

My Abutter Claims What?

By William D. Jalkut, Esq.

Your project seems to be ready to break ground. You obtained all your municipal permits and approvals. You closed on the property. Your financing is in place. Your contractors are locked in. You look forward to the culmination of months, if not years, of hard work. What could go wrong?

There is a knock on the door. A Deputy Sheriff serves you with a Complaint For Adverse Possession and a Notice of Lis Pendens. That piece of land you need for access? A disgruntled abutter now claims that he owns part of it by adverse possession extending back more than 20 years. The Lis Pendens on record now serves as a practical block to the start of your project.

How could this be? You did everything right: you had a tape survey performed; you bought title insurance; you had very competent counsel. Unfortunately, none of that really matters now. You confront Superior Court litigation in which your nemesis abutter avers that for more than 20 years he and his predecessors in title (1) actually (2) have non-permissively possessed that parcel (3) in an open fashion (4) on a continuous basis (5) to the exclusion of others.

The title insurance company, likely with no regret, tells you that its policy does not cover adverse possession claims. The tape surveyor, somewhat defensively, tells you that he did not observe any encroachments. Even worse, your lawyer tells you that the case might not come to trial for two years.

What should you do? What can you do? The blame game isn't going to solve the problem. To a great extent, the response will depend on what the disgruntled abutter wants from the litigation. Typically, some want a slice of land or use of land that you might or might not be able to grant. Others will want cash. If you are able to resolve the claim quickly for a modest concession then you would be well advised to do so in order to avoid the delay, risk and expense of litigation.

If the disgruntled abutter refuses reasonable solutions, then you attack the lawsuit and the claim with vigor. Each of the necessary 5 elements to an adverse possession claim is vulnerable to scrutiny in both factual and legal contexts. There are nuances to each element that counsel can exploit. There are more than 200 years of Massachusetts jurisprudence and case law available to you that offer a fertile source for grounds to defeat any one of the 5 elements. If any one element can be defeated, then the entire adverse possession claim will fail.

Adverse possession represents something of a proverbial Achilles' heel to any developer. Nonetheless, the possibility should be anticipated. Though there is not much a developer can do on a preventative basis, consider negotiating for a flat warranty in the Purchase & Sale Agreement from the seller on the absence of any basis for such a claim. Instruct your tape surveyor to do more than just eyeball the boundaries. Think about eliciting an admission from the abutters that they have no such claims. Be proactive on the possibility rather than passive.

The entire concept of title by adverse possession is antithetical to the perspective of many businesspersons. For better or worse, the concept remains alive and well in Massachusetts and should not be ignored.

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