Chapter 4

Determining Boundaries Based on Adverse Possession

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§ 4.1 INTRODUCTION

Adverse possession is a mechanism by which possession and use of real property matures into title. The right to claim title by adverse possession arises under the common law; no statute expressly creates the right to adverse possession. However, a statute of limitation terminates a landowner's right to defend against such claims after 15 years, and it is the expiration of this statutory deadline that gives rise to ownership.

§ 4.2 SURVEY VERSUS ADVERSE POSSESSION

Boundaries established by adverse possession will supersede the outcome of an otherwise indisputably correct survey.

§ 4.3 STATUTE OF LIMITATIONS TO RECOVER TITLE AND POSSESSION OF REAL PROPERTY

Minnesota Statutes section 541.02 sets forth the statutory limitation of time for bringing an action to recover real estate—15 years:

> No action for the recovery of real estate or the possession thereof shall be maintained unless it appears that the plaintiff, the plaintiff's ancestor, predecessor, or grantor, was seized or possessed of the premises in question within 15 years before the beginning of the action.
>
> Such limitations shall not be a bar to an action for the recovery of real estate assessed as tracts or parcels separate from other real estate, unless it appears that the party claiming title by adverse possession or the party's ancestor, predecessor, or grantor, or all of them together, shall have paid taxes on the real estate in question at least five consecutive years of the time during which the party claims these lands to have been occupied adversely.
>
> The provisions of the preceding paragraph shall not apply to actions relating to the boundary line of lands, which boundary lines are established by adverse possession, or to actions concerning lands included between the government or platted line and the line established by such adverse possession, or to lands not assessed for taxation.

Another statute, Minnesota Statutes section 559.23, anticipates courts establishing legal boundaries:

> An action may be brought by any person owning land or any interest therein against the owner, or persons interested in adjoining land, to have the boundary lines established; and when the boundary lines of two or more tracts depend upon any common point, line, or landmark, an action may be brought by the owner or any person interested in any of such tracts, against the owners or persons interested in the other tracts, to have all the boundary lines established. The court shall determine any adverse claims in respect to any portion of the land involved which it may be necessary to determine for a complete settlement of the boundary lines, and shall make such order respecting costs and disbursements as it shall deem just.…

§ 4.4 ESSENTIAL ELEMENTS OF ADVERSE POSSESSION

In order to obtain legal confirmation of ownership of land, a claimant must establish all five essential elements of adverse possession:

1. Actual
2. Open
3. Hostile
4. Continuous
5. Exclusive

over a period of 15 years. *Ehle v. Prosser*, 197 N.W.2d 458, 462 (Minn. 1972).

A. Actual Possession

Generally, the easiest element to establish and the least-disputed, the claimant must have been in actual possession of the property for the 15-year statutory period. This means the claimant must have physically entered on the land, constructed an improvement, or generated some literal, tangible presence on the land. Common examples of actual possession include landscaping, mowing, paving, construction of a building, and recreational use.

Noise of gunfire, *Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.*, 624 N.W.2d 796 (Minn. Ct. App. 2001), and natural water flow, *Kral v. Boesch*, 557 N.W.2d 597, 600 (Minn. Ct. App. 1996), were found not to satisfy the actual possession requirement.

COMMENT

The cases mentioned above involved prescriptive easement claims as opposed to adverse possession, but are still instructive given that the elements for each cause of action are analogous, except that prescriptive easements look at use as opposed to possession. Courts have at times looked to prescriptive easement cases when deciding adverse possession cases, and vice versa.

B. Open Possession

Open possession usually means *visible* possession. While the law does not prescribe any particular manner by which an adverse possessor must possess a disputed tract of property, the possession must give "unequivocal notice to the true owner that some one is in possession in hostility to his title." *Ganje v. Schuler*, 659 N.W.2d 261, 266 (Minn. Ct. App. 2003) (citing *Skala v. Lindbeck*, 214 N.W. 271, 272 (Minn. 1927)). That said, it doesn't matter whether the owner actually sees the possession or not, just that the possession is technically visible. For example, in *Hickerson v. Bender*, 500 N.W.2d 169, 171 (Minn. Ct. App. 1993), the court stated:

> The Hickersons argue that the improvements were not "open, notorious, and hostile" because the improvements may not have been visible to their predecessors in title from adjoining Green Gables Road. We construe "open," however, to mean visible from the surroundings, or visible to one seeking to exercise his rights.

Or, "[a]s one case put it, the disseizor must not only possess the property, he or she must make that fact known by keeping their 'flag flying.'" *Ganje*, 659 N.W.2d at 266 (quoting *Romans v. Nadler*, 14 N.W.2d 482, 485 (Minn. 1944)).

C. Hostile Possession

Hostile possession does not mean that the possession was made with malicious intent or with hard feelings toward a neighbor. It simply refers to an intention to claim the property, a use that goes on *without the permission* of the record owner:

> … the requirement of "hostile" possession does not refer to personal animosity or physical overt acts against the record owner of the property but to the intention of the disseizor to claim exclusive ownership as against the world and to treat the property in dispute in a manner generally associated with the ownership of similar type property in the particular area involved.

Ehle v. Prosser, 197 N.W.2d 458, 462 (Minn. 1972) (citing *Norgong v. Whitehead*, 31 N.W.2d 267 (Minn. 1948); *Thomas v. Mrkonich*, 78 N.W.2d 386 (Minn. 1956)). "Hostility contemplates the disseizor entering and taking possession of the land as if it were the disseizor's and owning it with the intention of excluding all others." *Ganje*, 659 N.W.2d at 268.

Proof of the character of the original entry into the property can be problematic if it occurred many years ago. In prescriptive easement cases, if the claimant can prove all of the other elements clearly, then the claimant will have the benefit of the doubt on the original entry being hostile, i.e., without consent. *Nordin v. Kuno*, 287 N.W.2d 923, 926 (Minn. 1980). This presumption can be rebutted if the disseized owner has evidence that demonstrates that the original entry was permissive. In effect, once the other elements are shown, the burden of proof regarding hostility shifts to the defendant. *Boldt v. Roth*, 618 N.W.2d 393, 396 (Minn. 2000). Whether the presumption of hostility at original entry rule applies to adverse possession cases is unclear, however. *Ebenhoh v. Hodgman*, 642 N.W.2d 104, 110 n.2 (Minn. Ct. App. 2002).

In a dispute between co-tenants, permissive use is presumed unless and until the claimant can prove acts providing notice of claimants' hostile possession:

> [W]here the property dispute is between cotenants, it is presumed that the disseizor possesses the lands with the implicit permission of his cotenants. In order to overcome the presumption, the disseizor must establish an ouster of the other cotenants "consisting of acts or declarations of hostility sufficient to indicate a truly adverse possession and to start the statute of limitations running." *Adams v. Johnson*, 271 Minn. 439, 442, 136 N.W.2d 78, 81 (1965). The adverse possessor must present clear and unequivocal proof of the inception of hostile possession. *Burns v. Plachecki*, 301 Minn. 445, 449, 223 N.W.2d 133, 136 (1974).

Denman v. Gans, 607 N.W.2d 788, 795 (Minn. Ct. App. 2000). In *Denman*, hostility was not found: "Although there was evidence that appellants constructed docks, boathouses and even a fence on the waterfront, that construction was not entirely inconsistent with their property interest in the waterfront. And, more importantly, the record supports the finding that respondents had not been 'ousted.'" *Id.*

However, hostility was found in *Adams v. Johnson*, 136 N.W.2d 78, 81–82 (Minn. 1965), where co-tenants were in sole possession of the land, and improved it as if it was their own.

> [T]he trial court reasoned that the many improvements and repairs on the property constructed by [claimants] were overt and unequivocal acts usually associated with exclusive ownership. It also indicated that the distant family relationship would not raise an inference of permissive occupation. Coupling these aspects, the court concluded that defendants had notice that possession was hostile, not permissive, and that the statute of limitations had run. [Claimants]

> were openly occupying the land as if they were sole owners. They so occupied the property for almost 50 years. They should not now be penalized for failing to make an explicit claim to seemingly uninterested relatives when the obvious interpretation of their actions was that they were using the land for their sole benefit.… Not every undisturbed occupancy by a cotenant will result in a finding of ownership by adverse possession. But we think that finding is correct when the acts of ownership are overt and unambiguous and the relationship of the cotenants is such as not to raise an inference of permissive occupation.

PRACTICE TIP

A disseized owner can defeat hostility, and thus adverse possession, if he or she can prove that the possession was permissive. The owner granting permission should do so in writing and retain copies; otherwise, permission can be difficult to prove.

D. Continuous Possession

To acquire title by adverse possession, there must be a continuity of use for a period of 15 years. *Ganje v. Schuler*, 659 N.W.2d 261, 268 (Minn. Ct. App. 2003) (citing *Ebenhoh v. Hodgman*, 642 N.W.2d 104, 109 (Minn. Ct. App. 2002)). Possession must be continuous, and must not be uninterrupted in any way. An interruption of possession is fatal to the adverse possessor's claim. *Simms v. William Simms Hardware*, 12 N.W.2d 783 (Minn. 1943). Occasional and sporadic trespasses for temporary purposes will not satisfy the continuous element. *Romans v. Nadler*, 14 N.W.2d 482, 485 (Minn. 1944).

Even so, a brief absence by the landowner from the property for a trip can occur without causing a break in the continuity of possession:

> Mrs. Martin's possession for a time as tenant may properly be taken into account in determining the period of adverse possession. … Her temporary absence for 3 months on a trip to California did not break the continuity of her possession.

Kelley v. Green, 170 N.W. 922, 923 (Minn. 1919).

Even if possession is subsequently interrupted, if it had continued for 15 years before the period of interruption, title has ripened and should be established:

> To maintain a title, acquired by adverse possession, it is not necessary to continue the adverse possession beyond the time when title is acquired. The title once acquired is a new title; a legal title though not a record title is not lost by a cessation of possession, and continued possession is not necessary to maintain it.

Fredericksen v. Henke, 209 N.W. 257, 259 (Minn. 1926).

E. Exclusive Possession

To meet the exclusive element, the claimant must exhibit possession of the subject property consistent with a claim of ownership. "The exclusivity requirement of adverse possession is satisfied if the disseizor possesses the land

as if it were his own with the intention of using it to the exclusion of others." *Ebenhoh*, 642 N.W.2d at 108 (quotation omitted); *see also Ganje*, 659 N.W.2d at 267. Brief entries into the claimed land by the true owner were insufficient to defeat the plaintiff's claim of exclusive possession. *Ebenhoh*, 642 N.W.2d at 109.

§ 4.5 RELATIONSHIP BETWEEN PRESCRIPTIVE EASEMENTS AND ADVERSE POSSESSION

Prescriptive easement cases are illustrative in considering the elements of adverse possession, because—as the Minnesota Supreme Court has observed—the doctrines are largely analogous:

> Subject only to such differences as are necessarily inherent in the application of the rules in such cases, the same rules of adverse user apply in cases of easements by prescription as in those of title by adverse possession. Because of such inherent differences, the same continuity of user is not required in cases of prescriptive easements as in those of title by adverse possession. In cases of easements, the requirement of continuity depends upon the nature and character of the right claimed. It is sometimes said that there must be such continuity of user as the right claimed permits.

Romans v. Nadler, 14 N.W.2d 482, 485 (Minn. 1944).

An exception is the presumption of hostility at original entry rule. It is unclear whether this prescriptive easement rule applies to adverse possession cases. *Ebenhoh*, 642 N.W.2d at 110 n.2.

§ 4.6 TACKING OF OWNERSHIP AND POSSESSION

If a claimant has not personally held possession of the property for 15 years, he or she can "tack" the possession of their predecessor(s) in title to construct a 15-year period of possession. *Burns v. Plachecki*, 223 N.W.2d 133, 136 (Minn. 1974). Of course, the claimant must still prove that the predecessor(s) satisfied all five of the adverse possession elements.

Tacking requires privity between successive owners. *Fredericksen v. Henke*, 209 N.W. 257, 259 (Minn. 1926). In *Hanson v. Sommers*, 117 N.W. 842 (Minn. 1908), a case following foreclosures on both sides of a tangled chain of title, Hanson remained in possession, followed by his tenant for the statutory period. The supreme court held, "[n]o doubt can arise that there was here a privity of estate between the successive wrongful holders requisite to enable allowance of the privilege of tacking." *Hanson*, 117 N.W. at 843.

§ 4.7 BURDEN OF PROOF

Whether the adverse possession elements have been established is a question of fact. *Wortman v. Siedow*, 216 N.W. 782, 783 (Minn. 1927); *Ganje*, 659 N.W.2d at 266.

Generally speaking, the burden of proof is the clear and convincing standard, and every presumption is made against the claimant.

> Before title through adverse possession can be established, there must be clear and convincing evidence of actual, open, hostile, continuous, and exclusive possession by the alleged disseizor for the statutory 15 year period. *Engquist,* 243 Minn. at 504, 68 N.W.2d at 415; *see also* Minn. Stat. § 541.02 (2000). Evidence tending to establish adverse possession must be strictly construed, "without resort to any inference or presumption in favor of the disseizor, but with the indulgence of every presumption against him." *Village of Newport v. Taylor*, 225 Minn. 299, 303, 30 N.W.2d 588,

591 (1948); *see also Stanard v. Urban,* 453 N.W.2d 733, 735 (Minn.App.1990) ("The evidence must … amount to clear and positive proof before title by adverse possession will be granted." (citation omitted)), *review denied* (Minn. June 15, 1990).

Ebenhoh, 642 N.W.2d at 108.

A. Strict Construction of Evidence

The evidence is "strictly construed," i.e., looked at more closely than ordinary evidence. *Id.*

B. Conflicting Surveys: Question of Fact

The trial judge's decision as to the correctness of two surveyors whose opinions are in conflict is a question of fact. *Ganje*, 659 N.W.2d at 266.

C. Claims Involving Co-Tenants

Where adverse possession is claimed by a co-tenant against other co-tenants, the adverse possessor must present "*clear and unequivocal proof* of the inception" of hostile possession. *Burns v. Plachecki*, 223 N.W.2d 133, 136 (Minn. 1974) (emphasis added); *see also Denman v. Gans*, 607 N.W.2d 788, 795 (Minn. Ct. App. 2000).

§ 4.8 FACTORS DEFEATING ADVERSE POSSESSION CLAIM

A. Acknowledgment of Title

An acknowledgment by the adverse claimant of the owner's title before the statute has run in his or her favor breaks the continuity of his or her adverse possession, and it cannot be tacked to any subsequent adverse possession. *Olson v. Burk*, 103 N.W. 335 (Minn. 1905). In another decision, the claimant defending against an ejectment action admitted he had contracted with the legal owner to purchase the property. This acknowledgment of ownership defeated his claim. A 2008 unpublished decision involved an offer to purchase which was a factor defeating a claim of adverse possession. *Siegel v. Nagel*, No. A07-0324, 2008 WL 668131, at *2–3 (Minn. Ct. App. Mar. 11, 2008). A lease defeated a claim in *Sage v. Rudnick*, 69 N.W. 1096 (Minn. 1897). *But see Winfield v. Kasel*, No. A08-0812, 2009 WL 174211 (Minn. Ct. App. Jan. 27, 2009) (an adverse claimant first executed a lease for the disputed land, then prosecuted this suit successfully claiming he owned up to a fence by virtue of adverse possession. The court relied on the fact the statute of limitations had already expired). But in one old case, the court also recognized that a tenant's possession may actually become adverse to a landlord where the tenant attorns to and pays rent to another. *Hanson v. Sommers*, 117 N.W. 842, 843 (Minn. 1908).

PRACTICE TIP

Carefully denominate any offer of settlement by the claimant to purchase, take an easement, etc. as protected under Minnesota Rule of Evidence 408 pertaining to offers of compromise.

B. Consent/Permissive Use

In order for possession to be adverse, it cannot be commenced or continued with the consent of the legal owner. Said owner's consent makes the possession non-hostile. "[W]here an occupant's original possession of land was permissive the statute of limitations did not commence to run against the owner until the occupant had subsequently declared or otherwise manifested an adverse holding and notice thereof had been brought to the attention of the owner." *Norgong v. Whitehead*, 31 N.W.2d 267, 269 (Minn. 1948).

C. Inferred Consent/Family Relationship

Some courts considering prescriptive easement case have inferred consent where the property was owned by family members:

> We have recognized that this general rule of presumed hostility is modified in cases in which family members own both the dominant and servient estates. *See Wojahn v. Johnson*, 297 N.W.2d 298, 306 (Minn. 1980). The reason for this modification is that the nature of close familial relationships is such that mere actual, open, exclusive, and continuous possession is not enough to give notice to a family member that a use is hostile. *See Beitz v. Buendiger*, 144 Minn. 52, 54, 174 N.W. 440, 441 (1919) (explaining the impact of a close familial relationship in an adverse possession case). In these situations, the presence of the close familial relationship gives rise to "the inference, if not the presumption" that the use is permissive. *See Wojahn*, 297 N.W.2d at 306.

Boldt v. Roth, 618 N.W.2d 393, 396–97 (Minn. 2000).

How close must the family tie be to allow an inference of consent? *Nordin v. Kuno* contains the following discussion:

> The defendants claim that the presumption should instead be one of permission due to the family relationship between the Kunos. This court has inferred permission where a close family relationship exists. *Burns v. Plachecki*, 301 Minn. 445, 223 N.W.2d 133 (1974) (parent and child); *Lustmann v. Lustmann*, 204 Minn. 228, 283 N.W. 387 (1939) (close brothers); *Collins v. Colleran*, 86 Minn. 199, 90 N.W. 364 (1902) (parent and child). However, the court has refused to infer permission between three unfriendly sisters, *Beitz v. Buendiger*, 144 Minn. 52, 174 N.W. 440 (1919), and friendly neighbors, *Alstad v. Boyer*, 228 Minn. 307, 37 N.W.2d 372 (1949).

Nordin v. Kuno, 287 N.W.2d 923, 927 (Minn. 1980).

In addition, it appears that where the initial entry was by close friends who are "like family" the presumption of permissive use may apply: "[T]he groups had cordial relations for many years, according to them, 'like an extended family,' … This evidence shows that the … use of the 'Front Lot' was permissive and not hostile…." *Mahoney v. Spors*, No. A07-0529, 2008 WL 2102692, at *3 (Minn. Ct. App. May 20, 2008).

A sale of the property outside the family will end the presumption of consent:

> We now extend our *Wojahn* analysis to hold that, absent evidence of continued permission, the transfer of the servient estate to a stranger renders hostile a use previously considered permis-

> sive due to a close familial relationship and such transfer will commence the 15-year prescriptive easement time period.

Boldt v. Roth, 618 N.W.2d 393, 398 (Minn. 2000).

§ 4.9 PAYMENT OF REAL ESTATE TAXES

Minnesota Statutes section 541.02, which sets for the statute of limitations for recovery of possession of real estate, states in pertinent part:

> No action for the recovery of real estate or the possession thereof shall be maintained unless it appears that the plaintiff, the plaintiff's ancestor, predecessor, or grantor was seized or possessed of the premises in question within 15 years before the beginning of the action.
>
> Such limitations shall not be a bar to an action for the recovery of real estate assessed as tracts or parcels separate from other real estate, unless it appears that the party claiming title by adverse possession or the party's ancestor, predecessor, or grantor, or all of them together, *shall have paid taxes on the real estate in question at least five consecutive years of the time during which the party claims these lands to have been occupied adversely*.
>
> The *provisions of the preceding paragraph shall not apply to actions relating to the boundary line of lands*, which boundary lines are established by adverse possession, or to actions concerning lands included between the government or platted line and the line established by such adverse possession, or to lands not assessed for taxation.

(Emphasis added.) Thus, payment of the real estate taxes on the land is not required in instances where the claim simply involves settlement of the location of a boundary.

Nor is it required in claims not involving an entire parcel which is taxed as a separate parcel with its own property identification number. "Claims relating to boundary lines of lands *and claims to lands not assessed for taxation as separate tracts*—both of which are presented in this case—are clearly exempt from the statutory provisions requiring the payment of taxes." *Ehle v. Prosser*, 197 N.W.2d 458, 462 (Minn. 1972) (emphasis added).

§ 4.10 ADVERSE POSSESSION OF REGISTERED (TORRENS) PROPERTY

A. General Rule: Adverse Possession Not Allowed

The Torrens Act specifically prohibits adverse possession of Torrens property:

> Registered land shall be subject to the same burdens and incidents which attach by law to unregistered land. This chapter shall not operate to relieve registered land or the owners thereof from any rights, duties, or obligations incident to or growing out of the marriage relation, or from liability to attachment on mesne process, or levy on execution, or from liability to any lien or charge of any description, created or established by law upon the land or the buildings situated thereon, or the interest of the owner in such land or buildings. It shall not operate to change the laws of descent or the rights of partition between cotenants, or the right to take the land by eminent domain. It shall not operate to relieve such land from liability to be taken or recovered by any assignee or receiver under any provision of law relative thereto, and shall not operate to change or affect any other rights, burdens, liabilities, or obligations created by law

> and applicable to unregistered land except as otherwise expressly provided herein. *No title to registered land in derogation of that of the registered owner shall be acquired by prescription or by adverse possession*, but the common law doctrine of practical location of boundaries applies to registered land whenever registered. [Minnesota Statutes section] 508.671 shall apply in a proceedings subsequent to establish a boundary by practical location for registered land.

MINN. STAT. § 508.02 (emphasis added).

B. Exception for One Similar Doctrine – Boundary by Practical Location

Note, though, that boundary by practical location of Torrens property is allowed after the Torrens Act was amended in 2008. "Minn. Stat. § 508.02 … overrules *Geis* by expressly allowing judicial proceedings to establish boundaries by practical location." *Ruikkie v. Nall*, 798 N.W.2d 806, 821 (Minn. Ct. App. 2011).

This is especially important because of the similarities in function, if not in the elements of proof, between adverse possession and boundary by practical location. "Although the doctrine of practical location, at least in effect, is similar to acquiring title by adverse possession, the two theories are distinct and require proof of different elements." *Denman v. Gans*, 607 N.W.2d 788, 796 (Minn. Ct. App. 2000).

C. Restriction of Other Common Law Doctrines

Beginning in 2008, the Minnesota Court of Appeals and the Minnesota Supreme Court have expanded the prohibition against adverse possession to specifically apply to other doctrines in which ownership is established by possession. The first of these was de facto takings, a doctrine which provides that where the government takes possession of property and makes improvements to it, it cannot be divested of the property. As the Minnesota Supreme Court observed in *Brooks Investment Co. v. City of Bloomington*, 232 N.W.2d 911, 920 (Minn. 1975):

> It is well settled that a de facto taking creates in the condemnor a protectable legal interest in the property which is equivalent to title by condemnation; the condemnor can be forced to compensate to the original owner of the property, but the owner cannot eject the condemnor nor can he require discontinuance of the public use.

The Minnesota Supreme Court held that governmental entities cannot establish a protectable interest in Torrens property through de facto takings. The basis for the ruling was that de facto takings functioned similarly to adverse possession:

> [A]llowing the City to acquire the land at issue here by de facto taking *would operate in the same way as if the City acquired the land by adverse possession in that in both situations*, a landowner is deprived of rights to land due to actions of another.… Adverse possession, however, is an exception to the general proposition that Torrens property is subject to the same "burdens, liabilities, or obligations created by law" as unregistered property, because acquisition by adverse possession is specifically disallowed by the Torrens Act. Minn. Stat. § 508.02. We cannot ignore this legislative prohibition.

Hebert v. City of Fifty Lakes, 744 N.W.2d 226, 231–32 (Minn. 2008) (emphasis added).

In a second appeal of the same case, the Minnesota Court of Appeals explicitly broadened the principle to apply to statutory dedication, and one type of common law dedication. By statutory dedication, a government can establish ownership of property by possessing and maintaining it for six years:

> When any road or portion of a road has been used and kept in repair and worked for at least six years continuously as a public highway by a road authority, it shall be deemed dedicated to the public to the width of the actual use and be and remain, until lawfully vacated, a public highway whether it has ever been established as a public highway or not.

MINN. STAT. § 160.05, SUBD. 1. The Minnesota Court of Appeals determined that statutory dedication was sufficiently analogous to adverse possession that it, too, was prohibited: "because statutory dedication operates fundamentally similar to adverse possession, we conclude that statutory dedication is prohibited by the Torrens Act." *Hebert v. City of Fifty Lakes*, 784 N.W.2d 848, 853–55 (Minn. Ct. App. 2010).

Common-law dedication provides for dedication of land to the public if two showings are made: The demonstration of "the landowner's intent, express or implied, to have his land appropriated and devoted to a public use," and "acceptance of that use by the public." *Id*. at 855 (citing *Barth v. Stenwick*, 761 N.W.2d 502, 511 (Minn. Ct. App. 2009)). The *Hebert* court ruled that if the owner's intent is merely implied from the owner's conduct—and not expressly stated—it is another example of establishing ownership through possession of Torrens property, and also sufficiently analogous to adverse possession that it is prohibited: "But if statutory dedication is tantamount to adverse possession, common-law dedication based on an implied intent to dedicate is prohibited under the Torrens Act as well." *Id*.

Concerning the doctrine of implied easements, the court of appeals has issued the following unpublished opinion:

> [W]e do reject appellants' argument that easements by implication were created. The district court was correct when it concluded that the Torrens Act generally bars easements by implication. Under the Torrens Act, "[n]o title to registered land in derogation of that of the registered owner shall be acquired by prescription or by adverse possession." Minn. Stat. § 508.02 (1996). In addition, Minn. Stat. § 508.25 (1996) provides that:
>
> > Every person receiving a certificate of title pursuant to a decree of registration and every subsequent purchaser of registered land * * * shall hold it free from all encumbrances and adverse claims, excepting only the estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title * * *.
>
> Here, it is undisputed that each of the claimed easements lies, in whole or in part, across registered Torrens property.

Crablex, Inc. v. Cedar Riverside Land Co., No. C9-97-765, 1997 WL 729210, at *4–5 (Minn. Ct. App. Nov. 25, 1997).

§ 4.11 ADVERSE POSSESSION OF PUBLIC PROPERTY

A private citizen may not adversely possess adjoining public lands even though he or she would otherwise meet all the tests. Minnesota Statutes section 541.01 provides:

> [N]o occupant of a public way, levee, square, or other ground dedicated or appropriated to public use shall acquire, by reason of occupancy, any title thereto.
>
> No occupant of the land of a public or private cemetery shall acquire any title to the cemetery land by reason of the occupancy.

In *Rupley v. Fraser*, 156 N.W. 350 (Minn. 1916), a claimant acquired title to an entire tract which included public streets, just not the streets themselves. A claimant may not acquire a state swamp, *Scofield v. Schaeffer*, 116 N.W. 210 (Minn. 1908), or public school grounds, *Junes v. Junes*, 196 N.W. 806 (Minn. 1924); *see also* Op. Att'y Gen. 50 (1946).

There are exceptions to this rule. For example, a municipality can compromise a disputed boundary location and later be forced to honor it. In *Magnuson v. City of White Bear Lake*, 203 N.W.2d 848 (Minn. 1973), the location of a platted street was disputed and settled in 1924 (proven through introduction of a newspaper clipping from 1924). Though it was public land, the settlement of a good-faith boundary question by a governmental entity was held to be enforceable. *Magnuson*, 203 N.W.2d at 851.

Nonuse and failure to remove improvements or obstructions placed by the private party (acquiescence) alone are not enough to constitute abandonment by the municipality. *Stadtherr v. City of Sauk Center*, 231 N.W. 210 (Minn. 1930). There must be some affirmative or unequivocal acts of the municipality representing intent to abandon the public property. *Rein v. Town of Spring Lake*, 145 N.W.2d 537, 540 (Minn. 1966); *see also Denman v. Gans*, 607 N.W.2d 788 (Minn. Ct. App 2000) (holding that a waterfront property which was dedicated to the use of a small, defined group of property owners was not properly dedicated to a public use, and therefore not insulated against a claim of adverse possession by another).

§ 4.12 TERMINATING AN ADVERSE POSSESSION BEFORE IT RIPENS INTO TITLE

It is necessary to act; it is normally, however, not necessary to trash someone's shed which is over the line. However, after fair warning is given stating the claim must be resolved or action will taken, if use continues, action must be taken. Do not stand by while another's possession ripens into title.

One can sue to eject the other from the property, put up no trespassing signs, or otherwise interrupt the possession. Another approach is to announce consent to the claimant's permissive use. The problem here is that the claimant may fire back that it is the claimant's property to use as he or she sees fit, or worse the claimant just ignores the owner, leaving the consent in limbo.

Short of property owners getting into violent confrontations guaranteed to make settlement an impossibility, a timely lawsuit for ejectment before the running of the statute of limitations is an effective way to toll (stop the running of) the 15-year statute.

Lawyers and surveyors advising clients need to counsel the landowner to think before they act to remove someone else's property or improvements. An owner may bring an action for damages for trespass if the owner can show they have genuinely been hurt, or lost something. Often, there may be little proof of actual damages. The fact that another has occupied property along a 10-foot wide strip for five years may entitle the claimant to some nominal damages. Here is what the Minnesota Supreme Court has said about damages for trespass:

> The general rule is that damages in an action for trespass upon real property may be such as are appropriate to the tenure by which the plaintiff holds. Possession alone will entitle him to recover damages for any injury solely affecting it. If he seeks to recover for the future, he must show that his title gives him an interest in the damages claimed, and he can recover none except such as affect his own right, unless he holds in such relation to other parties interested that his recovery will bar their claim.

Williams v. Lynd Twp., 312 N.W.2d 110, 113 (Minn. 1981).

Although the court commented above regarding future trespass damages, often the remedy would be the removal of the trespass rather than the award of future damages. Damages may not be based on speculation or guess.

> Here, the district court first instructed the jury: "a party asking for damages must prove the nature, extent, duration, and consequences of his or her injury." *See* 4A Minnesota District Judges Association, *Minnesota Practice, Jury Instruction Guides – Civil*, JIG 90.15 (4th ed. 1999). Next, the court told the jury that it "must not decide damages based on speculation or guess."

Morlock v. St. Paul Guardian Ins. Co., 650 N.W.2d 154, 159 (Minn. 2002); *Peters v. Indep. Sch. Dist. No. 657, Morristown*, 477 N.W.2d 757, 760 (Minn. Ct. App. 1991).

PRACTICE TIP

The surest, safest way to stop the running of the 15-year statute of limitations, and to defend against a prospective claim for adverse possession, is to bring an action seeking ejectment of the trespasser.

§ 4.13 PLEADING CONSIDERATIONS

A. Identification of Real Property Being Claimed

If one is seeking to establish ownership by adverse possession, it is recommended to get a survey of the property, and a legal description of the parcel for which adverse possession is claimed, before bringing suit. A legal description of the claimed land will be necessary for recording the final court order with the county recorder.

B. Name as Parties Anyone Who Has an Interest in the Real Property Being Claimed

A claimant should name as parties to an adverse possession action all individuals, banks, etc. which have an interest in the real property being claimed. It is recommended that the claimant order an owner's and encumbrances report from a title company to identify all such parties. For example, if a claimant brings an adverse possession claim against a neighbor and is successful, but fails to name a mortgagee holding a mortgage on the property, the claimant's ownership of the real property will remain subject to the mortgage.

C. Plead Boundary by Practical Location in the Alternative

Though similar in operation, adverse possession and boundary by practical location are not identical and may require different proof. In one decision, the court of appeals inferred that it might bar a party from establishing practical location of a boundary if the party had proceeded solely on an adverse possession theory through the trial without ever mentioning the practical location theory. The court goes on to state that generally, "relief cannot be based on issues that are neither pleaded nor voluntarily litigated." *Roberge v. Cambridge Coop. Creamery Co.*, 67 N.W.2d 400, 403 (Minn. 1954).

D. Limitation on Equitable Relief

Though equity is said to be flexible, it has its limits. A trial court, in fashioning a remedy, may not ignore the facts proving a boundary has been established and give the possessor a more limited remedy, or compensate the

"disseized" party for his loss. In *Gabler v. Fedoruk*, 756 N.W.2d 725 (Minn. Ct. App. 2008), a claimant proved a boundary was established by practical location but the trial court only granted a prescriptive easement and awarded damages to the losing landowner. The court of appeals reversed and remanded for entry of an order establishing the boundary line with no damages award.

E. Ejectment and Trespass

The disseized owner can typically bring claims for ejectment and trespass damages against a disseizor, either in a lawsuit initiated by the disseized owner or in an answer and counterclaim to a lawsuit brought by the disseizor. *See* MINN. STAT. §§ 559.07 & 559.08.

F. Nuisance

Minnesota Statutes section 561.02 provides: "Any fence, or any other structure, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property shall be deemed a private nuisance." This means it may be enjoined and damages could be available. There is little case law on the enforcement of this statute.

PRACTICE TIP

Clients should be advised to avoid damaging any encroaching improvements, especially if the dispute is headed to litigation. Judges frown upon parties taking matters into their own hands and may be inclined to award punitive damages for destruction of property.

§ 4.14 ENFORCEMENT OF RIGHTS ACQUIRED BY ADVERSE POSSESSION

Judicial recognition of ownership established by adverse possession can be sought by bringing a claim, or counterclaim, for declaratory judgment under Minnesota Statutes sections 555.01 through 555.16. The following appendices are examples of pleadings that can be used in such an action.

APPENDIX A – SAMPLE SUMMONS

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT
Case Type: Other Civil

John Smith and Jane Smith,

Plaintiffs,

v.

Brian Brown, Mary Brown, and ABC Bank,

Defendants.

Court File No. _____

SUMMONS

TO: BRIAN BROWN AND MARY BROWN, 125 West Street, Hometown, Minnesota, and ABC Bank.

1. **YOU ARE BEING SUED.** The Plaintiffs have started a lawsuit against you. The Plaintiffs' Complaint against you is attached to this Summons. Do not throw these papers away. They are official papers that affect your rights. You must respond to this lawsuit even though it may not yet be filed with the Court and there may be no Court file number on this Summons.

2. **YOU MUST REPLY WITHIN 20 DAYS TO PROTECT YOUR RIGHTS.** You must give or mail to the person who signed this Summons **a written response** called an Answer **within 20 days** of the date on which you received this Summons. You must send a copy of your Answer to the person who signed this Summons located at Law Firm, P.A., 100 Main Street, Hometown, MN 55XXX.

3. **YOU MUST RESPOND TO EACH CLAIM.** The Answer is your written response to the Plaintiffs' Complaint. In your Answer you must state whether you agree or disagree with each paragraph of the Complaint. If you believe the Plaintiffs should not be given everything asked for in the Complaint, you must say so in your Answer.

4. **YOU WILL LOSE YOUR CASE IF YOU DO NOT SEND A WRITTEN RESPONSE TO THE COMPLAINT TO THE PERSON WHO SIGNED THIS SUMMONS.** If you do not Answer within 20 days, you will lose this case. You will not get to tell your side of the story, and the Court may decide against you and award the Plaintiff everything asked for in the Complaint. If you do not want to contest the claims stated in the Complaint, you do not need to respond. A Default Judgment can then be entered against you for the relief requested in the Complaint.

5. **LEGAL ASSISTANCE.** You may wish to get legal help from a lawyer. If you do not have a lawyer, the Court Administrator may have information about places where you can get legal assistance. **Even if you cannot get legal help, you must still provide a written Answer to protect your rights or you may lose the case.**

6. **ALTERNATIVE DISPUTE RESOLUTION.** The parties may agree to or be ordered to participate in an alternative dispute resolution process under Minnesota General Rule of Practice 114. You must still send your written response to the Complaint even if you expect to use alternative means of resolving this dispute.

7. THIS ACTION AFFECTS REAL PROPERTY located in Hennepin County, Minnesota, legally described as follows:

Lot 1, Block 1, West First Addition, Hennepin County, Minnesota

And

Lot 2, Block 1, West First Addition, Hennepin County, Minnesota

Date:_____ LAW FIRM, P.A.

By: _____
Attorney, #
100 Main Street
Hometown, MN 55XXX
(612) 555-1234
Attorneys for Plaintiffs

APPENDIX B – SAMPLE COMPLAINT

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT
Case Type: Other Civil

John Smith and Jane Smith, Court File No. _____

Plaintiffs,

v.

Brian Brown, Mary Brown, and ABC Bank, **COMPLAINT**

Defendants.

Plaintiffs, for their Complaint against Defendants, state and allege as follows:

PARTIES

1. Plaintiffs John Smith and Jane Smith (the "Smiths") are the fee owners of real property located at 123 West Street, Hometown, Minnesota, and legally described as:

Lot 1, Block 1, West First Addition, Hennepin County, Minnesota

(the "Smith Property").

2. Plaintiffs acquired title to the Smith Property via Warranty Deed dated _____ and recorded on _____ in the office of the Hennepin County Recorder as document number _____.

3. On information and belief, Defendants Brian Brown and Mary Brown (the "Browns") are the fee owners of real property located at 125 West Street, Hometown, Minnesota, and legally described as:

Lot 2, Block 1, West First Addition, Hennepin County, Minnesota

(the "Brown Property").

4. On information and belief, Defendant ABC Bank holds an interest in the Brown Property as mortgagee under a mortgage dated _____ and filed on _____ in the office of the Hennepin County Recorder as document number _____.

FACTUAL BACKGROUND

5. The Smith Property lies immediately north of the Brown Property; the entire southern boundary line of the Smith Property is common with the entire northern boundary line of the Brown Property. The common boundary line is approximately 250 feet long.

6. The Browns have recently claimed that the surveyed common boundary line between the Smith Property and the Brown Property (the "Surveyed Line") is further north than the line long-observed and understood by the Smiths, the Browns, and their respective predecessors-in-title (the "Actual Line").

7. The area of real property between the Surveyed Line and the Actual Line is approximately 1,500 square feet and is legally described in the attached Exhibit A (the "Occupied Property"). The Occupied Property is depicted in the Certificate of Survey attached hereto as Exhibit B.

8. The Smiths have regularly possessed and maintained the Occupied Property since 1995 including, but not limited to, landscaping, tree trimming, weeding, leaf blowing, raking, and grass cutting.

COUNT I:
ADVERSE POSSESSION

9. The Smiths restate and reallege the preceding paragraphs as if set forth fully herein.

10. For more than 15 years, the Smiths have been in actual, open, hostile, continuous, and exclusive possession of the whole of the Occupied Property, under claim of right.

11. The Smiths own the Occupied Property by adverse possession, free and clear of any interest of Defendants.

WHEREFORE, the Smiths demand judgment against Defendants as follows:

1. Declaring that the Smiths are the fee owners of the Occupied Property and that Defendants the Browns and ABC Bank have no estate or interest therein or lien thereon;

2. Determining that the Actual Line is the true boundary line between the Smith Property and the Brown Property pursuant to Minn. Stat. § 559.23 and to establish judicial landmarks thereon pursuant to Minn. Stat. § 559.25;

3. Awarding the Smiths their costs and disbursements incurred herein; and

4. Granting such other and further relief as the Court deems just and equitable.

Date:_____ LAW FIRM, P.A.

By: _____
Attorney, #
100 Main Street
Hometown, MN 55XXX
(612) 555-1234
Attorneys for Plaintiffs

ACKNOWLEDGEMENT

Plaintiffs, by their attorneys, acknowledge that costs and attorneys' fees may be awarded to the opposing party in the event that the allegations of this Complaint shall be determined to have been made in bad faith without any reasonable basis in fact or in law, pursuant to Minn. Stat. 549.211, subd. 2.

LAW FIRM, P.A.

By: _____
Attorney, #

APPENDIX C – SAMPLE ANSWER AND COUNTERCLAIM

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT
Case Type: Other Civil

John Smith and Jane Smith, Court File No. _____

Plaintiffs,

v.

Brian Brown, Mary Brown, and ABC Bank,

Defendants.

ANSWER AND COUNTERCLAIM OF DEFENDANTS BRIAN BROWN AND MARY BROWN

Defendants Brian Brown and Mary Brown (the "Browns"), for their Answer and Counterclaim against Plaintiffs, state and allege as follows:

1. Except as hereinafter admitted, denied, or qualified, the Browns deny each and every allegation and heading in the Complaint and put Plaintiffs to their strictest proof thereof.

2. The Browns are without sufficient information upon which to admit or deny the allegations in Paragraphs 1 and 2 of the Complaint.

3. The Browns admit the allegations in Paragraphs 3, 4, and 5.

4. Responding to the allegations in Paragraph 6, the Browns state that the Surveyed Line is the true boundary line between the Smith Property and the Brown Property, and deny the remainder of the allegations in Paragraph 6.

5. The Browns are without sufficient information upon which to admit or deny the allegations in Paragraph 7.

6. The Browns deny the allegations in Paragraph 8.

7. No response is required to Paragraph 9.

8. The Browns deny the allegations in Paragraph 10.

AFFIRMATIVE DEFENSES

1. Plaintiffs fail to state a claim upon which relief can be granted.

2. Plaintiffs' use of the Occupied Property has not been hostile, continuous, or exclusive.

3. Plaintiffs' use of the Occupied Property has been permissive.

4. Plaintiffs have offered to purchase the Occupied Property on multiple occasions.

5. Plaintiff's claims are barred or limited by all affirmative defenses set forth or created by Minnesota law, and in the Minnesota Rules of Civil Procedure including but not limited to estoppel, laches, accord and satisfaction, any applicable statute of limitations or other rule of law.

6. The Browns reserve the right to assert additional affirmative defenses after they are afforded sufficient time to investigate Plaintiffs' claims.

COUNTERCLAIM

For their counterclaim against Plaintiffs, the Browns state and allege as follows:

1. The Browns are the fee owners of real property located at 125 West Street, Hometown, Minnesota, and legally described as:

Lot 2, Block 1, West First Addition, Hennepin County, Minnesota

(the "Brown Property").

2. The Browns have resided at the Brown Property since their purchase in 1998.

3. On information and belief, Plaintiffs own and reside at the property located adjacent to the Brown Property to the North.

4. Plaintiffs have on occasion entered onto the Brown Property with the Browns' permission.

5. Plaintiffs are now alleging that they have possessed a portion of the Brown Property and that such possession has been actual, open, hostile, exclusive, and continuous under claim of right.

COUNT ONE:
DECLARATORY JUDGMENT

5. The Browns restate and re-allege all of the allegations contained in the preceding paragraphs as if fully set forth herein.

6. The Court is empowered under and pursuant to Minn. Stat. § 555.01, et seq. to interpret and to declare the rights of the parties in land.

7. The Browns are entitled to a declaratory judgment that they are the owner in fee of the Brown Property; and that Plaintiffs hold no right, title, or interest in the Brown Property.

COUNT TWO:
EJECTMENT

8. The Browns restate and re-allege all of the allegations contained in the preceding paragraphs as if fully set forth herein.

9. The Browns have the right to use and enjoy the entirety of their property.

10. Plaintiffs have alleged herein that they have possessed a portion of the Brown Property under claim of right. The Browns are entitled to an Order and Judgment of this Court requiring that Plaintiffs cease all further use of the Brown Property.

COUNT THREE:
TRESPASS DAMAGES

11. The Browns restate and re-allege all of the allegations contained in the preceding paragraphs as if fully set forth herein.

12. Plaintiffs are impeding the Browns' full use and enjoyment of their property by Plaintiffs' trespass upon the Brown Property.

13. The Browns have sustained and will continue to sustain monetary damages due to Plaintiffs' actions in an amount to be proven at trial.

WHEREFORE, the Browns demand judgment against Plaintiffs as follows:

1. Dismissing Plaintiffs' Complaint with prejudice;

2. Ordering and determining that the Browns are the owners of the Brown Property and that Plaintiffs hold no right, title, or interest in the Brown Property;

3. Ordering that Plaintiffs must cease all further occupation or possession of the Brown Property;

4. Ordering that Plaintiffs be ejected from any ongoing occupancy or possession of the Brown Property;

5. Awarding trespass damages against Plaintiffs in an amount to be determined by the Court;

6. Awarding the Browns their costs and disbursements incurred herein; and

7. Granting such other and further relief as the Court deems just and equitable.

Date:_____

DEFENSE FIRM, P.A.

By: _____
Attorney, #
100 1st Street
Hometown, MN 55XXX
(612) 555-5678
Attorneys for Defendants

ACKNOWLEDGEMENT

Defendants, by their attorneys, acknowledge that costs and attorneys' fees may be awarded to the opposing party in the event that the allegations of this Complaint shall be determined to have been made in bad faith without any reasonable basis in fact or in law, pursuant to Minn. Stat. 549.211, subd. 2.

DEFENSE FIRM, P.A.

By: _____
Attorney, #

APPENDIX D – SAMPLE NOTICE OF LIS PENDENS

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT
Case Type: Other Civil

John Smith and Jane Smith, Court File No. _____

Plaintiffs,

v.

Brian Brown, Mary Brown, and ABC Bank, **NOTICE OF LIS PENDENS**

Defendants.

NOTICE IS HEREBY GIVEN, that the above-entitled action has been commenced and that Plaintiffs' Complaint therein is now on file in the office of the administrator of the District Court above named; that the names of the parties to said action are as above stated; that the real property affected, involved, and brought in question by said action is in Hennepin County, Minnesota, and legally described as follows:

Lot 2, Block 1, West First Addition, Hennepin County, Minnesota

(the "Property").

Notice is further given that the object of said Complaint is to establish that Plaintiffs, by operation of adverse possession, are the fee owners of a certain portion of the Property free and clear of any interest of Defendants.

Date:_____ LAW FIRM, P.A.

By: _____
Attorney, #
100 Main Street
Hometown, MN 55XXX
(612) 555-1234
Attorneys for Plaintiffs

THIS INSTRUMENT WAS DRAFTED BY:
Law Firm, P.A.
100 Main Street
Hometown, MN 55XXX