

**Adverse Possession:
How Trespassing Turns into Ownership**

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**Saving Special Places
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I. What is Adverse Possession?

- a. Legal doctrine under which a person can become the owner of land not by buying it or inheriting it, but by using it.
- b. A person without a deed to the property can become the owner of the property
- c. They have to prove that they meet the legal elements (parts of a test) of adverse possession
- d. Successful adverse possession changes legal title of the land in question
- e. Terminology – prescriptive easement is when someone comes to hold an easement through adverse possession

II. Importance To Conservation Organizations

- a. Basics – want to know what you’re getting and what you already have
- b. Own a property in fee?
 - i. Could lose title to part or all of a property
 - ii. Could lose right to exclude if another person gains a right of access
- c. Hold a conservation easement?
 - i. Underlying landowner could change
 - ii. Impact on ease and friendliness of stewardship
 - iii. Again, could lose right to exclude others
- d. Looking to acquire either fee interest or a conservation easement?
 - i. Want to know exactly what you’re bargaining for and what you’re going to get moving forward
 - ii. Impact on amount of land being conserved

III. What Does a Trespasser Have To Prove?

- a. Four elements (parts of the test): open, adverse, continuous, exclusive use
- b. Open (to the owner of record)
 - i. Visible
 - ii. Obvious to a reasonable person caring for their property – would put the owner on notice or should put the owner on notice



- iii. Examples
 - 1. Actually knowing the possession or use was taking place is enough to show the “open” element is met
 - 2. Constructive Notice
 - a. Not enough for constructive notice
 - i. Removal of a dilapidated boathouse + routine walks on property + children played on property + cut Christmas trees + cut grass, removed trees, planted flowers = too occasional and not visible enough
 - ii. Planting trees and allowing to grow for 20 years
 - iii. Occasional timber cutting
 - b. Enough for constructive notice?
 - i. Construction of a retaining wall, stone wall, and planting a shrub
- c. Adverse
 - i. Inconsistency with another’s ownership of the land
 - ii. Use without permission
 - iii. Does not require hostility, animosity, bad motive, personal strife
 - iv. Lots of stuff does not matter
 - 1. Motive or reason for use or possession does not matter
 - 2. Doesn’t matter if the initial use was a mistake – Mastroianni v. Wercinski, 158 N.H. 380, 382–83 (2009)
 - 3. Doesn’t matter if the possessor believes he owns the land in fee – Hewes v. Bruno, 121 N.H. 32, 33–34 (1981)
- d. Continuous
 - i. 20 years in NH (other states range higher and lower)
 - ii. Can’t be broken up by nonuse periods – can’t take a year break
 - iii. Doesn’t matter if ownership of parcel changes or the claiming possessor changes ownership
 - 1. Tacking – add up time different possessors were possessing to get to 20 years
 - a. Alukonis v. Kashulines, 96 N.H. 107, 108–09 (1950) – successive owners of a property that fenced in an cultivated a strip of the neighbor’s titled property could gain that land by adverse possession when all owners’ use added up to more than 20 years; also Page v. Downs, 115 N.H. 373 (1975).
- e. Exclusive
 - i. Exclusion of all others’ use
 - ii. Indications of control of the area – use of fencing, signs, stone walls, structures, other indicators that the land is privately owned



- iii. This is the only factor that is different for prescriptive easements
 - 1. Prescriptive easement – right to use the land, not to own it
 - a. Often to cross, access for resources, or use more occasionally
 - b. Does not require exclusive use
 - c. Still requires other 3 elements (open, adverse, continuous)

IV. How Can Conservation Organizations Prevent Adverse Possession?

- a. Steps to take before closing/transfer
 - i. Baseline survey
 - ii. Walk the property and look for any use on an adjacent lot that seems to have crossed onto the property you are interested in
 - iii. Conversation with landowner about current neighbors/users
 - 1. Current landowner should know something about users and boundaries, but don't depend on them to have noticed everything
- b. Steps to take for properties and easements you already have
 - i. Consistent monitoring
 - 1. Walk the property, with landowner if needed
 - a. Again, look for any use on an adjacent lot that seems to have crossed onto your property
 - b. Note dates, anything observed
 - ii. If boundary markers/monuments are known, maintain them
 - 1. Trim vegetation
 - 2. Keep flags, rebar caps, or other color-based signals intact
 - iii. If boundary markers/monuments are missing, get a survey to re-locate them and have the surveyor replace them
 - iv. Good record-keeping of monitoring
 - 1. Like medical record, if it's not written down, it's as if it didn't happen

V. How To Avoid Adverse Possession If Trespass Occurs

- a. Caution: You might want to engage a lawyer and go through the steps in the next section now
 - i. It may inform how you initially approach the trespasser
- b. Promptly notify trespassers of their trespass and/or take action to remove them



- i. Ousting a trespasser requires more than verbal demands – have to make it very clear that they are being removed from the land
 1. O'Malley v. Little, 2017 NH LEXIS 169 (Aug. 31, 2017) – repeated verbal demands to move a fence, including walking the fence line, wasn't enough to oust the trespasser
 2. Give permission for others to use
 - a. Who you don't mind
 - b. Even if you do mind, stops the 20-year clock
 - c. Both
 - i. Permission for short-term while they wrap up and work towards completely leaving the property
 1. Maple-sugaring
 2. Constructed Improvements
 3. Agricultural crops
 - d. If the trespasser does not leave, consider strategies to resolve the dispute

VI. How To Resolve Disputes – You Want Someone To Go/Stop They Don't Think They Have To Go/Stop

- a. Hire an attorney
- b. Evaluate the claim together
 - i. Are the elements met
 1. Open: Is it something visible that the owner (you?) should have noticed?
 2. Adverse: Is it something that is incompatible to your continued ownership?
 3. Continuous: How long do they claim they've been continuously using the land in that way? More than 20 years?
 4. Exclusive: Have they been the exclusive user of the land? (Not for prescriptive easements)
 - ii. Review your records – how are they?
 1. Baseline documentation
 2. Survey
 3. Stewardship records
 - iii. Review your capacity
 1. Money
 2. Time
 3. Insurance (terra firma)
 - iv. Consider how important (or not) this property is to you
 - v. Put all that together to develop plan out of possible options
 1. Do nothing



2. Seek out-of-court settlement
3. Seek relief from the court
- c. Details on Options
 - i. Do nothing
 1. Most risky, cheapest and quickest in the short term
 2. Trespasser could extend trespass
 3. Cloud on title
 4. Problem likely to get worse and more expensive to solve later
 5. Might be a breach of a duty or a contract
 - ii. Seek out-of-court settlement – this is what I almost always advise
 1. Range of options
 2. For any option – need legally binding papers that show the adverse possession claim is over
 3. Consider formal mediation
 4. Could “give” the trespasser the land
 - a. If your evaluation is that the trespasser actually has a good legal claim and you are low in resources
 - b. Adjust property lines through lot line adjustment (although this triggers costs in legal fees, surveying, and possible Town approvals)
 - i. Variations
 1. Trespasser pays fees associated with solution
 2. Trespasser pays an actual purchase price
 5. Force trespasser off land
 - a. If your evaluation is that the trespasser has a poor legal claim and you have the resources or have insurance
 - b. Start gently with letters and/or meetings
 - c. If needed, ratchet all the way up to litigation
 6. Meet in the middle
 - a. If your evaluation is that the trespasser has a moderate legal claim and you have the moderate resources, or you have little resources
 - b. Adjust property lines through lot line adjustment (although this triggers costs in legal fees, surveying, and possible Town approvals)
 - i. Variations (same as above)
 1. Trespasser pays fees associated with solution
 2. Trespasser pays an actual purchase price
 - c. Give permission
 - i. Permanent – easement



- ii. Temporary – license
- 7. Litigation
 - a. Defend or bring a quiet title claim
 - b. Can be risky and expensive and slow
 - i. 6 to 18 months
 - ii. \$10,000 to \$100,000
 - iii. Might lose after all that
 - c. Very fact-specific – usually not clear cut
 - i. Facts are hard to prove going back 20 years or more
 - ii. Witnesses may be deceased or not competent or physically able to testify
 - iii. Typically rely on photos and other documents
 - d. Goal is to persuade judge that trespasser does not have a good adverse possession claim
 - i. Once judge decides, you are stuck with that decision unless you undertake costly appeals which you may not win
 - e. Even if it is unpalatable or undesirable to work out an out-of-court agreement with trespasser, you have some control over the outcome, but at court you have little to none

VII. Conservation Easements Generally Survive Adverse Possession

- a. Conservation easements can survive adverse possession of the underlying property, theoretically, but could cause many stewardship issues and possible adverse possession of the conservation easement itself, dependent on facts
- b. Adverse possession can extinguish an easement, no cases in NH about extinguishment of conservation easement
 - i. Titcomb v. Anthony, 126 N.H. 434, 437 (1985) – “It is well established that an easement acquired by grant may be extinguished by continuous adverse possession for a period of twenty years.”
- c. Can be adversely possessed as to some, but not all, uses
 - i. Example – if possessor prevented vehicle traffic on easement, but not foot traffic, the easement could be lost for vehicles but not pedestrians

VIII. State, cities, and towns

- a. In NH, someone cannot adversely possess land that the state owns



- b. Same goes for town land as long as the Town holds the land for a public purpose (and the courts have a broad interpretation of “public purpose”)
- c. Brief town ownership can interrupt the 20-year period for otherwise private lands
 - i. Kellison v. McIssac, 131 N.H. 675 (1989) – an adverse possession claim failed because a town owned the land for part of the required 20-year period due to tax foreclosure; see also Burke v. Pierro, 159 N.H. 504 (2009) (new title created by a tax sale terminated the running period and reset it after the town sold the property).
- d. However, subsequent tax sale after 20 years is met does not prevent the ripening of those claims – Marshall v. Burke, 162 N.H. 560 (2011)

IX. Other resources

<https://www.landtrustalliance.org/news/adverse-possession-land-whose-land>

<http://www.lawschool.cornell.edu/research/cornell-law-review/upload/sprankling.pdf>

