

UNDERSTANDING SOLAR EASEMENTS AS A PART OF SOLAR ENERGY DEVELOPMENT

The creation of government incentives for renewable energy, a heightened interest in energy independence and an increasing concern for the environment have all sparked the growth of the solar energy industry. For residential and commercial property owners that are exploring solar energy development, a common issue is simply whether there is currently sufficient access to sunlight to make the project worthwhile and, can anything be done to prevent obstruction to the sunlight in the future? The issue of “solar access” or the ability of sunlight to reach a building or a home’s solar panels becomes an important concern in analyzing a solar project since unobstructed sunlight is an essential part of the efficient operation of a solar system.

Solar energy systems only work if the operator has guaranteed access to sunlight. Issues of solar access involve neighboring air space, including the height and setback of adjacent buildings and trees. As a general rule, existing zoning regulations found in most communities for building setbacks, lot density limitations and height restrictions are sufficient enough to permit adequate sunlight access for properties without any obstruction from adjacent structures and trees. But sometimes the zoning restrictions by themselves are not enough to protect future growth. In that case, the best remedy, as permitted by the laws of a majority of states, is the creation of a solar easement between adjoining neighbors. The purpose of the easement is to get an agreement from the neighboring property that they will not do anything to obstruct sunlight. The easement typically will address the setback and height requirements for buildings and limitations on vegetation growth. Solar easements seek to create adequate protections for solar operators while not creating hardship for adjacent property owners.

A solar easement is generally described as “a right, expressed as an easement, restriction, covenant, or condition contained in any deed, contract, or other written instrument executed by or on behalf of any landowner for the purpose of assuring adequate access to direct sunlight for solar energy systems” (Washington Code). A typical solar easement requires: 1) a description of the real property subject to the solar easement and a description of the real property benefiting from the solar easement (including vertical and horizontal angles); 2) height restrictions placed on structures and vegetation (including trees) which would impair the passage of sunlight onto the adjoining property; 3) terms for revisions to the easement and conditions for termination and 4) an explanation of the compensation for the owner of the real property subject to the solar easement for maintaining the easement and for the owner of the real property benefiting from the solar easement in the event of interference with the easement. Easements, like other conveyance documents, must be in writing. The easements must also be recorded in the office of the recorder of the county where the easement is granted in order to run in perpetuity with the property.

The legal descriptions of both the real property that benefits by the easement and is burdened by the easement must be sufficient to describe the space over the burdened property which needs to remain unobstructed. Because of the earth’s movement in relationship to the sun, the sun’s position in the sky varies throughout the year. The critical hours for protection are from 9:00 am to 3:00 pm. During these hours over 90% of the sun’s radiation for that day falls on earth. Based on that time period and the usual angles of the sun, the angles of possible obstruction can be calculated for purpose of the easement.

A property owner considering solar needs to address the issue of a solar easement early in the process since there is no common law right to sunlight. Solar easements are therefore necessary to protect a property owner who chooses to invest in a solar energy system. But solar easements are just one piece of the real estate equation when planning a solar system for a business or residence. Many communities have zoning regulations that may restrict the opportunity of installing a solar system. Typically these obstacles can be addressed through the process of requesting a variance to allow for the installation. Since solar is relatively new, many neighborhood covenants and leases may not even contemplate the issue of solar but may generally have aesthetic provisions that impact solar installations.

Over 30 states have enacted solar easement statutes including California, Washington, Massachusetts, Montana, Minnesota, Florida, Idaho and Rhode Island. These laws provide the opportunity for neighboring property owners to voluntarily negotiate easements between them to provide for unobstructed solar access now and into the future. Many states have also enacted legislature to mandate the right to solar installations. For example, California has the “Solar Shade Control Act” which provides protection to solar system owners from shading caused by trees on adjacent properties. The law includes a penalty under the California penal code if a neighbor of a solar system does not remove or alter a tree or shrub after reasonable notice. The penalty includes fines of \$1,000 per day after the notice until the violation is removed. Utah is another state that has supported the development of solar. Under Utah law, the land use authority has the right to refuse development plats or subdivision plans if there are any restrictions that have the effect of prohibiting reasonably sited and designed solar collectors or other energy devices from being installed. The Utah Code also has a provision on solar easements whereby an owner of land agrees to ensure adequate exposure of sunlight such that on any given clear day of the year, not more than 10 percent of the collectible solar power will be blocked.

Solar easements permit property owners to voluntarily agree with their neighbors to assist with solar development. Such easements are not only important to validate the future success of a solar development, but are truly essential if the project is to survive long term. Solar energy project owners, whether in a residential or commercial setting must understand the concept of solar easements and include this concept as part of their overall solar energy development strategy.

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