

California's Solar Rights Act

A Review of the Statutes and Relevant Cases

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Updated December 2014

Originally Published January 2007



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1. INTRODUCTION

California has been a leader in promoting solar energy since 1976, when it began to provide financial incentives for investment in solar energy technologies.¹ One legacy of California’s early interest in solar energy is a series of laws designed to protect a consumer’s right to install and operate solar energy technology on a home or business, including access to sunlight, or solar access. Although California’s solar energy laws have been around for nearly thirty years, we now examine this groundbreaking legislation for two reasons. First, consumers and businesses often misunderstand the provisions and application of these laws. Second, given the significant financial incentives available for solar technologies in California and the availability of property-assessed clean energy (“PACE”) financing programs,² it is likely that the number of operating solar energy systems will increase dramatically. As a result, it is reasonable to expect that the number of solar access questions in California will also increase.

This paper examines the sections of California law known collectively as the Solar Rights Act (hereinafter “the Act”), and reviews lawsuits brought under the Act.³ Through the Act, which was enacted in 1978, the legislature sought to balance the needs of individual solar energy system owners with other property owners by developing solar access rights.⁴ The Act limits the ability of covenants, conditions, and restrictions, (hereinafter “CC&Rs”) typically enforced by homeowner associations (hereinafter “HOAs”), and local governments to restrict solar installations. These are perhaps the most well known and frequently contested provisions of the Act.⁵ However, the Act also creates the legal right to a solar easement and requires local governments to preserve passive cooling and heating opportunities to the extent feasible in new development projects. The extent to which the Act protects solar energy system owners from restrictions by HOAs and local governments is frequently misunderstood and the subject of many disputes. Therefore, this paper is intended to provide solar energy users, HOAs, and local governments more information about the content and application of California’s primary solar access law.

1.1. Organization of the Paper

The paper is organized into the following sections:

- Section 2 provides a brief overview of the Act’s key provisions.
- Section 3 discusses the ability of CC&Rs, such as those enforced by HOAs, to restrict solar energy installations.

¹ A solar energy tax credit was created in 1976 and codified in California Revenue and Taxation Code Section 23601 (repealed 1987).

² PACE programs allow local government entities to offer sustainable energy project loans to eligible property owners. Through the creation of financing districts, property owners can finance renewable onsite generation installations and energy efficiency improvements through a voluntary assessment on their property tax bills.

³ The Solar Rights Act comprises the following California codes of law: California Civil Code Sections 714 and 714.1, California Civil Code Section 801, California Civil Code Section 801.5, California Government Code Section 65850.5, California Health and Safety Code Section 17959.1, California Government Code Section 66475.3, and California Government Code Section 66473.1.

⁴ See 1978 Cal. Stat. ch. 1154.

⁵ While not all common interest developments associations are called HOAs, for simplicity we use HOA throughout this paper to denote all associations. Please see Civil Code § 4100 (As amended by AB 805 (2012 Cal. Stat. ch. 180)).

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- Section 4 discusses how provisions of the Act limit the ability of local governments to restrict solar energy installations and require an expedited, streamlined permitting process for small residential rooftop solar systems.
- Section 5 provides information about the definition and use of solar easements, which are provided for in the Act.
- In Section 6, we examine solar easements in new developments, as required and permitted by the Act.
- Section 7 summarizes and concludes this paper.
- The Appendix, comprising Sections 8 and 9, includes other resources discussing the Act and the full text of the statutory codes comprising the Act.

2. OVERVIEW OF THE ACT

The Act creates a legal framework for solar access. It includes limited protections to allow consumers access to sunlight and to limit the ability of HOAs and local governments from preventing the installation of solar energy systems.

The Act was adopted in 1978 and went into effect on January 1, 1979.⁶ Its enactment contributed to California's strong policy commitment to solar energy. According to the original legislation, "[t]he purpose of the act is to promote and encourage the widespread use of solar energy systems and to protect and facilitate adequate access to the sunlight which is necessary to operate solar energy systems."⁷ The enacting bill further states that:

The use of solar energy systems will reduce the state's dependence on nonrenewable fossil fuels, supplement existing energy sources, and decrease the air and water pollution which results from the use of conventional energy sources. It is, therefore, the policy of the state to encourage the use of solar energy systems.⁸

This policy rationale is as relevant today as it was in 1978 and continues to drive California's solar energy policy initiatives.

2.1. Components of the Act

For the purposes of this paper, we focus on the following six key provisions of the Act in California law today:

1. Limits on CC&Rs to Restrict Solar Installations – The Act prohibits CC&Rs, like those enforced by HOAs, which would unreasonably restrict the use or installation of solar energy systems. (California Civil Code Sections 714 and 714.1).

⁶ 1978 Cal. Stat. ch. 1154.

⁷ *Id.* at Sec. 2(c).

⁸ *Id.* at Sec. 2(b).

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2. Solar Easements – The Act establishes the legal right to a solar easement, which protects access to sunlight across adjacent properties. (California Civil Code Section 801). It also describes the minimum requirements needed to create a solar easement. (California Civil Code Section 801.5).
3. Definition of a Solar Energy System – The Act defines which solar energy systems are covered by its provisions. (California Civil Code Section 801.5).
4. Limits to Local Government Restrictions on Solar Installations – The Act discourages local governments from adopting an ordinance that would unreasonably restrict the use of solar energy systems. (California Government Code Section 65850.5). It also requires local governments to use a non-discretionary permitting process for solar energy systems and to create an expedited, streamlined permitting process for small residential rooftop solar energy systems. (California Government Code Section 65850.5 and California Health and Safety Code Section 17959.1). Additionally, provisions of the Act require local governments seeking state-sponsored incentives for solar energy systems to demonstrate compliance with certain provisions of the Act. (California Civil Code Section 714).
5. Passive Solar Opportunities in Subdivisions – The Act requires certain subdivisions to provide for future passive and natural heating and cooling opportunities to the extent feasible. (California Government Code Section 66473.1).
6. Allowance for Requiring Solar Easements – The Act allows cities and counties to require by ordinance the dedication of solar easements in certain subdivision developments as a condition of tentative map approval. (California Government Code Section 66475.3).

3. LIMITS ON CC&RS TO RESTRICT SOLAR INSTALLATIONS

In California, common interest developments such as condominiums and planned communities typically have associations to manage their affairs and enforce their rules. These associations, often called HOAs, are widespread and an increasingly important part of homeownership in California.⁹ HOAs have rules and regulations, expressed in part through CC&Rs that govern many aspects of homeownership within the common interest development, including the installation of solar energy systems. To ensure that CC&Rs do not place unreasonable restrictions on the use of solar energy, California enacted Civil Code Section 714 in 1978 as part of the Act.¹⁰ Section 714 limits the ability of HOAs to restrict solar energy system installations through unreasonable CC&Rs and prohibits undue discrimination in processes used to consider and approve solar energy installations.

3.1. What are CC&Rs?

CC&Rs are the governing documents that dictate how an HOA operates and what rules the owners, their tenants, and guests must obey. CC&Rs include three distinct legal mechanisms: (1) covenants; (2) conditions; and (3) restrictions. Covenants, also called “restrictive covenants,” are enforceable promises that assign either a benefit or a burden to a property.¹¹ Covenants are usually part of the property title or deed and therefore apply to subsequent property owners. Conditions relate to the circumstances that may end an ownership

⁹ Julia L. Johnston & Kimberly Johnston-Dodds, *California Research Bureau, Common Interest Developments: Housing at Risk?* 1 (2002), available at <http://www.library.ca.gov/crb/02/12/02-012.pdf>.

¹⁰ See 1978 Cal. Stat. ch. 1154.

¹¹ *Black's Law Dictionary* 419 (9th ed. 2009).

interest (e.g., right of first refusal, dissolution of the subdivision).¹² Restrictions refer to legal restrictions placed on the ownership or use of the property, such as easements or liens.¹³ In common interest developments, restrictive covenants typically dictate the manner in which solar energy systems can be installed.¹⁴

3.2. Does the Act Prohibit All CC&Rs From Restricting Solar Installations?

The Act contains many provisions and broadly addresses solar access issues, but it is perhaps best known for prohibiting CC&Rs that unreasonably restrict solar energy system installations. California Civil Code Section 714(a), in pertinent part, provides that “[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 . . . that effectively prohibits or restricts the installation or use of a solar energy system is void and unenforceable.”¹⁵ Because Section 714 does not define the precise meaning and application of “effectively prohibits or restricts,” courts have adopted a practical, flexible standard that permits the many variations of restrictions and effects to be considered on a case-by-case basis.¹⁶

Although the intent of Section 714(a) is to prohibit CC&Rs from placing restrictions on solar energy system installation, other subsections of 714 and 714.1 allow CC&Rs to impose certain reasonable restrictions on solar installations.¹⁷ The following provides information to determine whether a restriction is considered reasonable under the Act.

3.2.1. Cost and Performance Criteria for Reasonable Restrictions

The Act permits CC&Rs to impose requirements that do not “significantly” increase the cost of the system or decrease its efficiency or performance.¹⁸ Sections 714(d)(1)(A) and 714(d)(1)(B) provide criteria to define when a restriction has “significantly” altered system price or performance for both solar water heating and photovoltaic systems. Restrictions cannot increase the cost of solar water heating systems by more than ten percent, but in no case more than \$1,000.00, or decrease the system’s efficiency by more than ten percent.¹⁹ Restrictions on photovoltaic systems cannot increase the system cost by more than \$1,000 or decrease system efficiency by more than ten percent.²⁰ Restrictions on either type of system need only increase cost or decrease efficiency to be found unreasonable under the Act.²¹

¹² See *id.*

¹³ *Id.* at 421.

¹⁴ Thomas Starrs et al., *Bringing Solar Energy to the Planned Community: A Handbook on Rooftop Solar Systems and Private Land Use Restrictions* 13, http://www.sdenery.org/uploads/Final_CC&R_Handbook_1-01.pdf.

¹⁵ While Section 714(a) does not explicitly state that this prohibition applies to leases, a cautious reading of the Act suggests that this prohibition covers residential, commercial, and industrial leases.

¹⁶ See *Palos Verdes Homes Ass’n v. Rodman*, 182 Cal. App. 3d 324, 328 (1986).

¹⁷ See Cal. Civ. Code §§ 714(b), 714(d)(1)(A), and 714(d)(1)(B).

¹⁸ § 714(b).

¹⁹ § 714(d)(1)(A).

²⁰ § 714(d)(1)(B).

²¹ See § 714(d)(1)(A)-(B).

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With limited case law in this area, it is unclear whether these criteria could also be applied to restrictions imposed by local governments (e.g., restrictions or requirements imposed during the permitting process). We discuss local governments' ability to restrict solar energy systems in Section 4 of this paper.

3.2.2. Alternative Comparable System

Section 714(b) also permits reasonable restrictions that allow a prospective solar energy system owner to install "an alternative system of comparable cost, efficiency, and energy conservation benefits." Although Section 714(b) does not explain what makes an alternative system "comparable," a California Court of Appeal found that an HOA could prohibit installation of passive solar water heaters, which can extend above the roof surface, but allow comparable active solar water heaters, which can have a lower profile on the roof and are similar in cost and performance.²²

3.2.3. Other Restrictions Permitted Under the Act

Section 714.1 permits CC&Rs to impose certain restrictions on solar energy system installations despite the cost, efficiency, and comparable system criteria provided for in Section 714. Separate from the reasonable restrictions permissible under Section 714, Section 714.1 allows CC&Rs to impose the following reasonable restrictions:

- Restrictions on Common Area Installations – Section 714.1(a) permits CC&Rs to "impose reasonable provisions" that restrict solar energy installations in common areas. Common areas are defined in Section 4095 or 6532 as "the entire common interest development except the separate interests therein" for residential, commercial, and industrial properties. That is, a common area is the area of the development not owned separately by individuals. For example, in a condominium or planned development, all the property other than units, homes, parcels, and lots owned by individuals would be considered common areas. These typically include community centers, walkways, or common hallways.
- Prior Approval – Section 714.1(b) requires "the owner of a separate interest, as defined in Section 4185 or 6564, to obtain the approval of the association for the installation of a solar energy system in a separate interest owned by another." Section 4080 and 6528 define an "association" as "a nonprofit corporation or unincorporated association created for the purpose of managing a common interest development." This definition generally refers to both residential HOAs and association created to manage industrial and commercial properties. In the context of Section 714.1(b), a common interest development is a: (1) community apartment project; (2) condominium project; (3) planned development; or (4) a stock cooperative.²³ In general, a property owner in a common interest development seeking to install a solar energy system should contact their HOA to determine installation policies and guidelines.
- Maintenance and Repair – Section 714.1(c) allows HOAs to create requirements relating to the maintenance, repair, or replacement of roofs or other building components affected by solar energy installations.
- Indemnification or Reimbursement – Section 714.1(d) allows associations to require solar energy system installers to indemnify or reimburse the association for loss or damage caused by installation, maintenance, or use of the solar energy system.

²² See *Palos Verdes Ass'n v. Rodman*, 182 Cal. App. 3d 324, 328 (1986).

²³ Each of these common interest development types is defined in California Civil Code Section 4185 & 6564.

3.3. Definition of a Solar Energy System

The Act defines what types of solar energy systems qualify for its legal protections. For the purposes of the Act, Section 801.5(a) defines a “solar energy system” as any solar collector or other solar energy device or any structural design feature of a building whose primary purpose is to provide for the collection, storage, and distribution of solar energy for space heating, space cooling, electric generation, or water heating.²⁴ It is important to note that Section 801.5(a)’s statutory definition of “solar energy system” does not explicitly state whether it includes only small-scale consumer systems or whether it also encompasses large-scale industrial solar systems.²⁵ AB 2188 amended Government Code Section 65850.5 providing a definition for “small residential rooftop solar energy systems” without further defining solar energy systems.²⁶

Based on this statutory definition, the following common solar energy systems would likely be considered “solar energy systems” under the Act:

- Photovoltaics (solar electric).
- Solar water heating for use within a building.
- Solar water heating for space heating.
- Solar pool heating.

3.3.1. Additional Criteria to Supplement the Definition of a Solar Energy System

Section 714(c)(1) provides additional criteria that supplements the definition of a solar energy system. These criteria likely would have to be met in addition to the standard definition provided in Section 801.5 in order to be considered an eligible solar energy system under Section 714.

²⁴ The Act’s definition of a solar energy system differs from the statutory definition of a “solar collector” promulgated in California’s Solar Shade Control Act under California Public Resources Code Section 25981.

²⁵ However, an examination of the legislative history behind a recent amendment to the Act arguably suggests that Section 801.5(a)’s definition of a solar energy system is intended to apply only to consumer distributed generation systems. In a 2000 bill which revised Section 801.5(a)’s definition of “solar energy system,” the Legislature declared that “low polluting disturbed generation resources, installed on customer sites, can reduce customer costs of energy . . . and provide customers with improved reliability in the event of an electricity outage.” 2000 Cal. Stat. ch. 537, sec. 801.5, § 1(b). Furthermore, the same bill defined “distributed generation” as “any onsite generation, interconnected and operating in parallel with the electricity grid, that is used *solely* to meet onsite electric load.” *Id.* at sec. 25620.10, § 4(i)(3) (emphasis added). Therefore, this legislative history presents one plausible interpretation suggesting that only small-scale consumer systems intended to meet onsite electric load qualify as solar energy systems under the Act.

²⁶ California Government Code Section 65850.5(j)(3)(A)-(D) (2014 Cal. Stat. ch. 521):

“Small residential rooftop solar energy system” means all of the following:

- (A) A solar energy system that is no larger than 10 kilowatts alternating current nameplate rating or 30 kilowatts thermal.
- (B) A solar energy system that conforms to all applicable state fire, structural, electrical, and other building codes as adopted or amended by the city, county, or city and county and paragraph (3) of subdivision (c) of Section 714 of the Civil Code.
- (C) A solar energy system that is installed on a single or duplex family dwelling.
- (D) A solar panel or module array that does not exceed the maximum legal building height as defined by the authority having jurisdiction.

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- Health and Safety Requirements – Section 714(c)(1) provides that a solar energy system must meet applicable health and safety standards and requirements imposed by state and local permitting authorities, consistent with Section 65850.5 of the Government Code.
- Solar Water Heating Certification – Section 714(c)(2) requires a solar energy system used to heat water in residential, commercial, or swimming pool applications to be certified by an accredited listing agency as defined in the Plumbing and Mechanical Code. This section specifies that the entire solar energy system and installation process must receive certification, rather than simply certifying each of its component parts.
- Solar Electric Standards – Section 714(c)(3) requires a solar energy system used to produce electricity, such as photovoltaics, to meet all applicable safety and performance standards established by the California Electrical Code, the Institute of Electrical and Electronics Engineers, and accredited testing laboratories such as Underwriters Laboratories and, where applicable, rules of the California Public Utilities Commission regarding safety and reliability.

3.4. Fair Approval Process for Solar Energy Systems

The Act additionally seeks to ensure that processes used to consider and approve solar energy system installations are fair to the applicant. Section 714(e)(1) provides that:

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.

This subsection uses broad language that arguably could apply to the approval processes of an HOA or a local government. Given the context of subsections in Section 714 and existing case law, this language on fair approval processes most likely applies to HOAs. It is unclear whether it also applies to approval processes of local governments because California Government Code Section 65850.5 specifically addresses city and county permitting of solar energy systems. We discuss this topic in more detail in Section 4.

The Act also requires that an association, as defined by Civil Code Section 4080 or 6528, must approve or deny an application in writing within 45 days of receipt of the application.²⁷ An application is deemed approved if denial is not received in this time period unless the delay is the result of a reasonable request for additional information.²⁸

3.5. Violation of California Civil Code Section 714

California Civil Code Section 714(f) describes the penalties for violation of this section of the Act. It states that “[a]ny 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).” In addition, Section 714(g) provides that reasonable attorney’s fee will be awarded to the prevailing party in a case brought to enforce compliance with Section 714.

²⁷ California Civil Code Section 714 (e)(2)(A).

²⁸ California Civil Code Section 714 (e)(2)(B).

3.6. Relevant Cases

Published case law relating to the Act is limited. This is particularly true for published cases relating to HOAs imposing unreasonable restrictions on solar energy systems installations. Lack of awareness on the part of homeowners and HOAs about the Act's provisions and potentially high litigation costs could account for the limited case law.²⁹

This section provides a summary of the following cases involving HOAs and individual solar energy system owners.

- Tesoro Del Valle Master Homeowners Ass'n. v. Griffin, 133 Cal. Rptr. 3d 167 (2011).
- Palos Verdes Home Ass'n v. Rodman, 182 Cal. App. 3d 324 (1986).
- Fox Creek Cmty. Ass'n v. Carson, 1 CA-CV 11-0676, 2012 WL 2793206 (Ariz. Ct. App. July 10, 2012).
- Garden Lakes Community Ass'n v. Madigan, 204 Ariz. 238 (Ct. App. 2003).

3.6.1. Tesoro Del Valle Master Homeowners Ass'n. v. Griffin

Tesoro Del Valle Master Homeowners Association v. Griffin addressed the issues of whether the CC&Rs imposed a reasonable restriction on solar energy systems and whether an HOA can deny permission to build a solar energy system without identifying an alternative location that is "reasonable" under the Solar Rights Act.³⁰

Griffin, a resident of the Tesoro housing development, applied to install a photovoltaic rack system on the slope outside his home's perimeter wall and on the roof of the home.³¹ The Tesoro CC&Rs generally allowed construction of solar energy systems; however, Tesoro Board approval was required for all solar installations and improvements on sloped areas could not damage the existing slope ratio, drainage, or cause erosion.³²

The Tesoro Board denied Griffin's application to construct the hillside photovoltaic system due to safety and aesthetic concerns, but Griffin proceeded to construct the photovoltaic system without approval.³³ The Board filed suit to have the hillside photovoltaic system removed and the jury found the Tesoro CC&R restrictions "reasonable" under section 714(b).³⁴

On appeal, the court held that whether Tesoro's CC&Rs constitute a "reasonable" restriction is a question of fact for the jury.³⁵ The court found substantial evidence supporting the jury's finding based on expert testimony showing that a comparable alternative system could be installed within Griffin's yard for a lower cost and with only a 14 percent reduction in output.³⁶ Finally, the court stated that the Tesoro Board was not

²⁹ Valerie J. Faden, Net Metering of Renewable Energy: How Traditional Electricity Suppliers Fight to Keep You in the Dark, 10 Widener J. Pub. L. 109, 131 (2000).

³⁰ *Tesoro Del Valle Master Homeowners Assn. v. Griffin*, 133 Cal. Rptr. 3d 167 (2011). See id. at 174-75, 184.

³¹ *Id.* at 171; Brief of Appellant at 1, *Tesoro Del Valle Master Homeowners Assn.*, 133 Cal. Rptr. 3d 167 (2011) (No. B222531), 2010 WL 6380566 at *1.

³² *Id.* at 170-71.

³³ *Id.* at 172, 179.

³⁴ *Id.* at 178.

³⁵ *Id.* at 176.

³⁶ *Id.* at 178.

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responsible for identifying an alternative site for building the photovoltaic system upon denial of Griffin's application to build on the hillside.³⁷ Therefore, the court ordered Griffin to remove the hillside solar energy system.³⁸

3.6.2. Palos Verdes Home Ass'n v. Rodman

Palos Verdes Home Ass'n v. Rodman provides guidance on what constitutes a reasonable restriction on solar energy system installations.³⁹ The issue in this case was whether the HOA's actions violated Section 714's reasonable restriction standard.⁴⁰

Rodman, a resident of the Palos Verdes Home Association, sought to install a passive solar water heating system on the roof of his home.⁴¹ The Palos Verdes Home Association's CC&Rs required a homeowner to receive prior approval from the HOA for any improvements made outside of a home.⁴² The CC&Rs also contained guidelines for installing a solar energy system.⁴³ The CC&Rs generally allowed for the installation of active systems, but prohibited Rodman's proposed passive system.⁴⁴ The prohibition of Rodman's proposed system was based primarily on aesthetics.⁴⁵ If Rodman's passive system was designed to comply with the HOA's CC&Rs, the additional modifications would have added between \$1,400 and \$1,800 to the cost of installation.⁴⁶

Rodman ignored the CC&Rs and had the system installed by a private company.⁴⁷ The HOA notified Rodman that his system was not in compliance with their guidelines and filed a complaint against Rodman.⁴⁸ The trial court ruled in favor of the HOA, requiring Rodman to remove his system.⁴⁹ Rodman appealed, arguing that the HOA's CC&Rs violated Section 714.⁵⁰ Rodman argued that the HOA's solar installation guidelines effectively restricted his passive solar energy system installation by significantly increasing the system's cost and decreasing its efficiency.⁵¹

The appellate court ultimately affirmed the trial court's decision, ruling that an installer of a solar energy system cannot ignore HOA guidelines when those guidelines would only minimally increase installation

³⁷ *Id.* at 178-79, 184.

³⁸ *Id.* at 185.

³⁹ 182 Cal. App. 3d 324, 328-29 (1986).

⁴⁰ *Id.* at 328.

⁴¹ *Id.* at 326.

⁴² *Id.*

⁴³ *Id.* at 327, note 2.

⁴⁴ *Id.* at 328.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 326.

⁴⁸ *Id.* at 326-27.

⁴⁹ *Id.* at 327.

⁵⁰ *Id.*

⁵¹ *Id.*

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costs.⁵² The court relied on expert testimony presented by the HOA.⁵³ This testimony, given by a mechanical engineer, concluded that the active systems allowed by the HOA were comparable in cost and performance to the prohibited passive systems.⁵⁴ The court reasoned that even though there would have been a significant increase in cost to install the passive system under HOA guidelines, Rodman could have installed an active system with no increase in cost.⁵⁵ As a result, the court concluded that the HOA's CC&Rs were reasonable and did not violate Section 714.⁵⁶

3.6.3. Fox Creek Cmty. Ass'n v. Carson

Fox Creek Community Association v. Carson, an unreported Arizona case, addressed the issue of what constitutes a reasonable restriction on solar installations.⁵⁷ Like *Garden Lakes Community Association*, discussed above, California courts are not required to abide by the holding of *Fox Creek* because the decision was made in Arizona. This case discusses Arizona's solar rights law and is included as reference only.

Carson owned a home in Fox Creek Estates, which had CC&Rs requiring homeowners to acquire the Association's approval before building a solar energy system.⁵⁸ The CC&Rs required solar devices be screened or concealed to the extent the Association reasonably deems appropriate.⁵⁹

Carson submitted an application to install a solar tracking device outside the wall surrounding his home and proposed screening the device with Rosewood Sisso trees.⁶⁰ Carson began construction of the solar tracking device before receiving the Association's approval.⁶¹ The Association denied Carson's application, but agreed the solar installation would be approved if a six-foot block wall was constructed around the device or it was moved inside the fenced backyard.⁶²

Carson did not construct the wall or move the solar tracker and the Association filed suit.⁶³ Carson submitted evidence that construction of the wall would cost between \$12,800 and \$15,200.⁶⁴ Despite the cost, the court held that the Association's restrictions did not prohibit installation of Carson's solar device because it could have been installed in the fenced yard for a lower cost and with only a marginally lower level of energy

⁵² *Id.* at 328.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 328–29.

⁵⁷ *Fox Creek Cmty. Ass'n v. Carson*, 1 CA-CV 11-0676, 2012 WL 2793206, ¶ 8 (Ariz. Ct. App. July 10, 2012).

⁵⁸ *Id.* at ¶ 2.

⁵⁹ *Id.*

⁶⁰ *Id.* at ¶ 4-5.

⁶¹ *Id.* at ¶ 4-6.

⁶² *Id.* at ¶ 5-6.

⁶³ *Id.* at ¶ 5.

⁶⁴ *Id.* at ¶ 17.

output.⁶⁵ Alternatively, a block wall could be built to screen the device.⁶⁶ Therefore, the court held that Carson’s solar tracking device must either be moved to the backyard or screened with a brick wall.⁶⁷

3.6.4. Garden Lakes Community Ass’n v. Madigan

Garden Lakes Community Ass’n v. Madigan, an Arizona case, also seeks to define what can be considered a reasonable restriction on solar installations.⁶⁸ In this case, the court ruled that the increased cost required to comply with the HOA’s CC&Rs was one factor that effectively prohibited the installation of solar energy systems.⁶⁹ Because this decision was made in an Arizona court, California courts are not required to abide by its holding. In addition, the decision deals with Arizona’s solar rights law, which uses different language than California law. We include it here only as a reference.

The Garden Lakes Community Association sued the Madigan family and the Speak family for installing solar panels that were not approved by the HOA and did not meet the HOA’s installation requirements.⁷⁰ Under the HOA’s CC&Rs, panels cannot be visible to the public and must be screened.⁷¹ In this instance, both the Madigans and the Speaks installed solar panels on their roof without a screen.⁷² In order to comply with the CC&Rs, the Speaks would have had to either construct a patio cover and place the solar panels on top of the patio roof or build a screening wall around the existing roof panels.⁷³ The HOA’s construction expert testified that the cost of building a patio cover for the Speaks would have been nearly \$5,000; not including the additional cost incurred installing the solar panels on the patio roof.⁷⁴ Both the trial court and appellate court ruled in favor of the homeowners.⁷⁵ Relying on Arizona’s solar rights law, the appellate court found that the HOA’s CC&Rs “effectively prohibited” the installation and use of the solar panels.⁷⁶ Concluding that “cost is a factor to be considered” in determining whether a CC&R effectively prohibits solar energy systems, the court held that, among other factors, the additional costs necessary to comply with the HOA’s CC&Rs were enough to effectively dissuade homeowners from installing solar energy systems.⁷⁷

⁶⁵ *Id.* at ¶ 15-16.

⁶⁶ *Id.*

⁶⁷ *Id.* at ¶ 7.

⁶⁸ 204 Ariz. 238 (Ct. App. 2003).

⁶⁹ *Id.* at 243.

⁷⁰ *Id.* at 240.

⁷¹ *Id.* at 239.

⁷² *Id.*

⁷³ *Id.* at 242.

⁷⁴ *Id.* at 243.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

4. LOCAL GOVERNMENT'S ABILITY TO RESTRICT SOLAR INSTALLATIONS

In this section, we discuss how California Government Code Section 65850.5 and California Civil Code Section 714(h) limit the ability of local governments to restrict solar energy systems by requiring the use of a non-discretionary permitting process and by requiring local governments to certify compliance with Section 714 prior to receiving state-sponsored solar energy incentives.⁷⁸ This section also discusses the expedited, streamlined permit process requirement for small residential rooftop solar systems mandated by AB 2188 (Chapter 521, Statutes 2014).

4.1. Non-Discretionary Permitting of Solar Energy Systems

California Government Code Section 65850.5 establishes permitting standards and requires local governments to use a non-discretionary permitting process, rather than a discretionary permitting process, to review solar energy system applications. However, as discussed in Section 4.1.5, AB 2188 expressly applies the Act to small residential rooftop solar systems but maintains ambiguity as to what types of other solar energy system fall under the Act's non-discretionary permitting process. This portion of the Act includes the following provisions.

4.1.1. Solar as a Statewide Affair

Section 65850.5(a), in part, provides that “[t]he implementation of consistent statewide standards to achieve the timely and cost-effective installation of solar energy systems is not a municipal affair . . . but is instead a matter of statewide concern.” This statement provides a basis to establish a statewide standard for permitting and discourage local governments from enacting varying and subjective permitting standards.⁷⁹

4.1.2. Legislative Intent Language

Section 65850.5(a) expresses California's intent to promote and encourage solar energy systems. It also promulgates the legislature's intent to prohibit local governments from implementing burdensome permitting requirements and encourages public agencies to remove any barriers to solar energy installations.⁸⁰ While codified, this legislative intent language does not *expressly* prohibit any actions by local governments. Rather, it only discourages certain actions, and therefore, it is unclear how such language would be enforced by the courts. Section 65850.5 includes the following policy statements:

- Discourage Local Governments from Placing Barriers on Solar installations – Section 65850.5(a), in pertinent part, states that it is the intent of the legislature to prohibit local governments from adopting “ordinances that create unreasonable barriers to the installation of solar energy systems, including but not limited to, design review for aesthetic purposes.” This subsection seeks to prevent a local jurisdiction from restricting a solar installation based solely on discretionary factors such as aesthetics,

⁷⁸ Two bills added provisions to the Act that expand its reach to local governments: AB 1407, which was enacted in 2003 and codified at 2003 Cal. Stat. ch. 290, and SB 2473, which was enacted in 2004 and codified at 2004 Cal. Stat. ch. 789.

⁷⁹ This statement might also have been included to require charter cities to comply with the provisions of this section of law. See *Energy; Incentives for the Use of Solar Energy*, 10 Pac L.J. 478, 481 (1979).

⁸⁰ Cal. Gov't Code § 65850.5(a).

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but stops short of expressly prohibiting such restrictions. Because the language is expressed as legislative intent, it is unclear how a court might enforce this section of law.⁸¹

- California Policy to Promote Solar Energy – Section 65850.5(a) provides that it is the policy of the state of California to “promote and encourage the use of solar energy systems and to limit obstacles to their use.”
- Encourage Local Governments to Remove Barriers to Solar Energy – Section 65850.5(a) promulgates that it is the intent of the legislature that “local agencies comply not only with the language of this section, but also the legislative intent to encourage the installation of solar energy system by removing obstacles to, and minimizing costs of, permitting for such systems.”

4.1.3. Permitting Standards

Section 65850.5(b) and the remaining subsections of Section 65850.5 establish permitting standards for solar energy systems based on health and safety concerns and equipment certification and performance standards. The Act requires cities and counties to “administratively” approve applications to install solar energy systems by issuing a building permit or other non-discretionary permit.⁸² Based on this section of law, local governments cannot implement or use a discretionary permitting process to review solar energy applications. Instead, they must use a non-discretionary ministerial or administrative process that is based on the following criteria:

- Health and Safety – Local review of solar energy applications must be limited to “those standards and regulations necessary to ensure that the solar energy system will not have a specific, adverse impact upon the public health or safety.”⁸³ The law defines a “specific adverse impact” as “a significant, quantifiable, direct, and unavoidable impact, based on objective, identified, and written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.”⁸⁴ To determine if an adverse impact exists, permitting officials must limit their review to local, state, and federal laws.⁸⁵
- Solar Water Heater Certification – Section 65850.5(f)(2) provides that a solar water heating system must be certified by an accredited listing agent as defined in the California Plumbing and Mechanical Code. Certification must apply to the entire solar energy system and installation process.⁸⁶
- Photovoltaics Compliance with Applicable Codes – As promulgated in Section 65850.5(f)(3), a photovoltaics or solar electric system must “meet all applicable safety and performance standards established by the California Electrical Code, the Institute of Electrical and Electronics Engineers, and

⁸¹ One interpretation is that this language does prevent cities and counties from enforcing ordinances that effectively prohibit or unreasonably restrict the use of solar energy systems other than for preservation or protection of public health and safety. This interpretation also presumes the statutory definition of unreasonable restrictions in California Civil Code Section 714 that applies to CC&Rs would also apply here to restrictions imposed by local governments. *See Energy; Incentives for the Use of Solar Energy*, 10 Pac L.J. at 481.

⁸² Cal. Gov’t Code § 65850.5(b).

⁸³ *Id.*

⁸⁴ § 65850.5(g)(3).

⁸⁵ § 65850.5(b).

⁸⁶ § 65850.5(f)(2).

accredited testing laboratories such as Underwriters Laboratories and, where applicable, rules of the Public Utilities Commission regarding safety and reliability.”

4.1.4. Adverse Impact on Health or Safety

If a city or county finds – based on substantial evidence – that installing a solar energy system would result in an adverse impact on public health or safety, it can require a use permit.⁸⁷ However, according to Section 65850.5(c), the municipality cannot deny an application for the use permit unless it “makes written findings based upon substantial evidence in the record that the proposed installation would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact.” The Act defines “a feasible method to satisfactorily mitigate or avoid the specific, adverse impact” as including, but not limited to, “any cost-effective method, condition, or mitigation imposed by a city or county on another similarly situated application in a prior successful application for a permit.”⁸⁸ The law also provides that a city or county shall use its best efforts to ensure that the selected method, condition, or mitigation also meets the cost and efficiency criteria of California Civil Code Section 714(d)(1)(A) and (B).⁸⁹ If the city or county places conditions on the application in order prevent the adverse impact on health and safety, those conditions must be at the lowest possible cost to the applicant.⁹⁰

If the city or county denies the applicant an administrative (or ministerial) permit and/or a use permit, California Government Code Section 65850.5(d) authorizes the applicant to appeal the decision to the city or county planning commission.

4.1.5. Definition of a Solar Energy System

The term “solar energy system,” as used in Section 65850.5, has the same meaning set forth in California Civil Code Section 801.5.⁹¹ AB 2188 amended Section 65850.5 defining “Small residential rooftop solar energy systems” expressly providing that the section applies to small-scale consumer systems under 10 kilowatts (kW). As discussed in Section 3.3 of this paper, Section 801.5’s definition of “solar energy system” is silent as whether it also includes large-scale systems.⁹² California Government Code Section 65850.5 also includes the same language contained in California Civil Code Section 714(c)(1) regarding health and safety codes and certifications for solar water heating and photovoltaics systems that supplements the standard definition. Therefore, proposed systems not meeting the Act’s definition of a “solar energy system” are not protected by the Act’s permitting process.

⁸⁷ § 65850.5(b).

⁸⁸ § 65850.5(j)(1).

⁸⁹ Id.

⁹⁰ § 65850.5(e).

⁹¹ § 65850.5(j)(4).

⁹² California Civil Code Section 801.5(a), in pertinent part, states:

As used in this section, "solar energy system" means either of the following:

- (1) Any solar collector or other solar energy device whose primary purpose is to provide for the collection, storage, and distribution of solar energy for space heating, space cooling, electric generation, or water heating.
- (2) Any structural design feature of a building, whose primary purpose is to provide for the collection, storage, and distribution of solar energy for electricity generation, space heating or cooling, or for water heating.

4.2. AB 2188: Streamlined Permitting Process For Small Residential Rooftop Solar Energy Systems

AB 2188 (Chapter 521, Statutes 2014) amended California Government Code Section 65850.5 instituting a statutory mandate for local jurisdictions to adopt an ordinance that creates a streamlined, expedited permitting process for small residential rooftop solar energy systems on or before September 30, 2015. The amended language of Government Code Section 65850.5 also mandates that each jurisdiction substantially conform its expedited, streamlined permitting process to recommendations contained in the most current version of the *California Solar Permitting Guidebook*⁹³ adopted by the Governor's Office of Planning and Research (OPR) in developing its ordinance. This is the first statutory mandate that requires codification of Solar Rights Act requirements at the local level. An implementation and model ordinance was developed by the Energy Policy Initiatives Center to aid local jurisdictions with this process. The implementation document can be found on EPIC's [website](#).

4.2.1. Application and Requirements

All cities, counties, or cities and counties with jurisdiction over permitting are subject to the AB 2188 amendment of California Government Code Section 65850.5. AB 2188 charges each jurisdiction with codifying an expedited, streamlined permitting process for small residential rooftop energy systems that complies with all provisions of the Solar Rights Act. The amended statute defines small solar rooftop energy system to mean all of the following:

- A solar energy system that is no larger than 10 kilowatts alternating current nameplate rating or 30 kilowatts thermal.
- A solar energy system that conforms to all applicable state fire, structural, electrical, and other building codes as adopted or amended by the city, county, or city and county and paragraph (3) of subdivision (c) of Section 714 of the Civil Code.
- A solar energy system that is installed on a single or duplex family dwelling.
- A solar panel or module array that does not exceed the maximum legal building height as defined by the authority having jurisdiction.⁹⁴

Each jurisdiction must pass an ordinance creating a streamlined permitting process for systems that meet this definition.

4.2.2. AB 2188 Requirements

AB 2188 requires local jurisdictions to take specific action to create a streamlined permitting process. The following paragraphs breakdown these requirements in an easy to follow outline.

Ordinance and Process: AB 2188 requires every city, county, or city and county to adopt an ordinance that creates an expedited, streamlined permitting process for small residential rooftop solar energy systems consistent with the goals and intent of Government Code 65850.5(a) on or before September 30, 2015 (Government Code Section 65850.5(g)(1)). The amendment further:

⁹³ The latest version of the *California Solar Permitting Guide* adopted by the *Governor's* Office of Planning and Research can be found at: <http://www.opr.ca.gov/>.

⁹⁴ California Government Code Section 65850.5 (jj) (3).

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- Requires each city, county, or city and county to consult with the local fire department or district and the utility director, where a city, county, or city and county operate a utility, with regards to the adoption of the ordinance (Government Code Section 65850.5(g)(1); and
- Requires each city, county, or city and county to substantially conform its expedited, streamlined permitting process to the recommendations for expedited permitting, including the checklist and standard plan contained in the most current version of the *California Solar Permitting Guidebook* adopted by the Governor's Office of Planning and Research (Government Code Section 65850.5(g)(2)); and
- Requires adoption of a checklist of all requirements that an applicant must comply with for a system to be eligible for expedited review (Government Code Section 65850.5(g)(1); and
- Requires publication of the checklist and other required permitting documents on a publicly accessible Internet Website, if one is available (Government Code Section 65850(g)(2).

Local Modifications of Checklist Requirements: A city, county, or city and county may adopt an ordinance that modifies the checklist and standards found in the *California Solar Permitting Guidebook* due to unique climatic, geological, seismological, or topographical conditions (Government Code Section 65850.5(g)(2)). Such modifications must substantially conform to the recommendations for expedited permitting.

Application Submission: AB 2188 requires that a city, county, or city and county allow electronic submittal, as defined by Government Code Section 65850.5(j)(2), of a permit application and associated documentation (Government Code Section 65850.5(g)(2)). The amendment further:

- Requires the authorization of electronic signature on all forms, applications, and other documentation in lieu of a wet signature. If a city, county, or city and county cannot authorize an electronic signature, the reason for the inability to accept electronic signatures must be included in the ordinance. This removes the statutory requirement of authorizing electronic signatures (Government Code Section 65850.5(g)(2)); and
- Defines electronic submittal as the utilization of one or more of the following: Email; The Internet; and/or Facsimile (Government Code Section 65850.5(j)(2)(A)-(C).

Application Review, Approval, and Denial: AB 2188 requires approval of all necessary permits or authorization for small solar systems by an administrative review process consistent with both Government Code Section 65850.5(b) and the adopted ordinance where the city, county, or city and county confirms that an application is complete and meets the requirements of the checklist (Government Code Section 65850.5(g)(1)). The amendment further:

- Requires issuance of a written correction notice detailing all deficiencies in the application and any additional information required to be eligible for the expedited permit issuance if an application is deemed incomplete (Government Code Section 65850.5(g)(1)); and
- Requires that a city, county, or city and county shall not condition approval for any solar energy system permit on the approval of a solar energy system by an association, as that term is defined in Section 4080 of the Civil Code (Government Code Section 65850.5(i)).

Local governments must also ensure that their process complies with California Government Code Sections 6585.5 (b) – (f) with regards to review, denial, and appeal.

System Inspection: AB 2188 mandates that a local government can only require a single inspection of eligible small residential rooftop solar energy systems. The inspection must be performed in a timely manner and may include a consolidated inspection (Government Code Section 65850.5(h)). However, a separate fire safety inspection may be performed where an agreement with the local fire authority to conduct a fire safety inspection does not exist (Government Code Section 6585.5(h)). Finally, AB 2188 authorizes a subsequent

inspection if a system fails inspection. The subsequent inspection need not conform to the requirements of the statutory subdivision (Government Code Section 65850.5(h)).

4.3. Local Government Compliance With Section 714

Section 714(h) prohibits a public entity from receiving state-sponsored grant funding or loans for solar energy programs if it fails to certify its compliance with the requirements of Section 714. The language in this subsection is somewhat ambiguous regarding which parts of Section 714 a public entity would have to comply with to be eligible for state-sponsored incentives. Only one other subsection, Section 714(f), specifically mentions local governments, and that subsection exempts public entities from paying damages (See Section 4.4.1 for further discussion).

A possible interpretation of this requirement is that public entities would have to comply with Section 714 by not imposing restrictions that significantly affect the cost and efficiency of a solar energy system (e.g., restrictions imposed through the permitting process). It is also possible that public agencies are considered “approving entities” and would also have to comply with the provisions in Section 714(e), which requires that a solar energy application be processed in the same manner used with similar applications and that the approving entity not willfully avoid or delay approval of the application.⁹⁵ Section 714(h)(2) additionally prohibits local public entities from exempting residents in its jurisdiction from the requirements of Section 714. Therefore, a local government might also comply by demonstrating that it has not exempted any residents from the requirements of Section 714. In the absence of case law interpreting this specific subsection of the Act, it remains unclear which provisions of Section 714 a public entity would have to comply with to be eligible for state-sponsored solar energy incentives.

4.4. Relevant Cases

4.4.1. *Arterberry v. County of San Diego*

In *Arterberry v. County of San Diego* the California Fourth Appellate District evaluated whether California Civil Code Sections 714(f) & (g) allow a prevailing party to collect actual damages and attorneys fees against a public entity. Property owner Arterberry appealed an order denying him attorney fees under California Code Section 714(g) for damages incurred as a result of the County of San Diego delay in issuing a certificate of occupancy for the solar energy system.⁹⁶ The original lawsuit prayed for a writ of mandate to force the County to inspect and approve the solar energy system on the property and an injunction enjoining the County from retaliating against Arterberry.⁹⁷ The suit also sought damages and attorneys fees on both cause of actions under California Civil Code Section 714(g).⁹⁸ The County inspected and approved the solar energy system prior to the court hearing of the cause of action and Arterberry took the mandate action off calendar. The County filed a demurrer to dismiss the injunction and damages.⁹⁹ The court dismissed the injunction but

⁹⁵ In *Arterberry v. County of San Diego* (see Section 4.4.1) the court suggests in dicta that public entities are “approving entities” under California Civil Code Section 714 (e) (1) in its discussion of whether California Civil Code Sections 714 (f) and (g) apply to public entities. However, no case law directly addresses the issue of whether public entities are “approving entities”.

⁹⁶ *Arterberry v. County of San Diego*, 182 Cal.App.4th 1528 (2010) at 1530-31.

⁹⁷ *Id.* at 1532.

⁹⁸ *Id.*

⁹⁹ *Id.*

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overruled the demurrer for damages.¹⁰⁰ The court dismissed the action but retained jurisdiction over the motion for attorney fees after the parties reached a stipulated settlement.¹⁰¹ The court denied the motion finding that California Civil Code Section 714 (f) precluded both private rights of actions for damages against a public entity as well as attorney fees against a public entity under California Civil Code Section 714(g).¹⁰² The court of appeal affirmed the trial courts ruling finding that the plain language of Section 714(f) expressly immunizes public entities from damages for violation Section 714, and thus precludes attorney fees because a plaintiff cannot be a “prevailing party” under Section 714 (g) where recovery for damages is expressly precluded.¹⁰³

4.4.2. Larsen v. Town of Corte Madera

In the *Larsen v. Town of Corte Madera* line of cases, homeowner Larsen sought to use the provisions of California Government Code Section 65850.5 and California Health and Safety Code Section 17959.1 to overturn the Town of Corte Madera’s denial of his petition to build a second story addition to his house, which he alleged would include a solar energy system.¹⁰⁴

http://www.lexis.com/research/retrieve?_m=45b4b2dfebe2233bc5da5accc28a89e2&csvc=le&cform=&_fm_tstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVtb-zSkAA&_md5=0dd50012941d6a214ccebffd6c1613cc-clsc1#clsc1Larsen repeatedly sought approval for his roof renovation through the Town's design review process, and the various applications had either been denied by the defendant Town or withdrawn by Larsen.¹⁰⁵

This case was originally heard in 1996 in the U.S. District Court for the Northern District of California and was later reviewed on appeal by the Ninth Circuit Court of Appeals. Another case involving the same parties was argued before the U.S. District Court nine years later in 2005. In each case, Larsen attempted to use California laws intended to protect solar energy system owners from “unreasonable restrictions” to challenge local ordinances. Each case is summarized below.

Larsen v. Town of Corte Madera (Larsen I), 1996 U.S. Dist. LEXIS 3936 (N.D. Cal. Mar. 26, 1996).

Larsen I is the original case brought by Larsen. In this action, Larsen was contesting the Town’s land use decision rejecting Larsen’s proposed construction.¹⁰⁶ In addition to Larsen’s equal protection claim, at issue before the court was whether then-existing California Government Code Section 65850.5 and California Health and Safety Code Section 17959.1 required the Town to allow Larsen to make the requested modifications to his home to accommodate his planned solar energy system.¹⁰⁷ Prior to its amendment as of January 1, 2005, both California’s Health and Safety Code and Government Code provisions were promulgated to prohibit local legislative bodies from enacting certain ordinances which would interfere with

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 1533.

¹⁰³ *Id.* at 1536.

¹⁰⁴ *See Larsen v. Town of Corte Madera (Larsen I)*, 1996 U.S. Dist. LEXIS 3936 (N.D. Cal. Mar. 26, 1996); *Larsen v. Town of Corte Madera (Larsen II)*, 1996 U.S. App. LEXIS 33570 (9th Cir. Dec. 20, 1996); *Larsen v. Town of Corte Madera (Larsen III)*, 2005 U.S. Dist. LEXIS 30846 (N.D. Cal. Nov. 8, 2005).

¹⁰⁵ *Larsen III*, 2005 U.S. Dist. LEXIS at *1.

¹⁰⁶ *Larsen I*, 2005 U.S. Dist. LEXIS at *1–*3.

¹⁰⁷ *Id.* at *6.

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the installation of solar systems.¹⁰⁸ Specifically, the court was asked to determine whether these then-existing sections of law applied to “specific land use decisions made by a local government in its non-legislative capacities.”¹⁰⁹

Ruling in favor of the Town, the court held that both code sections were inapplicable to this case.¹¹⁰ This was due, in large part, to the statutory language of the then-existing code sections. For instance, the court found that California Government Code Section 65850.5 was inapplicable here because that section “only applies to ordinances passed by local government legislative bodies.” Because Larsen was contesting the specific land use decision of the Town in its non-legislative capacity, the court concluded that there was “no local ordinance at issue in this matter.”¹¹¹ Therefore, the court rejected Larsen’s argument and ruled in favor of the Town. In an unpublished decision, the Ninth Circuit Court of Appeals affirmed *Larsen I*.¹¹²

Larsen v. Town of Corte Madera (Larsen III), 2005 U.S. Dist. LEXIS 30846 (N.D. Cal. Nov. 8, 2005).

In this case, Larsen contested a Town resolution which increased the Town’s design review fee from \$45 to \$785, plus \$100 per hour for time and costs.¹¹³ Larsen wished to raise the roof of his home an additional two feet so that he could install new solar panels, but objected to the Town’s heightened design review fee.¹¹⁴ In his complaint, Larsen alleged that the increase in the town’s design review fee violated and was preempted by then-existing California Health and Safety Code Section 17959.1 and California Government Code Sections 65860 and 65850.5.¹¹⁵

The court ruled that Larsen’s challenge to the Town’s resolution failed on the merits for primarily two reasons.¹¹⁶ First, the local resolution to raise the document review fee from \$45 to \$785 did not violate then-existing Section 65860.5 because the resolution “simply increased the Town’s design review fees” and did “not have the effect of prohibiting or of unreasonably restricting the use of solar energy systems.”¹¹⁷ Second, Larsen was not entitled to the legal protections offered by the Act because his building failed to meet the definition of a solar energy system, as defined in California Civil Code Section 801.5.¹¹⁸ The court explained “that a roof, which is the focus of the design review process, is not part of a ‘solar energy system.’”¹¹⁹ Because the “primary purpose” of a roof is to cover a house, as opposed to the “collection, storage, and distribution of solar energy,” Larsen’s roof was not protected by the Act.¹²⁰

¹⁰⁸ See Cal. Gov’t Code § 65850.5 (1979); Cal. Health & Safety Code § 17959.1 (1979).

¹⁰⁹ *Larsen I*, 2005 U.S. Dist. LEXIS at *7.

¹¹⁰ *Id.* at *6.

¹¹¹ *Id.* at *7–*8.

¹¹² *Larsen II*, 1996 U.S. App. LEXIS at *2.

¹¹³ *Larsen III*, 2005 U.S. Dist. LEXIS 30846, at *3 (N.D. Cal. Nov. 8, 2005).

¹¹⁴ *Id.* at *1.

¹¹⁵ *Id.* at *3.

¹¹⁶ *Id.* at *14–*17.

¹¹⁷ *Id.* at *15 (internal quotations omitted).

¹¹⁸ *Id.* at *16.

¹¹⁹ *Id.*

¹²⁰ *Id.* at *17.

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.¹²¹ 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?

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.¹²² There are two basic types of easements. An affirmative easement is a non-possessory right to use land in the possession of another.¹²³ A negative easement restricts a property owner from using their property in some manner.¹²⁴ 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?

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.¹²⁵ In 1978, as part of the Act, California added the right to receive sunlight to its list of statutorily recognized easements.¹²⁶ 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

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

¹²¹ Cal. Pub. Res. Code §§ 25980–25986.

¹²² *Black’s Law Dictionary* 585–86 (9th ed. 2009).

¹²³ *Id.* at 586.

¹²⁴ *Id.* at 587.

¹²⁵ See Melvin M. Eisenstadt & Albert E. Utton, *Solar Rights and Their Effect on Solar Heating and Cooling*, 16 Nat. Resources J. 363, 376 (1976).

¹²⁶ 1978 Cal. Stat. ch. 1154; see also Cal. Civ. Code § 801.

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enforceable.¹²⁷ 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

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.¹²⁸

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.¹²⁹ 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.¹³⁰ 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.¹³¹

5.5. California Government Code Section 66475.3

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.¹³² 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.

¹²⁷ See *Zipperer v. County of Santa Clara*, 2005 Cal. App. Unpub. LEXIS 8982, at *13 (Cal. Ct. App. Sep. 30, 2005).

¹²⁸ Adrian J. Bradbrook, *Future Direction in Solar Access Protection*, 19 *Envtl. L.* 167, 181 (1988).

¹²⁹ *Id.* at 180.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² California Government Code Section 66426 specifies those subdivisions requiring a tentative and final map.

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- 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*

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.¹³³

The Zipperers built a home with solar heating and cooling systems in the mid-1980s.¹³⁴ In 1991, the County of Santa Clara purchased an adjacent property containing a small grove of trees.¹³⁵ 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.¹³⁶ In 1997, the Zipperers requested that the County trim or remove the offending shading trees.¹³⁷ The County did not respond to the Zipperer's request, and instead passed an ordinance exempting itself from California's Solar Shade Control Act.¹³⁸

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.¹³⁹ 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.¹⁴⁰ 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.¹⁴¹

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.¹⁴² The court explained that "the governing provision is

¹³³ 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).

¹³⁴ *Zipperer*, 2005 Cal. App. Unpub. LEXIS at *2.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at *25 note 4.

¹³⁹ *Id.* at *4.

¹⁴⁰ *Id.* at *9.

¹⁴¹ *Id.*

¹⁴² *Id.* at *13.

section 801.5, which specifically requires a writing in order to create a solar easement.”¹⁴³ 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.”¹⁴⁴ Therefore, because the Zipperers did not have an express, written instrument, the court held that no solar easement existed.¹⁴⁵

6. PRESERVING PASSIVE SOLAR OPPORTUNITIES IN SUBDIVISION DEVELOPMENTS

The Act also aims to preserve the use of passive solar design opportunities in subdivision developments. This intention is codified in California Government Code Section 66473.1 and California Civil Code Section 66475.3.

6.1. California Government Code Section 66473.1

For subdivisions that require a tentative map, California Government Code Section 66473.1(a) requires that such subdivision designs must “provide, to the extent feasible, for future passive or natural heating or cooling opportunities in the subdivision.”¹⁴⁶

Section 66473.1(b) provides the following examples of natural or passive heating and cooling opportunities:

- Heating – Design of lot size and configuration to permit orientation of a structure in an east-west alignment for southern exposure.
- Cooling – Design of lot size and configuration to permit orientation of a structure to take advantage of shade or prevailing breezes.

Section 66473.1 provides additional guidance on passive heating or cooling opportunities. When considering such opportunities, developers and permitting agencies should take into account the local climate, contour, and configuration of the parcel to be divided, as well as other design and improvement requirements.¹⁴⁷ Such consideration should not reduce “allowable densities or the percentage of a lot that may be occupied by a building or structure under applicable planning and zoning in effect at the time the tentative map is filed.”¹⁴⁸

Section 66473.1(d) exempts certain condominiums from this requirement. Specifically, “condominium projects which consist of the subdivision of airspace in an existing building when no new structures are added” are exempt from the requirements of this section.¹⁴⁹

¹⁴³ *Id.* at *14.

¹⁴⁴ *Id.* at *15.

¹⁴⁵ *Id.* at *12.

¹⁴⁶ California Government Code Section 66426 specifies those subdivisions requiring a tentative and final map.

¹⁴⁷ § 66473.1(c).

¹⁴⁸ *Id.*

¹⁴⁹ § 66473.1(d).

7. CONCLUSION

The Act establishes rights for homeowners and businesses to access sunlight for the purpose of creating thermal or electric energy. It defines how an HOA and a local government can limit solar energy system installations; permits a property owner to seek a solar easement to ensure access to sunlight across adjacent properties; and allows governments to preserve passive solar heating and cooling opportunities by requiring developers to create easements in certain subdivisions.

We revisit this landmark law because its provisions are, by and large, not well understood by the general public. Additionally, California's solar market is expected to grow significantly in the coming decade as a result of expanded financial incentives for solar energy systems. As more homes and businesses install solar energy systems and local governments pursue renewable energy solutions, understanding and clarifying the provisions of the Act will only become more relevant and important.

This paper provides information and analysis on the Act to help parties understand the provisions of the law and to understand how the law affects them. Our research should help solar collector owners determine if they are eligible for protections under the Act, HOAs determine if they are liable for an allegation brought under the Act, and cities and counties understand their role in promoting solar energy systems and enforcing solar access provisions under the Act.

8. APPENDIX

8.1. Other Resources

For more information about the Act, the following articles and books are a useful resource:

- Adrian J. Bradbrook, *Future Direction in Solar Access Protection*, 19 *Envtl. L.* 167 (1988). A law review article generally discussing solar access laws.
- Kenneth H. Burke & Bruce N. Lemons, *Simplified Solar Easements*, 2 *Solar L. Rep.* 320 (1980–1981). A law review article that discusses solar easement laws.
- Melvin M. Eisenstadt & Albert E. Utton, *Solar Rights and Their Effect on Solar Heating and Cooling*, 16 *Nat. Resources J.* 363 (1976). An article that examines the legal history and theories behind solar easements and right to light.
- *Energy; Incentives for the Use of Solar Energy*, 10 *Pac. L.J.* 478 (1979). A review of the Solar Rights Act and Solar Shade Control Act legislation. It also discusses possible legal problems and enforcement of solar easements.
- Eugene J. Riordan & Robert L. Hiller, *Describing the Solar Space in a Solar Easement*, 2 *Solar L. Rep.* 299 (1980-1981). A law review article that discusses the technicalities to be agreed upon when forming a solar easement.
- Thomas Starrs et al., *Bringing Solar Energy to the Planned Community: A Handbook on Rooftop Solar Systems and Private Land Use Restrictions*, http://www.sdenergy.org/uploads/Final_CC&R_Handbook_1-01.pdf.
- Robert L. Thayer, *Solar Access, "It's The Law!": A Manual on California's Solar Access Laws for Planners, Designers, Developers, and Community Officials* 9–13, (1981). A handbook that details solar laws and their practical applicability in subdivision development.

9. FULL TEXT OF STATUTES

The Solar Rights Act comprises the following California sections of law: California Civil Code Sections 714 and 714.1, California Civil Code Section 801, California Civil Code Section 801.5, California Government Code Section 65850.5, California Health and Safety Code Section 17959.1, California Government Code Section 66475.3, and California Government Code Section 66473.1. These sections of law are reprinted here in their entirety.¹⁵⁰

9.1. California Civil Code Section 714

(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, and any provision of a governing document, as defined in subdivision (j) of Section 1351, that effectively prohibits or restricts the installation or use of a solar energy system is void and unenforceable.

(b) This section does not apply to provisions that impose reasonable restrictions on solar energy systems. However, it is the policy of the state to promote and encourage the use of solar energy systems and to remove obstacles thereto. Accordingly, reasonable restrictions on a solar energy system are those restrictions 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.

(c) (1) A solar energy system shall meet applicable health and safety standards and requirements imposed by state and local permitting authorities, consistent with Section 65850.5 of the Government Code.

(2) Solar energy systems used for heating water in single family residences and solar collectors used for heating water in commercial or swimming pool applications shall be certified by an accredited listing agency as defined in the Plumbing and Mechanical Codes.

(3) A solar energy system for producing electricity shall also meet all applicable safety and performance standards established by the California Electrical Code, the Institute of Electrical and Electronics Engineers, and accredited testing laboratories such as Underwriters Laboratories and, where applicable, rules of the Public Utilities Commission regarding safety and reliability.

(d) For the purposes of this section:

(1) (A) For solar domestic water heating systems or solar swimming pool heating systems that comply with state and federal law, “significantly” means an amount exceeding 10 percent of the cost of the system, but in no case more than one thousand dollars (\$1,000), or decreasing the efficiency of the solar energy system by an amount exceeding 10 percent, as originally specified and proposed.

(B) For photovoltaic systems that comply with state and federal law, “significantly” means an amount not to exceed one thousand dollars (\$1,000) over the system cost as originally specified and proposed, or a decrease in system efficiency of an amount exceeding 10 percent as originally specified and proposed.

¹⁵⁰ All current California laws can be found at <http://www.leginfo.ca.gov>.

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(2) "Solar energy system" has the same meaning as defined in paragraphs (1) and (2) of subdivision (a) of Section 801.5.

(e) (1) 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.

(2) For an approving entity that is a homeowners' association, as defined in subdivision (a) of Section 1351, and that is not a public entity, both of the following shall apply:

(A) The approval or denial of an application shall be in writing.

(B) If an application is not denied in writing within 45 days from the date of receipt of the application, the application shall be deemed approved, unless that delay is the result of a reasonable request for additional information.

(f) 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).

(g) In any action to enforce compliance with this section, the prevailing party shall be awarded reasonable attorney's fees.

(h) (1) A public entity that fails to comply with this section may not receive funds from a state-sponsored grant or loan program for solar energy. A public entity shall certify its compliance with the requirements of this section when applying for funds from a state-sponsored grant or loan program.

(2) A local public entity may not exempt residents in its jurisdiction from the requirements of this section.

9.2. California Civil Code Section 714.1

Notwithstanding Section 714, any association, as defined in Section 1351, may impose reasonable provisions which:

(a) Restrict the installation of solar energy systems installed in common areas, as defined in Section 1351, to those systems approved by the association.

(b) Require the owner of a separate interest, as defined in Section 1351, to obtain the approval of the association for the installation of a solar energy system in a separate interest owned by another.

(c) Provide for the maintenance, repair, or replacement of roofs or other building components.

(d) Require installers of solar energy systems to indemnify or reimburse the association or its members for loss or damage caused by the installation, maintenance, or use of the solar energy system.

9.3. California Civil Code Section 801

The following land burdens, or servitudes upon land, may be attached to other land as incidents or appurtenances, and are then called easements:

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1. The right of pasture;
2. The right of fishing;
3. The right of taking game;
4. The right-of-way;
5. The right of taking water, wood, minerals, and other things;
6. The right of transacting business upon land;
7. The right of conducting lawful sports upon land;
8. The right of receiving air, light, or heat from or over, or discharging the same upon or over land;
9. The right of receiving water from or discharging the same upon land;
10. The right of flooding land;
11. The right of having water flow without diminution or disturbance of any kind;
12. The right of using a wall as a party wall;
13. The right of receiving more than natural support from adjacent land or things affixed thereto;
14. The right of having the whole of a division fence maintained by a coterminous owner;
15. The right of having public conveyances stopped, or of stopping the same on land;
16. The right of a seat in church;
17. The right of burial;
18. The right of receiving sunlight upon or over land as specified in Section 801.5.

9.4. California Civil Code Section 801.5

(a) The right of receiving sunlight as specified in subdivision 18 of Section 801 shall be referred to as a solar easement. "Solar easement" means the right of receiving sunlight across real property of another for any solar energy system.

As used in this section, "solar energy system" means either of the following:

(1) Any solar collector or other solar energy device whose primary purpose is to provide for the collection, storage, and distribution of solar energy for space heating, space cooling, electric generation, or water heating.

(2) Any structural design feature of a building, whose primary purpose is to provide for the collection, storage, and distribution of solar energy for electricity generation, space heating or cooling, or for water heating.

(b) Any instrument creating a solar easement shall include, at a minimum, all of the following:

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- (1) A description of the dimensions of the easement expressed in measurable terms, such as vertical or horizontal angles measured in degrees, or the hours of the day on specified dates during which direct sunlight to a specified surface of a solar collector, device, or structural design feature may not be obstructed, or a combination of these descriptions.
- (2) The restrictions placed upon vegetation, structures, and other objects that would impair or obstruct the passage of sunlight through the easement.
- (3) The terms or conditions, if any, under which the easement may be revised or terminated.

9.5. California Government Code Section 65850.5

(a) The implementation of consistent statewide standards to achieve the timely and cost-effective installation of solar energy systems is not a municipal affair, as that term is used in Section 5 of Article XI of the California Constitution, but is instead a matter of statewide concern. It is the intent of the Legislature that local agencies not adopt ordinances that create unreasonable barriers to the installation of solar energy systems, including, but not limited to, design review for aesthetic purposes, and not unreasonably restrict the ability of homeowners and agricultural and business concerns to install solar energy systems. It is the policy of the state to promote and encourage the use of solar energy systems and to limit obstacles to their use. It is the intent of the Legislature that local agencies comply not only with the language of this section, but also the legislative intent to encourage the installation of solar energy systems by removing obstacles to, and minimizing costs of, permitting for such systems.

(b) A city or county shall administratively approve applications to install solar energy systems through the issuance of a building permit or similar nondiscretionary permit. Review of the application to install a solar energy system shall be limited to the building official's review of whether it meets all health and safety requirements of local, state, and federal law. The requirements of local law shall be limited to those standards and regulations necessary to ensure that the solar energy system will not have a specific, adverse impact upon the public health or safety. However, if the building official of the city or county makes a finding, based on substantial evidence, that the solar energy system could have a specific, adverse impact upon the public health and safety, the city or county may require the applicant to apply for a use permit.

(c) A city or county may not deny an application for a use permit to install a solar energy system unless it makes written findings based upon substantial evidence in the record that the proposed installation would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact. The findings shall include the basis for the rejection of potential feasible alternatives of preventing the adverse impact.

(d) The decision of the building official pursuant to subdivisions (b) and (c) may be appealed to the planning commission of the city or county.

(e) Any conditions imposed on an application to install a solar energy system shall be designed to mitigate the specific, adverse impact upon the public health and safety at the lowest cost possible.

(f) (1) A solar energy system shall meet applicable health and safety standards and requirements imposed by state and local permitting authorities.

(2) Solar energy systems for heating water in single family residences and solar collectors used for heating water in commercial or swimming pool applications shall be certified by an accredited listing agency as defined in the California Plumbing and Mechanical Codes.

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(3) A solar energy system for producing electricity shall meet all applicable safety and performance standards established by the California Electrical Code, the Institute of Electrical and Electronics Engineers, and accredited testing laboratories such as Underwriters Laboratories and, where applicable, rules of the Public Utilities Commission regarding safety and reliability.

(g) (1) On or before September 30, 2015, every city, county, or city and county, in consultation with the local fire department or district and the utility director, if the city, county, or city and county operates a utility, shall adopt an ordinance, consistent with the goals and intent of subdivision (a), that creates an expedited, streamlined permitting process for small residential rooftop solar energy systems. In developing an expedited permitting process, the city, county, or city and county shall adopt a checklist of all requirements with which small rooftop solar energy systems shall comply to be eligible for expedited review. An application that satisfies the information requirements in the checklist, as determined by the city, county, and city and county, shall be deemed complete. Upon confirmation by the city, county, or city and county of the application and supporting documents being complete and meeting the requirements of the checklist, and consistent with the ordinance, a city, county, or city and county shall, consistent with subdivision (b), approve the application and issue all required permits or authorizations. Upon receipt of an incomplete application, a city, county, or city and county shall issue a written correction notice detailing all deficiencies in the application and any additional information required to be eligible for expedited permit issuance.

(2) The checklist and required permitting documentation shall be published on a publically accessible Internet Web site, if the city, county, or city and county has an Internet Web site, and the city, county, or city and county shall allow for electronic submittal of a permit application and associated documentation, and shall authorize the electronic signature on all forms, applications, and other documentation in lieu of a wet signature by an applicant. In developing the ordinance, the city, county, or city and county shall substantially conform its expedited, streamlined permitting process with the recommendations for expedited permitting, including the checklists and standard plans contained in the most current version of the California Solar Permitting Guidebook and adopted by the Governor's Office of Planning and Research. A city, county, or city and county may adopt an ordinance that modifies the checklists and standards found in the guidebook due to unique climactic, geological, seismological, or topographical conditions. If a city, county, or city and county determines that it is unable to authorize the acceptance of an electronic signature on all forms, applications, and other documents in lieu of a wet signature by an applicant, the city, county, or city and county shall state, in the ordinance required under this subdivision, the reasons for its inability to accept electronic signatures and acceptance of an electronic signature shall not be required.

(h) For a small residential rooftop solar energy system eligible for expedited review, only one inspection shall be required, which shall be done in a timely manner and may include a consolidated inspection, except that a separate fire safety inspection may be performed in a city, county, or city and county that does not have an agreement with a local fire authority to conduct a fire safety inspection on behalf of the fire authority. If a small residential rooftop solar energy system fails inspection, a subsequent inspection is authorized, however the subsequent inspection need not conform to the requirements of this subdivision.

(i) A city, county, or city and county shall not condition approval for any solar energy system permit on the approval of a solar energy system by an association, as that term is defined in Section 4080 of the Civil Code.

(j) The following definitions apply to this section:

(1) "A feasible method to satisfactorily mitigate or avoid the specific, adverse impact" includes, but is not limited to, any cost-effective method, condition, or mitigation imposed by a city, county, or city and county on another similarly situated application in a prior successful application for a permit. A city, county, or city and county shall use its best efforts to ensure that the selected method, condition, or mitigation meets the conditions of subparagraphs (A) and (B) of paragraph (1) of subdivision (d) of Section 714 of the Civil Code.

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(2) “Electronic submittal” means the utilization of one or more of the following:

(A) Email.

(B) The Internet.

(C) Facsimile.

(3) “Small residential rooftop solar energy system” means all of the following:

(A) A solar energy system that is no larger than 10 kilowatts alternating current nameplate rating or 30 kilowatts thermal.

(B) A solar energy system that conforms to all applicable state fire, structural, electrical, and other building codes as adopted or amended by the city, county, or city and county and paragraph (3) of subdivision (c) of Section 714 of the Civil Code.

(C) A solar energy system that is installed on a single or duplex family dwelling.

(D) A solar panel or module array that does not exceed the maximum legal building height as defined by the authority having jurisdiction.

(4) “Solar energy system” has the same meaning set forth in paragraphs (1) and (2) of subdivision (a) of Section 801.5 of the Civil Code.

5) “Specific, adverse impact” means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified, and written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.

9.6. California Health & Safety Code Section 17959.1

(a) A city or county shall administratively approve applications to install solar energy systems through the issuance of a building permit or similar nondiscretionary permit. However, if the building official of the city or county has a good faith belief that the solar energy system could have a specific, adverse impact upon the public health and safety, the city or county may require the applicant to apply for a use permit.

(b) A city or county may not deny an application for a use permit to install a solar energy system unless it makes written findings based upon substantial evidence in the record that the proposed installation would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact. This finding shall include the basis for the rejection of potential feasible alternatives of preventing the adverse impact.

(c) Any conditions imposed on an application to install a solar energy system must be designed to mitigate the specific, adverse impact upon the public health and safety at the lowest cost possible.

(d) (1) A solar energy system shall meet applicable health and safety standards and requirements imposed by state and local permitting authorities.

(2) A solar energy system for heating water shall be certified by the Solar Rating Certification Corporation (SRCC) or other nationally recognized certification agency. SRCC is a nonprofit third party supported by the United States Department of Energy. The certification shall be for the entire solar energy system and installation.

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(3) A solar energy system for producing electricity shall meet all applicable safety and performance standards established by the National Electrical Code, the Institute of Electrical and Electronics Engineers, and accredited testing laboratories such as Underwriters Laboratories and, where applicable, rules of the Public Utilities Commission regarding safety and reliability.

(e) The following definitions apply to this section:

(1) "A feasible method to satisfactorily mitigate or avoid the specific, adverse impact" includes, but is not limited to, any cost effective method, condition, or mitigation imposed by a city or county on another similarly situated application in a prior successful application for a permit. A city or county shall use its best efforts to ensure that the selected method, condition, or mitigation meets the conditions of subparagraphs (A) and (B) of paragraph (1) of subdivision (d) of Section 714 of the Civil Code.

(2) "Solar energy system" has the meaning set forth in paragraphs (1) and (2) of subdivision (a) of Section 801.5 of the Civil Code.

(3) A "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified, and written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.

9.7. California Government Code Section 66475.3

For divisions of land for which a tentative map is required pursuant to Section 66426, the legislative body of a city or county may by ordinance require, as a condition of the approval of a tentative map, the dedication of easements for the purpose of assuring that each parcel or unit in the subdivision for which approval is sought shall have the right to receive sunlight across adjacent parcels or units in the subdivision for which approval is sought for any solar energy system, provided that such ordinance contains all of the following:

- (1) Specifies the standards for determining the exact dimensions and locations of such easements.
- (2) Specifies any restrictions on vegetation, buildings and other objects which would obstruct the passage of sunlight through the easement.
- (3) Specifies the terms or conditions, if any, under which an easement may be revised or terminated.
- (4) Specifies that in establishing such easements consideration shall be given to feasibility, contour, configuration of the parcel to be divided, and cost, and that such easements shall not result in reducing allowable densities or the percentage of a lot which may be occupied by a building or a structure under applicable planning and zoning in force at the time such tentative map is filed.
- (5) Specifies that the ordinance is not applicable to condominium projects which consist of the subdivision of airspace in an existing building where no new structures are added.

For the purposes of this section, "solar energy systems" shall be defined as set forth in Section 801.5 of the Civil Code.

For purposes of this section, "feasibility" shall have the same meaning as set forth in Section 66473.1 for the term "feasible".

9.8. California Government Code Section 66473.1

(a) The design of a subdivision for which a tentative map is required pursuant to Section 66426 shall provide, to the extent feasible, for future passive or natural heating or cooling opportunities in the subdivision.

(b) (1) Examples of passive or natural heating opportunities in subdivision design, include design of lot size and configuration to permit orientation of a structure in an east-west alignment for southern exposure.

(2) Examples of passive or natural cooling opportunities in subdivision design include design of lot size and configuration to permit orientation of a structure to take advantage of shade or prevailing breezes.

(c) In providing for future passive or natural heating or cooling opportunities in the design of a subdivision, consideration shall be given to local climate, to contour, to configuration of the parcel to be divided, and to other design and improvement requirements, and that provision shall not result in reducing allowable densities or the percentage of a lot that may be occupied by a building or structure under applicable planning and zoning in effect at the time the tentative map is filed.

(d) The requirements of this section do not apply to condominium projects which consist of the subdivision of airspace in an existing building when no new structures are added.

(e) For the purposes of this section, "feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social and technological factors.