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Adverse Possession Of a Government's Property

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Adverse possession is a well-recognized method of gaining title to property,[1] with a long history of court rulings in New York, including a number by the New York Court of Appeals.[2] More than just a law school theory, adverse possession remains an alive and vibrant doctrine; indeed, the New York Legislature saw fit just a few years ago to amend the law setting forth the standard governing adverse possession.[3]

It has long been established that a governmental entity cannot lose title to property by adverse possession when it holds the property in its governmental capacity.[4] Nonetheless, courts frequently are called on to resolve adverse possession claims by a private individual or company seeking to acquire property by adverse possession from a government or government entity. As reflected in the recent decision by the Supreme Court, Bronx County, in *Brocho V'hatzlocho Corp. v. Metropolitan Transportation Authority*,[5] governments are not necessarily immune from the effects of adverse possession.

The 'MTA' Case

The *MTA* case involved real property at 538 Johnson Ave. in Brooklyn that was owned by Brocho V'Hatzlocho Corporation. The Metropolitan Transit Authority claimed ownership to property immediately adjacent to Brocho V'Hatzlocho's property. Brocho V'Hatzlocho asked the court to determine that it was the owner of the adjacent property by reason of adverse possession. In response, the MTA primarily contended that the law of adverse possession did not apply to it in this case because of its status as a "public authority."[6]

In its decision, the court explained that a municipality cannot lose title through adverse possession to property that it owned in its governmental capacity or that had been made inalienable by statute. The court found that this principle applied to the MTA because it performed an "essential governmental function."[7]

The court, however, rejected the MTA's argument that the rule meant that all property to which the MTA held title was immune from adverse possession, explaining that when a municipality held real property in its proprietary capacity, there was no immunity against adverse possession. It also refused to accept the MTA's argument that because it was a public benefit corporation created by the legislature to develop and further public transportation and implement a unified mass transportation policy within the metropolitan commuter transportation district consisting of New York City and the surrounding suburban counties, all of its property—including the property claimed by Brocho V'Hatzlocho—was integral to its transportation mission and should be deemed to be held by the MTA in a governmental capacity, rather than in a proprietary capacity, as a matter of law.

The court pointed out that the MTA was seeking to dispose of the property claimed by Brocho V'Hatzlocho and that it had solicited proposals from prospective purchasers. In the court's view, the immunity from adverse possession conferred on certain governmental property was based on the inalienability of property dedicated to the public trust and not held for the purpose of sale or other disposition. Accordingly, it concluded, the MTA had not established that the disputed property was immune from adverse possession as a matter of law.[8]

Capacity

In some instances it may be rather clear when a government entity meets its burden[9] to demonstrate that it holds property in a governmental capacity. For example, in *Kings Park Yacht Club v. State of New York*,[10] the Appellate Division, Second Department, upheld a decision by the Supreme Court, Suffolk County, in favor of the State of New York with respect to property located on the grounds of the Kings Park Psychiatric Center that was being used by the plain-

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tiff as a private yacht club. In rejecting the plaintiff's adverse possession claim, the court held that the state held the property in its governmental capacity for purposes of operating a mental hospital that, in fact, still was operating at the time that the plaintiff commenced its adverse possession action.

In other instances, though, the issue often may not be as clear. To assist in making this determination, courts have suggested various indicia to consider.

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For instance, in *Casini v. Sea Gate Ass'n*,[11] a not-for-profit association argued that it had acquired ownership by adverse possession of an elliptically-shaped traffic island from New York City that the city had acquired through a tax foreclosure proceeding. The Supreme Court, Kings County, ruled in favor of the association, and the Second Department affirmed.

In its decision, the appellate court pointed to what it characterized as a "well-recognized distinction" between land held by the state as sovereign in trust for the public for a public purpose such as highways, public streams, canals, and public fair grounds and land held as a proprietor only, for the purpose of "sale or other disposition." It then found it significant that there was no record that the city had ever formally dedicated the traffic island for a public use or had used it for a public purpose. Moreover, the Second Department continued, the city was not prohibited by any statute from alienating the property. The appellate court also noted that although the city's administrative code provided that land the city acquired through in rem foreclosure proceedings was deemed to be held by the city for a "public use," this presumption applied only for a period of three years from the date of the final judgment of foreclosure—and in this case the presumption of public use created by the administrative code had expired before the adverse possession proceeding had been filed.[12]

Another Second Department case, *Gallo v. City of New York*, involved property that the government had leased to private entities who utilized it for commercial purposes. The Second Department nonetheless found that the government had established that despite the leases, the property was held in a governmental capacity for the significant public purpose of monitoring leachate and the migration of landfill gas from the Fresh Kills Landfill, adding that the existence of a private profit motive by the lessees did not preclude the operation of the property from serving a public purpose.

There also may be instances when the government takes actions clearly inconsistent with its attempt to argue that it held property in a governmental capacity. *Monthie v. Boyle Road Associates*,[13] involved a portion of a 48-acre site that had been acquired by a school district. The district used only 19 acres of the complete site for school buildings, a playground, and athletic fields. Years after it had purchased the property, it offered to sell the remaining 29 acres. In a notice to bidders, the district described the site as "vacant land" and noted that the land was zoned "Residential-B1." In a portion of the offering, written on school district stationery, the district said that it was offering to sell "vacant land" that was "no longer required for school purposes" and that, in fact, the property that it wanted to sell was "not being used." The appellate court then upheld the decision by the Supreme Court, Suffolk County, that the property was not held by the school district in its governmental capacity.

Conclusion

The governmental-proprietary distinction seems quite well established in New York law, notwithstanding the 1988 decision by the Court of Appeals in *Matter of County of Monroe*.[14] In that case, the court addressed the City of Rochester's imposition of its land use requirements on the County of Monroe, and held that the governmental-proprietary "labeling device" should be replaced with a "balancing of public interests" analytic approach. Despite that ruling, the court nevertheless has continued to use the governmental-proprietary analytic approach in other areas,[15] and numerous other courts[16]—including the court in the *MTA* case—have continued to apply that distinction. Unless the Court of Appeals were specifically to reject the governmental-proprietary test in adverse possession cases, it is likely to be the rule for the foreseeable future.

1. Generally speaking, adverse possession requires that the possession be hostile and under claim of right, actual, open and notorious, exclusive, and continuous for a period of 10 years. See, e.g., *Galchi v. Garabedian*, 105 A.D.3d 700 (2d Dept. 2013).
2. See, e.g., *Belotti v. Bickhardt*, 228 N.Y. 296 (1920).
3. See Real Property Actions and Proceedings Law Article 5; see also Anthony S. Guardino, "Courts Reject Retroactivity Of Adverse Possession Claims," NYLJ, Nov. 28, 2012; Anthony S. Guardino, "Adverse Possession," NYLJ, July 23, 2008.
4. See *City of New York v. Wilson & Co.*, 278 N.Y. 86 (1938).
5. 40 Misc. 3d 1204(A) (Sup. Ct. Kings Co. 2013).
6. See Public Authorities Law §1263.
7. See Public Authorities Law §1264(2).
8. See, also, *Man Yum Ng v. Metropolitan Transportation Authority*, 17 Misc. 3d 1110(A) (Sup.Ct. Kings Co. 2007) (no immunity from adverse possession for MTA where land in question had not been used for any transportation function or governmental function for decades).
9. See, e.g., *Schwarz v. Trustees of Freeholders and Commonalty of Town of Huntington*, 85 A.D.3d 1008 (2d Dept. 2011).
10. 26 A.D.3d 357 (2d Dept. 2006).
11. 262 A.D.2d 593 (2d Dept. 1999).
12. See, also, *Albany Parking Services. v. City of Albany*, 3 A.D.3d 711 (3d Dept. 2004) (where use of disputed property for street purposes had been discontinued and the area thereafter was neither rededicated nor used for any other public purpose, Supreme Court, Albany County, had properly found it to be held in city's proprietary capacity and subject to adverse possession claim).
13. 281 A.D.2d 15 (2d Dept. 2001).
14. 72 N.Y.2d 338 (1988).
15. See *State NY ex rel. Grupp v. DHL Express (USA)*, 19 N.Y.3d 278 (2012); *World Trade Center Bombing Litig.*, 17 N.Y.3d 428 (2011); *Karedes v. Colella*, 100 N.Y.2d 45 (2003).
16. See, e.g., *Gallo v. City of New York*, 51 A.D.3d 630 (2d Dept. 2008); *Starner Tree Serv. v. City of New Rochelle*, 271 A.D.2d 681 (2d Dept. 2000); *Casini v. Sea Gate Ass'n.*, 262 A.D.2d 593 (2d Dept. 1999).