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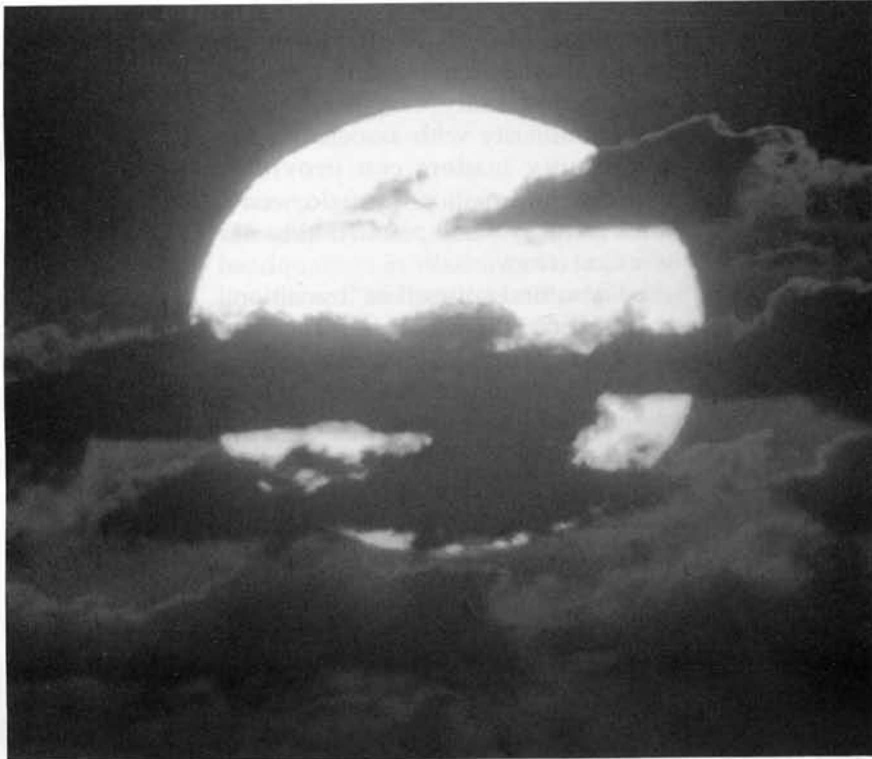

Photo - Earl Denny

Shedding Some Light on Solar Easements

by Rick Elliott, SR/WA

SINCE ALASKA IS USUALLY not confused with California in terms of sunshine, I was surprised to learn that the state of Alaska, like California and at least 13 other states, has a law that pertains to protection of "access to sunlight." The legal mechanism is an instrument called a "solar easement."

What is a solar easement? Well, the term "solar," of course, refers to the sun, and an easement is traditionally thought of as a "right to use" ... So, does this mean that you as a property owner must have an easement before basking in the sunlight in your own backyard? Or does it mean that the sun will not shine on you unless you have a proper and legally enforceable easement from God? Fortunately not. My understanding of a solar easement is that it is a mechanism that allows a property owner to protect his or her property so that the property will continue to benefit from sunlight.

Since it restricts the use of the servient estate, a solar easement is a "negative" easement. For example, the servient estate owner may be precluded from building a structure above a specific height. The restrictions are similar in some ways to the restrictions imposed by an avigation easement or a scenic easement. Easements pertaining to "light, air and view" are often lumped together for discussion and legal analysis.

An Airborne Easement?

A solar easement can be thought of as an easement running through the air. The solar easement reserves a corridor through which the sun can shine without impediment. For example, the easement may be such that the servient estate owner cannot build any structures taller than 20 feet. Structures in excess of 20 feet might interfere with the sunlight reaching the dominant estate. Just as a servient estate owner cannot block an easement for a road, with a solar easement, the servient estate owner cannot block the path of sunlight to the dominant estate.

What is the Common Law Regarding Access to Sunlight?

According to American Jurisprudence (1994): Under the common law, the owner of land has no legal right, in the absence of an easement, to the light and air unobstructed from the adjoining land. Accordingly, in the absence of an easement of light ... a property owner has no legal cause for complaint for interference therewith by the lawful erection of a building or other structure on the adjoining land.

Conversely, American Jurisprudence notes that under the English doctrine of ancient lights, if a landowner had received sunlight across adjoining property for a specified period of time, the landowner was entitled to continue to receive unobstructed access to sunlight across the adjoining property. The landowner had acquired a negative prescriptive easement and could prevent the adjoining landowner from obstructing access to light. However, no American common-law jurisdiction recognizes a landowner's right to acquire an easement of light by prescription.

What the Courts Have Said ...

As is often the case, the courts' rulings have not been as clear cut as the common law. For example, there is a divergence of opinion as to whether easements of light (as well as air and view) may arise by implied grant. The doctrine of implied grant of access to light has been recognized in several jurisdictions.

The rule is that an implied grant of an easement of light will be sustained only in cases of "real and obvious" necessity. An implied grant will be denied in cases where it appears that the owner of the dominant estate can, at a reasonable cost, have or substitute other lights for his or her building. (American Jurisprudence).

In the America Law Review (29 ALR 4th 351) Zitter outlines some theories that have been advanced as to possible legal recourse for a landowner (who does not have an express easement) seeking to protect access to light needed for solar energy. These possible recourses are in addition to the implied easement recourse discussed above:

- "Spite" Structure Prohibition: "Spite" structures are built with the express purpose of shutting off light to adjoining land. Laws have been passed in many jurisdictions prohibiting the erection of spite structures with the malicious motive of injuring a landowner by shutting out his or her light, air or view.
- Statutory regulation of solar energy rights: Local zoning can provide setbacks, transferable development rights, or overlay zones for solar uses.
- Application of Nuisance Theory: The courts will generally weigh the gravity of the harm to the plaintiff against the utility of the defendant's activity in deciding whether an action is a nuisance. The social utility of solar use may be found to so far outweigh the conflicting use of the airspace that a court would protect the solar use by

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enjoining the interference or by granting damages.

In the case of *Prah v. Maretti* (29 ALR 4th 324), the nuisance theory recourse was applied. The court concluded that an unreasonable obstruction of access of sunlight for purposes of solar energy might constitute a private nuisance.

The background for this case is as follows: The owner built the first home in the subdivision and installed a solar energy system. The system included collectors on the roof to supply energy for heat and hot water. A neighbor purchased the lot adjacent to and immediately to the south of the owner's lot. The neighbor started the planning for construction of a new home. It became apparent to the owner that if the neighbor's home were built as planned it would cause a shadowing effect on the solar collectors and reduce the efficiency and possibly damage the system. To avoid the adverse affects, the owner requested the neighbor to shift the location of the house on the lot to minimize the shadowing effect. The neighbor refused to change the location. The owner went to court.

In his analysis of this case, the judge explained that the courts in the past have not been receptive to the providing of broad protection of a landowner's access to sunlight. This reluctance was based on three policy considerations:

1. The right of landowners to use property as they wished as long as they did not cause physical damage to a neighbor.

2. The fact that sunlight was valued only for aesthetic enjoyment or for illumination.

3. The interest of society in not restricting or impeding land development.

However, the court said that these three policies were no longer fully accepted or applicable. The court pointed out that society has increasingly regulated the use of land by the landowner for the general welfare, and that sunlight may be needed, not just for aesthetic reasons, but as a source of energy. Further, the court reasoned that the need for easy and rapid development is not as great as it once was. Therefore, the court ruled that a nuisance claim action was appropriate in this case. (Zitter)

Court rulings regarding compensation for loss of access to sunlight related to condemnation actions have also been a mixed bag.

In a California case, *Sher v. Leiderman*, however, the court ruled differently. In this case the plaintiffs' had designed their house so that winter sun would heat the house through south-facing windows and skylights. The plaintiffs alleged that the neighbors to the south had allowed trees to grow to the point that they shaded the plaintiffs' house during winter months. This made their house gloomy and increased heating bills. Even though these allegations were not disputed, the court ruled that blockage of light to a neighbor's property did not constitute actionable nuisance, regardless of impact on the injured party's property.(29 ALR 4th 349-353).

In an Illinois case, *O'Neill V. Brown*, a landowner sought an injunction to stop a second story addition to their neighbor's home on the grounds that the home would partially shade their greenhouse and thus encroach upon a solar easement allegedly created under the Solar Energy Act (SEA). The court ruled that the language of SEA did not evidence legislative intent to establish and give effect to new property right of solar access. The injunction was not granted. (29 ALR 4th 349-353).

Court rulings regarding compensation for loss of access to sunlight related to condemnation actions have also been a mixed bag. In a Nevada case *Probasco v. City of Reno*, the court ruled that the abutting owner was not entitled to compensation from a condemnor by reason of infringement upon light, air and view over a public highway unless the owner acquired such rights by express covenant.

In a California case, *Beckham v. State*, the court held just the opposite. The abutting owner was found to be entitled to compensation because his access to light and air was infringed upon. Generally, the courts have held that the right of access to light, air and view constitute "abutters' rights" and will be considered in condemnation proceedings. (American Jurisprudence)

How is a Solar Easement Obtained?

How can you obtain a solar easement if you are interested in protecting your source of light? Well, if you have a friendly neighbor, perhaps that neighbor would donate the easement. More likely, you would have to purchase it just as you would any other easement. If you are fortunate enough to own the adjacent property that is critical to your source of sunshine, you could reserve a solar easement prior to disposing of the adjacent property. Of course, as any good appraiser would tell you, the solar easement could reduce the fair market value of the servient estate. On the other hand, it could enhance the value of the dominant estate. In the final analysis, you may have to determine which is more important ... a few bucks or that warming sunshine?

The Alaska State Law (AS 34.15.145) has this to say about the creation of solar (light) easements:

An easement obtained for the purpose of protecting the exposure of property to the direct rays of the sun must be created in writing and is subject to the recording requirements for other conveyances of real property.

An instrument creating a solar easement must include, but is not limited to:

1. The vertical and horizontal angles, expressed in degrees, at which the solar easement extends over the real property subject to the solar easement;
2. Any terms or condition under which the solar easement is granted or under which it will be terminated;
3. Any provisions for compensation of the owner of the property benefiting from the solar easement in the event of interference with the enjoyment of the solar easement, or compensation of the owner of the property subject to the solar easement for maintaining the solar easement.

Thus, under Alaska law, a solar easement:

- Like any other conveyance, must comply with the statutes of fraud. It must be in writing.
- Is subject to the state recording requirements. (Recording is critical because the recorded document is constructive notice of the easement to subsequent purchasers of the property affected.)
- Must be specific so that the extent of the impediment to the servient estate can be readily determined.
- Must specifically state any terms or conditions governing the granting or the termination of the easement.
- Must specifically state any provisions dealing with compensation. Compensation could be owed to the dominant estate owner for violating the easement. Conversely, the servient estate owner could be entitled to payment for maintaining the easement.

As with any easement, a solar easement should be in writing, and the intent should be specifically and clearly stated. In order to make certain that the source of sunlight is protected, it is best to have an express grant of easement.

Why Have a Solar Easement?

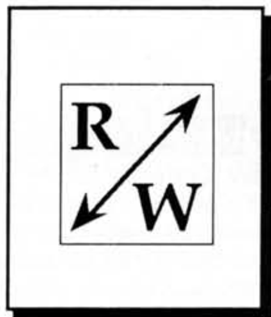
If you are a sun worshipper you may want to make sure that those bright rays are not cut off by a vengeful neighbor who decides to build a high-rise building on the vacant lot that you sold him for a too high price. Or maybe you spent thousands of dollars converting your home to solar energy. You would want to protect your energy source.

As noted earlier, you may not be able to protect your access to sunlight without an express grant. So whether you just want to enjoy the sunshine or you need to protect the sunshine as an energy source, a solar easement is something to consider. And for those professionals who deal with land interests on a daily basis, I hope this has shed a little light on the subject for you. ❑

SOURCES

1. American Jurisprudence, second edition, volume 1, 1994.
2. American Law Reports, ALR 4th, volume 29, 1984. 1994.
3. American Law Reports, ALR 4th supplement, September, 1994.
4. Jay M. Zitter, J.D., "Solar Energy: Landowner's Rights Against Interference with Sunlight Desired for Purposed of Solar Energy," 29 American Law Review 4th, page 349-353.

Rick Elliott is a natural resource manager for the state of Alaska. He is currently the program manager for the Land Management and Municipal Land Trustee programs in the Department of Community and Regional Affairs. He holds master degrees in Public Administration and Business Management from the University of Alaska, Anchorage.



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