



# CONSTRUCTION LAWLETTER

For Industry Professionals, Managers, Contractors, Subcontractors, Trades & Suppliers

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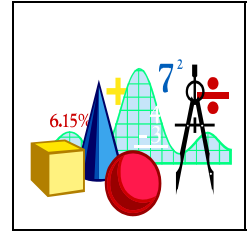
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## ADVERSE POSSESSION

To acquire title to land by **adverse possession**, a party must establish by clear and convincing evidence that **possession** of the land was open, notorious, exclusive, **adverse**, hostile, and continuous for more than 21 years. *Grace v. Koch* (1998), 81 Ohio St.3d 577, 579, 692 N.E.2d 1009. To establish adversity, "the tenant must unfurl his flag on the land, and keep it flying so that the owner may see, if he will, that an enemy has invaded his dominions and planted his standard of conquest." Id. at 581, 692 N.E.2d 1009. Merely mowing the grass or engaging in minor landscaping is insufficient to establish **adverse possession**. *Gehron v. Petry* (Jan. 23, 1995), Preble App. No. CA94-04-008, at 3, 1995 WL 22686. The legal titleholder has the benefit of a strong presumption that he is the legal owner. *Diddy v. Bradburn* (Feb. 22, 2000), Clermont App. Nos. CA99-05-049 and CA99-06-059, at 4, 2000 WL 197245. **Adverse possession** must be proved and will not be presumed. Id. *Bravard v. Curran*, 155 Ohio App.3d 713, 2004-Ohio-181.

\* \* \*

To prevail on a claim of **adverse possession**, the moving party must demonstrate "exclusive **possession** and open, notorious, continuous, and **adverse** use for a period of twenty-one years." *Bohaty v. Centerpointe Plaza Assoc. Ltd. Partnership*, (Feb. 20, 2002), 9th Dist. No. 3143-M at 3, appeal denied (2000), [96 Ohio St.3d 1439](#), quoting *Grace v. Koch* (1998), [81 Ohio St.3d 577](#), syllabus. A successful claim of **adverse possession** requires proof of each aforementioned element by way of clear and convincing evidence. *Grace*, 81 Ohio St.3d 577, syllabus. Clear and convincing evidence is an intermediate degree of proof that produces in the mind of the trier of fact a solid conviction or belief as to the allegations sought to be established. *Cross v. Ledford* (1954), [161 Ohio St. 469](#). The Ohio Supreme Court explained that the doctrine of **adverse possession** should be disfavored because a successful claim results in a legal title holder forfeiting ownership to an **adverse** holder without compensation. *Grace*, 81 Ohio St.3d

at 580. Thus, the elements of **adverse possession** are stringent, and the burden of proof rigorous. Id.

[402]

{¶13} It is axiomatic that a claim of **adverse possession**, which is viewed with disfavor and requires a heavy burden of proof, may not be argued impliedly but instead must be argued with specificity and particularity. See *Grace*, 81 Ohio St.3d 577, syllabus. To hold otherwise would be to stand in bold contradiction to the long-established jurisprudence of **adverse possession**. This we are loathe to do.\* \*\*

{¶25} In order to establish the right to a prescriptive easement, the moving party must establish that he has used the subject property: (1) openly; (2) notoriously; (3) adversely to the servient property owner's property rights; (4) continuously; and (5) for a period of at least twenty-one years. *Bell v. Joecken* (Apr. 10, 2002), 9th Dist. No. 20705, at 6, citing *Pence v. Darst* (1989), [62 Ohio App.3d 32](#), 37. Each element must be proven by clear and convincing evidence. *Beaver v. Williams* (Feb. 21, 2001), 9th Dist. No. 20050, at 6, quoting *Nusekabel v. Cincinnati Pub. School Employees Credit Union, Inc.* (1997), [125 Ohio App.3d 427](#), appeal not allowed (1998), [81 Ohio St.3d 1512](#). *Morris v. Andros*, 158 Ohio App.3d 396,401-402, 2004-Ohio-4446.

## Inconsistencies of opinion, arising from changes of circumstances, are often justifiable.

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(1782-1852)

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