

By Bershad & Tuvel, Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C. Maintaining an Action for Adverse Possession and Easement by Prescription in New Jersey

The doctrine of adverse possession is a well-established legal theory, which allows one who does not possess title to a specific parcel of land to obtain title through conduct, which would have the general public perceive that such person is the true owner. The policy behind the doctrine is clearly that society rewards those who maximize their property rights and punishes those who ignore them. In New Jersey, the Legislature has made adverse possession a statutory cause of action and case law has established the elements, which must be demonstrated by the actions of the adverse possessor. To acquire title by adverse possession, possession must be (1) actual and exclusive; (2) hostile; (3) visible or notorious; and (4) continued and uninterrupted. All of these elements must be maintained for a period of time, which has been set forth by the Legislature pursuant to statute. However, confusion has arisen over the years as to which statute enacted by the Legislature applies in an adverse possession case. Although one might assume this to be a straightforward answer, it took the Supreme Court decision in *J & M Land Co. v. First Nat. Bank* to resolve the issue.

In New Jersey, four statutes



Russell B. Bershad Jason R. Tuvel

exist which set forth a time period entitling one in possession of land to quiet the title to the property. However, two statutes provide this remedy to one in possession after twenty-years, while the others sustain a thirty or sixty-year statutory time period. Which governs?

The Supreme Court held that the two latter statutes, which maintain thirty and sixty-year periods, are the adverse possession statutes in New Jersey. The Court underscored that the former statutes merely set forth a twenty-year time period for a landowner entitled to recover possession or quiet the title to property in possession of another, while the thirty and sixty-year statutes are substantive statutes creating a cause of action for adverse possession that did not exist at common law allowing title to vest in the occupier of the real estate. The court further emphasized that the twenty-year statutes did not apply in an adverse possession situation because "allowing an adverse

possessor to choose which statute to apply would render the thirty/sixty statute a nullity."

The *J & M* case also addressed how it's holding effected the common law doctrine of easement by prescription. An easement by prescription is a derivative of adverse possession in that it enables one to quiet the title to a possessory interest in property. In *J & M*, the Court held, in the absence of a specific statutory provision, by analogy the period derived from the local statutes of limitations for adverse possession apply to causes of action for an easement by prescription. Furthermore, the Court held that all elements required under the common law for a claim of adverse possession must be demonstrated in an action for an easement by prescription.

The effects of the *J & M* decision could not be seen until the recent Appellate Division decision in *Randolph Town Center, L.P. v. County of Morris*, which was affirmed on the issue of the statutory period for a prescriptive easement by the New Jersey Supreme Court in February of 2006. This case represented the first reported decision since *J & M* where the court was faced with the issue of whether to apply the twenty-year or the thirty-

year statutory period. In *Randolph Town Center*, the Appellate Division reversed the trial court's ruling that the County of Morris had established a prescriptive easement to drain water through a culvert under the Sussex County Turnpike onto property owned by the plaintiff developer. The basis for reversing the lower court's decision was the failure of the trial court to instruct the jury that the plaintiff had to establish all of the elements of a prescriptive easement for a thirty-year period based on the holding in *J & M*.

The *J & M* and *Randolph Town Center* decisions have solidified the law in New Jersey with respect to the causes of action of adverse possession and easement by prescription. If the property in dispute does not consist of woodland or uncultivated tracts, the claimant must demonstrate all of the elements of adverse possession set forth above for the thirty-year statutory period.

Russell B. Bershad is a director, and Jason R. Tuvel is an associate, in the Real Property and Environmental Department at the law firm of Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C., which has offices in Newark, New York, Philadelphia and Trenton. ■