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ADVERSE POSSESSION CLAIMS IN PARK LAND

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In many instances, the boundaries between public park land and surrounding private property are not clearly delineated. Over time, some private landowners have had a tendency to encroach on an adjacent public park through seemingly innocuous landscaping activities like mowing the grass or planting a garden. Whether innocent or intentional, such encroachments on public park land constitute a trespass to land subject to immediate removal at the expense of the neighboring private land owner.

As governed by statute in a given jurisdiction, an open, notorious and hostile trespass to land over a specified period of time could give rise to a claim of adverse possession by a private landowner against a neighboring property. However, as a majority rule, adverse possession does not apply to the State and its political subdivisions, including public park lands. In the cases described herein, private landowners argued unsuccessfully that their continued and ongoing encroachment into adjacent park land over a long period of time some how gave rise to a claim of legal ownership via adverse possession.

PRIVATE LANDSCAPING IN PUBLIC PARK

In the case of *Band v. Audubon Park Commission*, 936 So.2d 841 (La.App. 7/12/2006), private homeowners, the Bands, claimed ownership through adverse possession of property within a public park. When the Bands purchased the property in 1981, they recognized that there were visible encroachments on the property that intruded into Audubon Park. These intrusions into the public park included a brick patio and a light metal fence within a 10' by 30' area.

In 2003, Audubon Park Commission (Audubon) began correspondence with the Bands and other residents informing them that their property was encroaching onto Audubon Park property. Audubon presented the homeowners with alternatives, including allowing them to sign a lease for the property or to remove the encroachment. All ten of the affected homeowners agreed to one or the other of the alternatives. The Bands, however, declined either alternative and instituted proceedings against Audubon alleging ownership of the property under various theories including acquisitive prescription, i.e, adverse possession.

The trial court granted Audubon's motion for summary judgment. In the opinion of the trial court, Audubon Park was a "public thing" and not susceptible to being acquired through prescription, specifically adverse possession. The Bands appealed.

PARKS AS PUBLIC "THINGS"

The issue before the appeals court was, therefore, whether the Bands had "essentially acquired public property by acquisitive prescription." In the opinion of the appeals court, there was no judicial precedent or state law that would "allow landowners encroaching upon public property

to acquire ownership rights over the property owned by a municipality and dedicated for public use."

As cited by the court, Louisiana state law categorized property as "common, public, and private things." The law defined "public things" as those "owned by the state or its political subdivisions in their capacity as public persons." Accordingly, the appeals court found: "The very definition of a 'public thing' prohibits a private person from owning a public thing." Moreover, the court found "public things" included "public parks owned by a political subdivision in its public capacity." Further, as a political subdivision of the State, the appeals court found the City of New Orleans owned public parks in its public capacity, including Audubon Park.

In this particular instance, the court found the City of New Orleans owned Audubon Park in its public capacity. In so doing, the appeals court noted, "Audubon Park was purchased in 1871, specifically pursuant to a Louisiana legislative act for a specific purpose to establish a public park for the City of New Orleans."

Moreover, "after the act of sale, and for the last 134 years," the court found "the entirety of the area in question [in Audubon Park] has been dedicated and used as a public park for the benefit of all." Further, since the inception of Audubon Park, the appeals court noted the City of New Orleans had "never abandoned this property nor has it ever revoked its dedication as a public park." Having found Audubon Park was a "public thing belonging to the City of New Orleans in its public capacity, the appeals court would assure "the public has a right to unfettered use of the park."

In so doing, the appeals court took particular note of the fact that the Bands "purchased their property, with knowledge that it was encroaching onto Audubon Park property with constructions such as a lightweight metal fence and a single layer brick patio." In the opinion of the appeals court, these private constructions did "not change a public park to private property." Further, state law (Art. 458) regarding "Works obstructing the public use" expressly authorized the removal of such encroachments:

> Works built without lawful permit on public things, including the sea, the seashore, and the bottom of natural navigable waters, or on the banks of navigable rivers, that obstruct the public use may be removed at the expense of the persons who built or own them at the instance of the public authorities, or of any person residing in the state.
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> The owner of the works may not prevent their removal by alleging prescription or possession.

State law, however, provided an exception which would permit a "building" to remain if it "merely encroaches on a public way without preventing its use, and which cannot be removed without causing substantial damage to its owner." However, in this particular situation, the appeals court found this exception did not apply to the Bands because their encroachments into Audubon Park did indeed prevent public use. As noted by the appeals court, the "fence and patio ostensibly allows two people to enjoy the use of a public thing to the exclusion of all other

members of the public to enjoy the park." Since these encroachments precluded public use, the appeals court held "Audubon Park Commission has the right and the authority to demand the removal of the encroachments" at the Bands' expense.

On appeal, the Bands had also argued that removal of the "encroachments would create a security or hazardous living situation as well as affect their property aesthetically, causing a potential decrease in property value." The appeals found this argument to be "totally without merit." In so doing, the appeals court noted the Bands were "well aware that their property was encroaching onto public property when they purchased the property on Walnut Street."

The appeals court, therefore, held it was "not possible to acquire by acquisitive prescription those things which are owned by a political subdivision in its public capacity," including the disputed parcel claimed by the Bands in Audubon Park

ACQUISITIVE PRESCRIPTION

On appeal, the Bands had further argued that they had "acquired property rights in ownership of the encroaching property through a theory of acquisitive prescription or adverse possession" because Audubon had effectively abandoned the park's public use" in the disputed area containing the encroachments.

As described by the appeals court, applicable state law would allow for "acquisitive prescription" or adverse possession as "a mode of acquiring ownership of immovable property or real rights by possession" under the following circumstances:

> Property may be acquired by ten-years possession, with just title and good faith, or by thirty-years possession, without the requirement of just title or good faith. The party alleging acquisitive prescription must prove, by a preponderance of the evidence, the intent to possess as owner and that his possession has been continuous and uninterrupted, peaceable, public, and unequivocal. Every presumption is in favor of the titleholder rather than the party alleging adverse possession...
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> Acquisitive prescription does not run in favor of a precarious possessor, that is, one who possesses with the permission of the owner or on behalf of the owner. The intent to possess as owner must be express rather than covert. Although the intent may be implied from possession that is open, notorious, public, continuous and uninterrupted, to the exclusion of the owner, there must be strong evidence that gives the owner some notice that his property is in jeopardy.

However, under the circumstances of this particular case, the appeals court reiterated acquisitive prescription or adverse possession would not apply because Audubon Park was a "public thing" and as such this "public property was insusceptible to prescription." In so doing, the appeals court rejected the Band's argument that the property occupied by their patio and fence for more than thirty years was subject to adverse possession because the City had effectively abandoned the public use and purpose of Audubon Park on that particular 10' by 30' parcel.

> Given the fact that public things, such as Audubon Park, can only be owned by the State or its political subdivision it is clear that these adjacent property owners cannot acquire any portion of Audubon Park by the mere passage of time through claims of adverse possession or acquisitive prescription.

The appeals court, therefore, affirmed the judgment of the trial court which had concluded the Bands were "encroaching onto this public property and were therefore required to remove the encroachment at their own expense."

RAILS TO TRAILS FARMING

Similarly, in the case of *Houck v. Board of Park Commissioners of the Huron County Park District*. 2007 Ohio 5586 (Ohio 10/25/2007), the issue before the Supreme Court of Ohio was whether real property owned by a park district could be acquired by adverse possession. Richard Houck and others (Houcks) owned property near a corridor of property that was once owned by a railroad and accommodated railroad tracks. Sometime prior to 1979, the railroad ceased its operations and removed the track, ties, ballast, and other fixtures from its property ("railroad property") Houcks alleged that they entered the railroad property in 1979 and constructed a road, installed a cable to limit access to the road, planted crops, and otherwise used a drainage ditch in cultivating their farm land.

In 1997, the Northwest Ohio Rails to Trails Association, Inc. ("NORTA"), purchased the railroad property. A year later NORTA sold the railroad property to six park districts, as tenants in common for the purpose of constructing a segment of a recreational trail that will run through several northern Ohio counties. In February 2001, the Huron County Park Department sent a letter to the Houcks explaining that the railroad property would be used for a recreational trail when finances permitted, but until then, the Houcks were welcome to use the property.

In October 2003, the Houcks filed suit asking the court to quiet title (i.e., establish legal ownership) to the railroad property in their favor. The Houcks contended they had acquired title to the railroad property by adverse possession, i.e. they had engaged in at least 21 years of continuous, exclusive, open, and notorious possession adverse to the owners.

The Houcks alleged that the adverse possession of approximately one-third of the railroad property began in 1949 by a prior property owner. By "tacking" or combining that prior period of possession onto the Houcks' possession of the property since 1979, the Houcks claimed the required 21-year period of continuous possession for adverse possession was satisfied.

The trial court, however, found that the prior owner's claimed possession of the one-third part of the property entailed cultivating the railroad property up to the tracks was not hostile for purposes of adverse possession. Thus, the trial court found that the Houcks' possession of the entire railroad property did not begin until 1979 when they entered the property. As a result, the trial court held the park districts' purchase of the railroad property in 1998 terminated the Houcks' continuous possession of the property at 19 years, two years short of the 21 years required by adverse possession. Moreover, the trial court held that a park district was immune

from a claim of adverse possession. The court of appeals affirmed. The Ohio supreme court agreed to review these decisions by the lower courts.

ADVERSE POSSESSION IMMUNITY?

As described by the state supreme court, for purposes of adverse possession, "[t]he critical issue in this case is whether the Houcks continuously possessed the railroad property for 21 years from the time they first entered the property in 1979." To resolve this issue, the supreme court would first determine whether park districts are immune from a claim of adverse possession. If so, the court would find "NORTA's sale of the railroad property to the park districts in 1998 effectively terminated Houcks' continuous possession of the railroad property approximately two years short of the required 21 years."

Conversely, if park districts were not immune from a claim of adverse possession, the court would find the Houcks had continuously possessed the railroad property for more than the required 21 years, from 1979 until 2001 (the date of the letter from the Huron County Park District notifying Houcks of the park districts' intended use of the property). If so, and park districts were not immune from a claim of adverse possession, the court indicated the Houcks could be successful in their adverse possession claim.

Under the doctrine of adverse possession, the state supreme court noted: "a plaintiff can acquire legal title to another's real property if he or she proves exclusive possession and open, notorious, continuous, and adverse use for a period of 21 years." In this particular instance, however, the appeals court had recognized the general rule that "adverse possession cannot be invoked against the state and its political subdivisions." Moreover, the appeals court acknowledged "the law disfavors adverse possession." Accordingly, the appeals court rejected the Houcks' argument that adverse possession can be used to acquire property owned by park districts.

ADVERSE POSSESSION IN PARK DISTRICTS?

In determining whether adverse possession could be applied against a park district, the state supreme court noted this issue was one of "first impression," i.e., this particular issue had never been addressed in previous decisions by the Supreme Court of Ohio. As a result, the state supreme court indicated it would be guided by the following general rule regarding the applicability of adverse possession to various government entities:

> The general rule is that adverse possession does not apply against the state. No adverse occupation and user of land belonging to the state of Ohio, however long continued, can divest the title of the state in and to such lands. Early cases recognized that the state, as a sovereign, was not subject to adverse possession; but they declined to extend that immunity to other subdivisions of the state.

Because a park district had "the authority to acquire, hold, and possess property," the Houcks had claimed the park district should also be subject to a claim of adverse possession. The state supreme court rejected this argument. In so doing, the court noted that a number of state

appellate courts had previously held "adverse possession *cannot* be applied against the state *or* its political subdivisions":

> [T]he nature of the property in question is not critical to our analysis. Rather, it is the general policies underpinning these decisions that we find persuasive to our analysis and that justify continued support of the rule that adverse possession does not apply against park-district property.
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> The very purpose of a park district is the "preservation of good order within and adjacent to the parks and reservations of land, and for the *preservation* of the *parks, parkways,* and *other reservations of land* under its jurisdiction and control and of property and natural life therein." R.C. 1545.09

Accordingly, the state supreme court found adverse possession to be incompatible with legislation that recognized a park district's "conservation of natural resources" serves the "`health and general welfare of the community."

> To permit adverse possession of park-district property would interfere with the public's enjoyment and use of park lands as well as with a park district's obligation to conserve and protect park property.

DUTY TO MONITOR PARK PROPERTY?

The state supreme court also considered whether governmental entities, like private property owners, should be "vigilant in monitoring its property for trespassers" over time to avoid a potential claim of adverse possession. In the opinion of the state supreme court, it would be contrary to public policy and impose an unfair burden upon governmental entities to require park property to continually monitor their lands for trespass and encroachments by private parties:

> The setting aside of land for future public use in order to provide for orderly development is, in and of itself, a valuable use of land resources. That the public might later be deprived of the use of such land by operation of the statute of limitation [i.e, 21 years for adverse possession] imposes upon municipalities the burden of continual inspection of all public lands. Such a burden would be prohibitive and contrary to the public interest.

Further, the state supreme court noted a number of public park agencies in Ohio had filed "amicus curiae" (friend of the court) briefs indicating "park-district property boundaries are difficult to monitor" for potential adverse possession due to the following:

> (1) the large amount of property owned by park districts, (2) the remote nature of some of the property, (3) the lack of resources to adequately monitor property boundaries, (4) the lack of boundary markers, and (5) environmental covenants with the Ohio Environmental Protection Agency that prevent fencing of some park property.

Further, as noted by the state supreme court, the difficulty of monitoring park property boundaries was underscored by the substantial amounts of park district properties spread across great distances. For example, as noted by the supreme court, an inventory of the properties within parks administered by Board of Park Commissioners of the Lorain County Metro Parks listed 22 different park-district-owned properties that contain more than 5170 acres of woods, wetlands, ponds, and fields, as well as a section of a 65-mile recreational trail within 500 square miles of Lorain County. Moreover, many of these acres in park district properties were left in their natural state.

Accordingly, in the opinion of the state supreme court "government entities cannot be expected to be as vigilant as private property owners in monitoring their property," particularly park districts. Further, the court found: "The public should not suffer for a government's negligence or inattention to its property boundaries because undeveloped land is a precious commodity in today's crowded world." In so doing, the state supreme court recognized that "adverse possession is disfavored" by courts:

> Adverse Possession represents the forced infringement of a landowner's rights, a decrease in value of the servient estate [i.e., the land being encroached upon], the encouraged exploitation and development of land, the generation of animosity between neighbors, a source of damages to land or loss of land ownership, the creation of forced, involuntary legal battles, and uncertainty and perhaps the loss of property rights to landowner.

In particular, the state supreme court found "such disfavor especially acute" for park district land because "adverse possession of park property deprives the public of the enjoyment of park property and imposes a burdensome obligation on park districts to monitor their property."

Having found "adverse possession of park-district property is against public policy and the legal principles underlying adverse possession," the state supreme court held park district property is "not subject to adverse possession." As a result, the state supreme court concluded the park districts had "valid legal title to the railroad property." The state supreme court, therefore, affirmed the judgment of the lower courts in favor of the defendant park districts.

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