

SENATE BILL REPORT

ESHB 1026

As of March 11, 2011

Title: An act relating to adverse possession.

Brief Description: Changing provisions relating to adverse possession claims.

Sponsors: House Committee on Judiciary (originally sponsored by Representatives Rolfes, Orcutt, Carlyle, Blake, Angel and McCune).

Brief History: Passed House: 2/23/11, 95-1.

Committee Activity: Judiciary: 3/11/11.

SENATE COMMITTEE ON JUDICIARY

Staff: Juliana Roe (786-7438)

Background: Adverse possession is a principle of real estate law that allows a person who possesses the land of another for a specified period of time to claim legal title to that land. To make a successful claim, the person must have sufficiently possessed the property for a set period of time and meet several additional conditions stemming from statutes and common law. Adverse possession claims often arise as a defense to actions for ejectment or to quiet title to a parcel.

Washington law generally requires plaintiffs or their predecessors to have possessed the land at issue for at least ten years before an adverse possession action is commenced. In certain situations, state statutes reduce the length of possession necessary. The payment-of-taxes statute allows an adverse possessor to gain title in only seven years if, in addition to meeting the usual common-law requirements, the person (1) has color of title, a document that appears to convey title but does not legally do so; (2) has paid all taxes on the land for seven successive years; and (3) has a good faith belief that he or she has title. The less-commonly used connected-title statute reduces the period to seven years for a possessor who has a title to the land traceable to a public deed.

Judicial decisions generally require an adverse possession to be (1) open and notorious, such that possession is visible and discoverable to the true owner; (2) actual and uninterrupted, requiring sufficient physical possession or use of the land over a continuous, specified length of time; (3) exclusive, or not shared with the true owner; and (4) hostile, or objectionable to the owner of the land considering the character of possession and location of the property.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Courts presume the holder of legal title to the land has possession, so the party claiming to have adversely possessed the property has the burden of establishing the existence of each element for the requisite period. In Washington, courts do not take account of the adverse possessor's good faith belief, or lack thereof, that he or she owns the land.

A person bringing an adverse possession claim must prove each element of the case by a preponderance of the evidence, the burden of proof typically used in civil jury cases. However, some cases require plaintiffs to offer more persuasive proof, such as clear, cogent, and convincing evidence. To satisfy the preponderance of the evidence standard, a factfinder must determine a fact to be more probably true than not. Under the higher standard, courts have required factfinders to determine that a fact is highly probable.

This higher standard of proof is required in some adverse possession-related actions. For example, an adverse possessor claiming ownership of forest land must establish by clear and convincing evidence that the adverse claimant has made or erected substantial improvements and remained on the land for at least ten years. Courts also require the clear, cogent, and convincing standard for the doctrine of mutual recognition and acquiescence, a theory related to adverse possession that allows a marked property boundary line to be adjusted when both parties have long considered it to lie in a certain place.

Adverse possession claimants generally are not required to pay defending parties' legal costs or attorneys' fees. When a landlocked property owner wants to acquire access through a private condemnation of a way of necessity, however, the owner must pay attorneys' fees incurred by the other parties, and for the value of the easement granted.

Summary of Bill: A person asserting a claim of adverse possession must prove each element of his or her case by clear, cogent, and convincing evidence. The new burden of proof and possible requirement to pay costs and fees do not affect adverse possession claims brought under the connected-title statute or the payment-of-taxes statute. The new provisions also do not apply to the statute governing adverse possession of forest lands.

A person who loses in an action asserting title to real property by adverse possession may be required to pay all or part of the other party's costs and reasonable attorneys' fees if the court determines that such an award is equitable and just.

A party who prevails against the holder of recorded title at the time an adverse possession action is filed, or against a later purchaser of the title, may be required to reimburse that holder or purchaser for part or all of any taxes and assessments on the property that the losing party paid during the period of adverse possession. The court also may require the prevailing party to pay to the county treasurer part or all of any taxes and assessments levied on the property after the filing of the claim that are due and remain unpaid at the time of judgment.

If the court orders payment or reimbursement of taxes and assessments, the court must decide how to allocate the taxes and assessment based on all the facts and in a way that appears equitable and just.

This act applies to adverse possession actions filed on or after July 1, 2012.

Appropriation: None.

Fiscal Note: Not requested.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: This bill does not get rid of basic adverse possession laws. Rather, it raises the standard which must be proved by those who wish to take another's land and awards attorney's fees on a case by case basis. These are reasonable and modest reforms to help level the playing field. There currently exists a website that explains how an individual can obtain land cheaply by way of adverse possession. This is unfair.

One example comes from a woman who purchased a 20 acre parcel with an old farm house. She had hopes of building her dream house on this land. When she had the property surveyed she discovered that two of her neighbors were impending on her land. She tried discussing the matter with her neighbors to no avail. She was forced to hire an attorney even though neither one of her neighbors fit the criteria for adverse possession. Her attorney informed her that she would have to spend a great deal of her own money in defending her property. She filed suit which resulted in her dog being shot and her fence being broken. This problem led to a battle between the neighbors. Prior to this issue she had gotten along with her neighbors. The fight lasted four years.

People have a reasonable expectation to believe that they have legal title to what they purchase. However, people abuse the law and continue to take something for nothing. Colorado has changed its law on adverse possession. New York has also changed its law so that inserting fences or shrubs will not qualify. Title insurance companies will not pay for claims of adverse possession. Adverse possession laws allow your neighbors to hold you ransom. The current state of adverse possession destroys neighborhoods. Raising the evidentiary standard is the minimum of what should happen. This is a loss of land. Giving judges flexibility to award fees is fair. Just because this law has existed for so long does not mean that it has to remain the same.

CON: This bill is not a solution to this problem. What is really happening is trespassing. As a property owner, you have the right to force those on your land to move. The legislature should really just amend the trespass law. Under current timber trespass laws you don't just pay for the tree that you cut down, but you pay for the treble damages and attorneys' fees as well. What you should be doing is discouraging law suits over the survey line and encouraging stability of land title. This bill encourages people to go to court.

Adverse possession is different than it was in 1880. The common law has evolved. Adverse possession cases continually change to reflect differences in property ownership and use. The current laws strike a proper balance. There exists a process for landowners to resolve disputes.

OTHER: There is no problem with section two of the bill. But, section one that sets the new burden of proof will weaken the jurisprudence so that cases that were previously decided will not be subject to further interpretation. I suggest a standard of good faith.

Persons Testifying: PRO: Representative Rolfes, prime sponsor; Chris Norton, Christopher Mekie, landowners.

CON: Dwight A. Bickel, Washington Land Title Association; Bill Clarke, Washington Realtors.

OTHER: Robert W. Zierman, Justice Smiles, PLLC.