

## Chapter 12.45 SOLAR ACCESS AND VIEWS

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### **12.45.010 Purpose and objectives.**

A. The purpose of this chapter is to:

1. Set forth a procedure for the resolution of disputes between private property owners relating to the resolution of sunlight or views lost due to tree growth.
2. This view chapter does not impair obligations imposed by an existing easement, or a valid pre-existing enforceable covenant or agreement.
3. Nothing in this chapter is meant to replace the peaceful, sensible and just resolution of differences between neighbors acting in good faith. The provisions contained in this chapter are meant to encourage that such resolution occurs prior to engaging in the legal remedies provided by it.

B. The objectives of this chapter are:

1. To preserve and promote the aesthetic and practical benefits which trees provide for individuals and the entire community;
2. To discourage ill-considered harm to or destruction of trees;
3. To encourage the use of solar energy for heat and light;
4. To encourage food production in private gardens;
5. To restore access to light and views from the surrounding locale;
6. To encourage the maintenance of positive relationships within a neighborhood when there is conflict between objectives 1-2 and 3-5 above.
7. It is not an objective of this chapter to facilitate or encumber the transmission of radio and television signals. (Ord. 6286-NS § 1 (part), 1995: Ord. 6173-NS § 1 (part), 1993: Ord. 5817-NS § 1 (part), 1987)

### **12.45.020 Definitions.**

A. For the purposes of this chapter, the meaning and construction of words and phrases hereinafter set forth shall apply:

1. "Solar access" means the availability of sunlight to a property.
2. "Views" mean a distant vista or panoramic range of sight of Berkeley, neighboring areas or the San Francisco Bay. Views include but are not limited to skylines, bridges, distant cities, geologic features, hillside terrains and wooded canyons or ridges.

3. "Trees" means any woody perennial plant, usually with one or more major trunks attaining a height of at least fifteen feet at maturity.

4. "Complaining party" means any property owner (or legal occupant without objection of property owner) who wishes to alter or remove a tree(s) on the property of another which creates an obstruction to his or her access to sunlight or view whether such access is gained from an original dwelling or any addition thereto used as a dwelling.

5. "Tree owner" means any individual owning real property in Berkeley upon whose land is located a tree or trees alleged by a complaining party to cause an obstruction.

6. "Obstruction" means any substantial blocking or diminishment of a view from a structure lawfully used as a dwelling or access to sunlight to the real property which is attributable to the growth, maintenance or location of tree(s).

7. "Tree mediator or tree arbitrator" means any trained and experienced mediator or mediator/arbitrator acceptable to both complaining party and tree owner to mediate or arbitrate a tree dispute.

8. "Restorative action" means any specific requirement to resolve a tree dispute.

9. "Thinning" means the selective removal of entire branches from a tree so as to improve visibility through the tree and/or improve the tree's structural condition.

10. "Tree removal" means the elimination of any tree from its present location.

11. "Trimming" means the selective removal of portions of branches from a tree so as to modify the tree(s) shape or profile or alter the tree's appearance.

12. "Topping" means removal of the top portion of a tree's main leader stems, resulting in an overall reduction in the tree's height and size.

13. "Tree claim" means the written basis for arbitration or court action under the provisions of this article which includes all of the following:

a. The nature and extent of the alleged obstruction, including pertinent and corroborating physical evidence. Evidence may include, but is not limited to photographic prints, negatives or slides. Such evidence must show absence of the obstruction at any documentable time during the tenure of the current property owner (or legal occupant without objection of property owner), hereinafter referred to as complaining party. Evidence to show date of acquisition must be included.

b. The location of all trees alleged to cause the obstruction, the address of the property upon which the tree(s) are located, and the present tree owner's name and address. This requirement may be satisfied by the inclusion of the tree location, property address, and tree owner information.

c. Any mitigating actions proposed by the parties involved to resolve the tree claim.

d. The failure of personal communication between the complaining party and the tree owner to resolve the alleged obstruction as set forth in Section 12.45.030 of this chapter. The complaining part must provide physical evidence that written attempts at conciliation have been made and failed. Evidence may include, but is not limited to, copies of and receipts for certified or registered mail correspondence. (Ord. 6286-NS § 1 (part), 1995: Ord. 6173-NS § 1 (part), 1993: Ord. 5817-NS § 1 (part), 1987)

**12.45.030 Procedures.**

A. The procedures described in this section shall be followed in the resolution of tree disputes between private parties.

1. Initial reconciliation: A complaining party who believes in good faith that the growth, maintenance or location of tree(s) on the private property of another (hereinafter referred to as tree owner) diminishes the beneficial use of economic value of his or her property because such tree(s) interfere with the access to sunlight or views which existed prior to such growth, maintenance or location of the tree(s) on the property during the time the complaining party has occupied the property, shall notify the tree owner in writing of such concerns. The notification should, if possible, be accomplished by personal discussions to enable the complaining party and tree owner to attempt to reach a mutually agreeable solution.

2. Mediation: If the initial reconciliation attempt fails, the complaining party shall propose mediation as a means to settle the dispute on a relatively informal basis. Acceptance of mediation by the tree owner shall be voluntary. If mediation is elected, the parties shall mutually agree upon a tree mediator.

The mediation meeting may be informal, and no written record is necessary unless desired by the parties. The mediation process may include the hearing of viewpoints of lay or expert witnesses, and shall include a site visit to the properties of the complaining party and the tree owner. Parties should be encouraged to give notice to immediate neighbors and solicit input. The tree mediator shall consider the objectives, benefits and burdens set forth in this chapter in attempting to help both parties reach a resolution of the dispute. The tree mediator shall not have the power to issue binding orders for restorative action, but shall strive to enable the parties to resolve their dispute at this stage in order to eliminate the need for binding arbitration or litigation.

3. Tree claim preparation: In the event that the initial reconciliation process fails and mediation either is not elected or fails, the complaining party must prepare a tree claim (as defined in 12.45.020) and provide a copy to the tree owner, in order to pursue either binding arbitration or litigation. This constitutes a filing of a tree claim.

4. Binding arbitration: In those cases where the initial reconciliation process fails and where mediation has not resolved the dispute, the complaining party must offer to submit the dispute to binding arbitration and the tree owner may elect binding arbitration. The identity of the tree arbitrator shall be agreed upon by both the complaining party and the tree owner who shall indicate such agreement in writing. This agreement may provide for employment of experts representing the parties or may be limited to an investigation of the tree claim conducted by the tree arbitrator. The tree arbitrator shall follow the provisions of this chapter to reach a fair resolution of the tree claim and shall submit a complete written report to the complaining party and the tree owner. This report shall include the tree arbitrator's findings with respect to all standards listed in Section 12.45.040 (Standards) of this chapter, a pertinent list of all mandated restorative actions with any appropriate conditions concerning such actions including a schedule by which mandates must be completed. Such actions must be completed with due regard for the health of the tree. A copy of the arbitrator's report shall be filed with the City Clerk.

5. Litigation: In those cases where initial reconciliation fails and binding arbitration is not elected, civil action may be pursued by the complaining party for

resolution of the sunlight access or view tree claim under the provisions of this chapter. The litigant must state in the lawsuit that arbitration was offered and not accepted, and that a copy of the lawsuit was filed with the City Clerk. A copy of any order or settlement in the lawsuit shall also be filed with the City Clerk. (Ord. 6286-NS § 1 (part), 1995: Ord. 6173-NS § 1 (part), 1993: Ord. 5817-NS § 1 (part), 1987)

#### **12.45.040 Standards for resolution of disputes.**

A. In resolving the tree dispute, the tree mediator, tree arbitrator or court shall consider the benefits and burdens derived from the alleged obstruction within the framework of the objectives of this chapter as set forth in Section 12.45.010 in determining what restorative actions, if any, are appropriate. The burden of proof shall be on the complaining party.

1. Benefits:

- a. Visual quality of the tree(s), including but not limited to species characteristics, size, growth, form and vigor.
- b. Location with respect to overall appearance, design, and/or use of the tree owner's property.
- c. Soil stability provided by the tree(s) considering soil structure, degree of slope and extent of the tree's root system.
- d. Visual, auditory and wind screening provided by the tree(s) to the tree owner and to neighbors. Existing privacy provided by the tree(s) to the tree owner's home shall be given particular weight.
- e. Energy conservation and/or climate control provided by the tree(s).
- f. Wildlife habitat provided by the tree(s).
- g. The economic value of the tree(s) as measured by criteria developed by the International Society of Arboriculture and the economic value of the property as a result of the tree(s).
- h. Other tree-related factors, including but not limited to:
  - (i) The degree to which the species is native to the local region or area
  - (ii) Indigenous nature of the species to which the tree belongs
  - (iii) Specimen tree quality
  - (iv) Rare tree species, and the frequency of new planting of a tree

2. Burdens:

- a. The hazard posed by a tree or trees to persons or structures on the property of the complaining party including but not limited to fire danger and the danger of falling limbs or trees.
- b. The extent to which the trees diminish the amount of sunlight available to the garden or home of the complaining party.
- c. The extent to which the trees interfere with efficient operations of a complaining party's pre-existing solar energy system.
- d. The existence of landmarks, vistas or other unique features which cannot be seen because of growth of trees since the acquisition of the property.
- e. The extent to which the alleged obstruction interferes with sunlight or view. The degree of obstruction shall be determined by means of a measuring instrument or photography.

f. The extent to which solar access or the view is diminished by factors other than trees.

g. Deleterious effect of the trees upon the complaining party's vegetation through loss of heat and light except that the dropping of leaves or maintenance factors shall not be a burden under this chapter.

3. Restorative actions: The tree mediator shall recommend or the tree arbitrator or court shall order restorative action or no action according to Section 12.45.040 (Standards). Restorative actions may include written directions as to appropriate timing of trimming, thinning, topping or removal. Such restorative actions are to apply only to current parties to the dispute. The tree arbitrator or court may require compensation to the tree owner for value lost due to restorative actions.

Possible restorative actions may include:

- Trimming
- Thinning
- Delayed trimming or thinning
- Topping
- Tree removal, possibly with replacement plantings

a. Restorative actions shall be limited to the trimming and/or thinning of branches where possible and practical.

Trimming or thinning may be on a delayed basis, providing time for the top of the tree to grow above the point where it obstructs sunlight or view.

b. When trimming and/or thinning of branches is not a feasible solution, the impact on the health of the tree shall be considered and replacement may be required. Topping is not a generally accepted arboricultural practice and therefore is not recommended by the City.

c. In those cases where tree removal eliminates or significantly reduces the tree owner's benefits, replacement plantings shall at the tree owner's option be set forth in writing prior to the tree removal. The tree owner may elect tree removal with replacement plantings (as an alternative to trimming, thinning and topping).

d. All trimming, thinning, topping and tree removal required under this chapter shall be performed by a person or firm selected by the tree owner with the concurrence of the complaining party, except that in the event that the complaining party is not obligated to bear any of the cost for such action, his or her concurrence is not required. The use of a certified arborist for such work is encouraged but not required.

e. The extent of solar access or view available and documentable as present at any time during the tenure of the present owner or legal occupant is the limit of restorative action which may be required. If the complaining party is seeking a view or sunlight from an addition, the complaining party has no right to a view or solar access greater than that which existed at the time the construction of the addition was completed, or August 6, 1987, whichever date is later.

f. No restorative action may be required concerning any tree the base of which is more than three hundred feet from the immediate vicinity of the dwelling of the complaining party's property. If no dwelling exists, the distance shall be determined from the most likely dwelling site upon the property or from the geographical center of the property at the discretion of the mediator, arbitrator or court as appropriate.

g. A tree which has been the subject of restorative action under the terms of this chapter is exempted from other property owners' claims for a period of five years from date of filing of a tree claim.

h. Nothing in this section shall be construed to deny compensation to a tree owner to which a tree owner would be entitled under any other provision of law. (Ord. 6286-NS § 1 (part), 1995: Ord. 6173-NS § 1 (part), 1993: Ord. 5817-NS § 1 (part), 1987)

#### **12.45.050 Apportionment of costs.**

A. Cost of mediation and arbitration:

1. The complaining party shall pay all the costs, if any, of mediation.
2. The complaining party and the tree owner shall each pay fifty percent of all the costs of the arbitrator's professional fee, if any.

B. Cost of litigation:

1. The complaining party shall pay one hundred percent of both parties' reasonable attorneys' fees in the event that his or her claim is finally denied, or no action is ordered pursuant to Section 12.45.040, unless the tree owner has refused to participate in either the initial reconciliation or mediation.

2. In all other cases, the complaining party and the tree owner shall each pay his or her attorney's fees. Court costs shall be allocated to the parties at the court's discretion.

C. Cost of restorative actions: At any time during the procedure specified in this chapter, the parties may agree between themselves as to the allocation of the costs of restorative action. If such an agreement is not reached, the following shall apply:

1. As to trees planted prior to August 6, 1987, the complaining party shall pay one hundred percent of the costs of the initial restorative action. The complaining party shall pay the cost of subsequent restorative action as the result of the recurrence of the same obstruction.

2. As to trees planted subsequent to August 6, 1987, the tree owner and the complaining party shall each be responsible for fifty percent of the costs of restorative action and subsequent recurrence of the same obstruction.

D. Compensation for value of restorative actions: In the event a tree arbitrator or court orders restorative action and compensation to the tree owner therefor, the tree arbitrator or court may use any of the following methods to determine value lost: fair market value, replacement value, or trunk formula. "Trunk formula" shall mean the method of determining value as set forth in latest edition of the "Guide for Plant Appraisal," published by the Council of Tree and Landscape Appraisers. (Ord. 6286-NS § 1 (part), 1995: Ord. 6173-NS § 1 (part), 1993: Ord. 5817-NS § 1 (part), 1987)

#### **12.45.060 Liabilities.**

A. The issuance of mediation findings, an arbitration report or a court decision shall not create any liability of the City with regard to the restorative actions to be performed.

B. The complaining party shall indemnify and hold harmless the tree owner with respect to any damages or liability incurred by said owner, arising out of the performance of any work at the behest of the complaining party as follows:

1. With respect to trees planted prior to August 6, 1987, the complaining party shall indemnify the tree owner as to one hundred percent of any such damages or liability.

2. With respect to trees planted after August 6, 1987, the complaining party shall indemnify the tree owner as to fifty percent of any such damages or liability.

C. Failure to enforce on the part of the City will not give rise to any civil or criminal liabilities. (Ord. 6286-NS § 1 (part), 1995: Ord. 6173-NS § 1 (part), 1993: Ord. 5817-NS § 1 (part), 1987)

#### **12.45.070 Enforcement.**

A violation of this chapter is not a misdemeanor, and the enforcement of this chapter shall be by private parties involved. The complaining party shall have the right to bring injunctive action to enforce any restorative action ordered pursuant to this chapter. (Ord. 6286-NS § 1 (part), 1995: Ord. 6173-NS § 1 (part), 1993: Ord. 5817-NS § 1 (part), 1987)

#### **12.45.080 Severability.**

If any portion of this chapter is struck down by court action, all other portions will remain in effect. (Ord. 6286-NS § 1 (part), 1995: Ord. 6173-NS § 1 (part), 1993: Ord. 5817 § 1 (part), 1987)