

# *Reducing Losses Caused by Adverse Possession Claims*

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# What is “adverse possession?”

- It is the result of centuries of English common law to make ownership of land match the actual use of the land.
- In the most simple explanation, these laws award ownership to one who uses land, taking from another who does not use the land.
- The society goals are:
  - to promote the use of land,
  - prevent land lying unused and fallow,
  - reward those who use land, and
  - punish those who sit on their rights.
- It is real common for people to view that as stealing the land of another person.



# Elements to be Proven:

## 1. "Open and Notorious"

- "title holder has actual notice of the adverse use"
- "any reasonable person would assume he/she is the owner"



# Elements to be Proven:

## 2. "Actual and Uninterrupted"

- "must demonstrate some sort of physical possession"
- "continuity may be established although the land is used regularly for only a certain period each year"



# Elements to be Proven:

## 3. "Exclusive"

- "does not need to have absolutely exclusive possession"
- "the possession must be of a type that would be expected of an owner"
- "exercise of dominion over the land in a manner consistent with actions a true owner would take"



# Elements to be Proven:

## 3. "Exclusive"

- "An occasional, transitory use by the true owner will not prevent adverse possession if the uses the adverse possessor permits are **such as a true owner would permit** a third person to do as a "neighborly accommodation."



# Elements to be Proven:

## 4. "Hostile for ten years"

- "Hostility does not import enmity or ill-will, but rather imports **that the claimant is in possession as an owner** in contradistinction to holding in recognition of or subordination to the true owner."



# Elements to be Proven:

## 4. "Hostile for ten years"

- "Use that is only based on permission of the record owner negates the hostility element."
- A use that was commenced **as if the owner of the land**, hostile to the record owner, is not cancelled when the record owner later gives permission.



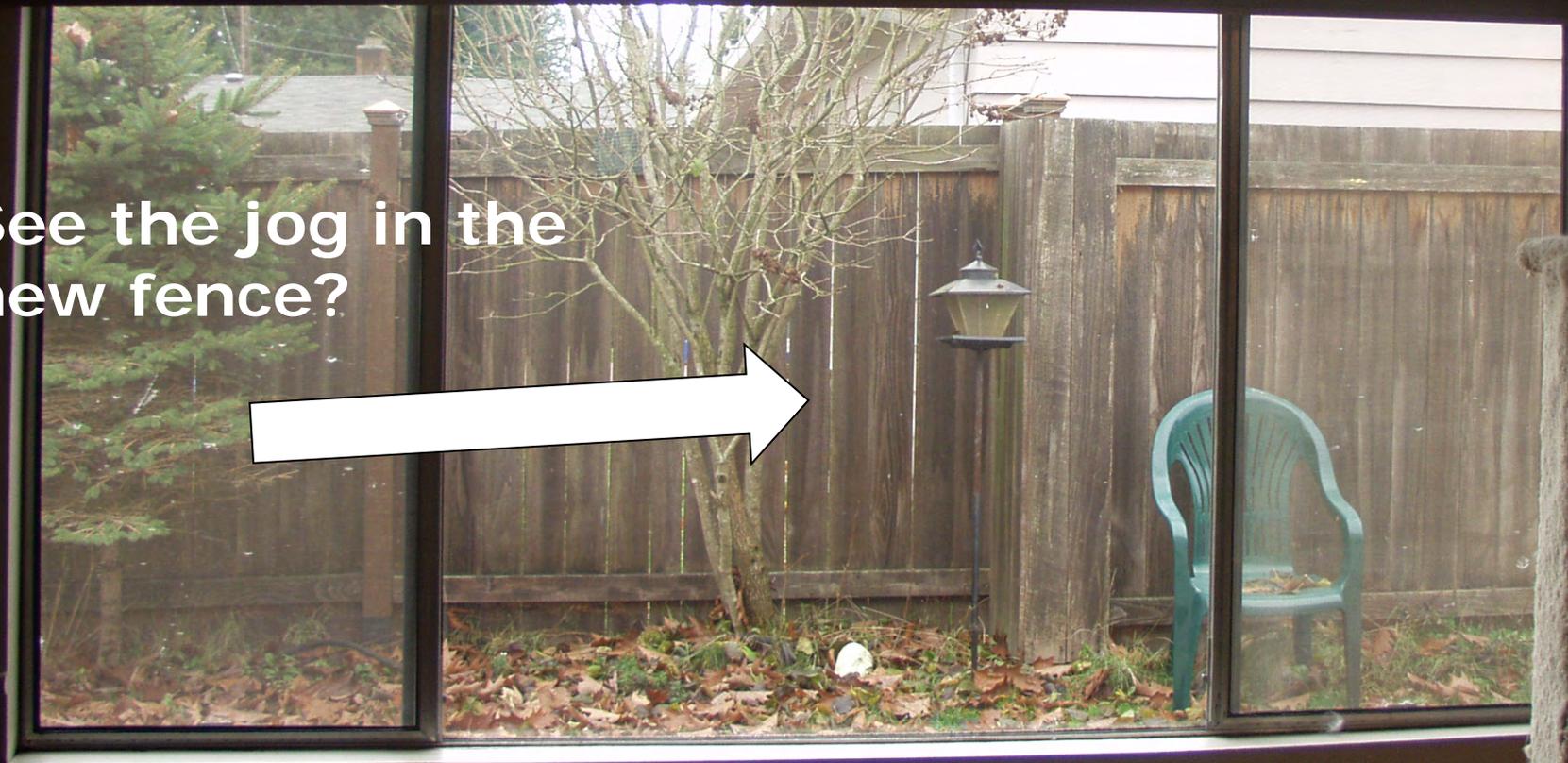
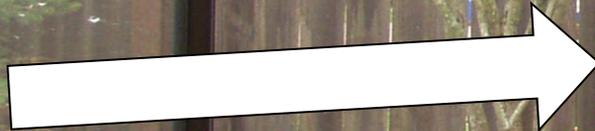
**Notice the two foot jog  
in the new fence.**



See the jog in the old fence?



See the jog in the  
new fence?



See the jog in the  
old fence?



**This is a picture of the old fence:**



This is a picture of an older version of the fence:



# New Statute

- Effective for legal actions filed after 7-1-12
  - (3) The prevailing party in an action asserting title to real property by adverse possession may request the court to award costs and reasonable attorneys' fees. The court may award all or a portion of costs and reasonable attorneys' fees to the prevailing party if, after considering all the facts, the court determines such an award is equitable and just.



# New Statute

- Effective for legal actions filed after 7-1-12
  - (1) The possessor may be required to reimburse the record title holder for part or all of any taxes or assessments levied on the real property during the period the property was possessed.



Does a title insurance policy cover the Johnsons' loss when the new neighbor forces the fence to be moved?



**Covered Claim?**

# Enforced Removal of Encroachment

- Basic Policy – standard coverage excepts unless disclosed by recorded documents.
- Basic Policy – extended coverage does not insure outside the defined Land.
- ALTA 9 series or WA 100 does insure.
- Homeowner's Additional Protection Endorsement insures against enforced removal of structures, but excludes fences.



# Enforced Removal of Encroachment

The Homeowner's Policy clearly insures:

CR 21: You are forced to remove Your existing structures because they encroach onto Your neighbor's land. If the encroaching structures are boundary walls or fences, the amount of Your insurance for this Covered Risk is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.



Does a title insurance policy cover the new neighbor's loss due to the adverse possession right of Johnsons?



# Adverse Possession

- Basic Policy – standard coverage excepts unless disclosed by recorded documents.
- The Homeowner's Additional Protection Endorsement does not provide coverage against adverse possession.
- Basic Policy – extended coverage clearly insures against loss of any portion of the Land.



# Adverse Possession

The Homeowner's Policy appears to provide indemnity for loss of the Land:

- CR 1: Someone else owns an interest in Your Title.
- CR 5: Someone else has a right to limit Your use of the Land.



# Adverse Possession

If after the Policy Date, the Homeowner's Policy insures against a new encroachment, but excludes fences:

- CR 28: Your neighbor builds any structures after the Policy Date -- other than boundary walls or fences -- which encroach onto the Land.



# “Standard Coverage” General Exceptions in Homeowner’s Policy

- The design of all ALTA policy forms is to provide extended coverage. The use of “local” general exceptions reduces the coverage to standard coverage.
- In the WA area, most title companies do not use general exceptions to avoid the adverse possession covered risk.



# "Standard Coverage" General Exceptions in Homeowner's Policy

Safer recommendation is to show an exception on commitments for Homeowner's Policies, removed only when boundary improvements are on the survey line:

**"Any right, title or interest in the Land acquired by a neighbor by actual use of the Land that is apparent by inspection."**



