹ The Arizona Court of Appeals interpreted this general rule in a 2003 case, *Garden Lakes Community Ass'n v. Madigan*, where it looked at many factors and held that the HOAs' restrictions were unenforceable because it "effectively prohibited" the homeowners from installing or using their solar energy device.¹² The second statute was enacted in 2007, and addressed HOA rules on the physical placement of solar energy devices.¹³ Taken together, these two statutes provide significant protections for the Arizona homeowners who wish to install a solar energy system on their private property.¹⁴

Arizona's original solar rights statute, A.R.S. § 33-439, provides that "[a]ny covenant, restriction or condition contained in any deed, contract, security agreement or other instrument ... which effectively prohibits the installation or use of a solar energy device ... is void and unenforceable."¹⁵ For the last thirty-four years, this statute has allowed Arizonans to install solar energy devices in their backyards and on their roofs.¹⁶ HOAs, however, may still place restrictions on how the homeowners install such devices. The extent of these restrictions turns on the language of the statute and the meaning of "effectively prohibits" within A.R.S. § 33-439.¹⁷

***1029** In 2003, the Arizona Court of Appeals interpreted the meaning of "effectively prohibits" within A.R.S. § 33-439 in *Garden Lakes Community Ass'n v. Madigan*.¹⁸ In this case, the Court held that a restrictive covenant enacted by an HOA effectively prohibited installation of solar energy devices on private property, in direct contradiction to A.R.S. § 33-439.¹⁹ The HOA had placed architectural restrictions on the construction and appearance of solar energy devices on homes such as: the panels must be an integrated part of the roof design, the solar units must not be visible to the public, and the Architectural Review Committee must approve the device prior to installation.²⁰ The homeowners, however, had installed rooftop solar water heaters without following the association's guidelines.²¹ The Court analyzed the intent and purpose of the legislature to determine whether the association "effectively prohibited" the use of the solar energy devices by introducing these architectural restrictions.²² The Court found that the enactment of statewide solar energy statutes revealed that the Arizona legislature sought to encourage the use of solar energy by "offering incentives and limiting disincentives for the use of solar energy devices."²³ The Court, however, also found that the legislative history did not explain the exact meaning and application of the phrase "effectively prohibits."²⁴ The Court explained that Arizona does not follow a bright line rule, but instead adopts a flexible standard that allows restrictions to be decided on a case-by-case basis.²⁵

To determine whether a deed restriction "effectively prohibits" the installation or use of a solar energy device, courts weigh several *Garden Lakes* factors.²⁶ These factors include, but are not limited to: the content and language of the restrictions or guidelines; the conduct of the HOA in interpreting and applying the restrictions; the existence of feasible alternatives; feasibility and cost of alternative designs; whether the HOA policy is wholly responsible for precluding installation; and whether restrictions impose too great a cost, in relation to what typical homeowners in the community are willing to spend.²⁷ By applying these factors, the court intended to provide general guidance to trial courts and parties involved in--or anticipating--litigation regarding restrictions affecting solar energy devices.²⁸ Overall, neither the case, nor A.R.S. § 33-439, eliminate the power of HOAs to impose aesthetic and architectural restrictions on the installation and use of solar energy ***1030** systems. The only bright-line rule appears to be that solar systems may not actually be prohibited by the guidelines of a HOA.²⁹

Three years following the *Garden Lakes* case, the Arizona legislature introduced A.R.S. § 33-1816, which explicitly allows HOAs to "adopt reasonable rules regarding placement of a solar energy device if those rules do not prevent the installation, impair the functioning of the device or restrict its use or adversely affect the cost or efficiency of the device."³⁰ In its 2012 decision in *Fox Creek Community Association v. Carson*, the Arizona Court of Appeals interpreted A.R.S. § 33-1816 for the first time. The Court decided in favor of the HOA by finding that the homeowner could not prove the restrictions were unreasonable and that the homeowner should have reapplied for approval from the HOA.³¹ Neither the courts nor the legislature has determined whether this statute imposes any additional requirement to A.R.S. § 33-439 and the *Great Lakes* standard.³² Furthermore, Arizona's legislature has been silent on the threshold for "adverse" affects or "reasonableness."³³

III. A NATIONAL PERSPECTIVE

When comparing stringency in protecting solar installations and limiting the restrictions that HOAs can place on solar energy devices, Arizona is above average among the twenty-two states that have solar rights laws.³⁴ A report by the Solar Foundation ranks states' solar rights policies into four categories, helping clarify stringent and lenient policies through the country.³⁵ The four categories are: Type I (no limits on restrictions), Type II (undefined "reasonable" restrictions"), Type III (qualified "reasonable" restrictions), and Type IV (quantified restrictions).³⁶ Arizona is a "Type III" state, which has a "reasonability" standard for allowing restrictions, but does not precisely quantify them.³⁷

Only eight states -- California, Florida, Hawaii, Illinois, Nevada, New Jersey, Texas, and Vermont -- enforce quantifiable limits on HOAs' ability to restrict solar energy systems.³⁸ The level of specificity in each statute makes it clear which restrictions are allowed. This is efficient because it limits the costs and time spent in legal disputes over solar ***1031** energy.³⁹ For example, Florida, Illinois, and Vermont have placed quantifiable limits on the restrictions an HOA can place on the

system orientation, such as the direction it faces.⁴⁰ Many of the eight states have placed limits on the amount by which the restriction is allowed to decrease the system's performance.⁴¹ These limits allow the HOA to enforce a specific restriction as long as the performance of the system does not fall below a given percentage.⁴² Additionally, California, Hawaii and New Jersey have decided to place caps on the financial amount by which the restrictions can increase the total cost of the installation.⁴³

IV. PROPOSAL

The Arizona Legislature clearly intended to promote the usage of solar energy;⁴⁴ however, the statutes in place today are only a starting point. Arizona can take further action if it wishes to grow into a state that supports solar energy systems with specificity and predictability. The *Garden Lakes* standard lays out factors for courts to follow for future litigation. While allowing for flexibility can be a good thing, it unfortunately limits predictability. On one hand, homeowners do not know if installation of their solar device is allowed and will often times push the envelope. On the other hand, HOAs are often too restrictive in their covenants, conditions and restrictions, and effectively prohibit solar energy devices all together. Specificity of HOA restrictions in the case of solar energy is positive. Therefore, Arizona should consider becoming a state with quantified limitations, modeling their solar energy policies after Type IV states.

After the Court's 2012 decision in *Carson*, there is still a question as to what the Arizona legislature intended by the language "adversely affect." Without a precise meaning, environmentally minded homeowners will spend unnecessary time and money on litigation against HOAs. Specific limitations on HOA restrictions would be beneficial to Arizona because they would not only help predictability, but they would ensure correct enforcement of the restrictions.

It is clear that Arizona law limits restrictions to those that "adversely affect" the cost or efficiency of a solar energy device, but the legislature needs to specify the threshold as to what impact can be considered "adverse." For example, Arizona can allow HOAs to enforce a restriction as long as the solar device's performance does not decrease by 25%. Additionally, an HOA's restriction can be prohibited if the installation costs increases by 15%. Both of these quantified restrictions are reasonable and therefore, set a standard for all HOAs to follow.

Overall, it is important to realize that using the sun as a natural resource whose rays can be harvested through increasingly efficient solar energy devices. By laying out specific *1032 limitations on HOAs, Arizona can incentivize homeowners to choose solar energy over less environmentally friendly options to power their homes. Making smart legislative decisions now can benefit Arizonans for generations to come. This growth, however, may not be possible if homeowners and HOAs are left in the dark as to what specific restrictions are allowed.

Footnotes

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¹ Advanced Management Executives, *Arizona Solar Rights Law*, http://www.amemanagement.net/css/documents/arizona_solar_rights_law.pdf (last visited Feb. 16, 2014). (all footnotes formatted like this)

² *Id.*

³ Arizona State University, *Arizona's Solar Rights Law*, (July 2013), <http://energypolicy.asu.edu/wp-content/uploads/2012/03/Solar-HOA-Brief-Final.pdf> [hereinafter *Arizona's Solar Rights Law*].

⁴ *Id.*

5 *Id.*

6 Coleen McCann Kettles, A Comprehensive Review of Solar Access Law in the United States: Suggested Standards for a Model
Statute and Ordinance, iii (2008), available at
<http://www.solarabcs.org/about/publications/reports/solar-access/pdfs/Solaraccess-full.pdf>.

7 *Id.*

8 *Id.*

9 Arizona's Solar Rights Law, *supra* note 2.

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 Ariz. Rev. Stat. Ann. § 33-439 (1989)

16 Arizona's Solar Rights Law, *supra* note 2.

17 *Id.*

18 Garden Lakes Cmty. Ass'n v. Madigan, 62 P.3d 983, 984 (Ariz. Ct. App. 2003).

19 *Id.*

20 *Id.*

21 *Id.* at 983.

22 *Id.* at 986.

23 *Id.* at 987.

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.* at 989.

30 ARIZ. REV. STAT. ANN. § 33-1816(B) (2007).

31 Fox Creek Cmty. Ass'n v. Carson, No. 1 CA-CV 11-0676, 2012 WL 2793206, at *4 (Ariz. Ct. App. July 10, 2012).

32 Arizona's Solar Rights Law, *supra* note 2.

33 *Id.*

34 *Id.*

35 The Solar Foundation, *A Beautiful Day in the Neighborhood: Encouraging Solar Development through Community Association Policies and Processes*, 12, http://thesolarfoundation.org/sites/thesolarfoundation.org/files/HOA%20Guide_Final.pdf (last visited Feb. 16, 2014).

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.* at 13.

42 *Id.*

43 *Id.*

44 Garden Lakes Cmmt., 62 P.3d at 987.

