

## Adverse Possession.

During this trial, you have heard the term “adverse possession.” In order to prove adverse possession, PLF must show that, for a period of at least twenty uninterrupted years, the following five things were more likely true than not true:

1. PLF actually used the land;
2. PLF openly and obviously used the land;
3. PLF exclusively used the land;
4. PLF used the land in a way that was adverse to DFT; and
5. DFT did not give PLF permission to use the land.<sup>1</sup>

I will now explain to you what each of these things means.

### (a) Actual Use

First, PLF must prove, more likely than not, that PLF actually used the land. A person actually uses the land if he/she uses, controls, or changes the land in the way a land owner typically treats his or her own land. Here, you must examine how PLF occupied the land and consider the land’s features and characteristics, because a landowner would use different types of land differently. For instance, someone would use a city lot differently from a large piece of land in the woods.<sup>2</sup>

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<sup>1</sup> *Lawrence v. Town of Concord*, 439 Mass. 416, 421 (2003); *Kendall v. Selvaggio*, 413 Mass. 619, 621–622 (1992); *Ryan v. Stavros*, 348 Mass. 251, 262 (1964); *Holmes v. Johnson*, 324 Mass. 450, 453 (1949).

<sup>2</sup> *LaChance v. First Nat’l Bank & Trust Co.*, 301 Mass. 488, 491 (1938); *Brandao v. Docanto*, 80 Mass. App. Ct. 151, 156–157 (2011); *Peck v. Bigelow*, 34 Mass. App. Ct. 551, 556 (1993).

### **(b) Open and Obvious [Notorious] Use**

Second, PLF must prove, more likely than not, that PLF openly and obviously used the land. PLF must prove that s/he/it did not attempt to hide his/her/its use of the land.

PLF must also prove, that PLF's use of the land was so obvious that that a landowner likely would notice it. PLF can prove this by showing that his/her/its use of the land was so obvious that DFT would have discovered it himself/herself/itself. PLF can also prove this by showing that his/her/its use was so obvious that you would reasonably expect someone else to tell the DFT about it. For example, erecting a fence or building on the land acts as notice to the world, and you may presume that DFT was aware of any such acts. PLF does not have to prove that DFT actually knew of his/her/its use of the land.<sup>3</sup>

### **(c) Exclusive Use**

Third, PLF must prove, more likely than not, that PLF had exclusive use of the land. That means that PLF took steps to prevent the DFT and all other persons from entering the land to the same extent that a landowner would have barred other persons from entering the land.<sup>4</sup> You should consider the nature of PLF's use and the condition of the land. Some land uses may not be enough to show exclusive use of woodlands or vacant land in the country, but might be adequate proof if the land is in the center of a large city.

### **(d) Adverse Use for Twenty Years**

Fourth, PLF must prove, more likely than not, that PLF's use of the land was actual, open, obvious and exclusive for an uninterrupted period of at least twenty years. That means that PLF must have used the land without the

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<sup>3</sup> *Lawrence v. Town of Concord*, 439 Mass. 416, 421–422 (2003); *Foot v. Bauman*, 333 Mass. 214, 218 (1955); *Boothroyd v. Bogarty*, 68 Mass. App. Ct. 40, 44 (2007).

<sup>4</sup> *Brandao v. DoCanto*, 80 Mass. App. Ct. 151, 157–58 (2011); *Peck v. Bigelow*, 34 Mass. App. Ct. 551, 557 (1993).

DFT's permission for at least twenty uninterrupted years. PLF must prove that DFT never objected to PLF's use of the land. PLF does not have to show that s/he/it resided on the land or used the land for a single purpose over that period. [*<If Applicable>* PLF may make seasonal use of the land, as long as [his/her/its] possession remains unbroken.<sup>5</sup>]

PLF may meet the 20-year requirement by adding the time period of his/her/its use to the time period a person or entity adversely possessed the land immediately before PLF. To do this, PLF must prove that, more likely than not, this predecessor met all the elements of adverse possession I have described. PLF must also prove that there was no break in time between the predecessor's adverse use and PLF's adverse use of the land.<sup>6</sup>

[*<If Applicable>* It is PLF's conduct and not [his/her/its] state of mind that governs whether [he/she/it] possesses the land adversely.<sup>7</sup>]

#### **(e) Lack of Permission**

Fifth, PLF must prove that DFT never gave PLF permission to use the property and never objected to PLF's use of the property. If DFT assented to PLF's use of the property, you must decide whether that assent amounted to permission. If PLF actually used the property in a way that was open, obvious, adverse and exclusive for a period of twenty years, you may conclude that DFT did not give permission. You do not have to draw that conclusion if the evidence persuades you that DFT did not give permission.<sup>8</sup>

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<sup>5</sup> *Kershaw v. Zecchini*, 342 Mass. 318, 321 (1961); *Lebel v. Nelson*, 29 Mass. App. Ct. 300, 302 (1990); *see Pugatch v. Stoloff*, 41 Mass. App. Ct. 536 (1996).

<sup>6</sup> *Kershaw v. Zecchini*, 342 Mass. 318, 320-21 (1961); *Holmes v. Johnson*, 342 Mass. 450, 453-454 (1949).

<sup>7</sup> *Totman v. Malloy*, 431 Mass. 143, 146 (2000); *Kendall v. Selvaggio*, 413 Mass. 619, 623-624 (1992); *Peck v. Bigelow*, 34 Mass. App. Ct. 551, 555 (1993); *Lebel v. Nelson*, 29 Mass. App. Ct. 300, 302 (1990).

<sup>8</sup> *Totman v. Malloy*, 431 Mass. 143, 146 (2000); *Stone v. Perkins*, 59 Mass. App. Ct. 265, 266 (2007).