

Don't Get Possessed! Protection Against Adverse Possession

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In an EXCLUSIVE GlobeSt.com contributed article, Pryor Cashman lawyers explain how adverse possession can happen in urban areas, and how landowners including developers can protect themselves from such claims.

As law students learn during their first-year course on property rights, there is a centuries-old common law doctrine called “adverse possession,” under which a person may actually acquire legal title to another person’s property by, among other things, openly occupying the property unchallenged over an extended period of time. While this archaic legal doctrine continues to exist in some form in virtually every state, in urban centers like New York City—where every inch matters and property rights are meticulously protected—property owners have long discounted the threat of a claim of adverse possession.

And yet, a series of recent cases demonstrate that claims of adverse possession are alive and well in New York City. In one such case, *Children’s Magical Garden, Inc. v. Norfolk St. Dev., LLC*, members of a 30-year-old community garden on a vacant lot on Manhattan’s Lower East Side made a claim of adverse possession, thus grinding to a halt the record property owner’s attempt to build a six-story residential building on its lot. In a decision issued in July, a New York appellate court upheld a determination that the community garden has at least adequately pleaded in its complaint that it continuously exercised a claim of right over the garden for more than 10 years, and that it did so openly by erecting a fence and maintaining a locked gate around the garden, a necessary element to successfully claiming adverse possession. While the case will continue, and there is no guarantee that the community garden will ultimately prevail, it (and cases like it) are cautionary tales for New York property owners.

How can this happen? In New York, a party seeking to obtain title by adverse possession



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must prove that (1) the possession was hostile and under a claim of right; (2) the possession was actual; (3) the possession was open and notorious; (4) the possession was exclusive; and (5) the possession was continuous for, at minimum, the statutory period of ten years. Because a claim of *adverse* possession, by definition, must be *adverse*, the essential requirement of an adverse possession claim is that a trespasser proves that their occupancy has been without permission and under a claim of right. Under the common law, in the absence of an overt acknowledgment during the statutory period that ownership rested with another party, actual knowledge of the true owner did not destroy the element of claim of right.

Recognizing that, under this common law rubric, predatory claims of adverse possession could persist, the New York Legislature amended the applicable statute, found in New York’s Real Property Actions and Proceedings Law (RPAPL), by

codifying the “claim of right” requirement for adverse possession. Under the revised statute (RPAPL 501(3)), to establish a claim of right to the property, an adverse possessor now must have “a reasonable basis for the belief that the property belongs to” him or her. Parties that know they are not the true owners may no longer successfully assert a claim. However, this new statutory definition only applies to claims that accrue *after* the statute’s enactment in 2008. If someone could have asserted a claim for adverse possession in 2007, the new property-owner-friendly “claim of right” statutory standard does not apply.

How can a property owner protect against such a claim? In New York, property owners are well served to take the following steps:

Take Control. First and foremost, an adverse possessor needs to control the property for 10 years in order to succeed. If you think your property is being adversely possessed, swift action to eject any improper occupiers can cut off the 10-year period. Under the 2008 RPAPL amendment, informing the adverse possessor of your rightful claim to the property also may destroy any potential claim. As such, you should immediately make the adverse possessor aware of your property rights.

Document Any Interaction With Potential Adverse Possessors. There are various admissions a party might make that will defeat its claim of adverse possession. Acknowledging that the property does not belong to them, requesting permission to use the property, or making an offer to purchase the property, are all detrimental to a claim. Maintaining evidence of any such statements is vital.

Ensure Local Authorities Have Updated Deeds. In at least one New York case, an adverse possessor had a claim of right where, over 10 years, they attempted to contact the municipality in order to ascertain the proper landowner. The municipality did not have records to show who the owner might be; as such, the adverse possessor was not put on notice of any other actual ownership. By ensuring the timely filing of any and all property deeds, any subsequent inquiries will put the inquiring party on



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notice as to proper ownership. Although knowledge of actual ownership is not fatal under the old common law, it is under the 2008 RPAPL amendment.

Maintain Good Neighborly Relations. Good relationships with your neighbors could help defeat a claim for adverse possession. A friendly relationship could lead to a presumption that any use by the adverse possessor-neighbor was permissive, which would defeat the required element of hostility, as will any evidence of actual permission to use the property.

Adverse possession must be a consideration for property owners, even in urban centers like New York City. Ensuring you have a comprehensive knowledge of your property boundaries, ensuring all proper documentation is filed with the local authorities, and taking swift action, can all help you successfully protect your property interests from a later title claim by an adverse possessor.

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