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Robert Steinbaum

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Dennis M. Gonski, Esq.
Dollinger, Gonski & Grossman
Suite 212
710 Route 46 East
Fairfield, NJ 07004

Dear Mr. Gonski:

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P. O. Box 20081
238 Mulberry Street
Newark, NJ 07101-6081
www.njlj.com
tel: 973.854.2940
fax: 973.642.0920
rsteinbaum@amlaw.com

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REAL ESTATE & TITLE INSURANCE

Adapting to a Changing World

Does the doctrine of adverse possession still have a place in modern real estate law?

By Dennis M. Gonski

Ownership of land in New Jersey brings with it a variety of rights, obligations and interests. Land is of course capable of multiple and often diverse uses. It is also capable of being simply "open space," maintained in a raw and natural state. While ownership of land is primarily thought of in terms of what affirmative use an owner might make, ownership also implies the right to elect to make no use whatsoever.

The doctrine of "adverse possession" arose at a time when there was both available farmable land and the need to feed a hungry population. The social interest (public policy) encouraged productivity of available land, even if such productivity would be achieved by one who was not the land's true owner. Incentives and punishments were meted out. An owner who failed to make beneficial "use" of his land risked a loss of title. Reward the "user" and punish the "non-user." Use the land you own, and should you not, lose your title to one who will. Such is the cornerstone of adverse possession.

As with much of New Jersey's real

Gonski is a member of Dollinger, Gonski & Grossman of Fairfield, practicing in the area of title insurance law.

property law, the concept of adverse possession came to "the colonies" as an adaptation of English law. New Jersey enacted adverse possession statutes promptly after gaining its statehood, and has continued those statutes in varied form, even to this very day. The public policy of our state still remains one to encourage and promote the efficient use of land whenever practicable.

Yet, perceptions of what constitutes the public interest do change over time. Public policies find new goals to promote. "Open space" and "land preservation" measures that were hardly a concern in colonial times, are viewed much differently today. As residential and commercial development consumes more and more of the less and less available land, the notion of preserving "open space" becomes more compelling. Encouragements to keep land "open" and "unused" are growing in popularity.

Has this change in land use goals also brought with it an erosion of the justification for the doctrine of "adverse possession"? Evidence of such erosion is already apparent in those judicial decisions that have made it more difficult to assert adverse possession as a remedy. Indeed, the required period for adverse possession has recently been increased from 20 years to 30 years (and possibly 60 years) — a veritable lifetime in terms of nonproductive use. Will future court decisions entirely frown upon adverse possession by equating it to mere forfeiture?

If the public policy that created the doctrine of adverse possession is no

longer sound, must the doctrine itself be questioned as a justifiable remedy? Does the doctrine even have a reason for being?

Adverse Possession Is a Fiction

To real estate lawyers and other students of the law, "adverse possession" has been defined by decades of case law, and is generally applied by rote. It has been called the law's greatest fiction, because by its sole authority one can create title to land merely by a showing of a possessive use which is at once: actual, exclusive, adverse (or hostile), visible, notorious, continued and uninterrupted for the required statutory period.

In 2001, the Supreme Court in *J & M Land Company* (166 N.J. 493) increased the previously accepted statutory period for adverse possession from 20 to 30 years.

Although relief by adverse possession is certainly still available, a trend in the decisions of the Supreme Court has made it increasingly difficult to obtain as a remedy. Indeed, there have even been suggestions by learned critics that adverse possession statutes should no longer be treated as true statutes of limitations, but rather should be deemed subject to the tolling provisions applicable only to statutes of repose.

Possession is Still 'Nine Points'

Adverse possession has always been a creation of statute. Common law did not recognize the transmission of land title by the lapse of any period of time. At common law, possession of one's land by another — no matter how long in duration — was tortious con-

duct; a trespass remediable by ejectment in favor of the true land owner. Common law title to land was in perpetuity — no matter how long the land had been abandoned — no matter how long the land was “used” by another — no matter how “adverse” the possession of a “user” might be. The early rule was simple and strict: “For true it is that neither fraud nor might can make a title where there wanteth right.” *Edward Altham's Case*, 8 Coke Rep. 147, 154, 77 Eng. Reprint 698, 707 (1610).

As English society changed, however, so did its laws. With the growth of the English population came an increased need for agricultural production. “Absentee ownership” of land became increasingly intolerable to the growing number of mouths to feed. An expanding populace demands productive and bountiful use of all available land, not fallow open space.

In the years preceding the American Revolution, the English rule of “blind” perpetual ownership of real property gave way to a Royal Statute of Limitations, the stated purpose of which was to “quiet estates” and to avoid suits over title. The practical effect of such a statute however, was to reward those making bountiful use of land, and punish those who did not. English judges soon began opining on the virtues of “physical possession” over absentee ownership. One of the more famous observations in this regard, was the “nine points” statement made by Lord Mansfield: “Possession is very strong; rather more than nine points of the law.” *Corporation of Kingston upon Hull v. Horner*, Lofft., 576, 591 (1774).

Soon after the Revolution, and with the creation of its statehood, New Jersey enacted two separate statutes establishing the doctrine of “adverse possession” in this State. Sections 1 and 2 of the Act of June 5, 1787, are the predecessors of statutes for actions based upon possession of real property (N.J.S.A. 2A:14-30 and -31).

Hence, the development of adverse possession can be seamlessly traceable from early English law into the current New Jersey statuto-

ry scheme.

From Productivity to Stability

The earliest application of adverse possession was generally directed at the acquisition of title to what, by today’s standards, were considerable tracts of land.

Although equally available to determine property boundaries, such early use does not appear to have been a significant application. Colonial land was plentiful (and cheap) and there was little concern whether a boundary of a large tract might be located here, or over there. Furthermore, early measures of land were crude at best, making boundary location more of an approximation than an absolute. This is not to say that boundaries could not be surveyed — for indeed many early surveys were made (albeit with the technology of the time). However, the proliferation of surveying and in turn the advances in survey technology, are modern phenomena, owing primarily to subdivision, lender, and title industry requirements.

It is perhaps the advent and proliferation of title insurance that has most successfully transformed the use of adverse possession into its present use as a remedial tool. Title companies currently use the doctrine as a vehicle to remove both potential and actual title claims that for whatever reason are not revealed in the customary 60-year search of record title. The doctrine is also used as a tool to remove the myriad of title defects generated by conveyancing errors or perpetuated by the existing recording system of land records. The title clearing function of adverse possession is today far more important than is its use for title creation. Modern use of the doctrine of adverse possession is largely a remedial tool to resolve a defective chain-of-title, or to vindicate a long standing status quo.

An equally important modern function of adverse possession is its ability to resolve neighboring boundary lines in a manner that allows conformance to both reasonable expectation and actual possession. Title instruments are not always clearly drafted, causing conflicts as to

the location of “paper” boundaries. Imprecision (or outright errors) in a metes and bounds description of real property is exacerbated by the precision of today’s surveying equipment, which now afford more or less pinpoint accuracy in property line locations. Boundary disputes have increased as older, larger tracts have been splintered into subdivision after subdivision of lands where older surveys may have been lacking or in some cases totally absent. And, as land values escalate, so too does the incentive to claim even small quantities of lands.

The proliferation of boundary claims has in turn resulted in the creation of some new rules. For example, the Supreme Court in *Mannillo* (54 N.J. 378), denied adverse possession to a longstanding sidewalk encroachment in a neighborhood environment, opining the notion that in a neighborhood environment such an encroachment might easily be overlooked by a true owner who desires to appear as a “good neighbor” and avoid antagonistic conflict.

Another example is the recent case of *Bubis v. Kassin*, 184 N.J. 612, where the court expanded the definitions of what had traditionally been understood to be a “fence,” “wall” and “hedge row,” as operative boundary markers.

Today: A Dual Remedy

The doctrine of adverse possession arose at a time that required productive use of land. In its earliest incarnation, the objective of the doctrine was to promote land development and agricultural use by rewarding those who made productive use of the land. The doctrine also served as a means to punish those landowners who were neglectful of their property rights. A title obtained by adverse possession has never been deemed a derivative title — it is truly a fictional grant that begins the start of an entirely new chain-of-title based solely upon a usage that began as a “trespass.”

Over time, thinking on land use issues began to change — and so did the utilization of adverse possession as a

remedial tool.

Today the doctrine provides a dual remedy: it services a social interest by "quieting title" from old and neglected claims; it also serves to protect the reliance interests of those who are either adverse possessors or who have

to deal with adverse possessors, in promotion of the status quo.

The doctrine of adverse possession indeed retains its place as a valuable remedy in real property law. This is true even though its original function has truly been altered by

societal change. It is at once but another example of a startling simple truth: "...as the usages of society alter, the law must adapt itself to the various situations of mankind." Mansfield, Lord, in *Barwell v. Brooks*, 3 Doug. 371, 373 (1784). ■