The Antithetical Concepts of Condominium Common Areas and Adverse Possession

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If you take those two words at everyday meaning, the term is an apt description of theft or a hostile takeover. Of course, most of us understand them as a legal term of art describing a way to essentially take the property of others. When I first learned about adverse possession, I found the concept simultaneously fascinating and off-putting. It offended my sensibilities that if one were to act obnoxiously enough for a sufficiently long period of time in their use of another's property, one could establish a legitimate claim of right over that property. (On the other hand, I was also intrigued about how I could go about staking an aggressive claim in the world as a then untitled individual).

The concept of adverse possession is not so simple as petty theft, of course. One could fill volumes with scholarly discussions on it, but a basic overview will suffice for this article. Essentially, adverse possession is a way of "acquiring title to real property by possession for a statutory period under certain conditions" *Black's Law Dictionary, Seventh Edition*. In Massachusetts, those conditions require one to actually possess land in an "***open, notorious, exclusive*** and ***adverse***" fashion for twenty years. The import of each of these elements – open, notorious, exclusive and adverse – is nuanced as well, but they more or less mean what they sound like: you must unabashedly use another's land, without permission, for a long time to have a claim.

Over my years of practice, my understanding of this doctrine has developed, and I appreciate the circumstances where it makes sense to afford those who put property to productive use rights in that property. Still, I admit that even now I tend to have a knee-jerk negative reaction when faced with questions of adverse possession. Perhaps that, and my role as a community association advisor, is why I found the recent Land Court decision in Pisano v. Thunberg, 2021 Mass. LCR LEXIS 83, 29 LCR 284, 2021 WL 2656937, reaffirming.

Pisano is a case of "first impression" – which means it dealt with an issue that had never previously been addressed by the Massachusetts Land Court – and an

interesting one for condominium practitioners like me. Mrs. Pisano and Nader (the plaintiffs), the owners of a unit at a condominium in Provincetown, Massachusetts, brought the case claiming that they had adversely possessed a portion of the condominium's common area.

Let's stop there for a second. When I started reading this case, my first thought as a "condominium lawyer" was: "How could unit owners possibly believe they have a claim to adversely possess common areas?" This notion was so contrary to my sense of condominium law, it seemed outrageous. My initial thought was that if the plaintiffs were correct, this could open the proverbial floodgates of claims from those who had, without permission of their associations, annexed or staked claim over common areas. This was noteworthy to me as the facts of this case present a fairly common scenario that I frequently see in my own practice: unit owners extending their decks/patios/landscaped areas, etc. into the common areas without express authorization.

In Pisano, when the plaintiffs purchased their unit at the condominium, the prior owners informed them that the deck appurtenant to the unit extended into the common areas (and had for at least ten years prior). The Land Court accepted as true the plaintiffs' contention that, from the time of their purchase, they had "continuously used, maintained, improved, and landscaped the deck, visible to the other Unit Owners" and that this use has been exclusive. The Land Court also accepted that the plaintiffs "extended their use and enjoyment of common areas in ways that are unpermitted and forbidden by the Condominium Master Deed and Trust, including … extending their use of common area storage beyond the parameters of their permitted use." Thus, the plaintiffs argued they could demonstrate that they had legally expanded their unit where they had satisfied all of the elements of an adverse possession claim – open, notorious, exclusive, adverse use for more than 20 years (tacking on the prior owner's similar use).

The condominium trust argued that even if the plaintiffs could "support a claim of adverse possession factually, 'the ownership in a condominium community defeats" the adverse possession claim. The trust reasoned that "common areas must, as a matter of law, remain undivided under G.L. c. 183A, §5." The plaintiffs countered that the condominium statute (M.G.L. c. 183A), does not explicitly bar claims for adverse possession, and, therefore, "[u]nless and until the Legislature enacts a statute barring adverse possession to common areas" they could acquire title in that fashion. This set the stage for the Land Court to determine "whether condominium unit owners may obtain title by adverse possession over

common areas of a condominium, adding that area to their unit, or whether such a claim is barred by c. 183A."

Fortunately (in my opinion), the Land Court set this right. The court found that while the condominium statute did "not explicitly bar adverse possession claims over common areas by unit owners, that [did] not end the inquiry. The court must look at the language of the statute to determine if the Legislature intended that unit owners be barred from obtaining title to common areas by adverse possession." Judge Foster noted that, by law, each unit owner in a condominium is entitled to an undivided interest in the common areas and facilities as set forth in the master deed and that the statute made it clear that such interest may "*not be altered without the consent of all unit owners whose percentage of the undivided interest is materially affected, expressed in an amendment to the master deed duly recorded*…" The Court interpreted the provisions of the statute, read together, to provide for "a scheme of common ownership of common areas that is antithetical to adverse possession by one of the unit owners." (Yes! Antithetical indeed).

In what I hope proves to be immutable precedent (as it neatly squares with my understanding of condominium law in this state), the Land Court ruled that "to allow a single unit owner to take title to common area by adverse possession would allow that unit owner to expand their unit into the common area without the consent of all unit owners. While adverse possession is just that —adverse— the statutorily provided-for scheme to which unit owners submit when they voluntarily buy into the condominium arrangement of property rights necessarily means some forms of ownership, i.e., ownership by adverse possession over common areas, will not be allowed."

In other words, condominium owners can forget expanding their units by hostile takeover. Those looking to expand decks, patios or similar elements into the common areas should coordinate with their governing boards to do so in compliance with the governing documents and M.G.L. c. 183A.