



# The Florida Senate

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Committee on Judiciary

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## REVIEW OF REQUIREMENTS FOR ACQUIRING TITLE TO REAL PROPERTY THROUGH ADVERSE POSSESSION

### Issue Description

In Florida, if a person continuously occupies a parcel of real property for seven consecutive years and does not possess a legal document to validate a claim to the property, the person may acquire ownership of the property via adverse possession. The person must first file an adverse possession return with the county property appraiser within one year of entry onto the property. The person must also pay all assessed property taxes and liens during the period of occupancy. Finally, the person asserting an adverse possession claim without color of title must demonstrate that he or she has cultivated or improved the land in some manner or protected the land subject to the claim by a substantial enclosure (typically a fence). A person may make an adverse possession claim despite the fact that he or she has actual knowledge that the property in question belongs to another.

Current law does not guarantee the record landowner the first opportunity to pay the taxes on his or her property. As a result, the property tax bills may be paid by the person claiming adverse possession before the property owner receives the tax bill or makes the payment. Regardless of the motives of the adverse possessor, the filing of the adverse possession return with the property appraiser may create problems for the record landowner in the event he or she wishes to sell the property. In order to protect his or her interests in the property after the adverse possession filing, a property owner must either persuade the filer to voluntarily withdraw the adverse possession claim or file a civil action to protect the owner's rights to the property. The current laws governing adverse possession claims may be conducive to abuse of the adverse possession process in Florida.

The purpose of this interim project is to review the case law, statutes, and legal scholarship in Florida and other states regarding the application of adverse possession to identify opportunities to discourage abuse of the adverse possession process and to examine the adverse possession framework in its entirety for potential enhancements.

### Background

#### Origins of Adverse Possession

Centuries ago in England, statutes limiting the time in which to initiate a legal action to recover possession of land by way of an ejectment action were created.<sup>1</sup> These limitations on ejectment actions continue to exist today in most states to terminate the property owner's access to the courts to recover possession in land.<sup>2</sup> The adverse possession doctrine "takes these statutes one conceptual step further by providing that the adverse possessor actually gains legal title, displacing the record owner."<sup>3</sup> The doctrine of adverse possession "dates back at least to sixteenth century England and has been an element of American law since the country's founding."<sup>4</sup> The first adverse possession statute appeared in the United States in North Carolina in 1715.<sup>5</sup>

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<sup>1</sup> Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2421 (Aug. 2001) (citing 3 *American Law of Property*, s. 15.1, at 755-56 (A. James Casner ed., 1952)) (tracing the origin of adverse possession to the thirteenth century).

<sup>2</sup> *Id.* at 2421-22.

<sup>3</sup> *Id.* at 2422.

<sup>4</sup> Alexandra B. Klass, *Adverse Possession and Conservation: Expanding Traditional Notions of Use and Possession*, 77 U. COLO. L. REV. 283, 286 (Spring 2006).

<sup>5</sup> Brian Gardiner, *Squatters' Rights and Adverse Possession: A Search for Equitable Application of Property Laws*, 8 IND. INT'L & COMP. L. REV. 119, 129 (1997).

Adverse possession is defined as “[a] method of acquisition of title to real property by possession for a statutory period under certain conditions.”<sup>6</sup> An adverse possessor must generally establish five elements in relationship to possession. The possession must be:

- Open;
- Continuous for the statutory period;
- For the entirety of the area;
- Adverse to the record owner’s interests; and
- Notorious.<sup>7</sup>

In most jurisdictions, state statutory law prescribes the limitations period – the period in which the record owner must act to preserve his or her interests in the property – while the state’s body of common law governs the nature of use and possession necessary to trigger the running of the statutory time period.<sup>8</sup> As legal scholars have noted, “[a]dverse possession decisions are inherently fact-specific.”<sup>9</sup> Therefore, an adverse possessor must establish “multiple elements whose tests are elastic and provide the trier of fact with flexibility and discretion.”<sup>10</sup>

### Policy Considerations Supporting Adverse Possession

The initial policy considerations supporting adverse possession statutes are that the doctrine encourages landowners to “maintain and monitor their land.”<sup>11</sup> Furthermore, adverse possession discourages owners from “sleeping” on their property rights for extended periods of time. Legal theorists assert that once the record property owner obtains actual or constructive notice that someone is asserting dominion over his or her property, the owner has a legal obligation to assert his or her rights within the enumerated time frame or forfeit those rights.<sup>12</sup> Some argue that adverse possession promotes “efficient and economic use of land, thereby serving important economic and social ends.”<sup>13</sup> Others assert that adverse possession serves an administrative purpose by curing minor title defects, which in turn protects the title of the possessor.<sup>14</sup>

Jurist Oliver Wendell Holmes proposed another rationale for adverse possession, described as the “personhood model.”<sup>15</sup> His theory recognizes that after a significant period of time, the person in actual possession of land develops a personal attachment to the property that is stronger than the attachment of the record owner, “who presumably has become increasingly detached from the land.”<sup>16</sup> Because the adverse possessor has embraced the land, while the record owner has essentially abandoned the land, it arguably becomes necessary, as a matter of law, to transfer title to the individual with the strongest ties to the real property.<sup>17</sup>

### Adverse Possession in Florida

In Florida, there are two ways to acquire land by adverse possession, which are prescribed by statute.<sup>18</sup> First, an individual adversely occupying property may claim property under color of title if he or she can demonstrate that

<sup>6</sup> *Id.* at 122 (quoting BLACK’S LAW DICTIONARY 53 (6th ed. 1990)).

<sup>7</sup> *Id.*

<sup>8</sup> Klass, *supra* note 4, at 287.

<sup>9</sup> Geoffrey P. Anderson and David M. Pittinos, *Adverse Possession After House Bill 1148*, 37 COLO. LAW 73, 74 (Nov. 2008).

<sup>10</sup> *Id.*

<sup>11</sup> Gardiner, *supra* note 5, at 122.

<sup>12</sup> Klass, *supra* note 4, at 289.

<sup>13</sup> Gardiner, *supra* note 5, at 122.

<sup>14</sup> Klass, *supra* note 4, at 290.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Candler Holdings Ltd. Iv. Watch Omega Holdings, L.P.*, 947 So. 2d 1231, 1234 (Fla. 1st DCA 2007). In addition to adverse possession, a party may gain use of adversely possessed property by acquiring a prescriptive easement upon a showing of 20 years of adverse use. The elements necessary to establish a prescriptive easement are akin to the elements of an adverse possession claim. To establish a prescriptive easement, a claimant must, by clear and convincing evidence, prove:

- Actual, continuous, and uninterrupted use by the claimant or any predecessor in title for the prescribed period of 20

the claim to title is the derivative of a recorded written document and that he or she has been in possession of the property for at least seven years.<sup>19</sup> It is irrelevant whether the recorded document is legally valid or is fraudulent or faulty. To demonstrate possession, the adverse possessor must prove that he or she cultivated or improved the land, or protected the land by a substantial enclosure.<sup>20</sup> Alternatively, in the event a person occupies land continuously without color of title – i.e., without any legal document to support a claim for title – the person may seek title to the property by filing a return with the county property appraiser’s office within one year of entry onto the property, and paying all property taxes and any assessed liens during the possession of the property for seven consecutive years.<sup>21</sup> Similar to claims made with color of title, the adverse possessor may demonstrate possession of the property by showing that he or she:

- Protected the property by a substantial enclosure (typically a fence); or
- Cultivated or improved the property.<sup>22</sup>

In Florida, courts have noted that “[p]ublic policy and stability of our society . . . requires strict compliance with the appropriate statutes by those seeking ownership through adverse possession.”<sup>23</sup> Adverse possession is not favored, and all doubts relating to the adverse possession claim must be resolved in favor of the property owner of record.<sup>24</sup> The adverse possessor must prove each essential element of an adverse possession claim by clear and convincing evidence.<sup>25</sup> Therefore, the adverse possession claim cannot be “‘established by loose, uncertain testimony which necessitates resort to mere conjecture.’”<sup>26</sup>

### Abuse of the Adverse Possession Process

Despite the policy considerations supporting the application of adverse possession in Florida, abuse of the statute may be occurring in certain contexts because the adverse possessor may acquire title to property in instances where the record owner attempts to pay taxes and monitors the property. Some landowners in Florida<sup>27</sup> have expressed concern that individuals are capitalizing on the current adverse possession laws to gain title to adjoining properties, and that the burden to overcome these claims unfairly rests with the property owner of record. For

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years;

- That during the whole prescribed period the use has been either with actual knowledge of the owner or so open, notorious, and visible that knowledge of the use is imputed to the owner;
- That the use related to a certain limited and defined area of land or, if for a right-of-way, the use was of a definite route with a reasonably certain line, width, and termini; and
- That during the whole prescribed period the use has been adverse to the lawful owner, that is, the use has been made without the owner’s permission and under some claim of right other than permission from the owner, the use has been either exclusive of the owner or inconsistent with the owner’s rights to its use and enjoyment, and the use has been such that, during the whole prescribed period, the owner had a cause of action against the user for the use being made.

*Dan v. BSJ Realty, LLC*, 953 So. 2d 640, 642 (Fla. 3d DCA 2007).

<sup>19</sup> Section 95.16, F.S. See also *Bonifay v. Dickson*, 459 So. 2d 1089 (Fla. 1st DCA 1984). The Florida Legislature, by acts now embodied in statute, reduced the period of limitations as to adverse possession to seven years but left at 20 years the period for acquisition of easements by prescription. *Crigger v. Florida Power Corp.*, 436 So. 2d 937, 945 (Fla. 5th DCA 1983).

<sup>20</sup> Section 95.16, F.S.

<sup>21</sup> Section 95.18(1), F.S. The 1939 Legislature added to what is now s. 95.18(1), F.S., a provision which required that an adverse possessor without color of title must file a tax return and pay the annual taxes on the property during the term of possession. Chapter 19254, s. 1, Laws of Fla. (1939). A 1974 amendment to the statute eliminated the requirement that taxes be paid annually. Chapter 74-382, s. 1, Laws of Fla.

<sup>22</sup> Section 95.18(2), F.S.

<sup>23</sup> *Candler Holdings Ltd. I*, 947 So. 2d at 1234.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* (citing *Bailey v. Hagler*, 575 So. 2d 679, 681 (Fla. 1st DCA 1991)).

<sup>26</sup> *Id.* (quoting *Grant v. Strickland*, 385 So. 2d 1123, 1125 (Fla. 1st DCA 1980)).

<sup>27</sup> Senate professional staff interviewed landowners subject to adverse possession claims, as well as real property practitioners, to gauge their experiences with the process. In some instances the record landowner may reside in another state. This absence from Florida may further impair the landowner’s ability to oppose an adverse possession claim.

example, in some counties, adjoining landowners have filed numerous adverse possession returns on several properties and have paid property taxes on those parcels in an attempt to claim title to the property by adverse possession despite any good faith claim to title. There is no boundary line dispute or other good faith belief that the title to the property lawfully belongs to the adverse possessor. According to property appraisers and real property practitioners, in some cases, the property owner may not receive notice that a claim of adverse possession has been filed on his or her property and may not become aware of a potential problem until his or her tax payment is returned, or an attempted sale of the parcel reveals the filing. In order to protect the owner's property interests, he or she may be required to initiate litigation to eject the adverse possessor or to receive a judgment declaring his or her rights to the property. Significant legal fees and other costs may be associated with countering adverse possession claims.

On the other side of the argument, the adverse possession practices that some object to are authorized by the existing statutory framework. Over time, legal scholars have articulated policy considerations underlying the concept of adverse possession; however, the current adverse possession statute itself does not articulate policy-based criteria for when application of the doctrine is warranted or merited. Rather, the statute prescribes objective procedures for someone to follow if he or she wishes to claim property via adverse possession. Although some proponents of adverse possession reform may view these practices as an abuse or misuse of the intended goal of adverse possession, the practices do not violate the law.

## Findings and/or Conclusions

In light of the concerns expressed about adverse possession claims made without color of title in Florida, Senate professional staff consulted with property appraisers, tax collectors, real property practitioners, property owners, and other interested parties to determine how adverse possession claims without color of title are processed in actual practice, to identify any inequities in the process, and to formulate possible enhancements to the overall framework. Although research and interviews revealed that adverse possession continues to have some utility in Florida and that the complete abolition of adverse possession in Florida is unwarranted, most agree that in adverse possession claims the scales are tipped in favor of the adverse possessor rather than the property owner of record, at least in the initial stages of the filing of the adverse possession claim.

From the filing of the adverse possession return to any litigation resulting from the claim, research reveals that the Legislature could prescribe measures that would afford protection to landowners from adverse possession claims without color of title against landowners who monitor and pay taxes on the property. Because someone may simply file a return to initiate the adverse possession claim with little or no investment in the claim, these findings suggest some potential enhancements to the adverse possession process that would "raise the stakes" for an adverse possessor. Other findings suggest modifications to the current statutory framework to enhance the overall application of adverse possession without color of title to benefit both adverse possessors and record landowners.

## Utility of Adverse Possession in Florida

According to those interested in real property issues, adverse possession in Florida may be used by individuals to gain title to property in a variety of contexts. Adverse possession arises in numerous circumstances relating to real property, including, but not limited to:

- Disputes over boundary lines;
- Cases in which the true owner of a parcel cannot be determined by the county;
- Cases in which property has been abandoned by the record owner;
- Cases in which the true owner is known to the adverse possessor, the true owner fails to pay property taxes on the property, and the adverse possessor chooses to seek title; or
- Cases in which the true owner is known to the adverse possessor, the true owner pays the property taxes on the property, but the adverse possessor chooses to seek title.

Some counties in Florida have experienced an influx of adverse possession filings, while other counties have received very few filings, or none at all, in recent years. For example, the following figure illustrates the number of adverse possession filings received by the Polk County Property Appraiser's Office in recent years:

<b>ADVERSE POSSESSION FILINGS POLK COUNTY, FLORIDA 2004-2009<sup>28</sup></b>	
<b>Year</b>	<b>Returns Filed</b>
2004	17
2005	114
2006	82
2007	17
2008	267
2009	38
<b>Total Filings</b>	<b>535</b>

Currently, Polk County has more than 500 adverse possession returns on record. In Orange County, there are 51 total adverse possession filings on record out of 434,940 total parcels. The Brevard County Property Appraiser's Office has between 100 and 150 adverse possession returns on record. Although the incidence of adverse possession claims appears to be more prevalent in rural areas in Florida, urban areas also experience adverse possession filings.

Based upon research and interviews with real property practitioners, adverse possession continues to serve legitimate public interests throughout Florida. From curing title defects on a rural parcel, to encouraging development of abandoned properties with little or no value in an urban area, the current adverse possession statutes promote diligence in maintenance of one's property and allow individuals to improve rural and urban areas by acquiring title to abandoned parcels. Real property practitioners report that adverse possession claims are fact specific, with each case presenting unique circumstances and consequences. Even with obvious beneficial uses of the current adverse possession statutes, certain changes and enhancements to the adverse possession framework may be necessary to deter individuals from availing themselves of this doctrine for the purpose of exploiting the property rights of a known owner of record who monitors his or her property and attempts to timely pay property taxes.

### **Filing of the Adverse Possession Return**

Under the statute, the first step in pursuing an adverse possession claim without color of title is the filing of the adverse possession return with the property appraiser's office in the county where the property is situated. The Department of Revenue has developed a form return that requires the adverse possessor to include the following pertinent information related to the adverse possession claim:

- Date of filing;
- Date of entering into possession of the property;
- Name and address of the claimant;
- Legal description of the property;
- Notarization clause; and
- Receipt (to be completed by the property appraiser or designated representative).<sup>29</sup>

Because the return is a crucial step in initiation of the adverse possession process, certain changes to the administration of the return, as well as modifications to the return itself, may balance the interests of record landowners with adverse possessors.

<sup>28</sup> Data provided by the Polk County Property Appraiser's Office.

<sup>29</sup> Florida Department of Revenue, Form DR-452, *Form for Return of Real Property in Attempt to Establish Adverse Possession without Color of Title* (rev. Aug. 1993).

### ***Uniform Return***

Although most property appraisers report that they are using the return developed by the Department of Revenue, there is no requirement by statute that a uniform return be adopted or utilized. Some attorneys have advised that they create their own return and file it with the property appraiser. Property appraisers reported that they do not make the return available on the property appraiser's website, but that the form is available in the property appraiser's office to a citizen seeking to file an adverse possession claim. In order to promote uniformity throughout the state, the Legislature may wish to require the adoption of a uniform return to be filed with the property appraiser. A form return could be included in statute, or the Legislature could require the Department of Revenue to promulgate a rule establishing a return for uniform use by property appraisers.

### ***Description of Use of the Property***

The current adverse possession return does not require the adverse possessor to describe how the property is being possessed or used. Because use and possession are required elements of adverse possession claims that are often contested in litigation, some have argued that requiring an adverse possessor to actually describe how he or she is using the property on the return would benefit owners of record, and in some instances deter abuse of the process. An adverse possessor could not simply write the date of possession and the legal description and file the form with the property appraiser, but instead would be required to set forth factual details describing whether he or she has used the property by fencing it, cultivating it, or improving it in some manner. Providing this information may also have some evidentiary value for record landowners opposing the adverse possession claim in court. Hypothetically, an adverse possessor may assert in the return that he or she has fenced the disputed property. In turn, the record owner may take photographs of the disputed property after the date of the filing of the return demonstrating that no fence was present on the property. The landowner could introduce the return and the photographs, if admissible, to rebut the adverse possessor's claim at trial.

In addition, property appraisers also report that adverse possessors often provide only portions of the legal description of the disputed property on the return. To enhance the accuracy of these filings, property appraisers suggest requiring the entire valid legal description on the return. Furthermore, some property appraisers have suggested requiring adverse possessors to file a survey of the disputed property with the return. This approach may deter abuse of the process by requiring the adverse possessor to commit financially to the claim, and it would aid property appraisers in determining the exact boundaries of the parcel or portion of the parcel that is in dispute.

### ***Penalty of Perjury***

Although the adverse possessor must have the current return notarized prior to filing with the property appraiser, there is no penalty for providing false information on the return. One potential option to discourage the filing of false information is to require the adverse possessor to attest to the truthfulness of the information provided on the return under penalty of perjury. For example, language could be included on the form which states:

UNDER PENALTIES OF PERJURY, I DECLARE THAT I HAVE READ THE FOREGOING  
RETURN OF REAL PROPERTY IN ATTEMPT TO ESTABLISH ADVERSE POSSESSION  
WITHOUT COLOR OF TITLE AND THAT THE FACTS STATED IN IT ARE TRUE AND  
CORRECT.

The adverse possessor would then be required to sign the written declaration and have the return notarized.<sup>30</sup> An adverse possessor may more seriously consider the filing of the adverse possession return if confronted with possible prosecution for a third-degree felony for providing false information on the return. Conversely, individuals frequently sign documents under penalty of perjury and may not fully appreciate the criminal and monetary penalties associated with providing false information on the document.

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<sup>30</sup> A person who knowingly made a false declaration on the return would be guilty of the crime of perjury by false written declaration, which is a third-degree felony, punishable by imprisonment not to exceed five years and a fine not to exceed \$5,000. Section 92.525(3), F.S.

### ***Filing Fee for Returns***

Another option to deter abuse of the adverse possession process is to require the adverse possessor to pay a filing fee to the property appraiser upon the filing of the return. In conjunction with other reforms and changes related to the adverse possession return, an adverse possessor may more seriously consider the filing of the return if he or she must make a monetary investment to pursue the claim. The fee could range from a nominal fee to a higher fee that would considerably curb adverse possession filings. Property appraisers report that processing these payments would increase their administrative workload. However, they recognize that the minimal number of filings would counterbalance this burden. Whether to allow the property appraisers to retain these funds to absorb any costs associated with processing these payments or direct the filing fees to general revenue must also be carefully considered if a filing fee is pursued.

### **Adverse Possession Filing Notation**

Upon the presentation of the return to the property appraiser's office, the property appraiser accepts the form and updates the parcel information to denote the adverse possession filing. The property appraiser does not verify the accuracy or legal sufficiency of the information provided. In some counties, the property appraiser includes a clear notation that an adverse possession return has been filed on a particular parcel. This notation often appears in the legal description field of the parcel information. This enables a property owner or other layperson searching the property appraiser's website to quickly discern whether an adverse possession claim has been filed against a particular parcel. In other counties, it may not be evident that an adverse possession claim has been filed against a particular parcel after reviewing the parcel information available on the property appraiser's website. Providing a clear notation that an adverse possession claim has been filed may be beneficial to property owners, as well as a member of the public who have some interest in a particular parcel of property.<sup>31</sup>

### **Notice of Adverse Possession Claims to Property Owners**

The current adverse possession statutory framework does not require notice to the property owner of record that an adverse possession return has been filed with the property appraiser's office. As a result, unless the property appraiser's office has instituted a policy of providing notice to the record landowner as a courtesy, the record owner often is unaware of the adverse possession filing. During discussions with various property appraisers throughout the state, only a few indicated that, upon receipt of a return, the property appraiser provides a copy of the return and a form letter to the record property owner advising that an adverse possession claim has been filed.

Providing the record landowner with some form of notice that an adverse possession claim has been filed may enhance a property owner's ability to oppose an adverse possession claim. In order to provide notice to the record landowner, the Legislature could require the adverse possessor to serve notice on the record landowner, if the record landowner can be determined, within a prescribed number of days after filing the notice with the property appraiser. The complexity of this notice could range from simply mailing the return to the record landowner by certified mail, to actual personal service, similar to service required upon initiation of a civil action in a Florida court. The adverse possessor could be required to provide proof of service to the property appraiser within a certain number of days after filing of the return in order to avoid removal of the adverse possession return from the records. Alternatively, the Legislature could require the property appraiser to provide a copy of the return to the record landowner upon the filing of the return. Although most argue that notice would enhance a record owner's ability to counter an adverse possession claim, some argue that proper monitoring of the land, as well as notice that taxes are being paid by someone else, should be sufficient notice to the record owner that an adverse possession claim is being pursued.

### **Payment of Property Taxes by Adverse Possessors**

In addition to filing the return for adverse possession and satisfying the other statutory elements, an adverse possessor must also pay all taxes and matured installments of special improvement liens levied against the property by the state, county, and municipality in order to satisfy the adverse possession statute. The tax-payment requirement is a source of contention for some landowners and real property practitioners. Because of the broad

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<sup>31</sup> Property appraisers note that certain costs will be associated with updating systems to comply with any changes to adverse possession notations in their current public searchable databases.

implications of any changes to the tax-collection component of the adverse possession process, it may be difficult to construct enhancements to this process without exhaustive and comprehensive study.

### *Addition to the Tax Roll*

The filing of the return authorizes the property appraiser to include the adverse possessor on the tax roll.<sup>32</sup> Although all property appraisers are adding the adverse possessor to the tax roll, there appears to be two methods in use in Florida for accomplishing this task. Under the first method, most property appraisers add the adverse possessor as an additional owner of the real property with a zero-percent interest in the property. Under the second method, a few counties are creating a duplicate parcel with a distinct parcel number that lists the adverse possessor as the owner of the property.

In those counties that employ the first method by adding the adverse possessor as an additional owner, it is common practice that only the owner of record receives a tax bill. In practice, an individual seeking adverse possession in these counties nevertheless may pay taxes on the first day they are due before the record landowner remits payment. If the landowner tries to make the tax payment after the tax collector has received payment from the adverse possessor, the payment will not be accepted and will be returned to the record landowner.<sup>33</sup> Thus, the record owner and the adverse possessor must race to the tax collector office to protect their respective interests in the property. This method of adding the adverse possessor as an additional owner may not be conducive to accurate tax payments when only a portion of a parcel is claimed under adverse possession. Because an assessed value is not assigned by the property appraiser to the portion of the parcel, the adverse possessor may be required to pay taxes on the entire parcel. Some property appraisers also report that they do not have the authority to create a duplicate parcel and assign a parcel number when the adverse possession return has been filed.

Although adding the adverse possessor as an additional owner is the preferred method by property appraisers, creating a duplicate parcel under the second method has some advantages in addition to disadvantages. This method does not foreclose a record property owner's ability to pay taxes. In these counties, the record owner continues to pay taxes on the original parcel while the adverse possessor pays taxes on the duplicate parcel. Double taxation problems may exist with the collection of taxes on the same parcel from two different sources. In addition, there is no specific guidance to property appraisers regarding when and under what criteria refunds should be allowed for payments by adverse possessors when adverse possession claims are unsuccessful in court or are abandoned by the adverse possessor.

The duplicate-parcel method does facilitate payment of taxes by adverse possessors in partial claims. When the duplicate parcel is created in partial claims, a value is assessed to the disputed portion of the property and the adverse possessor is not required to pay an entire tax bill. However, when both tax payments are accepted, a record owner cannot defeat an adverse possession claim by making a tax payment. Under the first method (adding the adverse possessor as an additional owner), if the record owner makes the first property tax payment for a tax year, the adverse possessor's claim is defeated, and the clock for adverse possession starts over again.

Due to the inconsistencies and problems inherent in both methods of adding the adverse possessor to the tax roll, the Legislature may wish to establish how the property appraiser will add the adverse possessor to the tax roll, accounting for those scenarios in which adverse possession claims only include portions of parcels of property. Alternatively, the Legislature could require the Department of Revenue to adopt rules to create a uniform procedure for addition of tax collectors to the tax roll and for collection of taxes by both record landowners and adverse possessors.

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<sup>32</sup> The current form return contains a receipt to be signed by the property appraiser acknowledging the filing of the return, as well as certifying that the adverse possessor has been added to the tax roll.

<sup>33</sup> The property appraiser may only accept one payment for a parcel of property. Any subsequent payments will not be accepted. See Op. Att'y Gen. Fla. 71-214 (1971). In this opinion, in addition to concluding that the tax collector should accept property taxes from the first party to tender payment and return subsequent payments, the Attorney General concluded that the tax collector must mail each person listed on the tax roll a notice of taxes levied against the subject property as required in s. 197.065, F.S. (1971).

If the Legislature determines that it is preferable for the property appraiser to create a duplicate parcel with a distinct parcel number upon the filing of an adverse possession return, one option to address the double-taxation problem associated with this method is to allow the tax collector to collect payments from both the record owner and the adverse possessor and hold the extra collected taxes in an escrow account until final disposition of the adverse possession claim. It may be necessary to formulate a process to allow for refunds to record owners and adverse possessors contingent upon the outcome of the adverse possession claim, as well as to allow for forfeiture of tax payments by the adverse possessor in the event he or she never files suit to gain title after satisfying the statutory requirements of the claim. This approach may have a minimal impact on the local government budgeting process due to the limited number of filings throughout the state each year. Property appraisers would experience an increase in administrative duties associated with maintenance of the escrow accounts, monitoring the status of the adverse possession claims, as well as administering the refund of payments.

### ***Priority of Tax Payments for Record Landowners***

In conjunction with any changes to the tax component in adverse possession cases, the Legislature may wish to consider establishing priority of tax payments to improve a record landowner's ability to pay taxes on his or her property prior to the adverse possessor. Some landowners and practitioners assert that it is inequitable to allow a third party to pay the property taxes on their property, when the record owner is capable and willing to make the tax payment. These individuals call for some reform to preserve the ability to pay property taxes without the threat of the return of the payment in the event the adverse possessor makes the first payment of the taxes. In order to address this concern, the Legislature could provide a record landowner a window of opportunity to pay property taxes before an adverse possessor could remit payment. For instance, a statutory change could preclude an adverse possessor from making a tax payment each year until 30 days have passed from the mailing of the tax bill to the record landowner. Another option is to establish priority for property tax payments made by record landowners. Under this approach, regardless of when the record landowner makes a timely tax payment, if an adverse possessor has already remitted payment, the adverse possessor's payment would be returned and the record landowner would be afforded credit for the tax payment.<sup>34</sup> Most property appraisers believe that establishing priority may be preferable and less administratively challenging than providing a certain number of days for the record landowner to make the tax payment.

Any changes in the tax-collection process for the benefit of the record owner would be a policy shift that could effectively preclude the adverse possessor from obtaining title to property because the adverse possessor may be unable to satisfy the tax-payment element of the statute. In addition, any changes to the tax-payment framework, as it relates to real property, must be carefully evaluated. The current process of allowing installment and partial payments in some jurisdictions, as well as discounts for early tax payments, may complicate efforts to afford record landowners the first opportunity to pay property taxes. In addition, although the occurrences of adverse possession claims may be minimal, local government funding could be affected by refunds to adverse possessors who have paid property taxes prior to the record landowner. Furthermore, tax collectors may incur costs associated with additional duties to monitor duplicate tax payments and determine if refunds are appropriate.<sup>35</sup>

### **Removal of Adverse Possessors from Tax Roll**

Under current practice, the adverse possessor is added to the tax roll upon the filing of the adverse possession return. Property appraisers report that they only have authority to remove the notation of the adverse possession filing from their records if:

- The adverse possessor voluntarily withdraws the adverse possession filing;<sup>36</sup>
- The adverse possessor fails to pay taxes at any point during the seven years;<sup>37</sup>

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<sup>34</sup> Currently, corrections resulting in refunds of \$400 or more must be approved by the Department of Revenue prior to remittance of the refund by the tax collector. See s. 197.182(1)(i), F.S.

<sup>35</sup> Property appraisers may also incur some costs in establishing a method to document adverse possession filings on the tax roll to aid tax collectors in determining if refunds to adverse possessors are necessary.

<sup>36</sup> Some property appraisers have created a withdrawal form to clearly document the adverse possessors intent to withdraw the adverse possession claim. The Legislature may wish to require the Department of Revenue to develop a uniform withdrawal form for use by county property appraisers to promote uniformity throughout the state.

- A court order is received quieting title in favor of the record owner; or
- A deed is filed granting title of the disputed land from the adverse possessor to the record owner.

Unless the record landowner persuades the adverse possessor to withdraw the claim, files suit to protect his or her interests in the property and receives a favorable judgment from the court, or receives a deed from the adverse possessor conveying the disputed property, the record owner has no recourse for removing the notation that an adverse possession claim has been filed from the property appraiser's records. In some instances, adverse possessors may abandon their claim without ever pursuing a court order awarding title in their name. However, the adverse possessor may remain on the tax roll beyond the seven-year adverse possession time frame. The Legislature may wish to specify under what circumstances property appraisers may remove adverse possessors from the tax roll.

### “Good Faith” Requirement in Adverse Possession Cases

Both Colorado and New York have adopted enhanced and more stringent statutory requirements for adverse possession claims. In July 2008, New York enacted a law changing the statutory requirements for adverse possession. According to the bill sponsor:

Adverse possession should be used to settle good faith disputes over who owns land. It should not be a doctrine which can be used offensively to deprive a landowner of their real property. That only encourages mischief between neighbors and even between families. No good can come of it. This is an incentive which must be curtailed.<sup>38</sup>

In effect, the Colorado and New York legislation limited the application of adverse possession claims to those scenarios in which the adverse possessor could demonstrate a “good faith” belief that the property in dispute belonged to the adverse possessor. For example, the New York adverse possession statute was amended to eliminate references to a “claim of title” and substitute a “claim of right,” which is defined by the statute as “a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be.”<sup>39</sup> Therefore, if the owner of record can be readily determined, the adverse possessor must demonstrate a reasonable belief that the property is his or hers in order to successfully pursue an adverse possession claim.

In 2008, a highly contentious and public adverse possession lawsuit in Boulder, Colorado, served as the catalyst for comprehensive reforms to Colorado's adverse possession statutory framework.<sup>40</sup> Similar to the New York legislation, the Colorado law limits adverse possession filings by requiring adverse possessors to prove all common law elements of the adverse possession claim and establish a reasonable good faith belief that the person adversely possessing (or his or her predecessor) was the true owner of the property.<sup>41</sup> In this context, “good faith” means that the claimant believed that the land belonged to the adverse possessor, while “bad faith” would suggest that the adverse possessor continued a trespass that he or she knew to be without right.<sup>42</sup>

Although the inclusion of the good faith requirement in adverse possession claims may thwart the initiation of claims against landowners who are monitoring their property and timely paying property taxes, others argue that

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<sup>37</sup> Some property appraisers reported that they monitor tax payments and will remove the adverse possessor from the tax roll if there is a break in tax payments by the adverse possessor. Other property appraisers report that they do not monitor tax payments made by adverse possessors.

<sup>38</sup> Tompkins County Bar Association, *Recent Changes to the Adverse Possession Statutes*, [http://www.tcbaweb.com/index.php?option=com\\_content&view=article&catid=902:law-in-the-news&id=61:real-property-law-update&Itemid=53](http://www.tcbaweb.com/index.php?option=com_content&view=article&catid=902:law-in-the-news&id=61:real-property-law-update&Itemid=53) (last visited Sept. 15, 2009) (quoting N.Y. State Senator Betty Little).

<sup>39</sup> N.Y. REAL PROP. ACTS. s. 501(3.). Under New York law, the adverse possessor is not required to demonstrate a “claim of right” if the owner or owners of the real property cannot be ascertained in county records and located by reasonable means.

<sup>40</sup> Anderson, *supra* note 9, at 73 (citing *McLean v. DK Trust*, No. 06cv982 (Boulder County District Court) and ch. 190, 2008 Colo. Sess. Laws 688).

<sup>41</sup> COLO. REV. STAT. ANN. s. 38-41-101(3)(b)(I)-(II). Other states have included a “good faith” element in their respective adverse possession statutes. See ALASKA STAT. s. 09.45.052, HAW. REV. STAT. ANN. s. 669-1, and LA. CIV. CODE ANN. art. 3475.

<sup>42</sup> Anderson, *supra* note 9, at 78.

the requirement poses evidentiary burdens and promotes speculation, possibly even perjury, with very little utility to the resolution of these claims.<sup>43</sup> Unless specific exceptions are adopted, including a good faith requirement in adverse possession claims in Florida would also preclude some adverse possession claims, such as cases where property has been abandoned by an owner of record and the adverse possessor wishes to develop and improve the property for the benefit of the community. This change would represent a significant policy shift from Florida's current statute, which specifically allows adverse possession claims without color of title.

### **Litigation-Related Remedies in Adverse Possession Cases**

Because record landowners may be subject to adverse possession claims and may be required to initiate civil litigation in order to protect their interest in real property, certain litigation-related remedies in adverse possession cases may balance attorney fees and costs incurred by the record owner with financial and other punitive risks associated with the adverse possession claim by the adverse possessor.

#### ***Equitable Relief in Adverse Possession Cases***

Prior to Colorado's adoption of reforms to the adverse possession process, Colorado judges were unable to award any type of compensation to landowners whose title to real property was awarded to an adverse possessor. Under the revised adverse possession framework, judges are authorized to require adverse possessors to pay for any land they are awarded, if deemed equitable under the particular circumstances of the adverse possession claim. The Colorado statute now provides that, in claims where the adverse possessor prevails, the judge may award, in his or her discretion, the following compensation if "fair and equitable under the circumstances":

- Damages to compensate the party losing title to the adverse possessor for the loss of the property measured by the actual value of the property; and
- An amount to reimburse the party losing title to the adverse possessor for all or a part of the property taxes and other assessments levied against and paid by the party losing title to the adverse possessor.<sup>44</sup>

In Florida, current law does not allow a judge presiding over an adverse possession claim to award compensation to the record landowner in the event the court awards title of the property to the adverse possessor. Expanding a judge's authority to award equitable relief, such as compensation to the record landowner if title is lost as a result of an adverse possession claim, may help eliminate extreme inequity in those cases where the adverse possessor is aware that the disputed property is owned by another, yet occupies the property and pays taxes in an attempt to gain title. In addition, adverse possessors may be less likely to file adverse possession claims if there is a genuine risk that they may be required to compensate the record owner for the property in those cases. Preservation of the judge's discretion to award compensation would allow the judges to refrain from awarding compensation in adverse possession cases that are truly premised upon the underlying principles of the doctrine. Conversely, allowing compensation to record landowners by adverse possessors arguably undermines the adverse possession doctrine, which contemplates acquisition of title to the property by open and notorious occupation and without any monetary payment by the adverse possessor. Furthermore, some practitioners assert that affording this relief would create additional litigation to determine the reasonable amount of compensation to be awarded.

#### ***Awards of Attorney Fees and Costs***

Record landowners subject to adverse possession claims must file an ejectment action, a declaratory action, or some other form of civil action in order to oppose the adverse possession filing with the property appraiser to protect their interests in the property in dispute. As previously noted, attorney fees and costs are inevitably associated with this litigation. In some cases, the total costs of legal fees and other expenses associated with the litigation may well exceed the value of the property. Therefore, a landowner may be discouraged from taking affirmative action in the legal system to secure his or her rights in the property.

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<sup>43</sup> *Id.* The Colorado Legislature also heightened the burden of proof in adverse possession cases from a preponderance of the evidence to clear and convincing evidence. COLO. REV. STAT. ANN. s. 38-41-101(3)(a). Florida currently requires proof of adverse possession claims by clear and convincing evidence. *Candler Holdings Ltd. I*, 947 So. 2d at 1234.

<sup>44</sup> COLO. REV. STAT. ANN. s. 38-41-101(5).

Some real property practitioners have suggested that including an attorney-fee provision in adverse possession cases may deter adverse possession filings and reimburse record landowners who chose to oppose the adverse possession filing in court. In practice, such a provision could provide for an award of all reasonable attorney fees and costs incurred by a record landowner upon initiation of an ejectment action or declaratory action to defeat the adverse possession filing. In order to encourage prompt action by record landowners, the Legislature may prescribe that attorney fees are only applicable to actions instituted by landowners within a certain period after the filing of the return and not in civil actions filed by adverse possessors to secure title to the property after the required occupancy period.

A counterargument to creating an attorney-fee provision is that limiting recovery to a record landowner may unnecessarily deter adverse possession filings that are consistent with the policy considerations underlying the doctrine. Furthermore, in some circumstances, a record landowner may recover attorney fees and costs under Florida law. Current law provides that a trial court “shall award” attorney fees to the prevailing party in an action where the court finds that the losing party or his attorney “knew or should have known” that the claim “[w]as not supported by the material facts necessary to establish the claim” or “[w]ould not be supported by the application of then-existing law to those material facts.”<sup>45</sup> Fees are not recoverable where the claim can be supported by “a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success.”<sup>46</sup> Thus, in some limited circumstances where the adverse possessor knowingly pursued an adverse possession claim knowing that the claim was not supported by law or material facts, a record landowner may be entitled to an award of reasonable attorney fees and costs under current law.

## Options and/or Recommendations

This review illustrates a number of potential enhancements to the adverse possession process in Florida. Senate professional staff recommends the following changes to the current adverse possession framework to deter abuse of the process and improve the overall administration of adverse possession claims without color of title:

- Requiring the adverse possessor or the property appraiser to provide actual or constructive notice to the owner of record of the disputed property, if the owner can be determined, upon the filing of an adverse possession return;
- Adopting a uniform return for adverse possession claims to promote uniformity throughout the state;
- Providing that the adverse possessor must provide a detailed description of his or her possession and use of the disputed property;
- Requiring adverse possessors to attest to the truthfulness of the information required in the return under penalty of perjury; and
- Requiring property appraisers to include clear notations that adverse possession filings have been made in their searchable property databases available to the public.

Additional options are available to the Legislature to discourage abuse of the adverse possession process and improve the administration of these claims for the benefit of both record landowners and adverse possessors. These options include:

- Requiring a filing fee for the filing of adverse possession returns with the property appraiser;
- Requiring the adverse possessor to obtain a survey of the disputed property and attach the survey to the return for adverse possession;
- Providing that if a judge awards title of disputed property to an adverse possessor, he or she may award compensation to the record landowner if equitable under the particular circumstances;
- Including a provision for attorney fees and costs if a landowner prevails in an initial ejectment or declaratory action in the adverse possession context;

<sup>45</sup> *Hustad v. Architectural Studio, Inc.*, 958 So. 2d 569, 570 (Fla. 4th DCA 2007) (citing s. 57.105, F.S.).

<sup>46</sup> *Id.*

- Prescribing the process for adding the adverse possessor to the tax roll, establishing priority of tax payments made by record landowners in the adverse possession context, or enacting other changes to improve the tax-collection component of the adverse possession statute;
- Prescribing when a property appraiser may remove the adverse possessor from the tax roll;
- Developing a withdrawal form for use by adverse possessors to indicate that they no longer wish to pursue the adverse possession claim; and
- Creating a good faith requirement for adverse possession claims without color of title, except for those instances in which the true owner of record cannot be determined by reasonable means.

As noted in the “Findings” section of this report, any enhancements or modifications to the current property tax process in the adverse possession context must be carefully evaluated to avoid any unintended consequences related to both property tax assessment and collection, as well as to the local government budgeting process. Changes to the tax-collection process favoring record landowners may constitute a significant shift in public policy by limiting the rights of adverse possessors.