

## **MEMORANDUM**

TO: Members and Observers, Drafting Committee to Amend the Uniform Common Interest Ownership Act (“UCIOA”) and Uniform Condominium Act (“UCA”)

FROM: Jim Smith, Reporter

DATE: January 24, 2020

RE: Adverse Possession

Part A briefly explains the application of the law of adverse possession in communities governed by UCOIA. Part B of this memorandum contains alternative draft language for a possible new section to be added to UCOIA. After Part B I have included materials on the law of adverse possession for any of you who may want a refresher (Parts C and D).

### **A. UCOIA and the law of adverse possession.**

UCOIA does not presently address the application of the law of adverse possession. In most states the general law of adverse possession applies to all real estate within a “common interest community,” as defined in UCOIA. In the few states that have title registration systems (often called “Torrens” systems), common interest communities built on registered land are immune from loss by the doctrine of adverse possession. Torrens statutes exempt all registered land from the law of adverse possession.

Because so much land is presently within common interest communities in the United States, claims of adverse possession and prescription arise frequently, almost certainly more frequently now than in the past when much less residential land was within these regimes. How frequently adverse possession claims are asserted is not easy to determine, as there are no published empirical studies. There are a good number of appellate court opinions, but they furnish a crude measure of actual claims, as many claims (as in all civil litigation) result in settlements, and many more are resolved by trial courts without appeal or without a published opinion following an appeal.

All types of property within common interest communities are susceptible to loss by the doctrine of adverse possession. This includes a “unit” as defined in UCOIA. Standard rules of adverse possession apply in a straightforward manner to units. Transfer of an entire unit from a record owner to an adverse possessor may take place. This is unlikely to happen in the context of “squatting.” It is more common when the person living in and possessing the unit does so under “color of title” with the mistaken belief that she owns the unit. Transfer of part of a unit may take place if the adverse possessor is in possession of only part of the unit as defined by the governing documents of the community. This is not likely to happen for units that consist only of a dwelling in a multi-unit building (typically where condominiums are used), but happens frequently in planned communities where units include yards.

Adverse possession issues often also arise in connection with “common elements” as defined in UCOIA. Although adverse possession may apply to anything defined as a common element, it appears that claims to common element parking spaces and green spaces come up especially frequently. The claimant may be a unit owner or a neighbor who owns land abutting the common interest community.

The law of adverse possession does not apply uniformly to common elements. This is a problem that may merit correction. UCOIA recognizes two different ownership forms for common elements. First, in condominiums the unit owners own the common elements as tenants in common. Second, in cooperatives and planned communities the association owns the common elements, and the unit owners have the right to use the common elements by virtue of the governing documents for the community. When the common elements are held in tenancy in common (co-tenancy), it is difficult for a unit owner who is in sole possession of part of the common elements to obtain title by adverse possession because the unit owner must prove ouster (discussed below). Conversely, when the common elements are held by the association, a court may decide that proof of ouster is not necessary.

## **B. Four possible approaches for an addition to UCOIA to deal with adverse possession.**

### **Approach 1. Immunize Common Elements from Loss by Adverse Possession.**

No title to any common element in derogation of the title of the unit owners or the association shall be acquired by adverse possession or by prescription.

#### **Drafting Note**

This provision protects all the common elements from loss of title by claims of adverse possession or prescription. This immunity applies to claims made by any person, including unit owners and neighboring property owners. This immunity is limited to real estate defined as “common elements” in UCOIA. This provision could be expanded to also immunize units from loss of title by adverse possession.

This provision leaves intact the enacting State’s substantive law of adverse possession to govern claims made by the association or the unit owners collectively as tenants in common. Claims of this type may be asserted when the common elements are subject to a title defect: a person other than association or the unit owners owns or has a potential claim to a common element. An adverse possession claim of this type protects the unit owners’ interest in the common elements, rather than jeopardizing the unit owners’ expectations of ownership and use of the common elements.

The language in this provision is based on Minn. Stat. § 508.02, which provides: “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.”

Like the Minnesota statute, this provision refers to both “adverse possession” and “prescription.” A Minnesota court has interpreted the statutory reference to “prescription” to preclude the creation of a prescriptive easement against registered land. *Moore v. Henricksen*, 165 N.W.2d 209, 216–17 (Minn. 1968). Accordingly, this provision is intended to immunize the common elements from claims of prescriptive easements made by any person.

### **Approach 2. Immunize Common Elements from Loss by Adverse Possession by Claims of Unit Owners.**

No unit owner shall acquire any title by adverse possession or by prescription to any common element in derogation of the title of the other unit owners or the association.

#### **Drafting Note**

This provision provides a more limited immunity than Approach 1 in its protection of the common elements. This provision precludes only a claim made by a unit owner. When the unit owners own the common elements in tenancy in common, this provision modifies existing law by not allowing a unit owner to acquire adverse possession by proving an “ouster” of the other cotenants. When the association owns the common elements, this provision modifies existing law, which in most states lacks reported law clearly delineating the requirements for a person to acquire adverse possession title to property owned by an association of which the person is a member.

This provision could also be expanded to immunize units from loss of title by adverse possession.

### **Approach 3. Protect Common Elements from Loss by Adverse Possession by Claims of Unit Owner with Statutory Ouster Rule.**

No unit owner shall acquire any title by adverse possession or by prescription to any common element in derogation of the title of the other unit owners or the association unless the unit owner proves ouster. Ouster is defined as words or acts of the possessing unit owner that unequivocally express to the other unit owners that the property is being adversely possessed. This requirement is in addition to all other requirements set forth in the law of this state other than this [act].

#### **Drafting Note**

This provision does two things. First, it contains a statutory ouster rule that replaces whatever definition of ouster the courts of the enacting state have developed. This serves to make the law uniform across enacting states. This ouster definition is based on *DeFoor v. DeFoor*, 722 S.E.2d 697 (Ga. 2012), and *Lindine v. Iasenza*, 15 N.Y.S.3d 248 (App. Div. 2015).

Second, this provision requires proof of ouster when the common elements are not held in tenancy in common (as in condominium communities) but are owned by the association. The policy rationale is that the loss of common elements to a unit owner by adverse possession should take place rarely, with no distinction made as to the form in which title to the common elements is held.

#### **Approach 4. Defer to Other State Law Governing Adverse Possession.**

Any claim by adverse possession or prescription to title of any real estate within any common interest community is determined by the law of this state other than this [act].

#### **Drafting Note**

This provision defers to the enacting State's substantive law of adverse possession with respect to any claim made by a person in a common interest community. It makes it clear that other UCOIA sections do not by implication modify the application of the law of adverse possession and prescriptive easements.

#### **C. Adverse possession: Standard elements and policies.**

In every state the doctrine of adverse possession is based upon the running of the statute of limitations. Expiration of the limitations period serves to transfer ownership to the wrongful possessor, who is treated as the recipient of a new title to the property. The new title generally is a fee simple absolute.

The five traditional requirements for adverse possession are

- Actual possession
- Open and notorious possession
- Hostile and adverse possession
- Exclusive possession
- Continuous possession

The courts evaluate the necessary elements over a continuum of time. All the elements must both exist and continue for the number of years specified by the statute of limitations.

Some states impose additional requirements. In several jurisdictions, the subjective good faith of the adverse possessor is required, expressly or by implication. Other states require that the possessor have "color of title" to the property or prove that the possessor has paid the real estate taxes, either across the board or for a particular type of adverse possession claim.

Courts and commentators have offered several policy justifications for the doctrine of adverse possession:

- First, there is a public interest in "quieting title" to land by cutting off old claims.

- Second, landowners who neglect to assert their property rights for a period longer than the statute of limitations merit punishment. They are negligent stewards who have “slept” on their rights.
- Third, there are reliance interests to protect. Due to the length of time, either the adverse possessor or other persons who have dealt with the adverse possessor are justified in relying on a continuation of the status quo. With respect to the adverse possessor, the reliance rationale is especially strong when the claimant took possession with a good-faith belief that he had acquired good title.
- Last, an efficiency rationale is based upon the goal of promoting land development. Those persons who use and improve land and cause it to be productive are rewarded because they have added to the community’s resources. Along with the reliance rationale, the efficiency perspective can support a conclusion that the adverse possessor has “earned” ownership rights.
- Some of these policies overlap, and some may be more persuasive than others. However, the outcomes in litigated cases often turn upon which policy or policies the court seeks to apply.

*See generally* James C. Smith, *The Glannon Guide to Property* 52-54, 160-62 (4th ed. 2019); *Friedman and Smith on Contracts and Conveyances of Real Property*, ch. 17 *Adverse Possession and Prescription* (Practicing Law Institute 8th ed. 2019).

#### **D. Adverse possession claims made by cotenants.**

A cotenant who possesses co-tenancy property may assert an adverse possession claim against other cotenants who are out of possession, but courts have imposed an additional requirement. In addition to the normal requirements, the claimant must prove an “ouster.” Otherwise, the cotenant’s possession is deemed to be permissive. The law of co-tenancy does not require that each cotenant use or take possession of the commonly owned property. A cotenant, just like any other property owner, may choose to ignore her property. A cotenant who is the sole possessor and user of the property ordinarily is acting rightfully. But if the possessing cotenant excludes the other cotenants, preventing them from entering and also enjoying the property, then there is an actionable wrong. The ousted cotenants may recover damages and obtain injunctive relief. And if the ousted cotenants fail to act for longer than the period of the statute of limitations, they may lose title to their undivided interests to the possessing cotenant.

An ouster is present when a cotenant engages in acts of possession or other conduct that is inconsistent with the rights of other cotenants. Proof of ouster by an excluded cotenant may include statements made by the cotenant in possession that show an intent to exclude, but conduct alone (such as changing the locks to a house or building) may suffice.

There are hundreds of reported cases addressing adverse possession claims made by cotenants against fellow cotenants. Below are brief descriptions of four illustrative cases, which indicate typical fact patterns and a range of outcomes.

Most of the reported adverse possession cases involve cotenants who are family members, sometimes close and sometimes distant relatives. In *Heirs at Law of Butler v. Butler*, 345 S.W.3d 225 (Ark. Ct. App. 2009), five children inherited a family farm in 1985 and one child died the next year. The surviving children rented the farm without the participation or consent of the deceased cotenant's heir and kept all the rents for almost 20 years. The heir, who had become a cotenant when he inherited his father's undivided one-fifth interest, prevailed in quieting title. The court rejected the other cotenants' adverse possession defense. The court observed that for adverse possession to ripen into title, the possession must be hostile, that is, adverse to the rights of the true owner. When cotenants own land, each has an equal right to possession. The possession of one cotenant is not ordinarily hostile to the rights of another cotenant. To make possession hostile, the possessing cotenant must give actual notice to the other cotenant or commit such acts of hostility that the cotenant may be presumed to know of the possessor's adverse claim. The court observed that, when the cotenants are relatives, stronger evidence of hostility is required.

One court diluted the ouster requirement when the claimant bought at a tax sale and was unaware that other persons owned an undivided one-half interest in the property. *Harkleroad v. Linkous*, 704 S.E.2d 381 (Va. 2011). In *Harkleroad*, the court allowed the claimant to establish ouster by open possession alone, without the need to prove ouster. Ordinarily, to gain title, a cotenant must prove an ouster because the sole possession of one cotenant is presumed to be non-hostile against the other cotenant. The court explained, however, that the presumption of non-hostile possession does not apply when the cotenants are strangers and not in privity. When such a stranger takes possession under a conveyance purporting to convey the whole estate and claims ownership of the whole, there is an ouster of the other cotenants. Thus, it was not incumbent on the claimant either to discover the existence of the cotenants or to give them actual notice of their possession.

In *B.B. & C. Partnership v. Edelweiss Condo. Ass'n*, 218 P.3d 310 (Colo. 2009), a condominium association lost the benefit of restrictions on a parking space due to an adverse possession claim. The condominium community had 20 dwelling units and 30 parking spaces, which were defined as common elements. At the outset, one parking space was conveyed with each condominium unit, and 10 spaces remained unassigned. The condominium declaration permitted the developer to sell the unassigned spaces to condominium owners or to third-party non-condominium owners. No person other than the developer, however, could sell or lease a parking space to a non-condominium owner. The developer sold one of the extra parking spaces to a condominium owner, and in 1976 that space was resold to a partnership, which did not own a dwelling unit. The partnership served as managing agent of the condominium property, and its employee parked his vehicle in the space for over 20 years while the partnership paid all taxes, maintenance fees, and insurance fees on the space. The dispute arose when the partnership sought to sell the parking space to a third party who was not a

condominium owner. In a quiet title action, the trial court held that the partnership obtained fee simple title to the space by adverse possession, free of the restrictions in the condominium declaration. The Colorado Supreme Court agreed that the partnership obtained adverse possession rights, but reversed, holding that its adverse possession claim was limited to ownership of the space as a common element subject to the restrictions on resale, not fee simple title.

In *Falls Garden Condominium Ass'n v. Falls Homeowners Ass'n*, 107 A.3d 1183 (Md. 2015), two neighboring common interest communities fought over a parking lot situated between the communities. A townhouse homeowners association had record title to the parking lot, which contained 67 parking spaces, but the neighboring condominium community believed it owned the parking lot. When the condominium association discovered its lack of title, it brought an action claiming ownership of 39 of the spaces based on adverse possession, and alternatively an easement by prescription. The parties negotiated a settlement that was memorialized in a "Letter of Intent," which contemplated the release of all claims of both parties and the execution of a 99-year lease of 24 spaces, at stated monthly rents, from the homeowners association to the condominium association. The appeal determined that the letter of intent was enforceable because it contained all the material terms necessary for a settlement and for an enforceable lease, and it did not address the merits of the underlying adverse possession and prescription claims. One infers, however, that the claims had sufficient plausibility to induce the association (the record owner) to settle rather than continue to litigate. (As an aside, the appellate opinion opens with an eye-catching quotation: "The way humans hunt for parking and the way animals hunt for food are not as different as you might think." Tom Vanderbilt, *Traffic: Why We Drive the Way We Do* 145 (2008)).