

# HOUSE BILL REPORT

## ESHB 1026

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### As Amended by the Senate

**Title:** An act relating to adverse possession.

**Brief Description:** Changing provisions relating to adverse possession claims.

**Sponsors:** House Committee on Judiciary (originally sponsored by Representatives Rolfes, Orcutt, Carlyle, Blake, Angel and McCune).

#### **Brief History:**

##### **Committee Activity:**

Judiciary: 1/13/11, 1/20/11 [DPS].

##### **Floor Activity:**

Passed House: 2/23/11, 95-1.

Senate Amended.

Passed Senate: 4/1/11, 48-0.

#### **Brief Summary of Engrossed Substitute Bill**

- Requires the higher "clear, cogent, and convincing evidence" standard of proof for some adverse possession claims.
- Allows a court to award costs and reasonable attorneys' fees to the prevailing party in an action asserting title to real property by adverse possession if the court decides such an award is equitable and just.
- Permits a court to decide that a party who prevails on an adverse possession claim must pay certain taxes levied on the property that were paid by another party or that went unpaid.

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### HOUSE COMMITTEE ON JUDICIARY

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 13 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Chandler, Eddy, Frockt, Kirby, Klippert, Nealey, Orwall, Rivers and Roberts.

**Staff:** Parker Howell (786-5793) and Edie Adams (786-7180).

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

## **Background:**

The doctrine of adverse possession allows a person who without permission physically possesses another's land to make a legal claim against the title holder in order to gain title to the property. For a person to make a successful claim, he or she must have sufficiently possessed the property for a set period of time and meet several additional conditions stemming both from common law and state statutes. Adverse possession claims often arise as a defense to actions for ejectment or to quiet title to a parcel.

Rationale. Adverse possession dates to early English legal history when modern ideas of title and possession of land were not clearly separated. The doctrine rests on the idea of conforming title to appearances of possession long held on the ground.

Statutes of Limitations. Washington law generally requires plaintiffs or their predecessors to have possessed the land at issue for at least 10 years before an adverse possession action is commenced. In certain situations, state statutes reduce the length of possession necessary. The "payment-of-taxes" statute allows an adverse possessor to gain title in only *seven* years if, in addition to meeting the usual common-law requirements, he or she: (1) has "color of title" (a document that appears to convey title but does not legally do so); (2) has paid all taxes on the land for seven successive years; and (3) has a "good faith" belief that he or she has title. The less-commonly used "connected-title" statute reduces the period to seven years for a possessor who has a title to the land traceable to a public deed.

Common-Law Elements. Judicial decisions generally require an adverse possession to be: (1) open and notorious, such that possession is visible and discoverable to the true owner; (2) actual and uninterrupted, requiring sufficient physical possession or use of the land over a continuous, specified length of time; (3) exclusive, or not shared with the true owner; and (4) hostile, or objectionable to the owner of the land considering the character of possession and locale of the property. Courts presume the holder of legal title to the land has possession, so the party claiming to have adversely possessed the property has the burden of establishing the existence of each element for the requisite period. In Washington, courts do not take account of the adverse possessor's good faith belief, or lack thereof, that he or she owns the land.

Burden of Proof. People bringing adverse possession claims generally must prove each element of their cases by a "preponderance of the evidence," the typical burden of proof used in civil jury cases. However, some types of cases require plaintiffs to offer more persuasive proof, such as "clear, cogent, and convincing evidence." To satisfy the preponderance of the evidence standard, a factfinder must determine a fact to be more probably true than not. Under the higher standard, courts have required factfinders to determine that a fact is "highly probable."

This higher standard of proof is required in some adverse possession-related actions. For example, an adverse possessor claiming ownership of "forest land" must establish by "clear and convincing" evidence that the adverse claimant has "made or erected substantial improvements" and remained on the land for at least 10 years. Courts also require the "clear, cogent, and convincing" standard for the doctrine of mutual recognition and acquiescence, a theory related to adverse possession that allows a marked property boundary line to be adjusted when both parties have long considered it to lie in a certain place.

Costs and Fees. Adverse possession claimants generally are not required to pay defending parties' legal costs or attorneys' fees. When a landlocked property owner wants to acquire access through a private condemnation of a way of necessity, however, the owner must pay attorneys' fees incurred by the other parties, and for the value of the easement granted.

**Summary of Engrossed Substitute Bill:**

A person asserting a claim of adverse possession must prove each element of his or her case by clear, cogent, and convincing evidence.

A person who loses in an action asserting title to real property by adverse possession may be required to pay all or part of the other party's costs and reasonable attorneys' fees if the court determines that such an award is equitable and just.

The new burden of proof and possible requirement to pay costs and fees do not affect adverse possession claims brought under the "connected-title" statute or the "payment-of-taxes" statute. The new provisions also do not apply to the statute governing adverse possession of forest lands.

A party who prevails against the holder of recorded title at the time an adverse possession action is filed, or against a later purchaser of the title, may be required to reimburse that holder or purchaser for part or all of any taxes and assessments on the property that the losing party paid during the period of adverse possession. The court also may require the prevailing party to pay to the county treasurer part or all of any taxes and assessments levied on the property after the filing of the claim that are due and remain unpaid at the time of judgment. If the court orders payment or reimbursement of taxes and assessments, the court must decide how to allocate the taxes and assessment based on all the facts and in a way that appears equitable and just.

This act applies to adverse possession actions filed on or after July 1, 2012.

**EFFECT OF SENATE AMENDMENT(S):**

The Senate amendment (1) eliminates the requirement that a party claiming adverse possession must prove the case by the higher burden of proof of clear, cogent, and convincing evidence, and (2) removes the provision allowing a court to award costs and reasonable attorneys' fees to the prevailing party in an adverse possession action.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Effective Date:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.

**Staff Summary of Public Testimony:**

(In support) The doctrine of adverse possession was developed more than a century ago, and modern technologies for mapping and surveying make adverse possession obsolete because property owners should be able to determine who truly owns a piece of land. Adverse possession is legalized land theft and can allow someone to take another's land for free, even when the owner paid taxes on that land for years. The current Washington law is unfair and flawed. Many states have revised their adverse possession laws. Claims of adverse possession can be costly to defend, financially devastate a defending title holder, and turn neighborhoods into battlefields. The bill would make it so adverse possessors no longer can force settlements by exposing the defending title holder to steep legal costs.

(Opposed) The current law represents a balance between competing interests. Adverse possession cases rarely occur from someone intentionally possessing another's land, and such claims usually arise as a defense.

The bill could promote frivolous litigation, negatively affect title companies, increase the cost of housing, and adversely affect cities that buy and sell land because sellers would be less likely to give warranty deeds. Often, public roads do not fall on recorded easements, resulting in adverse possession claims, and the bill would require governments to pay defending parties' fees.

The standard of evidence should be changed to "clear, cogent, and convincing evidence" because decisions in this area of law have not interpreted the "clear and convincing" standard. The requirement that the winning adverse possessor pay the other side's costs in every case goes too far, and the decision about how much a claimant pays should be left to the trier of fact. The provisions on liability for taxes also could be unfair, and a flat rule is improper. The bill should be changed to require an adverse possessor to bring a claim in "good faith" that he or she owns the land.

**Persons Testifying:** (In support) Representative Rolfes, prime sponsor; Christina Norton; Laurel Walloch; Christopher McKie; and Robert Zierman, Justice Smiles, Professional Limited Liability Company.

(Opposed) Craig Ritchie, City of Sequim; Michael Barrett, Washington State Bar Association Real Property, Probate and Trust Section; and Dwight Bickel, Washington Land Title Association.

**Persons Signed In To Testify But Not Testifying:** None.