

## 5. SOLAR EASEMENTS

An important factor when considering solar energy systems is current and future access to unobstructed sunlight. Shade from vegetation growth, increased building heights as a result of remodeling, and construction of new buildings on adjacent parcels can affect the amount of sunlight reaching a solar energy system in the future. California's Solar Shade Control Act provides limited protection to solar energy system owners from shading caused by trees and shrubs on adjacent properties.<sup>88</sup> No similar law exists to prevent new or modified structures on an adjacent property from shading an existing solar energy system. However, Sections 801 and 801.5 of the California Civil Code provide for solar easements, which allow a solar energy system owner access to sunlight across an adjacent parcel.

### 5.1. What is an Easement?

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An easement is a right that allows the holder to make some use of land that is not theirs or prohibits the owner of another property from using their land in some way that infringes on the rights of another property owner.<sup>89</sup> There are two basic types of easements. An affirmative easement is a non-possessory right to use land in the possession of another.<sup>90</sup> A negative easement restricts a property owner from using their property in some manner.<sup>91</sup> A solar easement is generally considered a negative easement because it prevents a property owner from using their property in a manner that would prevent sunlight from reaching a solar energy system located on an adjacent property.

### 5.2. What is a Solar Easement?

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Because a landowner's property rights extend to the airspace directly above their land, a landowner may grant access to the sunlight that transverses their land to a solar energy system owner on an adjacent parcel. This is generally referred to as a solar easement.<sup>92</sup> In 1978, as part of the Act, California added the right to receive sunlight to its list of statutorily recognized easements.<sup>93</sup> Section 801.5 defines a "solar easement" as the "right of receiving sunlight across real property of another for any solar energy system." A solar easement must therefore be created for the sole purpose of accessing sunlight to create thermal or electric energy using a solar energy system, as defined by Section 801.5. A person merely seeking to access sunlight could not seek protections under Sections 801 and 801.5.

### 5.3. Requirements to Establish a Solar Easement

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Section 801.5 does not explicitly state that a solar easement must be created in writing, but one California court, in an unpublished portion of its opinion, held that a solar easement must be written to be

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<sup>88</sup> Cal. Pub. Res. Code §§ 25980–25986.

<sup>89</sup> *Black's Law Dictionary* 585–86 (9th ed. 2009).

<sup>90</sup> *Id.* at 586.

<sup>91</sup> *Id.* at 587.

<sup>92</sup> See Melvin M. Eisenstadt & Albert E. Utton, *Solar Rights and Their Effect on Solar Heating and Cooling*, 16 Nat. Resources J. 363, 376 (1976).

<sup>93</sup> 1978 Cal. Stat. ch. 1154; see also Cal. Civ. Code § 801.

enforceable.<sup>94</sup> Section 801.5(b) specifies that “any instrument creating a solar easement” must, at a minimum, include all of the following:

- Description of the dimensions of the easement expressed in measurable terms;
- Restrictions that would impair or obstruct the passage of sunlight through the easement; and
- The terms or conditions, if any, under which the easement may be revised or terminated.

#### 5.4. Limitations of Solar Easements

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Solar easements, in theory, can ensure access to unobstructed sunlight for a solar energy system. However, obtaining a solar easement can be difficult. Because a neighboring landowner must grant the easement to a solar energy system owner through a bilateral negotiation, the neighboring landowner may refuse to negotiate or grant a solar easement. Further, easements can be burdensome and costly for individual homeowners to negotiate. Legal costs could exceed the cost savings of the system if neighbors are not willing to grant the easement for free.<sup>95</sup>

Depending on the density of houses in a neighborhood, a prospective solar energy system owner might have to negotiate with several neighbors to ensure access to sunlight.<sup>96</sup> This is often the case in cities or when multiple houses on a slope block access to sunlight. A greater number of parties negotiating typically increases cost and reduces the chance an easement will be created.<sup>97</sup> And, in certain cases, a solar easement is just not possible. Typically, more established neighborhoods were built with no consideration for the need of solar access. Even if parties are willing to negotiate for a solar easement, the design of the neighborhood may make it impossible to place solar collectors in an efficient manner.<sup>98</sup>

#### 5.5. California Government Code Section 66475.3

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While easements can be difficult to negotiate on an individual basis, particularly in existing neighborhoods, California Government Code Section 66475.3 provides local governments the ability to require solar easements under certain circumstances in subdivision developments. Under Section 66475.3, legislative bodies of a city or county can require certain subdivisions, by ordinance, to create solar easements to ensure that each parcel has the right to receive sunlight across adjacent parcels or units in the subdivision. Such requirements can only be applied to subdivisions for which a tentative map is necessary.<sup>99</sup> If a local jurisdiction chooses to adopt such an ordinance, it must specify the following pursuant to Section 66475.3:

- Standards for determining the exact dimensions and locations of easements.
- Restrictions on vegetation, buildings, and other objects that would obstruct the passage of sunlight through the easement.

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<sup>94</sup> See *Zipperer v. County of Santa Clara*, 2005 Cal. App. Unpub. LEXIS 8982, at \*13 (Cal. Ct. App. Sep. 30, 2005).

<sup>95</sup> Adrian J. Bradbrook, *Future Direction in Solar Access Protection*, 19 *Env'tl. L.* 167, 181 (1988).

<sup>96</sup> *Id.* at 180.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> California Government Code Section 66426 specifies those subdivisions requiring a tentative and final map.

- Terms or conditions, if any, for terminating or revising the easement.
- When establishing the easements, consideration shall be given to feasibility, contour, configuration of the parcel to be divided, and cost.
- An easement cannot reduce allowable densities or the percentage of a lot that can occupy buildings or structures under applicable planning or zoning requirements in force at the time the tentative map was filed.
- The ordinance is not applicable to condominium projects that consist of the subdivision of airspace in an existing building where no new structures are added.

## 5.6. Relevant Case: *Zipperer v. County of Santa Clara*

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In the unpublished portion of its opinion, the *Zipperer v. County of Santa Clara* court specifically discusses the need for written documentation of a solar easement and holds that all solar easements must be written.<sup>100</sup>

The Zipperers built a home with solar heating and cooling systems in the mid-1980s.<sup>101</sup> In 1991, the County of Santa Clara purchased an adjacent property containing a small grove of trees.<sup>102</sup> The trees on this parcel grew significantly after the County acquired the land and began to shade the Zipperer home, limiting their system's performance.<sup>103</sup> In 1997, the Zipperers requested that the County trim or remove the offending shading trees.<sup>104</sup> The County did not respond to the Zipperer's request, and instead passed an ordinance exempting itself from California's Solar Shade Control Act.<sup>105</sup>

In 2004, the Zipperers brought suit against the County under several causes of action, including breach of contract stemming from an implicit right to a solar easement.<sup>106</sup> The Zipperers alleged that the County had implicitly entered into a contract to provide a solar easement by allowing them to construct a solar home according to County requirements.<sup>107</sup> The Zipperers also contended that the County violated this solar easement by allowing the trees on the neighboring lot to grow to a height that shaded their solar energy system.<sup>108</sup>

The *Zipperer* court ruled, in the unpublished portion of its opinion, that an express, written instrument is required to create a solar easement in California.<sup>109</sup> The court explained that "the governing provision is

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<sup>100</sup> 2005 Cal. App. Unpub. LEXIS 8982, at \*12–\*13 (Cal. Ct. App. Sep. 30, 2005); *see also* *Zipperer v. County of Santa Clara*, 133 Cal. App. 4th 1013 (2005) (the published opinion).

<sup>101</sup> *Zipperer*, 2005 Cal. App. Unpub. LEXIS at \*2.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at \*25 note 4.

<sup>106</sup> *Id.* at \*4.

<sup>107</sup> *Id.* at \*9.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at \*13.

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section 801.5, which specifically requires a writing in order to create a solar easement.”<sup>110</sup> And, despite the fact that the Zipperers argued that other provisions provided exemptions to this written requirement, the court ruled that “section 801.5 plainly is the more specific provision, since it sets forth with particularity the requirements for creation of a solar easement.”<sup>111</sup> Therefore, because the Zipperers did not have an express, written instrument, the court held that no solar easement existed.<sup>112</sup>

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<sup>110</sup> *Id.* at \*14.

<sup>111</sup> *Id.* at \*15.

<sup>112</sup> *Id.* at \*12.