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ARTICLE

The Solar Shade Control Act— From Trees *Versus* Solar to Trees *and* Solar?[1]

By Serena Patitucci Torvik[2]

I. INTRODUCTION

Can bad cases ever make good law? Maybe in the case of homeowners Richard Treanor and Carolynn Bissett who were criminally prosecuted under the Solar Shade Control Act[3] ("SSCA") because their pre-existing trees cast shadows over their neighbor's solar panels. Until the recent enactment of an amendment to the SSCA, property owners could face criminal prosecution if their trees grew to shade a neighbor's solar panels, with no consideration given to whether the trees were planted before the panels were installed. The amendment, enacted to remedy the situation that befell Treanor and Bissett, has good intentions and may have the effect it was designed to have–striking a balance between trees and solar.[4] However, the amendment also forges new law in California, creating private nuisance liability for blocking a neighbor's sunlight. In other words, neighbors can now sue each other directly in civil court. With the increase in solar usage in the state, this may yet prove to be a situation of 'bad cases make bad law' after all.

The SSCA was originally passed in 1978 with the noble goal of encouraging the use of solar energy.[5] More recently, using the sun as an alternative energy source has become an important principle of both state and national energy policies.[6] In the age of "going green," California's public policy promotes "all feasible uses of alternative energy."[7] In 2007, California launched its Go Solar California program, providing financial incen-

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tives for installation of solar energy systems in homes and businesses.[8] As originally enacted, the SSCA generally protected owners of solar energy systems by preventing obstruction (shade) from neighboring trees that were later-planted or later-grown.[9] A person who violated the SSCA and failed to remedy the situation after notice was guilty of an infraction for maintaining a public nuisance and subject to criminal fine.[10] In other words, the local jurisdiction's district attorney would determine whether or not to file a court action.

The amendment to the SSCA, signed into law on July 22, 2008, and effective January 1, 2009,[11] has received publicity for its protection of pre-existing trees. However, it is probable that the more significant aspect of this amendment will prove to be its creation of a private nuisance cause of action. No longer will a disinterested party, the district attorney, decide whether to file a court action. Instead, neighbors can now sue their neighbors directly. This is unique in a state where traditionally there has been no actionable violation for blocking light to a neighbor's property.[12]

This article describes the history and purpose of the Solar Shade Control Act, analyzes cases interpreting it, discusses the 2008 amendment, and provides commentary regarding what the future holds for solar panels and trees in California. In short, does the amendment truly strike its intended balance? Or does it only shift the advantage? Will it help neighbors resolve disputes? Or will it lead to an increase in lawsuits related to solar usage and tree protection?

II. HISTORICAL CONTEXT OF THE SOLAR SHADE CONTROL ACT: ANCIENT LIGHTS VERSUS PROPERTY RIGHTS

The Doctrine of Ancient Lights is a common law principle holding that after 20 years of uninterrupted use, a landowner acquires an easement that prevents his neighbor from building an obstruction that blocks light from passing through the window.[13] Traditionally, California has *not* recognized the Doctrine of Ancient Lights, nor has it recognized a landowner's "natural right to air, light or an unobstructed view."[14] California has, instead, favored allowing property owners to develop their properties.[15]

In the absence of malicious motives, ordinarily a cause of action for private nuisance has not been recognized.[16] In other words, neighbors have traditionally had no cause of action against each other for blocking light. In California, generally the only way to create an easement for light (or air or view) is by express grant or reservation, by an agreement between the parties, or by the creation of an equitable servitude through appropriate covenants and restrictions.[17]

Unlike private parties, local governments, such as cities and counties, have been permitted to limit property owners' rights in order to preserve

sunlight pursuant to the legitimate exercise of the government's police power.[18] For instance, local governments can impose height restrictions on buildings, impose restrictions that preserve neighborhood character, protect views, and abate public nuisances.[19]

In this context, the California legislature enacted the Solar Rights Act and the SSCA. These Acts were adopted in 1978, coincident with the country's energy crisis.

III. KEY PROVISIONS OF THE SOLAR RIGHTS ACT AND THE SSCA.

A. The Solar Rights Act.

The stated purpose of the Solar Rights Act ("SRA"), the sister of the SSCA, is to "promote and encourage the widespread use of solar energy systems…and to facilitate adequate access to sunlight."[20] This Act could itself be the subject of an article, so the details will not be addressed here. However, the following are key provisions of the SRA, as related to the SSCA.

1. Limits Restrictions. The SRA voids covenants that prohibit or unreasonably restrict use or installation of solar energy systems.[21] Reasonable restrictions, such as prior approval and maintenance and repair, are permitted.[22] This typically comes into play with overly restrictive covenants, conditions, and restrictions (CC&Rs) enforced by homeowners' associations.

2. Creates "Solar Easements." The SRA establishes "solar easements" for defined solar energy systems, meaning "the right [to receive] sunlight across the real property of another."[23] Creation of a "solar easement" pursuant to the SRA still requires a written grant.[24]

3. Defines "Solar Energy Systems." The SRA defines "solar energy systems" to include active solar devices (e.g. solar panels and the like) and passive design strategies (e.g. window direction and size, building orientation and floor plan).[25]

4. Provides Guidelines for Local Governments. The SRA discourages local governments from enacting unreasonable restrictions on solar energy systems and requires local governments to use a non-discretionary permitting process for such systems.[26]

B. Key Provisions of the SSCA.

The SSCA's intent is to encourage and promote the use of solar energy systems by protecting owners of such systems from shade caused by neighboring trees.[27] As originally drafted, the SSCA could be summarized

as follows (the 2008 amendment, discussed below, revises some but not all of these provisions):

1. Protects "Solar Collectors." A threshold question is "Who is protected by the SSCA?" The SSCA protects "solar collectors," which it originally defined as "a fixed device, structure, or part [thereof], which is used primarily to transform solar energy into thermal, chemical, or electrical energy."[28] To qualify under the SSCA, a "solar collector shall be used as part of a system [that] makes use of solar energy for any or all of the following purposes: (1) water heating; (2) space heating or cooling; and (3) power generation."[29] In addition, a "solar collector" must be installed according to specific building and setback requirements, including being at least ten feet above the ground and set back at least five feet from the property line.[30]

2. Defines Violation. A person who owns or controls property violated the SSCA if her later-planted or later-grown trees cast a shadow over more than ten percent of the absorption area of a solar collector on another's property at any time between the hours of 10:00 a.m. and 2:00 p.m.[31] Note that tenants could arguably be liable under the SSCA as "controllers" of property.

3. Establishes Criminal Liability as Public Nuisance. Prior to the 2008 amendment, the SSCA set up a criminal procedure for prosecuting violators. The complainant (the owner of the blocked solar collector) had to establish to the satisfaction of the local prosecutor that a violation had occurred.[32] Thereafter, the prosecutor could serve "reasonable notice in writing" demanding correction of the violation, in other words, a notice of abatement.[33] If the violation was not corrected within 30 days, the complainant could file an affidavit with the prosecutor for the case to proceed.[34] The violator could thereafter be charged with an infraction and be found guilty of a public nuisance,[35] and fined $1,000 per day, until corrected.[36]

4. Provides Exemptions. Under the SSCA, certain exemptions apply. First, the SSCA does not protect solar collectors from existing trees that are already grown. In other words, someone cannot install solar panels in the shade and then force their neighbor to cut her trees. However, the SSCA does protect solar collectors from later-grown trees, which, prior to the 2008 amendment, included trees planted before the solar panels were installed that subsequently grew to block them.[37] Second, timberland and commercial agricultural crops are exempted.[38] Third, "replacement" trees, which are defined as trees planted to replace a tree growing prior to the instal-

lation of a solar collector, which subsequently dies, are exempted.[39] Fourth, local governments are permitted to enact ordinances exempting themselves.[40] And, finally, passive or natural solar systems that could block a neighboring active system may seek judicial exemption (note that the terms used in this section are not clearly defined).[41]

III. THE 2008 AMENDMENT TO THE SSCA[42]

The 2008 amendment to the SSCA accomplishes four major changes, as follows:

1. Notice. Owners of property where a solar collector is to be installed are authorized to provide pre-installation, written notice by certified mail to owners of affected properties.[43]

2. First in Time Is First in Right. Trees and shrubs planted prior to the installation of a solar collector are exempt.[44]

3. "Solar Collector" Redefined. A "solar collector" must be on the roof of a building, unless it is not possible due to specified conditions. A "solar collector" excludes systems designed to offset more than the building's electricity demand.[45]

4. Converted to a Private Nuisance. The public nuisance violation is repealed. A violation of the SSCA is now a private nuisance. A neighbor with an affected solar collector can provide his neighbor notice requesting compliance and sue in civil court for failure to comply.[46]

IV. THE PRE-AMENDMENT CASES

In the 30 years since the SSCA was enacted, only three published California court opinions have addressed it in any detail. In 1986, the California Court of Appeal, Sixth Appellate District, in *Sher v. Leiderman,* held that SSCA was not intended to apply to protect exclusively passive solar homes.[47] Next, in 1997, the California Court of Appeal, First Appellate District, in *Kucera v. Lizza*, held that nothing in the SSCA prevented a city from enacting an ordinance limiting tree growth.[48] And, finally, in 2005, the Court of Appeal, Sixth Appellate District, in *Zipperer v. County of Santa Clara,* confirmed that the County could exempt itself from the SSCA.[49]

Then, in 2007, the SSCA made national headlines when two Santa Clara County residents, Richard Treanor and Carolynn Bissett, were found guilty in criminal court of violating the Act. This case ultimately led to the 2008 amendment to the SSCA.

A. *Sher v. Leiderman*.[50]

The facts of *Sher* are as follows: In the 1960s, Mr. and Mrs. Sher designed and built home that included special design features to take advantage of the sun for heat and light (windows, orientation, etc.). The trial court found that the design features formed a system intended to transform solar energy into thermal energy, but that the home was a "passive solar home." The home did not use any "active" solar collectors or panels or employ any "thermal mass" for heat storage and distribution.

At around the same time, the Shers' uphill neighbors, the Leidermans, built their house. Despite disapproval from the local authority, the Leidermans planted a large number of trees for shade and privacy. In the 1970s, these trees began to cast shadows on the Sher house. On at least two occasions, the Shers paid to have the trees topped. Later, several trees were removed due to impact on a sewer easement. The Leidermans also paid to have the trees trimmed or removed. However, after 1979, the Leidermans refused to further control the trees' growth. At the time of trial, the Leidermans' trees blocked the sun to much of the Sher home in the winter months, between 10:00 a.m. and 2:00 p.m. This had an adverse impact on the home's thermal performance.

The Shers applied to the Santa Clara County District Attorney's office pursuant to the SSCA. The deputy district attorney determined that the SSCA did not apply to the Shers' situation and would not issue a notice of abatement to the Leidermans. Thereafter, the Shers sued the Leidermans in civil court.

The Shers' lawsuit included claims against the Leidermans for private nuisance and public nuisance under the SSCA. On the private nuisance cause of action, the Court of Appeal affirmed "well settled" case law in California that a landowner has no easement for light and air over adjoining land in absence of express grant and no private nuisance cause of action.[51] On the SSCA public nuisance cause of action, the Court of Appeal found that the definition of a "solar collector" under the SSCA did not include exclusively passive solar homes. Therefore, the protection afforded by the SSCA did not apply to the Shers' home.

B. *Kucera v. Lizza*.[52]

In *Kucera,* trees at Mr. Lizza's apartment building in the Town of Tiburon grew to obstruct views from an apartment building owned by the Kuceras. The Town had an ordinance preserving views and sunlight against unreasonable tree growth. The Court of Appeal upheld the Town's constitutional right to enact such an ordinance pursuant to the government's police power. The Court found that the Town ordinance validly conferred standing on private persons to enforce it. Finally, the Court held that the

SSCA did not signal preemption by the state legislature of all ordinances related to light.[53]

C. *Zipperer v. County of Santa Clara.*[54]

In the mid-1980s, the Zipperers built a home with active solar systems. In 1991, the County acquired an adjacent parcel of land. Thereafter, trees on the County's land grew to block the Zipperers' solar system, causing it to malfunction. Despite requests, the County did not trim or remove the trees. In 2002, the County adopted an ordinance exempting itself from the SSCA.

In 2004, the Zipperers sued. The Court held that the SRA specifically requires a writing to create a solar easement, and there was no writing here. The Court also held that under the SSCA the County was entitled to exempt itself from compliance with the SSCA.[55] Even though the County's exemption ordinance was enacted after the "violation," the Zipperers had no vested rights under the statute, so the exemption was valid. The Court reasoned that the Zipperers' claim was wholly statutory, the Zipperers had no vested right in maintaining the statutory claim, primarily because there was no final judgment on it at the time the exemption ordinance became effective, and the ordinance acted as a repeal of the SSCA's statutory authority, eliminating the Zipperers' claim.

D. "Vargas versus Treanor and Bissett."

Vargas and Treanor/Bissett shared a common back fence. Between 1997 and 1999, Treanor/Bissett planted eight redwood trees along the edge of their yard. In 2001, Vargas installed solar panels on his roof and on a trellis behind his house. At first, the trees did not shade the panels. However, the trees later grew to shade more than ten percent of the panels between 10:00 a.m. and 2:00 p.m. After failed attempts at informal resolution, Vargas filed a complaint with the Santa Clara County District Attorney. The deputy district attorney issued a notice of abatement. Apparently, Treanor/Bissett did not remedy the problem, because in December 2007, they were found guilty in criminal court of violating the SSCA. The judge ordered them to trim or remove two of the eight trees.

This case garnered national headlines "as an 'only in California, green vs. green' tale."[56] California State Senator Joe Simitian holds an annual "There Ought to Be a Law" contest, soliciting legislative suggestions from constituents.[57] This year, Treanor and Bissett won, resulting in the 2008 amendment to the SSCA.

V. CURRENT STATE OF THE LAW

The 2008 amendment provides that a person who plans to install a solar collector "may" give pre-installation notice to affected property

owners. Since this notice is permissive and not mandatory, however, it is not clear how this part of the amendment changes the existing law. In addition, other than providing a record (which could conceivably be provided by other documents, such as contractors' bills or purchase orders), the SSCA does not provide the person giving any such a notice any clear benefit for doing so, or any detriment to *not* doing so. If anything, there could be an unintended detriment to providing such notice prior to installing solar panels–a neighbor rushing to plant a tree that would then be pre-existing and, thus, exempted from the SSCA.

One of the goals of the 2008 amendment is to exempt pre-existing trees, whether or not they have grown to a height that would shade a neighbor's solar collector. (The SSCA as originally enacted did not exempt later-grown trees.) This change is sure to result in litigation as subsequent owners of property argue over when trees were planted and submit inconsistent evidence on this issue. Further, rather than creating a balance, the SSCA instead creates a race between neighbors to plant trees and install solar collectors.

Post-amendment, solar collectors must be installed on roofs, if at all possible, to minimize the possibility of shading from trees on neighboring properties. This seems logical and straightforward, but the exceptions could overtake the rule. Solar collectors may be installed on the ground in the case of "inappropriate roofing material, slope of the roof, structural shading, or orientation of the building." In some cases, this will surely be cut and dry, but certainly there will be cases where competing experts disagree.

In addition, solar collectors are only protected to the extent that they provide energy for the building's electricity demand. This seems clear, at first read, however, the key terms are not defined. Does a "building's electricity demand" include an electric car owned by the property owners? What about a detached outbuilding? These issues will likely also be resolved in court.

Finally, the SSCA is now enforced through private, rather than public, nuisance claims. This means that, for the first time ever in California, neighbors can sue each other over the right to sunlight across a neighboring property without a written easement establishing that right. Coupled with the increasing demand for alternative energy sources, including solar, and California's financial incentive programs for installing solar energy systems, it seems certain that SSCA lawsuits will soon be on the rise.[58]

VI. CONCLUSION

The 2008 amendment to the SSCA was enacted with the noble goal of trees and solar co-existing by removing the punitive remedies included in the original SSCA. However, as a result of the 2008 amendment, for the first time ever, California property owners have a claim for private nuisance against their neighbors for interfering with sunlight over their properties. As solar use increases, this amendment is very likely to be labeled another example of "bad cases make bad law."

NOTES

1. Taken from a quote by State Senator Joe Simitian, author of SB 1399 (ch. 176), as follows: "I was frustrated by the fact that this was always characterized as a debate between trees vs. solar, and now it is a conversation about trees and solar." As quoted in Paul Rogers, *In Trees vs. Solar, Trees Win*, San Jose Mercury News, July 22, 2008.
2. Serena Patitucci Torvik is a senior associate specializing in real estate and construction litigation in the Palo Alto office of Miller Starr Regalia.
3. Taken from a quote by State Senator Joe Simitian, author of SB 1399 (ch. 176), as follows: "I was frustrated by the fact that this was always characterized as a debate between trees vs. solar, and now it is a conversation about trees and solar." As quoted in Paul Rogers, *In Trees vs. Solar, Trees Win*, San Jose Mercury News, July 22, 2008.
4. Pub. Resources Code, §§ 25980 et seq.
5. Legislative history of SB 1399 (ch. 176). (see, e.g., Bill Analysis for April 1, 2008, hearing, Senate Energy, Utilities and Communications Committee).
6. Pub. Resources Code, § 25980; Gov. Code, § 65850.5; Civ. Code, § 714, subd. (b).
7. See Miller & Starr, California Real Estate 3d, §15.11, p. 44-45 (2003).
8. Pub. Resources Code, § 25980.
9. *www.gosolarcalifornia.ca.gov*.
10. Pub. Resources Code, § 25982. See, also, *Kucera v. Lizza*, 59 Cal. App. 4th 1141, 1152, 69 Cal. Rptr. 2d 582 (1st Dist. 1997), cited in *Zipperer v. County of Santa Clara*, 133 Cal. App. 4th 1013, 1021, 35 Cal. Rptr. 3d 487 (6th Dist. 2005), as modified, (Oct. 28, 2005).
11. Pub. Resources Code, §§ 25980 et seq.
12. SB 1399 (ch. 176).
13. See *Sher v. Leiderman*, 181 Cal. App. 3d 867, 875, 226 Cal. Rptr. 698 (6th Dist. 1986).
14. Black's Law Dictionary (8th ed. 2004).
15. *Kucera*, supra, 59 Cal. App. 4th at 1150.
16. See, e.g., *Posey v. Leavitt*, 229 Cal. App. 3d 1236, 1249-1250, 280 Cal. Rptr. 568 (4th Dist. 1991); *Wolford v. Thomas*, 190 Cal. App. 3d 347, 356, 235 Cal. Rptr. 422 (1st Dist. 1987); *Pacifica Homeowners' Assn. v. Wesley Palms Retirement Community*, 178 Cal. App. 3d 1147, 1152, 224 Cal. Rptr. 380 (4th Dist. 1986).
17. *Kucera*, supra, 59 Cal. App. 4th at 1150; *Sher, supra,* 181 Cal. App. 3d at 875.
18. *Sher*, supra, 181 Cal. App. 3d at 875; Miller & Starr, California Real Estate 3d, §15.10 (2003), "Methods of Creation."
19. *Kucera*, supra, 59 Cal. App. 4th at 1148-49.
20. *Kucera*, supra, 59 Cal. App. 4th at 1148-49; see, also, Gov. Code, § 65850; *Pacifica Homeowners' Assn.*, supra, 178 Cal. App. 3d at 1152.
21. California AB 3250 (1978, ch. 1366).
22. Civ. Code, §§ 714, 714.1.
23. Civ. Code, §§ 714, 714.1.
24. Civ. Code, § 801.5.
25. *Zipperer*, supra, 133 Cal. App. 4th at 1013.

26. Civ. Code, § 801.5, subd. (a).
27. Gov. Code, § 65850.5.
28. Pub. Resources Code, §§ 25980, 25982.
29. Pub. Resources Code, § 25981.
30. Pub. Resources Code, § 25981.
31. Pub. Resources Code, § 25982 (now appears in § 25981, subd. (d)).
32. Pub. Resources Code, § 25982.
33. Pub. Resources Code, § 25983.
34. Pub. Resources Code, § 25983.
35. Pub. Resources Code, § 25983.
36. As defined in Pen. Code §§ 370 and 371, and Civ. Code § 3480.
37. Pub. Resources Code, § 25983.
38. Pub. Resources Code, § 25982.
39. Pub. Resources Code, § 25984.
40. Pub. Resources Code, § 25984.
41. Pub. Resources Code, § 25985.
42. Pub. Resources Code, § 25986.
43. Senate Bill No. 1399 (ch. 176), as approved by the Governor and filed with the Secretary of State on July 22, 2008, and effective January 1, 2009.
44. Pub. Resources Code, § 25982.1, eff. Jan. 1, 2009.
45. Pub. Resources Code, § 25984, eff. Jan. 1, 2009.
46. Pub. Resources Code, § 25981, eff. Jan. 1, 2009.
47. Pub. Resources Code, § 25983, eff. Jan. 1, 2009.
48. *Sher*, supra, 181 Cal. App. 3d at 867.
49. *Kucera*, supra, 59 Cal. App. 4th at 1141.
50. *Zipperer*, supra, 133 Cal. App. 4th at 1013.
51. *Sher*, supra, 181 Cal. App. 3d at 867.
52. The 2008 amendment to the SSCA establishes a private nuisance cause of action for blocking light. Were this the sole reason for the Court's decision, the Shers would now have a cause of action against the Liedermans under the SSCA. However, the Court also found that the SSCA did not apply to the Shers, because their home did not meet the statutory definition of a "solar collector." While the 2008 amendment did change the definition of "solar collector," it did not broaden it to include exclusively passive solar homes, like the Shers' home at issue in this case.
53. *Kucera*, supra, 59 Cal. App. 4th at 1141.
54. The 2008 amendment to the SSCA essentially codifies the holding of this case in the newly added subdivision (b) to Pub. Resources Code, § 25985.
55. *Zipperer*, supra, 133 Cal.App.4th at 1013.
56. Pub. Resources Code, § 25985.
57. Paul Rogers, *In Trees vs. Solar, Trees Win*, San Jose Mercury News, July 22, 2008.
58. Douglas Fox, *Solar Energy Trumps Shade in California Prosecution of Tree Owner,* The Christian Science Monitor, March 18, 2008.
59. Accord, Legislative history of SB 1399 (see, e.g., Bill Analysis for April 1, 2008, hearing, Senate Energy, Utilities and Communications Committee).

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Edmund Regalia, Marvin Starr, and Harry Miller founded the law firm of Miller Starr Regalia headquartered in Walnut Creek. They and other members of the firm have been writing and editing the treatise, Miller & Starr, since shortly after the firm was founded in 1964. The current editor-in-chief-of the treatise, Karl E. Geier, assumed this position with the retirement of Edmund L. Regalia in July 2008.

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