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WISCONSIN STATE SENATOR

Testimony on Assembly Bill 465 Assembly Committee on Housing and Real Estate December 10, 2015

Thank you Chairman Jagler and committee members for holding a hearing today on Assembly Bill 465, which would reform Wisconsin's adverse possession statutes. I also want to thank Representative Craig for authoring the bill in the Assembly and appearing with me today to testify.

In order to understand the purpose and scope of the bill, it is important to gain a basic understanding of the concept of adverse possession. Adverse possession is an ancient legal doctrine that is grounded in English common law, and was created to ensure productive use of land in an agrarian society. Under adverse possession an individual may acquire title to land they do not own without compensating or consenting its original owner. Many have called adverse possession "legalized property theft" or "squatter's rights."

In order to claim adverse possession, an individual must meet a series of criteria codified in common-law, including:

- **Actual Possession:** The adverse possessor must take actual, physical possession of the land. Activities such as fencing the land or cultivating it typically satisfy this requirement.
- **Hostile:** The use of the property must be inconsistent with the right of the owner, and permissive use may never serve as the basis for a claim of adverse possession.
- **Open and Notorious:** The use of property must leave visible evidence on the property and must be sufficient to give the owner notice that the owner's rights have not been invaded. Concealed or intermittent uses, such as occasional tree cutting cannot form the basis for adverse possession.
- **Continuous:** Possession of the land must be continuous. For example, land which is possessed for grazing purposes each growing season may be held to be continuous, even though the land is not in use during the winter.
- **Exclusive:** The use of the property must be "exclusive", meaning the adverse possessor must show an intent to exclude others, including the owner, from using the property.
- **Statutory Time Period:** The adverse possessor must also possess the land for a period defined in statute, which depends on the circumstances of possession. The general statutory time period that someone must hold land to adversely possess it is 20 years. If an individual has title to the land the period drops to 10 years. If they hold both title and have paid property taxes on the land, the period drops to 7 years.

In practice, the most common cases of adverse possession often deal with disputed fence-lines that were not properly placed decades ago. However, due to the fact specific nature of this area of law, nearly every adverse possession case is different. Cases can range from intentional land grabs from ill willed neighbors to an individual squatting in an abandoned home. Whether or not an individual intentionally trespasses and claims title to property through adverse possession should not matter. The core problem of the current system is that it displaces the individual property rights of the owners who actually purchased the land.

Under Assembly Bill 465, most instances of adverse possession would be eliminated moving forward with two notable exceptions. The first exception would apply if a court is unable to identify or locate the record title owner or their successor. The second exception applies if a principal building, or any part of a principal building has been located on the property in question for the required period to adversely possess. If a person obtains title under this exception they would be required to pay the previous title holder for the fair market value of the real estate, the fair market value of any diminution in value to the original title owner's remaining real estate, and reimburse the original title owner for any property taxes paid during the required period of adverse possession.

It is important to note that under this bill, adverse possession will still be applicable for any real estate that fulfills the required criteria and statutory time period before the enactment of this bill. Simply put, we are stopping the clock moving forward, so if an individual has not possessed for the 20 year period upon enactment of the bill they would not be able to claim title to the property. Also, this bill does not prevent neighbors coming to an agreement on their own terms, as is common practice currently.

One of the primary responsibilities of government is to uphold the most basic of property rights for its citizens. Unfortunately, this doctrine does the exact opposite. This bill flips the equation in the debate over adverse possession to ensure that the rights of the original property owner are protected.

With vast improvements in surveying techniques and technology, the need for adverse possession has become outdated and unnecessary. Assembly Bill 465 makes reasonable reforms that in most cases eliminates this antiquated doctrine, and in the cases where it is allowed to continue, compensates the original property owner for the value of the land in question.

Thank you Mr. Chairman, and at this time I will be happy to answer any questions from the committee.



DAVID CRAIG

STATE REPRESENTATIVE

CHAIRMAN, ASSEMBLY COMMITTEE ON FINANCIAL INSTITUTIONS

Assembly Committee on Housing and Real Estate
Public Hearing, 10 December 2015
Assembly Bill 465
Representative David Craig, 83rd Assembly District

Chairman Jagler and Committee Members,

Thank you for hearing testimony on Assembly Bill 465.

Adverse Possession is a legal principle with roots in Roman law that allows individuals possessing property, that do not legally own it, to become the legal owners of said property if certain conditions are met. Under Wisconsin statute, the standard for adverse possession is met if six criteria are met: actual possession has occurred; the possession is hostile; the possession is open and notorious; the possession is continuous; the possession is exclusive; and the possession fulfills the statutory time period required under current law.

Given today's easily accessible and highly accurate records capabilities, adverse possession is in large part an unnecessary practice going forward. Additionally, it is often said that ignorance of the law is not an adequate defense. The same should be true of ignorance of property lines. Under current law, the onus is on the person having their land taken to object, making an innocent property owner punished for not defending their own property. This legislation makes important reforms to protect property owners while still providing balance in cases that involve principal buildings and faulty records. I believe it is important that we stand up for property owners and ensure that property rights are respected going forward.

Thank you for your consideration of this proposal. I am happy to answer any questions the Committee may have.

Assembly Bill 465
Assembly Committee on Housing and Real Estate

Hearing date December 10, 2015

Testimony of
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My name is Bush Nielsen. I am a real estate lawyer and a partner at the Reinhart Boerner Van Deuren law firm.

I have 34 years of experience in legal issues about the title to real estate. I am a trial lawyer and have litigated adverse possession for people who claimed those rights and those who opposed the possessor.

I testify in opposition to this bill on behalf of Wisconsin Land Title Association and Wisconsin real estate owners.

This bill is an overly broad reaction to small possible problems in the way a legal doctrine is used. Adverse possession has been recognized by Wisconsin courts since statehood, and long before there was a statute on the subject.

This rule of law comes to us from English law that dates back to at least the 16th century, and which was based on Roman law. I would be happy to provide historical law review articles that trace the doctrine's origins.

The abolition of adverse possession in Wisconsin would, in my opinion, be subject to immediate attack as an unconstitutional taking away of vested rights in real estate.

Further, this bill, if adopted into law, would unsettle many more parcels of real estate than it would assist.

Finally, this bill, if adopted, would not actually extinguish the principle of adverse possession. It would merely take away the long-standing firm time limits within which a record owner must evict a possessor.

Adverse possession was adopted and applied by our Supreme Court in numerous decisions issued shortly after statehood was granted, and before the time limits for evicting the possessor were codified by statute. See, for example, *Sydnor v. Palmer*, 29 Wis. 226 (1871); *Pepper v. O'Dowd*, 39 Wis. 538 (1876); *Allen v. Allen*, 58 Wis. 202, 16 N. W. 610 (1883); *Graeven v. Devies*, 68 Wis. 317, 31 N.W. 914

(1887); *Ablard v. Fitzgerald*, 87 Wis. 516, 58 N.W. 745 (1894); and *Ryan v. Schwartz*, 94 Wis. 403, 69 N.W. 178 (1896).

The most recent important decision from our Supreme Court, issued just last year, is *Wilcox v. Estate of Hines*, 355 Wis.2d 1, 849 N.W.2d 280, 2014 WI 60 (2014). In the *Wilcox* decision, the court stated that the doctrine of adverse possession came to Wisconsin from the English common law. The same statement was made by the Supreme Court about 50 years ago, in *Northwoods Development Corp. v. Klement*, 24 Wis.2d 387, 129 N.W.2d 121 (1964).

Our Supreme Court also relies on United States Supreme Court decisions that gave land by adverse possession. Those decisions were also based on English common law. See *Watkins v. Holman*, 1842, 16 Pet. 25, 10 L.Ed. 873; *Deputron v. Young*, 1890, 134 U.S. 241, 10 S.Ct. 539, 33 L.Ed. 923; and *Illinois Steel Co. v. Budzisz*, 1900, 106 Wis. 499, 81 N.W. 1027, 82 N.W. 534, 48 L.R.A. 830, 80 Am.St.Rep. 54.

The federal common law decisions were cited by our Supreme Court in the 1940 decision of *Bettack v. Conachen*, 235 Wis. 559, 294 N.W. 57 (1940). *Bettack* was decided long after Wisconsin adopted adverse possession laws. *Bettack* stated that the right of title by adverse possession flows not from the statute but from the common law.

The earliest adverse possession statute that I can find is Section 8, Chapter 138, of the Revised Statutes of 1858, cited in the *Allen* decision. That statute was renumbered as Section 4214 of the Annotated Statutes of 1889. The 1889 statute was quoted in the *Wilcox* decision from last year.

In 1925, Section 4214 was modified and renumbered as Wis.Stat. § 330.01 through 330.10, by Chapter 4 of the Laws of Wisconsin of 1925. The law was modified again by Chapter 79 of the Laws of 1931, Chapter 94 of the Laws of 1941, and a number of times since then. It was later renumbered as 893.06, 893.07 and 893.10, and then renumbered as 893.24 through 893.32 in Chapter 323 of the Laws of 1979. The wording of the law has changed little since 1858.

The statutes were not adopted to create new rights. They merely set fixed time limits for kicking out possessors.

In fact, the statutes have always admitted that possession grants title to real estate. Since at least 1889, the statutes have said that land possessed adversely is *owned* by the possessor. Section 4215 said: "An adverse possession of ten years, under sections four thousand two hundred and eleven and four thousand two hundred and twelve, or of twenty years under the two last preceding sections *shall constitute a bar to an action for the recovery of such real estate so held adversely or of the possession thereof.*" In other words, if land had been possessed for the required time as of 1889, the former owner no longer had the right to claim title to it.

It is now more than 150 years since Wisconsin adopted adverse possession, and about 125 years since the legislature set the time limits found in the current statutes. Members of the Wisconsin Land Title Association, as people who regularly deal with the title to real estate, can attest that the legislature should be very wary of adopting a law that changes the rules of ownership of real estate.

The rules about ownership of real estate are not supposed to change. People buy, sell and lend based on the idea that the rules about home ownership cannot change. AB 465 would cause the largest change in real estate ownership rules that I have seen in my 34 years of dealing with real estate titles. If adopted, this bill would likely cause the filing of hundreds of lawsuits about boundaries.

I believe that AB 465 would be attacked immediately based on two sections of the state constitution. Article I, Section 13 of the Wisconsin constitution states that "[t]he property of no person shall be taken for public use without just compensation therefor." The adverse possessor has occupied and worked the land, by cultivation, enclosure or other unequivocal claim of ownership, and has relied on the law to protect his or her claim of ownership. AB 465 would take away that title and protection. I believe that someone would be likely to claim in court that AB 465 took away vested ownership of land, without compensation, and thus the law is unconstitutional and void.

Article I, Section 12 of the Wisconsin constitution states that "[n]o ...ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed... ." Every statute of limitations has an ex post facto effect. The voiding of rights that are presently accruing under the statutes of limitation for adverse possession could be considered a violation of Section 12.

In addition, there is good reason not to eliminate adverse possession as a principle of law. Adverse possession is a doctrine of equity or fairness. It was developed to right wrongs, not to reward robbers. This rule of law is regularly used to allow someone to keep land that he has cultivated, gardened or occupied with a building for decades. Every situation has the possibility of someone taking advantage of a law for improper gain.

There have been thousands of adverse possession lawsuits and scores of reported Wisconsin decisions on the subject. In every case, the court balances the equities of both people who claim to own the property.

Many decisions have refused to apply the doctrine when it would be unfair, or when someone sought to take away land by trickery. The protections against such trickery already exist in the careful balance achieved in the statutes and the case law, which have slowly evolved over the last 167 years.

AB 465 throws out the baby with the bath water. It would take away rules that the courts routinely use to achieve fairness just because there of the possibility that a

rule of law intended for good could be used perversely to achieve an unjust result. Please let the courts continue to sort out justice, one case at a time. Many injustices will occur if the courts do not have the equitable tool of adverse possession.

Further, even if the adverse possession statutes were phased out as proposed by this bill, the law change would not undo the common law doctrine of adverse possession. The Wisconsin statutes do not, by themselves, implement the legal doctrine that possession of land ripens into title. That transfer of title occurs under the common law that Wisconsin adopted at statehood. Adverse possession was an accepted doctrine in England before 1540.

The statutes merely set a bright line time limit in which the record owner must act to evict the adverse possessor. The statutes are not the source of the law that allows a person to claim title by possession. The legislature may not take away rights that our court said existed before there ever was a statute.

Thus, the effect of AB 465 could be no more than to cause Wisconsin to revert to the doctrine of common law adverse possession.

I ask the members of this committee to vote in opposition to AB 465. Thank you.