

District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80302 (303) 441-1776	<div style="text-align: right; font-weight: bold; font-size: 1.2em;">E-FILED</div> <div style="text-align: right; font-size: 0.8em;">OCT 1, 2007</div> <div style="text-align: center; font-weight: bold; margin-top: 20px;">▲ COURT USE ONLY ▲</div>
Plaintiffs: RICHARD MCLEAN and EDITH STEVENS v. Defendant: DK TRUST and DON KIRLIN	
<i>Attorney for Plaintiff:</i> Kimberly Hult, Esq. <i>Attorney for Defendant:</i> William J. Kowalski, Esq.	Case Number: 06 CV 982 Division 12 Courtroom Q
ORDER	

This matter was tried before the Court on June 6-7, 2007, and July 26, 2007. Plaintiffs appeared and were represented by Kimberly Hult, Esq. Defendants appeared and were represented by William J. Kowalski, Esq. Based upon the testimony and evidence presented at the time of trial, as well as two visits by the Court to the disputed property at issue, the Court now issues the following Findings of Fact, Conclusions of Law, and Order regarding Plaintiff's Claim for adverse possession:

FINDINGS OF FACT

1. The disputed property in this matter is delineated on Plaintiff's Exhibit 1 as a footpath beginning from a point on Hardscrabble Drive approximately three feet south of the northeastern most corner of lot 50 in the Shanahan Ridge Six Subdivision, Boulder, Colorado, and continuing in a north westerly semi-circle direction to a point approximately twelve and one tenths (12.1) feet to the south of the northwestern corner of lot 50. This footpath was commonly referred to throughout these proceedings as "Edie's Path."
2. Plaintiffs, purchased lot 51, the lot immediately adjacent to the disputed property in 1981, and following the construction of their home thereon, moved into their home on lot 51 in 1982. Plaintiffs planted extensively the areas surrounding the northeast and east sides of their home such that no access to the back of their home was available except either through their home or on footpaths extending onto lot 50.
3. Edith Stevens testified that Plaintiffs used the disputed property continuously for twenty-five (25) years without the permission of Defendants. Ms. Stevens stated that Plaintiffs' use of the disputed property included: footpaths to Plaintiffs' west garden and deck that were used "virtually every day;" gardening; entertainment; deliveries; a wood pile; the remodeling of Plaintiffs' kitchen; and, the re-staining of Plaintiffs' home.
4. In terms of maintenance on the disputed property, Ms. Stevens testified that she and Mr. McLean regularly cut weeds on the property, trimmed the volunteer trees on the property, raked thatch on the property, and performed fire abatement on the property.

5. Ms Stevens testified that she never saw Defendants on the disputed property until the fall of 2006. Although she knew the lot was owned by someone, it was vacant. When asked by others about the disputed property, Ms. Stevens would reply that it was part of the adjacent lot that Plaintiffs used. Ms Stevens testified that the disputed property has "been an integral part of the use of our property."
6. Mr. McLean testified that: no-one interfered with Plaintiffs' use of the disputed property until the fall of 2006; he never met Defendants until the fall of 2006; neither he nor Ms. Stevens asked for permission from Defendants to use the disputed property; Plaintiffs knew the disputed property was someone else's land; and Plaintiffs used the disputed property openly, continuously, and notoriously for twenty-five (25) years.
7. Mr. McLean testified that he used the path, including the steps going up the rock retaining wall almost every day. Mr. McLean testified that he used the path designated as "Dick's Path" to bring the Plaintiff's lawnmower up from the garage to the west deck and yard, and to perform other maintenance on the west side of Plaintiffs' home as well as on the disputed property. Moreover, Mr. McLean also testified that guests and acquaintances used both his and "Edie's Path" to access the west side of Plaintiffs' home.
8. Mr. McLean trimmed the volunteer trees on the disputed property. Mr. Mclean moved what is now designated as the "wood pile" to its present location on lot 50 in 1984 or 1985.
9. Mr. Mclean testified that he and Ms. Stevens had a couple of "events" each summer wherein the disputed property was utilized.
10. Steve Brett, a neighbor of Plaintiffs who resided on the lot immediately adjacent to Lot 51 testified that Plaintiff's representations of their use of the disputed property was in fact accurate.
11. Tad Kline testified that he recalled using what he described as a "clear path" off of Hardscrabble Drive to access Plaintiffs' garden area in the back around the left side of their house on the forty (40) to fifty (50) times that he had visited Plaintiffs' home.
12. William Wright, the land surveyor responsible for the creation of Plaintiffs' Exhibit 1, opined that the "rock wall" and "landscaping," including the gardens below and above the "rock wall," were indicative of "use," and that they were in fact part of the 2059 Hardscrabble Drive property.
13. Janet Mitchell, another neighbor of Plaintiffs, testified that she had worked for the developer (McStain) around the time that Plaintiffs purchased lot 51 and moved in. Ms. Mitchell testified that she worked for McStain in sales for four years and in marketing for five to six years after that. Ms. Mitchell testified that she regularly saw Plaintiffs on the disputed property. Ms. Mitchell testified that Plaintiffs utilized the disputed property for gardening, Mr. McLean's telescope (and screens), and entertainment. Ms. Mitchell stated that she always beleived that Plaintiff's were on their own property, and that all the neighbors thought the disputed property was in fact Plaintiffs' property.
14. Joan McLean Braun, Mr. McLean's daughter, testified that she did not know the property was in dispute, and that she had always thought that Plaintiffs owned it. Ms. Braun testified that she assisted with the gardening, walkways (paths), and landscaping on the disputed

property. Ms. Braun testified that the path ("Edie's Path") is where it has always been, and that she has never seen a stranger using it. Ms. Braun testified that she had always felt the larger tree on the end of the rock wall was part of her father's property.

15. The Court finds that the testimony of Edith Stevens, Richard McLean, Steve Brett, Tad Kline, William Wright, Janet Mitchell, and Joan McLean Braun is credible and persuasive.

16. Rick Burman, a property manager who managed Shanahan Ridge between February of 2002 until March of 2007, testified that when property management inspections were conducted by himself and the homeowners association, they were only allowed to conduct such inspections from the street, the firelane or open space. Mr. Burman freely admitted that he did not know where the lot line between lots 51 and 50 was, nor did he know where the disputed property on lot 50 was.

17. Alan Lemke, the Crew Chief for Flagstaff Surveying, testified that although he did not recall seeing the footpaths on lot 50, he did recall landscaping in the northwest corner of lot 50 as well as the rock wall extending into lot 50.

18. Rob Caldwell, the fence contractor hired by Defendants initially testified that he did not observe any footpaths in the area that he was building. When directed to Exhibit 25, which shows "Dick's Path" off the Plaintiffs' driveway, Mr. Caldwell testified that: "I did not cause that in two days." And, when directed to Exhibit 26, which again shows "Dick's Path" off Plaintiffs' driveway, Mr. Caldwell testified that it "looks like a path down to the dirt."

19. Lee Stadelle, the land surveyor hired by Defendants proffered testimony that was completely contrary to that proffered by every other witness in this case that had actually spent time on the disputed property, including the Court. Mr. Stadelle testified: That the landscaping in the northwest corner of lot 50, along the rock wall, and that near the large spruce tree near the front of the property was "difficult for me to find;" that the "garden was more like wood chipping that had spilled out and/or some non-native grasses;" that the landscaping is more properly characterized as "minor landscaping that wandered over the line;" that he "saw no evidence of paths other than people walking the line;" and when directed to Plaintiffs' Exhibit 26, stated that he did not "see a discernable path to the drive."

20. Moreover, upon further questioning by the Court with respect to whether he had a legal obligation to note anything on his survey that calls into question the legal boundary between lots, Mr. Stadelle stated subjectively: "Yes, if it's major." Mr. Stadelle's testimony and observations regarding the disputed property are simply not credible.

21. Ben Hunsinger, a retired builder who currently resides in the Shanahan Ridge subdivision, testified that he participates in bi-annual homeowners association walkthroughs. Mr. Hunsinger testified that these walkthroughs are conducted from the street. Mr. Hunsinger testified that he has not seen any paths or stepping stones on lot 50, and that he had no evidence that Plaintiffs were using lot 50. Mr. Hunsinger, however, has never actually inspected the property, and agreed that there may be some things that can not be seen from the street. Finally, Mr. Hunsinger testified that ordinarily what is being looked for in these walkthroughs is whether there has been some deterioration of any improvements, i.e., the fences in or around the subdivision.

22. Kent Hogan, a Management/Operations Consultant and former home builder, testified that it was he who notified Ms. Kirlin in September of 2006, that Plaintiffs might assert a claim for adverse possession. Mr. Hogan testified that he last walked the property, lots 49 and 50,

when the Defendants purchased the property in 1984. At that time, Mr. Hogan was discussing potential building sites with Defendants on Lot 49, and did not recall seeing steps, paths or anything else on the disputed property. Mr. Hogan also testified that he had no reason to inspect the disputed property over the many years that have transpired since that time. Finally, Mr. Hogan had also discussed the possibility of Defendants listing lot 50 for sale with a realtor friend with whom he lives in order to pay for the construction of Defendants home on lot 49.

23. Susie Kirlin, Defendant Don Kirlin's wife, testified that she and her husband bought lots 49 and 50 in 1984. Ms. Kirlin and her husband walked on and by the property many times but never specifically went to lot 50 to observe anything, "because we were always drawn to lot 49 where we would build." The Kirlins had discussed selling lot 50 to finance the building on lot 49. Ms. Kirlin stated that she had inspected the property after her discussion with Mr. Hogan in September of 2006, but that she had not looked at the property until then and therefore had not seen the garden, wood pile, stone wall steps and pruned trees. When asked specifically whether she had done anything prior to October 2006 to stop Plaintiffs from possessing the property, Ms. Kirlin replied, "no I did not."

24. Defendant Don Kirlin went by the lots at least once per week. Mr. Kirlin did not recall walking the lot line between lots 50 and 51, and he never inspected the disputed portion of property because he "relied on the plat." Prior to the survey commissioned with Mr. Stadelle, no marker existed delineating the property line between the lots. Mr. Kirlin never noticed any of the alleged improvements. Mr. Kirlin conceded that prior to the lawsuit he had never had any contact with the Plaintiffs, he never gave Plaintiffs permission to use his land, he never told Plaintiffs to stop using his land, and the Plaintiffs' use of his land was in bad faith.

25. On June 7, and July 26, 2007, the Court, at the request of the parties, conducted a site review of the disputed property in the absence of the parties. The following are the Court's observations and findings from the first site review on June 7, 2007:

- a. There is non-native vegetation along the front drip-line of the large pine trees near the front of the lot. This non-native vegetation extends approximately three and one-half (3.5) feet into the adjacent lot (lot 50), and includes Iris plants and non-native ground cover plants.
- b. "Edie's Path" is very distinctive along the rock retaining wall that extends at least four (4) feet to the southwest of the larger ponderosa pine on Lot 50. Edie's path is actually southwest of the furthest end of the retaining wall by at least two feet.
- c. The woodpile in the northwest corner of lot 50 is very distinctive and is very visible from Hardscrabble drive, as is the retaining wall that extends to and beyond the left-most ponderosa pine on lot 50.
- d. Most distinctive is the relatively flat nature of lot 50 with the exception of the "cut out" or "hollowed out" almost half moon portion of land bordered by Edie's path on the left and held back by the retaining wall. This observation is clearly visible from the street.
- e. It is clear that significant pruning has been done on the "volunteer" ponderosa pines within this moon-shaped portion of land.

- f. Edie's path leads directly to an opening onto Plaintiffs' flagstone deck, ending between a large pinon pine on top of the rock wall containing the largest boulders and a smaller pinon pine at the east end of the 1996 garden upgrades. Plaintiff's maple tree and other gardening is to the northwest of the smaller pinon pine.
- g. It is difficult to tell exactly how old the upper garden is, but it is reasonable to believe that it has been there for a long time in light of the well worn paths, the degree to which the retaining wall extends into the adjacent lot (lot 50), the degree to which the adjacent lot has been "carved" out to accommodate the rock wall, and the improvements on and around it.
- h. As viewed from the street, and in the absence of the short incomplete fence, it would be easy to conclude that the disputed portion of property is actually part of lot 51. It is clear that this disputed portion of property has been used by Plaintiffs for many years.

The following are the Court's observations and findings from the second site review conducted on July 26, 2007:

- a. Edie's path remains very distinctive, and is consistent with the Court's observations on June 7, 2007.
- b. Absent the fence dividing Lots 49 and 50, Defendants' lot would appear as one large lot with the exception of this half moon shaped portion (disputed property bordered by Edie's path) on the east side.
- c. Considering that the disputed property has been sitting fallow since October of 2006, Edie's path is still quite distinctive.
- d. The remainder of the Court's observations are consistent with those made on June 7, 2007.

26. The testimony of Rick Burman, Alan Lemke, Rob Caldwell, Lee Stadel, Ben Hunsinger, Kent Hogan, Susie Kirlin, and Don Kirlin does not dissuade the Court from finding that Plaintiff's use of Defendants' property was actual, adverse, hostile, under a claim of right, exclusive and uninterrupted for the statutory period of time. In fact, the testimony of these witnesses lends further support to the Court's finding that Plaintiff's use of Defendants' property was actual, adverse, hostile, under a claim of right, exclusive and uninterrupted for the statutory period of time.

CONCLUSIONS OF LAW

I. BACKGROUND ON THE DOCTRINE OF ADVERSE POSSESSION

A. HISTORICAL UNDERPINNINGS

Adverse possession is a method of acquiring title to an interest in land without the consent, and typically over the objection, of the true owner. *See* 3 AM. JUR. 2D ADVERSE POSSESSION § 1 (2007). The adverse possession doctrine has existed since, at least, the sixteenth century. Alexandra B. Klass, *Adverse Possession and Conservation: Expanding Traditional Notions of Use and Possession*, 77 U. COLO. L. REV. 283, 286 (2006) (citing 16 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 91.01 (Michael Allan Wolf ed., Matthew Bender 2005) (1949)).

Moreover, the concept has been incorporated into American law since the country's inception.
Id.

B. POLICY JUSTIFICATIONS

Traditionally, the doctrine of adverse possession has been justified on various public policy grounds. However, times change, and the doctrine has evolved to reflect the needs of the present.

B. POLICY JUSTIFICATIONS

Traditionally, the doctrine of adverse possession has been justified on various public policy grounds by explaining that, after a significant amount of time, the claimant in possession of land forms a personal attachment that is stronger than the true owner's attachment to the land. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476-77 (1897). Justice Holmes posited that adverse possession becomes appropriate as a matter of law to transfer title to the person with the strongest attachment to the land. See *id.*

II. COLORADO'S ADVERSE POSSESSION LAW

A. ELEMENTS OF ADVERSE POSSESSION

In Colorado, the doctrine of adverse possession is governed by statute and the common law. “[A]ctual possession of the property in a manner hostile to the record owner’s right to possession . . . leads to title by adverse possession. The doctrine of adverse possession recognizes the record owner’s right to exercise dominion over the property, but holds that the right is lost if a claimant adversely possesses the property for the required time.” *Ocmulgee Props., Inc. v. Jeffery*, 53 P.3d 665, 667 (Colo. App. 2001) (citing C.R.S. § 38-41-101 (2001)).

To obtain title to an interest in land through adverse possession, a claimant must establish by a preponderance of the evidence that his or her possession was “actual, adverse, hostile, under a claim of right, exclusive and uninterrupted for the statutory period.” *Smith v. Hayden*, 772 P.2d 47, 52 (Colo. 1989); see also *Schuler v. Oldervik*, 143 P.3d 1197, 1202 (Colo. App. 2006). The statutory period for adverse possession in Colorado is eighteen years. See C.R.S. § 38-41-101(1) (2006). “A determination of whether possession is hostile, actual, exclusive, and adverse is a question of fact to be determined by the trier of fact.” *Schuler*, 143 P.3d at 1202.

1. ACTUAL POSSESSION OR OCCUPANCY

To establish actual possession, the claimant’s use must be sufficiently open and obvious to apprise the owner, through reasonable diligence, that another is making use of the land, allowing the owner to object. *Trask v. Nozisko*, 134 P.3d 544, 549 (Colo. App. 2006). The claimant must act as the average landowner would in utilizing the land for the ordinary uses of which the land is capable. *Schuler*, 143 P.3d at 1203. “Thus, the nature of the property is critical in determining what acts by the claimant are required for actual possession.” *Palmer Ranch, Ltd. v. Suwansawadi*, 920 P.2d 870, 873 (Colo. App. 1996). “The adverse possessor may use any actual visible means that puts the true owner and the public on notice of his dominion over the parcel.” *Schuler*, 143 P.3d at 1203; see also *Anderson v. Cold Spring Tungsten, Inc.*, 458 P.2d 756, 759 (Colo. 1969).

“When the boundaries of the land claimed by adverse possession are not established by fences or other barriers, and when there is no deed describing the extent of the land claimed, the

adverse claimant may not claim any property not actually occupied for the statutory period.” *Hayden*, 772 P.2d at 52 (citing *Anderson*, 458 P.2d at 759). “The extent of actual occupancy is a question of fact for the trial court to determine. In arriving at this determination, the court should consider that adverse possession by actual occupancy without a fence or other barrier does not require constant, visible occupancy or physical improvements on every square foot of the parcel claimed.” *Id.*

2. HOSTILITY

“For use to be ‘hostile,’ the adverse possessor must demonstrate an intention to claim exclusive ownership of the property occupied.” *Trask*, 134 P.3d at 549. “The possessor need not have the specific intent to take property from the owner for the hostility requirement to be satisfied.” *Sleeping Indian Ranch, Inc. v. West Ridge Group, LLC*, 107 P.3d 1028, 1031 (Colo. App. 2004), *rev’d on other grounds*, 119 P.3d 1062 (Colo. 2005); *see also Anderson*, 458 P.2d at 758. “All that is required to establish hostility is that the person claiming adverse possession occupy the property adversely to the rights of the record holder” and all others. *Palmer Ranch, Ltd.*, 920 P.2d at 872; *see also Lovejoy v. Sch. Dist. No. 46*, 269 P.2d 1067, 1069 (Colo. 1954). The trier of fact determines whether possession is hostile through reasonable deductions from the acts and declarations of the parties. *Vade v. Sickler*, 195 P.2d 390, 392 (Colo. 1948); *see also Moss v. O’Brien*, 437 P.2d 348, 349 (Colo. 1968).

B. SHIFTING PRESUMPTIONS

In an adverse possession case, the initial presumption is in favor of the record title holder. *Whinnery v. Thompson*, 868 P.2d 1095, 1099 (Colo. App. 2003), *rev’d on other grounds*, 895 P.2d 537 (Colo. 1995). “Every reasonable presumption is made in favor of the true owner as against adverse possession.” *Lovejoy*, 269 P.2d at 1070. However, “[a] presumption that the possession is adverse arises after the claimant has demonstrated that he has been in actual and exclusive possession of the property for the statutory period.” *Hayden*, 772 P.2d at 52 (citing *Raftopoulos v. Monger*, 656 P.2d 1308, 1312 (Colo. 1983), *overruled on other grounds by Gerner v. Sullivan*, 768 P.2d 701 (Colo. 1989)).

“In order to merit this presumption, the claimant’s use must be ‘sufficiently open and obvious to apprise the true owner, in the exercise of reasonable diligence, of an intention to claim adversely.’” *Hayden*, 772 P.2d at 52 (quoting *Hodge v. Terrill*, 228 P.2d 984, 988 (Colo. 1951)). “Further, a claimant’s possession need not be absolutely exclusive in order to attain the degree of exclusivity required for adverse possession.” *Palmer Ranch, Ltd.*, 920 P.2d at 872. “[A] mere casual entry for a limited purpose by the record owner is not necessarily sufficient to prove that the use of the property was joint.” *Hayden*, 772 P.2d at 52 (quoting *Hodge*, 228 P.2d at 988). “[A]ssuming that a presumption of adversity arises, the burden then falls upon the challenging party to overcome the presumption.” *Welsch v. Smith*, 113 P.3d 1284, 1288 (Colo. App. 2005) (citing *Niles v. Churchill*, 482 P.2d 994 (Colo. 1971)).

C. INTERRUPTION OF THE STATUTORY PERIOD

“[W]here the claimant has been in possession for the required period, the record owner must show an interruption of some aspect of the possession to defeat the claim; mere assertion of a claim of record ownership is not sufficient. Indeed, the claimant’s recognition of the owner’s record title while claimant remains in possession strengthens the adverse possession claim.”

Ocmulgee Props., Inc., 53 P.3d at 667 (citing *Schoenherr v. Campbell*, 472 P.2d 139 (Colo. 1970)).

“To disrupt the adverse possession claim, the record owner must assert a claim to the land or perform an act that would reinstate him in possession.” *Id.* (quoting *Bushey v. Seven Lakes Reservoir Co.*, 545 P.2d 158, 161 (Colo. 1975)). “A recognition of record title does not demonstrate an intent not to possess adversely.” *Ocmulgee Props., Inc.*, 53 P.3d at 667 (quoting *Schoenherr*, 472 P.2d at 141).

ORDER

WHEREFORE, based upon the Court’s Findings of Fact, and Conclusions of Law, the Court enters the following Order.

The Court finds by a preponderance of the evidence that Plaintiffs’ use of the disputed land was actual, exclusive, hostile, adverse, under a claim of right, and uninterrupted for at least 18 years. *Smith v. Hayden*, 772 P.2d 47, 52 (Colo. 1989), C.R.S. § 38-41-101(1) (2006).

The Court finds that, because Plaintiffs’ use was sufficiently obvious to permit a reasonably diligent owner to notice and object, Plaintiffs’ possession was actual. Although the boundaries of the disputed property were not delineated by fences, Plaintiffs did put the land to the ordinary use of which it was capable, and thus actually occupied it. *Palmer Ranch, Ltd. v. Suwansawadi*, 920 P.2d 870, 873 (Colo. App. 1996), *Hayden*, 772 P.2d at 52. Neither constant, visible occupancy nor physical improvements on every square inch are required to prove that property is occupied; rather, occupancy is proven by “any actual visible means ... which gives notice of exclusion from the property to the true owner or to the public and of the defendant’s dominion over it.” *Hayden*, 772 P.2d at 52. All plats of land at issue in this case were residential properties, and the use to which Plaintiffs put the disputed land was consistent with residential use. Ms. Stevens testified that since at least 1985, Plaintiffs used the property on a daily basis as a footpath to their garden and deck, gardened and entertained on it, kept their wood pile on it, and used its path to have deliveries made. Ms. Stevens also testified that Plaintiffs regularly cut weeds, trimmed trees, raked leaves, and performed fire abatement there. Mr. McLean testified that he used the disputed property to access Plaintiffs’ home and to hold his wood pile, and that he trimmed the trees on it. Five witnesses corroborate Plaintiffs’ description of their use of the disputed property, and the Court has found all of their testimony to be credible and persuasive. Steve Brett and Janet Mitchell, who had been Plaintiffs’ neighbors for approximately 20 years at the time of the litigation, testifies that they regularly saw Plaintiffs using the disputed property. Moreover, having personally visited the disputed property on two occasions, the Court is satisfied that Plaintiffs did, in fact, actually occupy the disputed property by putting it to their asserted uses and that Defendants had notice of the use.

Furthermore, the Court finds that Plaintiffs’ possession was exclusive. Given that they were unaware of any development on the property until 2006, Defendants cannot now claim that their familiarity with the property was sufficient to constitute joint use. Ms. Kirlin testified that, from the time Defendants purchased the property in 1984 until September 2006, she had not inspected the disputed property and did not know that Plaintiffs had developed it. Mr. Kirlin testified that he had neither inspected the disputed portion of property nor noticed any of the improvements on it. Both Plaintiffs testified that they had used the property continuously for 25

years without the permission of Defendants. This evidence forms a sufficient basis on which to conclude that Plaintiffs had exclusive and uninterrupted use of the property for at least 21 years.¹

Hence, because Plaintiffs' possession was actual and exclusive, a presumption of adversity arises. *Hayden*, 772 P.2d at 52. The Court finds that Defendants have not rebutted this presumption. Defendants have failed to prove that the possession was not hostile, not adverse, not made under a claim of right,² or interrupted. To prove hostility, the adverse possessor must merely intend to occupy the property adversely to the rights of the record holder, *Palmer Ranch v. Suwansawadi*, 920 P.2d 870 (Colo. App. 1996), and, here, Plaintiffs have proven their hostile use by "demonstrat[ing] an intention to claim exclusive ownership of the property occupied." *Trask v. Nozisko*, 134 P.3d 544, 549 (Colo. App. 2006). Plaintiffs knew that the disputed property was owned by someone else, and Mr. McLean testified that neither he nor Ms. Stevens asked for permission from Defendants to use the disputed property.

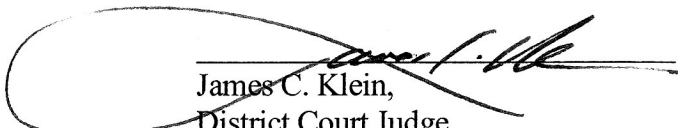
Defendants argue that the "claim of right" and hostility elements have not been satisfied because Plaintiffs knew at the time they began to use the property that it was owned by someone else, and because prior to 2000 Plaintiffs did not intend to assert a "claim of right" but rather used the property as a matter of convenience. The Court disagrees. As Plaintiffs point out, not only does a recognition of record title not demonstrate an intent not to possess adversely, it actually strengthens an adverse possession claim. *Schoenherr v. Campbell*, 472 P.2d 139, 141 (Colo. 1970). All that is required to meet the hostility requirement is that the adverse possessor intend to occupy the property adversely to the ownership rights of the record holder, and Plaintiffs' occupation of the disputed property in this case was inconsistent with Defendants' ownership of it.

Finally, the Court finds and concludes that the policy considerations underlying the doctrine of adverse possession justify transfer of title to Plaintiffs. In this case, Plaintiffs' attachment to the land is stronger than the true owners' attachment. Whereas Defendants were unaware of Plaintiffs' use of the disputed land during virtually their entire 22 year period of ownership, Plaintiffs have efficiently used the land on a daily basis. Given this history of use, the equities favor transfer of title to Plaintiffs.

Thus, the Court finds that Plaintiffs have adversely possessed the disputed land as described in Plaintiff's Exhibit 1. The Court Orders that title to this land be transferred to Plaintiffs.

BY THE COURT

October 17, 2007
Date


James C. Klein,
District Court Judge

¹ Defendants both testified that they "went by" lot 50 many times, but that they never specifically observed the development on the disputed land. Defendants also paid taxes and dues on the land. "[M]ere casual entry by the record owner is not necessarily sufficient to prove that the use of the property was joint," *Hayden*, 772 P.2d at 52, and the Court finds this limited "use" of the land does not defeat the exclusivity of Plaintiffs' possession.

² Under Colorado law, proof of use that is "adverse," "hostile," and "under a claim of right" is generally subsumed within the "hostility" analysis.