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ADVERSE POSSESSION OF MUNICIPAL LAND: IT'S TIME TO PROTECT THIS VALUABLE ASSET

Paula R. Latovick*

The laws of several states regarding adverse possession of municipal land vary widely from providing no protection to granting complete immunity from such loss. Generally, states that permit adverse possession of municipally owned land do so without articulating a rationale for allowing such a loss of a valuable municipal asset. In this Article, Professor Latovick describes why the current state of the law is unsatisfactory. She then considers the public policies raised by the issue of adverse possession of municipal land. Professor Latovick concludes by proposing that states should adopt legislation expressly protecting all municipal land from adverse possession and by suggesting model language for such statutes.

INTRODUCTION

The doctrine of adverse possession provides that an owner of land may lose the title to his land if he fails to eject trespassers promptly. If the trespasser uses the land as his own for the length of time specified in the state's statute of limitations,¹ and satisfies any additional common law and statutory requirements,² the owner is barred from recovering possession of the land from the trespasser.³

While statutes of limitation for the recovery of land have not historically run against federal⁴ and state governments,⁵ land

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1. See, e.g., ALASKA STAT. § 9.10.030 (Michie 1996); COLO. REV. STAT. § 38-41-101(1) (1982).

2. Typical common law requirements are that the possession be actual, open, notorious, exclusive, adverse to the title of the true owner, and continuous for the period prescribed by the statute of limitations. See *Mackinac Island Dev. Co. v. Burton Abstract & Title Co.*, 349 N.W.2d 191, 195 (Mich. Ct. App. 1984); *Ebell v. City of Baker*, 299 P. 313, 318 (Or. 1931).

3. While most adverse possession statutes of limitation speak only in terms of preventing a lawsuit by the original owner to recover possession, see N.J. STAT. ANN. §§ 2A:14-6, -7, -8, -30, -31 (West 1987), the effect of satisfying the statutory time period is to create a new title in the adverse possessor. See *Devins v. Borough of Bogota*, 592 A.2d 199, 201 (N.J. 1991); *O'Keeffe v. Snyder*, 416 A.2d 862, 873-74 (N.J. 1980).

4. See 48 U.S.C. § 1489 (1994).

5. See ALASKA STAT. § 38.95.010 (Michie 1996); N.H. REV. STAT. ANN. § 539:6 (1997). But see Paula R. Latovick, *Adverse Possession Against the States: The Hornbooks*

owned by municipal entities has generally received decidedly less protection. In a very few states, all land owned by cities and counties is expressly protected from adverse possession by statute.⁶ A number of other states protect limited categories of municipally owned land by statute.⁷ Most states, however, leave municipally owned land completely unprotected by statute. In those states, the only protection, if any, has been provided by the courts.⁸

This Article contends that the current method for protecting municipal land from adverse possession is inadequate in most states. It examines the difficulties inherent in applying the governmental/proprietary distinction, a test which has not adapted to reflect the modern realities of municipal land ownership and which does not recognize recent anti-development concerns. Noting the large amount of municipal land at risk of adverse possession, this Article concludes that states should enact statutes making all municipal land expressly immune from adverse possession.

I. THE CURRENT METHOD OF PROTECTING MUNICIPALLY OWNED LAND FROM ADVERSE POSSESSION IS INADEQUATE

A. *The Dual Nature of Municipal Corporations*

Historically, municipal corporations have been deemed to have both governmental and private (proprietary) aspects.⁹ This dual nature is important in the law of adverse possession because,

Have it Wrong, 29 U. MICH. J.L. REFORM 939 (1996) (discussing the failure of states to prevent adverse possession of state land by private parties).

6. See ALA. CODE § 6-2-31(b) (1993); COLO. REV. STAT. § 38-41-101(2) (1982); MISS. CODE ANN. § 15-1-51 (1995); see also discussion *infra* Part II.B.

7. See ARK. CODE ANN. §§ 22-1-202, -203 (Michie 1996) (protecting municipal waterworks lands and public school system property); KY. REV. STAT. ANN. § 413.050(1) (Michie 1992) (granting limited protection to streets, alleys, and other public easements); MINN. STAT. ANN. § 541.01 (West 1988) (protecting public ways, levees, squares, and other grounds dedicated to public use); see also discussion *infra* Part II.C.

8. See *Henry Cowell Lime & Cement Co. v. State*, 114 P.2d 331, 332-33 (Cal. 1941) (acknowledging a rule that municipal land dedicated to a public use may not be adversely possessed); *Brown v. Trustees of Schools*, 79 N.E. 579, 580 (Ill. 1906) (noting that statutes of limitations do not generally run against the state or any municipalities where public rights are implicated, based on the maxim of *nullum tempus occurit regi* (time does not run against the sovereign)); *Siejack v. City of Baltimore*, 313 A.2d 843, 846 (Md. 1974) (noting a rule that property held by a municipal corporation for a public use may not be adversely possessed); *Devins*, 592 A.2d at 200 (holding that municipal property not dedicated to a public use is subject to adverse possession).

9. See 3 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 1188, at 1887 (5th ed. 1911).

while courts generally have protected land held in a governmental capacity or dedicated to a public use from adverse possession, they have permitted adverse possession of municipal land held in a proprietary capacity.¹⁰ A municipal corporation¹¹ has been described as:

[A] body politic and corporate, established by sovereign power, evidenced by a charter, with a defined area, a population, a corporate name, and perpetual succession, established primarily to regulate the local or internal affairs of the area incorporated, and secondarily to share in the civil government of the state in the particular locality.¹²

Thus, a municipal corporation is a subordinate branch of state government entrusted with the administration of the local affairs of an area for the benefit of the local community. States differ as to whether a county constitutes a municipal corporation, some treating it instead as a branch of state government with no corporate characteristics.¹³

Although they constitute an important and integral part of our system of government, municipal corporations have nonetheless often been regarded as less than fully governmental in nature. The law may treat them as hybrid entities, with both governmental and private functions and characteristics.¹⁴ One court noted the following distinction:

10. See discussion *infra* Part I.C.

11. For purposes of this Article, the terms "municipal corporation" and "municipality" include towns, cities, parishes, and boroughs unless otherwise noted. The rules discussed have also been applied, occasionally, to other "quasi-municipalities." Examples of such quasi-municipalities include airport authorities, school districts, boards of education, drainage districts, and water and sewer districts. See CHARLES S. RHYNE, *MUNICIPAL LAW* § 1-4, at 6-7 (1957).

12. *Id.* at 2. For a discussion of the nature of municipal governments, focusing mainly on the city of New York but also drawing authority from New England states, see HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER* (1983). See also Joan Williams, *The Development of the Public/Private Distinction in American Law*, 64 *TEX. L. REV.* 225 (1985) (reviewing HARTOG, *supra*).

13. Counties have sometimes been described as "quasi-municipal corporations organized as subordinate agencies of the state government to aid in the proper administration of state affairs with such powers and functions as the law prescribes." See RHYNE, *supra* note 11, § 1-4, at 6. In some states, counties are considered to be municipal corporations. See *Neuenschwander v. Washington Suburban Sanitary Comm'n*, 48 A.2d 593, 597 (Md. 1946). In other states, counties are deemed distinct from municipalities. One Florida case distinguished counties from municipalities because counties are political divisions of the state under the state constitution, while municipalities are not. See *Keggin v. Hillsborough County*, 71 So. 372, 373 (Fla. 1916).

14. "Although municipal corporations are public agencies, exercising, on behalf of the State, public duties, yet they also exercise and acquire what the courts have called

A governmental function has to do with the administration of some phase of government; that is to say, dispensing or exercising some element of sovereignty. A proprietary function is one designed to promote the comfort, convenience, safety and happiness of the citizens. . . . A governmental function is necessary; a proprietary function . . . is not.¹⁵

This governmental/proprietary distinction is important to the issue of adverse possession because, while the courts have almost universally protected land held in a governmental capacity from adverse possession, they have often permitted adverse possession of land held in a proprietary capacity.¹⁶ The remainder of this section will examine the theories and practices relating to this distinction, and will clarify the need for a better approach.

B. The Governmental / Proprietary Distinction in Tort Law

There are several substantive legal areas where the characterization of a municipality's actions as governmental or proprietary is also important. Like adverse possession, the area of municipal immunity from tort liability is affected by this distinction, and a brief discussion of this area is helpful to illuminate the usefulness of the distinction. Municipalities are generally immune from liability for injuries caused by their agents while performing a governmental function, but they lose their immunity where the function performed by the agent is proprietary in nature.¹⁷

rights in a private and proprietary capacity rather than in a public and governmental capacity . . ." 3 DILLON, *supra* note 9, § 1188, at 1887.

15. *McPhee v. Dade County*, 362 So. 2d 74, 79-80 (Fla. Dist. Ct. App. 1978) (citation omitted).

16. See discussion *infra* Part I.C. Some early courts did not even protect land held in a governmental capacity. See *Evans v. Erie County*, 66 Pa. 222, 228 (1870) ("That the Statute of Limitations runs against a county or other municipal corporation, we think cannot be doubted. The prerogative is that of the sovereign alone: *Nullum tempus occurrat reipublicae*.").

17. See *Williams v. City of Longmont*, 129 P.2d 110, 111-12 (Colo. 1942); *Woodford v. City of St. Petersburg*, 84 So. 2d 25, 26 (Fla. 1955); *Augustine v. Town of Brant*, 163 N.E. 732, 733-34 (N.Y. 1928).

The difference between governmental and proprietary activities has never been defined satisfactorily.¹⁸ One court has suggested:

[I]n truth there is no universally accepted or all-inclusive test to determine whether a given act of a municipality is private or governmental in its nature, but the question is usually determined by the public policy recognized in the jurisdiction where it arises. . . . Where the act in question is sanctioned by legislative authority, is solely for the public benefit, with no profit or emolument inuring to the municipality, and tends to benefit the public health and promote the welfare of the whole public, and has in it no element of private interest, it is governmental in its nature.¹⁹

Even this "test," however, is not particularly helpful in determining what is a purely governmental function, as opposed to one contaminated with "local or special interests of the municipality."²⁰ Using this "test," Maryland courts have repeatedly held that the maintenance of streets and sidewalks is a matter of local interest to the municipality, and thus

18. See *Austin v. Mayor of Baltimore*, 405 A.2d 255, 272 (Md. 1979) (Cole, J., dissenting).

19. *Mayor of Baltimore v. State ex rel. Blueford*, 195 A. 571, 576 (Md. 1937) (holding a municipality immune from suit for negligence in the operation of a public pool). The *Blueford* Court claimed that:

[I]t is better that the adequate performance of such an act be secured by public prosecution and punishment of officials who violate the duties imposed upon them in respect to it than to disburse public funds dedicated to the maintenance of such public conveniences as public parks, playgrounds, hospitals, swimming pools, and beaches maintained at the public expense to private persons who have suffered loss through the negligence or default of municipal employees or agents charged with their management.

Id.; see also *E. Eyring & Sons Co. v. Mayor of Baltimore*, 252 A.2d 824, 825-26 (Md. 1969) (finding issuance of building permits as well as supervision and inspection of church construction to be governmental acts for the performance of which the city is immune from suit according to the standards established in *Blueford*).

20. *Mayor of Baltimore v. Eagers*, 173 A. 56, 59 (Md. 1934) ("It is often difficult to determine in a particular instance whether the duty involved is in the exercise or neglect of the municipality's governmental or political functions or of its ministerial and private or corporate functions. The decisions do not furnish a satisfactory test, as they are conflicting in their reasoning and conclusions.").

proprietary in nature, subjecting the municipality to liability for the negligence of its agents.²¹

The uncertainty arising from use of the governmental/proprietary distinction in determining municipal liability for the negligent actions of municipal agents has led to wildly inconsistent results, even between courts within the same state.²² For example, Florida courts have held that a municipality could be held liable for the negligent operation of a fire truck,²³ but not for an intentional assault by a police officer during the course of an arrest.²⁴ Similarly, the courts of Maryland have held the operation of a park and municipal swimming pool to be governmental and thus immune from suit for negligence,²⁵ and yet have classified maintenance of public

21. See *id.* at 59-60; *Mayor of Hagerstown v. Crowl*, 97 A. 544, 546 (Md. 1916) (holding city liable for negligence where it issued a building permit for construction of an addition to a building without requiring safeguards to protect nearby pedestrians, and a person was injured by a falling brick); *Mayor of Havre de Grace v. Fletcher*, 77 A. 114, 117 (Md. 1910) (holding a city liable for failing to stop a business from stacking beer kegs dangerously high on a public sidewalk).

22. "Not only are the cases in hopeless confusion as between jurisdictions, but even within a particular state they often turn on incomprehensible abstrusities." 2 STUART M. SPEISER ET AL., *THE AMERICAN LAW OF TORTS* § 6:9, at 49 (1985).

Likewise, Professor Davis concludes: "The distinction is probably one of the most unsatisfactory known to the law, for it has caused confusion not only among the various jurisdictions but almost always within each jurisdiction." 3 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 25.07, at 460 (1958).

23. See *City of Tallahassee v. Kaufman*, 100 So. 150, 152 (Fla. 1924) (holding that city charter giving city "power . . . to provide for and maintain a fire department" was "not a command to provide and maintain a fire department and fire-fighting apparatus as a purely governmental function, but . . . a grant of power to be exercised for the benefit of the municipality and its inhabitants"); *Maxwell v. City of Miami*, 100 So. 147, 149 (Fla. 1924). The court stated:

Reckless driving of fire trucks on the streets of a city is manifestly not essential to efficiency in fire fighting, and such conduct needlessly and unreasonably and consequently unlawfully impairs the private rights of those who are lawfully upon the streets with their property. Such conduct renders the streets unsafe, and, when permitted by the city, liability of the city may arise therefrom if persons and property lawfully on the streets are injured in consequence thereof.

Id.

24. See *Brown v. Town of Eustis*, 110 So. 873, 873-74 (Fla. 1926) (holding that an officer's unlawful actions were unauthorized by the city and thus not an exercise of the city's corporate power); see also *Kennedy v. City of Daytona Beach*, 182 So. 228, 229 (Fla. 1938) (asserting that a police force serves the public's interests, not the city's corporate interests); *Woodford v. City of St. Petersburg*, 84 So. 2d 25, 27 (Fla. 1955) (holding that the city's liability for negligent failure to prevent injury arising from spectators' actions at public ballpark depended upon the city's role in the effective abatement of the nuisance).

25. See *Mayor of Baltimore v. State ex rel. Blueford*, 195 A. 571, 575 (Md. 1937) (holding that operation of municipal swimming pool was a governmental function);

highways as proprietary, subjecting the municipality to liability for the negligence of its agents in that context.²⁶ Conspicuously absent is any overriding rationale that would justify a rule that holds a municipality to be more "governmental" while running a swimming pool than while maintaining city streets.²⁷

Nor have the cases been consistent between states. In California, Connecticut, Maryland, Ohio, and Utah, for example, the operation of a public park, swimming pool, or other recreation area is considered governmental, such that municipalities in those states are not liable in tort for their agents' negligence.²⁸ In Colorado, Florida, New York, and Virginia, however, the operation of a park, swimming pool, or recreation area has been deemed proprietary, and municipalities in those states may be liable in tort for their agents' negligence.²⁹

Mayor of Baltimore v. State *ex rel.* Ahrens, 179 A. 169, 173 (Md. 1935) (holding that maintenance of municipal park with bathing stream running through it was a governmental function).

26. See Mayor of Baltimore v. Eagers, 173 A. 56, 60 (Md. 1934) (negligent removal of a tree near a public square by municipal workers constituted a proprietary function and city was thus liable); Cox v. Board of Comm'rs, 31 A.2d 179, 181 (Md. 1943) (noting the Maryland rule that a city exercises a proprietary function when it maintains public highways and, therefore, is liable for its negligence).

27. It is difficult to find a good reason for holding that a municipality (using the word broadly) is not exercising the police power for the safety of the public when it is maintaining public highways. However, the rule in this state and in other jurisdictions is that the municipality is acting in its corporate capacity, and is liable for its negligence. See Cox, 31 A.2d at 181.

28. See Crone v. City of El Cajon, 24 P.2d 846, 848 (Cal. Dist. Ct. App. 1933) (operation of a swimming pool in a public park is a governmental function); Hannon v. City of Waterbury, 136 A. 876, 877 (Conn. 1927) ("Public parks, playgrounds, swimming pools, and public baths or bathing houses are all examples of municipal functions undertaken for the public benefit, and, unless maintained for the corporate profit of the municipality are within the rule of governmental immunity."); Ahrens, 179 A. at 173 ("maintenance, control, and operation" of a municipal park with an allegedly dangerous bathing stream was a governmental function); Blueford, 195 A. at 575 (operation of a public swimming pool was a governmental function); Selden v. City of Cuyahoga Falls, 6 N.E.2d 976, 977 (Ohio 1937) ("To simplify and shorten this discussion, it should be noted that the defendant municipality here acted in a governmental rather than a proprietary capacity in the construction and maintenance of its park with a swimming pool for the use and benefit of the general public."); Alder v. Salt Lake City, 231 P. 1102, 1103 (Utah 1924) ("While there are some cases to the contrary, the great weight of judicial opinion is that the maintenance of parks and playgrounds is a public and governmental function.").

29. See Williams v. City of Longmont, 129 P.2d 110 (Colo. 1942) (distinguishing the proprietary role of operating a public park from the governmental role of preserving order in that park); City of Denver v. Spencer, 82 P. 590, 590-92 (Colo. 1905) (public park); Pickett v. City of Jacksonville, 20 So. 2d 484, 486 (Fla. 1945) (swimming pool); Augustine v. Town of Brant, 163 N.E. 732, 734 (N.Y. 1928) ("The modern tendency is against the rule of nonliability. . . . A wise public policy forbids us to recognize the town of Brant as acting as a sovereign when it maintains its park. It acts as a legal individual voluntarily assuming a duty, not imposed upon it, for the benefit of a locality rather

This distinction between governmental and proprietary functions as it relates to immunity from tort liability has come under blistering attack.³⁰ Critics point out that the distinction fails to provide a framework for analyzing a new set of facts³¹ and thus fails to provide courts with necessary guidance. Many states have chosen to abandon the distinction between governmental and proprietary functions, and have chosen instead to render municipalities uniformly liable for the tortious actions of all of their agents.³² Courts and commentators have grown less

than the general public." (citation omitted)); *Hoggard v. City of Richmond*, 200 S.E. 610, 611 (Va. 1939) (swimming pool); see also 3 DAVIS, *supra* note 22, § 25.07, at 460-63 (analyzing *Hoggard*).

30. After describing the "unsubstantial nature of the reasons for the governmental-private distinction," one commentator noted:

All this would be bad enough if the test were simple and easy to determine. But no satisfactory basis for solving the problem whether the activity falls into one class or other has been evolved. The rules sought to be established [in determining whether a given function is governmental or proprietary] are as logical as those governing French irregular verbs.

Murray Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 VA. L. REV. 910 (1936), reprinted in 53 U. CIN. L. REV. 469, 493 (1984); see also *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130, 132-33 (Fla. 1957) (holding municipal corporation liable for the torts of police officers under the doctrine of respondeat superior and rejecting governmental/proprietary distinction as the basis for its decision); *Austin v. City of Baltimore*, 405 A.2d 255, 269 (Md. 1979) (Cole, J., dissenting) ("The majority . . . continues to perpetuate the gross inequity inherent in the doctrine of governmental immunity. . ."); John A. Gleason & Kenneth VanWinkle, Jr., Comment, *The Ohio Political Subdivision Tort Liability Act: A Legislative Response to the Judicial Abolishment of Sovereign Immunity*, 55 U. CIN. L. REV. 501, 506 (1986) ("The continued application of the governmental-proprietary distinction resulted in inconsistent decisions and often led to absurd and unjust consequences.").

31. One critic has argued:

These criteria are elusive and unsatisfactory. All the functions of a municipality are—or should be—for the public benefit. They are none the less so because they serve directly and primarily only a limited segment of the public rather than all the people of the state. To the extent that cities are instrumentalities of the state, their main function is to serve the state's purposes locally. The fact that the municipality makes a charge or a profit in connection with the service rendered has often been considered; but functions have been held governmental in spite of a charge, and functions have been held proprietary where there is neither charge nor profit. The historical test is a suggestive guide though a faltering one. Many of the functions now generally considered governmental were privately performed in the not very distant past. Little wonder that courts and commentators have despaired of finding a rational and consistent key to the distinction. . . .

2 FOWLER W. HARPER ET AL., *THE LAW OF TORTS* § 29.6, at 628-29 (2d ed. 1986).

32. See *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130, 132-34 (Fla. 1957). The court stated:

and less comfortable with both municipal immunity from tort claims and the governmental/proprietary test supporting that immunity.³³

It makes sense to abolish a distinction that is impossible to apply consistently and fairly, and that is unsupported by any well-articulated rationale.³⁴ This is true for claims of adverse possession as well as for tort claims. In the tort context, the governmental/proprietary distinction should be replaced by a rule of uniform liability for municipalities. However, as discussed in the next Part, abolition of this distinction in the adverse possession context should result in more, rather than less, protection for municipalities.

C. The Governmental / Proprietary Distinction in Adverse Possession Cases

1. There Are Many Reasons to Protect Municipal Land Held in a Governmental Capacity—Land owned by a municipality that is used in connection with the municipality's governmental powers, or which has been dedicated to a public purpose, has almost always been deemed immune from adverse possession. Courts have offered a number of justifications to support such immunity. First, in some states, land dedicated to a public use

The problem in Florida has become more confusing because of an effort to prune and pare the rule of immunity rather than to uproot it bodily and lay it aside as we should any other archaic and outmoded concept. This pruning approach has produced numerous strange and incongruous results. . . . [W]hen an individual suffers a direct, personal injury proximately caused by the negligence of a municipal employee while acting within the scope of his employment, the injured individual is entitled to redress for the wrong done.

Id.

33. See SPEISER, *supra* note 22, § 6.9, at 51–52 & n.2; see also *McAndrew v. Mularchuk*, 162 A.2d 820, 830–32 (N.J. 1960) (holding that municipal tort liability should be assessed based on respondeat superior analysis and not according to the governmental/proprietary distinction).

34. One of the few positive comments regarding this distinction in tort law comes from Professor Davis. "To the extent that the governmental-proprietary distinction produces municipal responsibility that might not otherwise exist, the distinction makes for justice, for liability for some municipal torts is to be preferred to liability for no municipal torts." 3 DAVIS, *supra* note 22, § 25.07, at 459. It is clear from his comment, however, that even Professor Davis would support the abolition of the distinction in favor of a rule providing consistent municipal liability for torts.

or trust is inalienable.³⁵ This being the case, title to such land cannot be taken by adverse possession.³⁶ Second, other state courts have held simply that land subject to a public trust may not be acquired by adverse possession, without regard to whether the land is alienable.³⁷ Third, courts have also held that unauthorized obstructions and erections upon public lands constitute nuisances, and that no amount of time can serve to legalize a nuisance.³⁸ A fourth theory posits that encroachments upon public property are a matter of sufferance until such time as the property is needed for its designated purpose, and are

35. See *Montgomery County v. Maryland-Washington Metro. Dist.*, 96 A.2d 353, 357 (Md. 1953) ("Property which is held in a governmental capacity or is impressed with a public trust, cannot be disposed of without special statutory authority."). One scholar offered the following explanation:

Public policy is the real underlying reason why such alienation is not permitted. It is felt that it is unwise for any particular administration to have power to sell all the property of the corporation. Too many opportunities for graft or political machinations would be presented if the municipality could alienate at pleasure, with the consequent result that the future welfare of such governmental agency would be a matter of doubt.

Delmar W. Doddridge, *Distinction Between Governmental and Proprietary Functions of Municipal Corporations*, 23 MICH. L. REV. 325, 332 (1925).

36. See *West Ctr. Congregational Church v. Efstathiou*, 627 N.Y.S.2d 727, 728 (App. Div. 1995); *Messersmith v. Mayor of Riverdale*, 164 A.2d 523, 525 (Md. 1960) ("In Illinois, . . . it is held that this statute [of limitations] does not apply to a suit brought by a municipal corporation to recover possession of property which was dedicated to it for the use of the public, since the corporation has no power to *alien* or *dispose* of the property, and hence there could be no paper title to be protected such as the statute contemplated."); 3 DILLON, *supra* note 9, § 1191, at 1892; see also BYRON K. ELLIOTT & WILLIAM F. ELLIOTT, *A TREATISE ON THE LAW OF ROADS & STREETS* § 883, at 968-69 (2d ed. 1900).

Municipal corporations have no power to alien or dispose of their streets for any purpose inconsistent with their use as highways. It would be a grave reproach to the law to permit a wrongdoer, one who is daily violating the law of the state itself, to take advantage of his own wrong and that of the municipality, and by such indirect and wrongful means obtain a right to the street which the corporation is prohibited from directly granting or destroying.

Id.

37. See *Thurston v. City of Forest Park*, 89 S.E.2d 509, 511 (Ga. 1955); *Town of Chouteau v. Blankenship*, 152 P.2d 379, 383 (Okla. 1944).

38. See ELLIOTT & ELLIOTT, *supra* note 36, § 883, at 968 ("There can be no rightful permanent private possession of a public street. Its obstruction is a nuisance, punishable by indictment. Each day's continuance thereof is an indictable offense, and it follows, therefore, that no right to maintain it can be acquired by prescription."); *Hedleston v. Hendricks*, 40 N.E. 408, 410 (Ohio 1895); 3 DILLON, *supra* note 9, § 1189, at 1889.

not, therefore, adverse to the right of the public entity.³⁹ A final justification recognizes the reality of municipal operations:

Individuals may reasonably be held to a limited period to enforce their rights against adverse occupants, because they have an interest sufficient to make them vigilant. But in public right of property, each individual feels but a slight interest, and rather tolerates even a manifest encroachment, than seeks a dispute to set it right.⁴⁰

Whatever the justification, many states have adopted statutes expressly protecting land dedicated to a public use from adverse possession.⁴¹ Many courts in states without such statutory guidance have also drawn the public/private, governmental/proprietary distinction in holding that land dedicated to a public use is immune from adverse possession.⁴² The only issue in such cases is whether the particular purpose for which the land is held is sufficiently "public" to merit immunity. As demonstrated in the next section, however, courts have not been consistent in making this determination.

2. There Are Few, if Any, Reasons Not to Protect Municipal Land Held in a Proprietary Capacity—It is reasonable to expect that all land owned by a municipality would be protected from adverse possession. Regardless of the use to which the land is put, or the manner in which it was acquired, it is an asset of the local government. The value of that land inures to the benefit of the citizens of the community regardless of whether it is dedicated to a public use or is maintained as an open parcel for

39. See *McClelland v. Miller*, 28 Ohio St. 488, 502 (1876). The *McClelland* court stated:

[T]he mere inclosing of a part of a highway by a fence, does not necessarily constitute such adverse possession, as against the public, as will confer title by mere lapse of time. When roads are laid out and travel is limited, necessity may not require that the whole width should be opened when a less quantity answers every purpose. But the fact that a portion of the highway remains in the possession of adjoining owners, is merely matter of sufferance, from which rights can not accrue.

Id.

40. *Commonwealth v. Alburger*, 1 Whart. 469, 488 (Pa. 1836).

41. See KAN. STAT. ANN. § 60-509 (1994); MO. ANN. STAT. § 516.090 (West 1952); TEX. CIV. PRAC. & REM. CODE ANN. § 16.030 (West 1986); VT. STAT. ANN. tit. 12, § 462 (1973). These states are discussed *infra* in Part II.A.

42. See *Henry Cowell Lime & Cement Co. v. State*, 114 P.2d 331, 332-33 (Cal. 1941); *Siejack v. Mayor of Baltimore*, 313 A.2d 843, 846 (Md. 1974).

potential future development.⁴³ Even if it is never developed and used for municipal purposes, the land may be sold and the profits may be applied to any number of municipal needs (such as increasing the size of the police force, constructing a new city hall, or maintaining roads and sewers). In other words, the current use of the land is irrelevant to its importance as a municipal asset capable of being converted to funds for important municipal projects in relatively short order.

Nonetheless, while the justifications discussed in Part I.C.1 drive courts to protect municipally owned land from adverse possession where that land has been dedicated to a public purpose, very often municipally owned land held in a private or proprietary capacity is deemed unprotected.⁴⁴ No coherent explanation for permitting the loss of a valuable municipal asset to adverse possession has been articulated. In his early treatise on the law of municipal corporations, Professor Dillon remarked: "As respects property not held for public use, or upon public trust, and as respects contracts and rights of a private nature, there is no reason why such corporations should not fall within limitation statutes, and be affected by them unless excluded from them."⁴⁵ This designation as "private" of lands devoted to certain municipal functions renders municipal owners subject to all statutes of limitation applicable to private entities.⁴⁶ The fact that these private functions often support governmental ones has been overlooked.

43. For example, Foster City, California bought land in a foreclosure sale which it sold five years later for \$24.5 million, over twice the amount of its investment. The city apparently had no immediate plans to develop the property when it was acquired. The city council made the purchase "in a down market" to protect part of the city's redevelopment assessment district. See Mark Simon, *Lucrative Payoff for Foster City: It Should Double Money on 35-Acre View Parcel*, S.F. CHRON., Aug. 1, 1996, at A15. Holding such property would not meet most traditional tests for "public use," but the value inured to the benefit of the community without such a dedication.

44. See *Siejack*, 313 A.2d at 846; see also *Henry Cowell Lime & Cement Co.*, 114 P.2d at 332; *Goldman v. Quadrato*, 114 A.2d 687, 690 (Conn. 1955).

45. 3 DILLON, *supra* note 9, § 1194, at 1900.

46. See *id.* § 1188, at 1187-88. Professor Dillon observed the following:

Although municipal corporations are public agencies, exercising, on behalf of the State, public duties, yet they also exercise and acquire what the courts have called rights in a private and proprietary capacity rather than in a public and governmental capacity, and such corporations are not exempt from the operation of limitation statutes in cases wherein arise questions involving property or contracts which do not pertain to the authority of the State which is exercised through them, but pertain to the *private and contractual rights* of the municipality, and such statutes run in favor of and against these corporations with respect to these private and proprietary rights and obligations in the same manner and to the same extent as against natural persons.

Similarly, Rhyne's treatise on municipal law states, without analysis or comment:

Title to land affected by the public interest or dedicated to a public use generally cannot be acquired by adverse possession or prescription against a municipal corporation or other local government unit, although a few courts have held to the contrary. . . . On the other hand, it has been held that property held by a municipality in its private or proprietary capacity may be lost by adverse possession.⁴⁷

McQuillin, in an earlier edition of his treatise, said flatly that "title to property of the municipality not devoted to a public use can be . . . acquired in all jurisdictions [by adverse possession]."⁴⁸ As will be shown, this assertion overstates the law on this issue.

The absence of analysis in the treatises regarding the vulnerability of proprietary municipal land may reflect the lack of any such analysis on the part of courts making the decisions referenced in the treatises. An important recent case which does engage in such an analysis is *Devins v. Borough of Bogota*,⁴⁹ in which the New Jersey Supreme Court set out a series of reasons for subjecting proprietary municipal land to adverse possession.⁵⁰ In addition to the traditional justifications for adverse possession,⁵¹ the court suggested that subjecting municipal land held in a non-governmental capacity to adverse possession is appropriate because: New Jersey law no longer grants the state sovereign immunity from suit in tort and contract cases;⁵² such a rule is not an "undue burden on municipalities;"⁵³ and the court was "reluctant to adopt a policy

3 *Id.*

47. RHYNE, *supra* note 11, § 16-13, at 383.

48. 10 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 28.55, at 143 (3d ed. 1950). In the latest edition, the authors have qualified their statement: "Although there is some authority to the contrary, title to property of the municipality not devoted to a public use can be acquired by adverse possession." 10 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 28.55, at 225 (3d ed. rev. 1990).

49. 592 A.2d 199 (N.J. 1991).

50. *See id.* at 202-03.

51. The court cited the following considerations: "First, statutes of limitation allow repose and avoid adjudications based on stale evidence. Second, adverse possession promotes certainty of title, and protects the possessor's reasonable expectations. Third, allowing adverse possession promotes active and efficient use of land, and 'tends to serve the public interest by stimulating the expeditious assertion of public claims.'" *Id.* at 202 (citations omitted).

52. *See id.* at 202.

53. *Id.* at 203.

that would encourage municipalities not to use, dedicate, or even identify their property.”⁵⁴ The plaintiff in *Devins* offered yet another justification: that adverse possession “would encourage municipal efficiency and the return of property to the tax rolls.”⁵⁵

When examined closely, however, none of these reasons is particularly compelling. The fact that New Jersey now permits itself and its subdivisions to be sued for the wrongful acts of their agents does not support the notion that municipalities should lose their land due to the oversight, mistake, or fraud of their agents. Holding a municipality accountable for its agents’ wrongful acts where innocent parties have been injured is quite different from giving away municipal land simply because local government agents failed to oust a trespasser in a timely manner.⁵⁶

The *Devins* court was also wrong in suggesting that it is not difficult for municipalities to keep track of and protect their land. That may be true of small towns, but recent reports demonstrate that many cities now own large numbers of parcels that they have taken for nonpayment of taxes.⁵⁷ As discussed below, the problem of identifying and protecting tax-reverted parcels is a large one, and not one to be discounted lightly. In adopting a rule that would penalize municipalities for not using or dedicating (by use or plans for use) their property, the *Devins* court took a position rejected by many modern courts. As discussed in the next section, the trend has been to recognize that merely holding title to land without any actual use or plans can and should constitute a valuable public function.

Finally, one can hardly agree with the *Devins* plaintiff that somehow the public wins where government land is transferred into private hands with no consideration. If enlarging the tax rolls is deemed necessary in any given city, presumably the governing body can choose to sell off some public land for full fair market value, thus enhancing public funds through both

54. *Id.* at 203.

55. *Id.* at 202.

56. *See supra* Part I.B.

57. *See* Editorial, *Gold, Perhaps, In the Land: LA Should Explore Selling Some Municipally Owned Parcels*, L.A. TIMES, July 16, 1996, at B6 (stating that in July 1996, Los Angeles had 7,602 municipally owned parcels of land and commenting that “[i]t’s laughable that the city has just two real estate experts and a few clerks for the task” of identifying appropriate parcels for sale); *see also infra* Part III.

the sales price and the taxes.⁵⁸ That body, and not the courts, should determine how municipal land is to be used. Furthermore, simply transferring the land to the tax rolls through adverse possession ignores the loss to the municipality of the value of the land itself. The potential value of such land is demonstrated by a 1996 proposal to sell approximately 300 properties in Los Angeles; the sale was expected to bring in \$30 million for the municipality.⁵⁹ Allowing the local government to make decisions about land sales also encourages municipal innovation and creativity. For example, in late 1996, the tiny Texas Panhandle town of Lefors held a raffle for fourteen city lots taken for non-payment of taxes, in attempt to bring in new families to help support the local schools and increase economic development.⁶⁰

The *Devins* court is not alone in overlooking the difficulty of keeping track of municipally owned land. One author has suggested that statutes of limitation should apply to municipally owned land because "government lawyers exercising ordinary care ought to be able to file suits on time; after all, most of Maryland's statutes of limitations are measured in years, not months."⁶¹ The problem, however, is not with timely preparation of the pleadings. In many cities the difficulty lies in identifying all municipally owned parcels and monitoring those parcels to determine whether or not someone is encroaching.

The *Devins* case is discussed in a number of articles, most of which support the court's analysis.⁶² One author said:

58. In 1996, the city of Newark auctioned 90 publicly owned parcels, most of which had been seized by the city for nonpayment of taxes. See George E. Jordan, *Long Lines at City Hall as Tax Time Comes Again*, THE STAR-LEDGER, Oct. 11, 1996, at 33.

59. See Hugo Martin, *L.A. Plans to Beef Up Coffers with Land Sales* L.A. TIMES, July 15, 1996, at A1. A 1995 auction of 19 properties brought in nearly \$10 million for Orange County. See Editorial, *supra* note 57, at B6.

60. See Allen Turner, *New Owners Get Lots of Incentive: Houston Cook Among 14 Winners in Land Giveaway*, HOUS. CHRON., Oct. 16, 1996, at 1. Many of those lots had reverted to the city after a 1975 tornado. See Erin Allday, *Sacrificial Land: A Small Town Gives Parts of Itself away to Keep Its School*, WALL ST. J. (Texas Journal), July 31, 1996, at 4. If those lots had been lost to adverse possessors during the 21 years the city held them, this option would not have been available.

61. Thomas A. Bowden, *Sovereign Immunity from Statutes of Limitation in Maryland*, 46 MD. L. REV. 408, 429 (1987).

62. See Carl C. Risch, Note, *Encouraging the Responsible Use of Land by Municipalities: The Erosion of Nullum Tempus Occurrit Regi and the Use of Adverse Possession Against Municipal Land Owners*, 99 DICK. L. REV. 197, 215 (1994) (adopting the "goals" of adverse possession statutes of limitations as set forth in *Devins*); Mary B. Edwards, *Recent Development*, 22 SETON HALL L. REV. 262, 265 (1991) (endorsing the new *Devins* rule). But see Denise Vicente Tighe, Comment, *Devins v. Borough of Bogota: Municipal Property for Sale or Theft*, 45 RUTGERS L. REV. 197, 216-25 (1992) (criticizing the *Devins* decision and arguing that the court should have deferred to legislative solutions).

The *Devins* court correctly focused on the spirit of the adverse possession laws because upholding the *nullum tempus* doctrine would have encouraged land waste. The Borough allowed the Lot to remain vacant for over twenty years while the plaintiffs, who employed the land for their use and enjoyment, were rightly rewarded for that use.⁶³

This comment assumes, with no factual support from the report of the case, that it is somehow nobler or better to use land, without regard to the type of use, than it is to leave it vacant. Hence, the suggestion that the plaintiffs should be "rewarded for their use."⁶⁴ While this was once the predominant American philosophy toward land use,⁶⁵ such bias in favor of universal aggressive land development has come under serious attack.⁶⁶ It is no longer persuasive to simply argue that use, without regard

63. Edwards, *supra* note 62, at 265.

64. This pro-development bias likewise motivates the pro-*Devins* analysis in Risch, *supra* note 62. The author laments the ways in which *nullum tempus* frustrates the goals of adverse possession. See Risch, *supra* note 62, at 213–19. Of course, it is the premise of this Article that adverse possession frustrates the reasonable operation of municipal government.

65. See RALEIGH BARLOWE, LAND RESOURCE ECONOMICS: THE POLITICAL ECONOMY OF RURAL AND URBAN LAND RESOURCE USE 284 (1958):

The idea of preserving land resources intact for future use has never gained much popular acceptance. To be sure, many conservationists stress the need for saving certain resources for future use; and some have probably overemphasized this point. But most people react negatively to a policy of nonuse. They favor the maintenance and saving of land resources, but only to the extent to which conservation policies can be made consistent with a program of effective current use.

Id.; see also Stephen S. Visher, *The Public Domain*, in CONSERVATION OF NATIONAL RESOURCES 15, 19 (Guy-Harold Smith ed., 3d ed. 1965) ("Wild land was long considered to have little value. . . . Similarly, trees were long inadequately appreciated. The man who cleared the most land was the popular hero, and he who did not completely clear his land was called lazy. The statement, made by those less blind than their fellows, that there would soon be a timber shortage was widely ridiculed.");

66. See, e.g., John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816 (1994) (arguing that the pro-development model of adverse possession "is fundamentally antagonistic to the twentieth century concern for preservation"); Latovick, *supra* note 5, at 944–45 (arguing that all state land, especially undeveloped land, should be immune from adverse possession to reduce incentives for private development); Comment, *Compensation for the Involuntary Transfer of Property Between Private Parties: Application of a Liability Rule to the Law of Adverse Possession*, 79 NW. U. L. REV. 758, 761 (1984) (arguing that the traditional justification for adverse possession—that it enhances economic efficiency—is invalid because "preservation of undeveloped land is a productive 'use' that does not entail exploitation of the land itself"); see also Aldo Leopold, *The Land Ethic*, in PEOPLE, PENGUINS, AND PLASTIC TREES 73–82 (Donald VanDeVeer & Christine Pierce eds., 1986).

to its type or intensity, is always preferable to non-use.⁶⁷ One might also ask whether the *Devins* plaintiffs had not already been sufficiently rewarded for their use by having twenty years rent-free enjoyment of land they did not own. It is not at all clear why they should also receive the title to the land at the expense of the local community.⁶⁸

Furthermore, it is unfair to characterize the situation in *Devins* as an incidence of "land waste." In fact, the lack of use in *Devins* does not come close to the concept of "legal waste" as the courts have defined it. "Waste occurs when the owner of a possessory estate engages in unreasonable conduct that results in physical damage to the land and substantial diminution in the value of estates owned by others in the same land."⁶⁹ In *Devins*, as in the typical adverse possession context, the municipality's "waste" involved permitting the land to sit idle for a period of time, during which time the claimant made use of the land. There was no suggestion that the city's lack of use in *Devins* in some way caused physical damage to the property.⁷⁰ In addition, in *Devins*, as in the typical setting, the municipality owned the land in fee simple, and there were no other parties owning an interest in the land.⁷¹ Simply leaving land vacant and unused, as any landowner has a right to do, is not "waste" according to the legal definition of that term. Nor is

67. See *American Trading Real Estate Properties, Inc. v. Town of Trumbull*, 574 A.2d 796, 802 (Conn. 1990). The court noted:

A municipality might, for example, elect to buffer a park from encroaching development by maintaining undeveloped property adjacent to the park. Similarly, a municipality might attempt to preserve the character of the community by acquiring 'open space' land or 'greenbelts' or might seek to protect wildlife or inland wetlands by purchasing land to be left in an undisturbed state.

Id.

68. See *State v. Simpson*, 397 P.2d 288, 292 (Alaska 1964) (declining to permit adverse possession of a city street even though the claimant and his predecessors had paid taxes on the land for almost 30 years). The court reasoned: "It is true that appellee and his predecessors . . . have paid taxes on the disputed area since 1936. On the other hand, they have had the rent free use of some 761 square feet of business property for the same period of years." *Id.*

69. *McKibben v. Mohawk Oil Co.*, 667 P.2d 1223, 1228 (Alaska 1983).

70. In fact, the court's only reference to the city's use of the land was that "the lot was permitted to remain vacant and unused by the Borough." 568 A.2d at 904.

71. *Id.* ("In November of 1962, the Borough had acquired title to that vacant property through an *in rem* foreclosure of a tax sale certificate . . .").

it still acceptable to suggest that just letting land sit idle is a waste of a valuable resource.⁷²

3. *The Difficulty in Determining What is a Sufficiently "Public" Use to Justify Protection*—Many states have incorporated into their laws, by statute, the public/private distinction regarding the adverse possession of municipally owned land. They have done so using a variety of formulations involving the word "public." A number of states exempt any "public ground" from adverse possession.⁷³ Others protect land dedicated or appropriated to a "public use,"⁷⁴ or a "public purpose."⁷⁵ A few others extend this protection to land dedicated to a "public, pious or charitable use."⁷⁶

In states whose statutes are silent on the subject, courts have held that municipal land not held in a governmental capacity, i.e., land not dedicated to some public use or purpose, is subject to adverse possession.⁷⁷ The key issue that arises in all of these states, then, is what constitutes a public use or purpose?

One category of municipal land often deemed not to be dedicated to a public purpose is land that was once open and undeveloped (before the claimant began using it) and for which the municipality had no expressed or immediate plans.⁷⁸ For

72. See generally Sprankling, *supra* note 66, at 816 (such an argument embraces "a prodevelopment nineteenth century ideology that encourages and legitimates economic exploitation . . . of wild lands").

73. See MICH. COMP. LAWS ANN. § 600.5821(2) (West 1987) (protecting "any . . . public ground"); NEB. REV. STAT. § 25-202(1) (1995) (protecting "public or political subdivision grounds"); N.H. REV. STAT. ANN. § 477-34 (1992) (protecting "any . . . public ground"); OR. REV. STAT. § 221.750 (1995) (protecting "public places").

74. See KAN. STAT. ANN. § 60-509 (1994); MINN. STAT. ANN. § 541.01 (West 1988); TEX. CIV. PRAC. & REM. CODE ANN. § 16.030 (West 1986).

75. See 735 ILL. COMP. STAT. ANN. § 5/13-111 (West 1992); S.D. CODIFIED LAWS § 15-3-17 (Michie 1984); UTAH CODE ANN. § 78-12-13 (1996); WASH. REV. CODE ANN. § 7.28.090 (West 1992).

76. See MO. ANN. STAT. § 516.090 (West 1952); VT. STAT. ANN. tit. 12, § 462 (1973).

77. The courts have used the terminology "not held for a public use or purpose" and "held in a proprietary capacity" interchangeably. See, e.g., *Montgomery County v. Maryland-Washington Metro. Dist.*, 96 A.2d 353, 357 (Md. 1953). The court noted:

[L]and bought for a public use, if not actually so used, cannot be said to be affected by a public trust, and hence may be sold without special legislative authority. . . . Property which is held in a governmental capacity or is impressed with a public trust, cannot be disposed of without special statutory authority. But as to property held in a proprietary capacity and not dedicated to public use, or impressed with a trust, the rule is otherwise.

Id. (citations omitted).

78. A lack of governmental intent to use land solely for public or governmental purposes is significant for a finding of adverse possession of municipal land. See *Brown*

example, land located near a parking lot which the plaintiff paved and used,⁷⁹ land acquired 125 years earlier for the purpose of drilling water wells (which never was drilled or otherwise developed),⁸⁰ and filled land in a creek bed⁸¹ all have been deemed susceptible to adverse possession because they were not held for an identified public purpose. In a Maryland case, the city of Baltimore had purchased a parcel of land pursuant to a law that required it to buy out existing water company facilities in order to complete an annexation.⁸² The city had no immediate use for the land and left it vacant.⁸³ The claimant occupied the land for the statutory period, and the court held that the city had lost the land through adverse possession because it had not been dedicated to a public use.⁸⁴

The Washington Court of Appeals has also adopted an approach which seems to demand that municipal land held in a governmental capacity must have an actual public use. In two cases, the court has held that simply leaving land open and free from development is done in a proprietary capacity.⁸⁵ In one case, the court permitted adverse possession of a county-owned parcel of land located on a lake and next to the Olympic National Park because it had not been dedicated "for use as a

v. Fisher, 193 S.W. 357, 362-63 (Tex. Civ. App. 1917); *City of Tonawanda v. Ellicott Creek Homeowners Ass'n*, 449 N.Y.S.2d 116, 121-22 (App. Div. 1982).

79. See *Lewis v. Village of Lyons*, 389 N.Y.S.2d 674, 676 (App. Div. 1976) (suggesting that because the city had previously sold other similar parcels to private buyers, it had no public purpose in mind for the lot at issue); see also *City of Tonawanda*, 449 N.Y.S.2d at 122 (in holding that the municipal land could be adversely possessed, the court noted that the city had been "discussing the sale, public auction, or leasing of the land with private citizens").

80. See *Prothro v. Natchitoches*, 265 So. 2d 242, 244-45 (La. Ct. App. 1972).

81. See *Mileau Corp. v. City of New York*, 421 N.Y.S.2d 258, 259-60 (App. Div. 1979).

82. See *Siejack v. Mayor of Baltimore*, 313 A.2d 843, 846-67 (Md. 1974).

83. See *id.* at 847.

84. See *id.* at 847. The court stated:

Quite likely nothing is more solidly established than the rule that title to property held by a municipal corporation in its governmental capacity, for a public use, cannot be acquired by adverse possession. Less frequently encountered, however, although apparently as well established, is the notion that municipal property not devoted to a public use can be so acquired. Until now we seem not to have been required to consider whether it should be acknowledged to be the law of Maryland. We think it is and we so hold . . . (citations omitted)

Id. at 846.

85. See *Kesinger v. Logan*, 756 P.2d 752, 755 (Wash. Ct. App. 1988), *aff'd*, 779 P.2d 263 (Wash. 1989); *Sisson v. Koelle*, 520 P.2d 1380, 1383 (Wash. Ct. App. 1974).

public right-of-way, or for any other public use.”⁸⁶ In the second case, the court permitted adverse possession of a right-of-way along a canal because “the property in question has never been set apart or devoted to any use by the District.”⁸⁷ Clearly there is no presumption in Washington that municipally owned land is held for a public purpose.

Similarly, a New York trial court held that meadow and marshland constituting “common lands” belonging to a town had been lost by adverse possession, stating:

There is no proof that these commons were being reserved for a governmental purpose. The proof is that the town has never used or attempted to use them except to hold them. In other words, the commons just laid idle for years upon years. That is inconsistent with a holding for governmental purposes. If the town is to avail itself of the municipal immunity from the prescription rule, I think it was required to adduce some proof that the locus in quo was reserved for some governmental purpose. The town’s failure to assert its title or to use the lands—both failures continuing over centuries—establishes sufficiently that the lands were not held for governmental purposes but were held by the town in its proprietary capacity. As such, the locus in quo was not free from the legal effects of adverse possession.⁸⁸

Contrary to these cases, in 1990, the supreme court of Connecticut recognized that merely holding land open and undeveloped may involve a public use.⁸⁹ The trial court had held that “something more, that is to say, actual public use, must be shown.”⁹⁰ In rejecting an “actual public use” requirement, however, the Connecticut Supreme Court stated:

The trial court’s narrow definition of the term public use . . . excludes the possibility of uses that may be highly

86. *Sisson*, 520 P.2d at 1383. The trial court had found that the county had “abandoned and forgotten about and had done nothing to sustain any title, or ownership, or control, of the land in question.” *Id.*

87. *Kesinger*, 756 P.2d at 755.

88. *Long Island Land Research Bureau v. Town of Hempstead*, 118 N.Y.S.2d 39, 46 (Sup. Ct. 1952), *aff’d*, 126 N.Y.S.2d 857 (App. Div. 1954), *aff’d*, 125 N.E.2d 872 (N.Y. 1955).

89. *See American Trading Real Estate Properties, Inc. v. Town of Trumbull*, 574 A.2d 796, 800–02 (Conn. 1990).

90. *Id.* at 801.

beneficial to the public but that do not involve the type of physical intrusion on the land that the "actual public use" standard appears to contemplate. A municipality might . . . elect to buffer a park from encroaching development by maintaining undeveloped property adjacent to the park . . . [or] might attempt to preserve the character of the community by acquiring "open space" land or "greenbelts" or might seek to protect wildlife or inland wetlands by purchasing land to be left in an undisturbed state. A standard of public use that fails to include such uses would do a great disservice to these commendable efforts to protect the environment. . . . Moreover, the rationale underlying the immunity of municipalities from adverse possession, that the public should not lose its rights to property as a result of the inattention of a governmental entity applies with even greater force to situations involving undeveloped lands, which may, by their nature, garner even less attention from local governments suffering from the constraints of scarce fiscal resources.⁹¹

The court adopted a more protective rule, holding that:

Land is indeed held for public use even when a municipality is not presently making use of the land but is simply holding it for development at some later time. Absent some evidence of municipal intention to abandon its plans for future development of the municipal property, the land is immune from claims of adverse possession.⁹²

This rule places the burden on the would-be adverse possessor to establish not only the usual elements of adverse possession but also that the municipality has consciously abandoned its plans for the parcel. This rule also protects municipal "uses" that might not have satisfied a more intrusive "actual public use" standard.

The New Hampshire Supreme Court reached the same conclusion several years earlier.⁹³ Certain shoreline lots were leased to private tenants by a town for several years until a large storm destroyed all of the buildings.⁹⁴ After that, the land lay idle for some forty years, during which time the plaintiffs

91. *Id.* at 802 (citation omitted).

92. *Id.* at 802.

93. *See* *McInnis v. Town of Hampton*, 288 A.2d 691 (N.H. 1972).

94. *See id.* at 693.

used it for recreational purposes and for access to the ocean.⁹⁵ In 1970, the town again leased the lots to a private tenant, an action the court described as being in the town's "quasi private or proprietary capacity."⁹⁶

Although it found that the town had acted in a proprietary capacity when leasing the property, the court noted that the town had not made proprietary use of the idle land during the intervening years.

It was findable upon the evidence that the lots were held by the town during the intervening period in a governmental capacity. . . . It could properly be found that mere retention of title, without more, was a public use and that the land was held in a governmental capacity during the period when the plaintiffs claimed to have acquired rights by user.⁹⁷

Applying novel reasoning, the court concluded that the town had held the land in its governmental capacity for the forty years the land lay idle, without finding that the land had been dedicated to a public use.⁹⁸ While most courts have assumed that land held in a governmental capacity is necessarily dedicated to the public use, the New Hampshire court treated these two inquiries as independent issues—finding the one did not necessitate finding the other.⁹⁹ By divorcing the two issues, the court was able to find that land held in a governmental capacity constituted a "public ground" under the governing statute and was, therefore, protected from adverse possession.¹⁰⁰

Another category of open land which has sometimes been subject to loss through adverse possession is land taken by a city for nonpayment of real estate taxes. In those cases, claimants have argued that land owned by a city pursuant to its taxing authority is held in its proprietary capacity and is

95. *See id.*

96. *Id.* at 693–94.

97. *Id.*

98. *See id.* at 694. As an alternative to his adverse possession claim, the plaintiff alleged that the land had been dedicated to public uses and could not be leased to a private tenant. *See id.* at 692–94.

99. *See id.* at 693–94.

100. *See* N.H. REV. STAT. ANN. § 477:34 (1992) ("No person shall acquire by prescription a right to any part of a town house, schoolhouse or church lot, or of any public ground by fencing or otherwise inclosing the same or in any way occupying it adversely for any length of time."). The *McInnis* court fully cited this provision. *See McInnis*, 288 A.2d at 693.

therefore subject to adverse possession. In one oft-cited case, *Goldman v. Quadrato*,¹⁰¹ the Connecticut Supreme Court agreed with this argument, stating:

After title to lot 3 passed to the city of Waterbury by virtue of a judgment foreclosing a tax lien, the lot was permitted to lie idle. It was neither used for nor dedicated to any public purpose. It remained, so to speak, legally fallow, a vacant parcel of land in which the public were given no beneficial rights, to be enjoyed presently or in the future. The city was at liberty to sell or otherwise dispose of the lot at pleasure. Under these circumstances, the lot was not devoted to a public use.¹⁰²

In so holding, the court rejected the argument that because tax collection is a governmental function, holding land pursuant to that function is also governmental. The court insisted that "the controlling factor is the use to which the realty was put after its acquisition."¹⁰³

In 1991, the Vermont Supreme Court was faced with a claim of adverse possession as to land a town had received in exchange for welfare support.¹⁰⁴ The town never utilized the parcel, and after fifty-one years the town sold it on a quit claim deed.¹⁰⁵ Rejecting the town's argument that all land held by a municipality is held in its governmental capacity,¹⁰⁶ the court instead chose what it termed a "balanced approach."¹⁰⁷ Citing

101. 114 A.2d 687 (Conn. 1955).

102. *Id.* at 690.

103. *Id.* But see *American Trading Real Estate Properties, Inc. v. Town of Trumbull*, 574 A.2d 796, 801-02 (Conn. 1990) (limiting *Goldman* to its facts and reasoning that "the public use requirement can be satisfied even if a property is not presently subject to public use so long as it is held with an intention to develop it at some time in the future").

104. See *Jarvis v. Gillespie*, 587 A.2d 981 (Vt. 1991). The Vermont statute in effect in 1932 provided that "[a] town shall relieve and support poor and indigent persons residing or found therein, when they are in need thereof . . ." VT. GEN. LAWS § 4215 (1917). It is also provided that "Upon the death of a property owner who has been assisted by a town under the provisions of this chapter, such town may recover against his estate the amount it has expended for such assistance . . ." VT. GEN. LAWS § 4224 (1917).

105. See *Jarvis*, 587 A.2d at 983.

106. "This standard . . . is in conflict with our statute which only exempts lands given to a 'public, pious, or charitable use.' Our statute does not provide a blanket exemption for municipally owned lands, which it easily could have, as evidenced by the provision exempting state-owned land." *Id.* at 987.

107. *Id.* at 987.

the Connecticut Supreme Court decision in *American Trading Real Estate Properties, Inc.*, the Vermont court held:

[L]and which is owned by a municipality is presumed to be given to a public use. However, this presumption can be rebutted by demonstrating that the town has abandoned any plans for the land. Evidence to be considered in determining this issue may include the reason the property was acquired by the town, uses the town has made of the property since acquisition, and whether the town has manifested an intention to use the property in the future.¹⁰⁸

Applying this approach, the court held that the presumption of dedication to a public use had been overcome. First, the town had not chosen to acquire the land for a stated public purpose. It had been taken in settlement of a debt.¹⁰⁹ Second, the town had made no public use of the property while it held title.¹¹⁰ Third, by conveying the land to a private individual, the town demonstrated that it had no intent of using the land for a public use in the future.¹¹¹

The states have not been unanimous, however, in deeming tax-reverted land to be held in a proprietary capacity. The supreme court of Washington decided early on that adverse possession would not run against the title to land held by a county acquired pursuant to a tax sale.¹¹² In so holding, the court stated:

[W]e are unable to see that the acquiring the land and holding it thereafter is any less the exercise of a right emanating in the power of taxation than is the levy and imposition of the tax in the first instance. All of the rights of the county here involved are traceable to and rest in the sovereign power of taxation. It is not a proprietary right or power exercised by the county in either instance, but purely governmental, looking to the administration of

108. *Jarvis*, 587 A.2d at 987 (citations omitted).

109. *See id.* at 988.

110. *See id.*

111. *See id.* This last element is particularly difficult for a municipality. Any time a municipality sells land, by definition, the municipality cannot have any future public plans for the land. That should not be taken as evidence that the land had not previously been dedicated to a public use, but rather shows only that the municipality has chosen not to continue owning the land in the future.

112. *See Gustaveson v. Dwyer*, 145 P. 458 (Wash. 1915), *aff'g en banc on reh'g* 139 P. 194 (Wash. 1914).

governmental functions. We are of the opinion that the general statute of limitations, though by its terms made applicable to counties, does not run against the county in favor of an adverse possessor of the land while the title of the land rests in the county.¹¹³

Several years later, the Washington court reached the same conclusion as to land held by a town.¹¹⁴

More recently, a number of courts have followed Washington's lead and held that land acquired through nonpayment of taxes is held for a "public use" and is thus protected from adverse possession.¹¹⁵ In those cases, the courts recognized that the land at issue had been received in lieu of the taxes that had been due and concluded that acquisition and ownership of land in lieu of taxes is a public function.¹¹⁶ One court also noted that the legislature had tried to make tax sales and tax titles more attractive to prospective purchasers, so as to make it easier for the municipalities to sell them.¹¹⁷ Permitting adverse possession of such land undermines the legislature's goal and may discourage prospective purchasers.¹¹⁸ But ultimately, in determining "whether the duty of collection of taxes placed by legislative mandate on local governments . . . is not in fact a governmental function," the court relied on comments from a 1973 Pennsylvania Supreme Court case:

[V]iews as to what constitutes a public use necessarily vary with changing conceptions of the scope and functions of government, so that today there are familiar examples of such use which formerly would not have been so considered. As governmental activities increase with the growing complexity and integration of society, the concept of 'public use' naturally expands in proportion.¹¹⁹

113. 145 P. at 460.

114. See *Johnson v. Burgeson*, 170 P.2d 311 (Wash. 1946).

115. See *Kellison v. McIsaac*, 559 A.2d 834, 837 (N.H. 1989); *Torch v. Constantino*, 323 A.2d 278, 281 (Pa. Super Ct. 1974); cf. *Jarvis v. Gillespie*, 587 A.2d 981, 987 (Vt. 1991) (distinguishing *Kellison* based on linguistic differences between the New Hampshire and Vermont statutes).

116. See *Kellison*, 559 A.2d at 837; *Torch*, 323 A.2d at 281.

117. See *Torch*, 323 A.2d at 280.

118. See *id.*

119. See *id.* (quoting *Dornan v. Philadelphia Hous. Auth.*, 200 A. 834, 840 (Pa. 1938)).

Thus, while other courts have applied the traditional rule with little or no thought as to its appropriateness in a modern setting, the Pennsylvania Superior Court properly considered the changing role of government in deciding the case before it.

Municipal land dedicated for use as a public street, road, or highway is a third category of land that has almost universally been deemed to be held for a public purpose and immune from adverse possession.¹²⁰ Generally, once the dedication is made and accepted by the municipality, the land is immune from adverse possession.¹²¹ The land may remain subject to the public trust even if the street is never actually constructed and the land is used adversely by private interests for many years.¹²² The simple fact that the land was never actually used as a road will not support a claim that the municipality has abandoned it.¹²³ It has also been held that a public road retains its public character even if no public funds are used for its maintenance and repair.¹²⁴ As one court stated:

There are greater reasons why city streets should not be subject to destruction by nonuse or adverse possession than can be found applicable to any other kind of property. No other kind of public property is subject to more persistent and insidious attacks or is less diligently guarded against seizure.¹²⁵

Similarly, the Ohio Court of Appeals refused to draw a distinction between municipal lands held in proprietary and governmental capacities.¹²⁶ Rejecting early Ohio cases that had

120. See *Thurston v. City of Forest Park*, 89 S.E.2d 509, 511 (Ga. 1955); *City of Billings v. Pierce Packing Co.*, 161 P.2d 636, 639-40 (Mont. 1945); *West Ctr. Congregational Church v. Efstathiou*, 627 N.Y.S.2d 727 (App. Div. 1995); *1540 Columbus Corp. v. Cuyahoga County*, 589 N.E.2d 467, 471 (Ohio Ct. App. 1990); *South Carolina State Highway Dep't v. Metts*, 240 S.E.2d 816, 817 (S.C. 1978); *Varallo v. Metropolitan Gov't of Nashville and Davidson County*, 508 S.W.2d 342, 347 (Tenn. Ct. App. 1973); *Commercial Waterway Dist. No. 1 v. Permanente Cement Co.*, 379 P.2d 178, 179-80 (Wash. 1963).

121. See *Devine v. City of Seward*, 258 P.2d 302, 305 (Kan. 1953). For an illuminating discussion of the dedication and acceptance requirements, see *American Trading Real Estate Properties, Inc. v. Town of Trumbull*, 574 A.2d 796, 801 (Conn. 1990) and *Kistler v. Gnazzo*, No. CV-88-0351677S O, 1992 WL 361588, at *3 (Conn. Super. Ct. Nov. 24, 1992), *aff'd*, 638 A.2d 1101 (Conn. App. Ct. 1994).

122. See *Devine*, 258 P.2d at 305.

123. See *Rasmussen v. Yentes*, 522 N.W.2d 844, 848 (Iowa 1994).

124. See *Goedecke v. Viking Inv. Corp.*, 424 P.2d 307, 311 (Wash. 1967).

125. *Laclede-Christy Clay Products Co. v. St. Louis*, 151 S.W. 460, 465 (Mo. 1912); see also *City of Billings v. Pierce Packing Co.*, 161 P.2d 636, 640 (Mont. 1945).

126. See *City of Bryan v. Killgallon*, No. WMS-81-6, 1981 WL 5791, at *2 (Ohio Ct. App. Sept. 25, 1981).

permitted adverse possession of proprietary municipal land, the court stated:

The setting aside of land for future public use in order to provide for orderly development is, in and of itself, a valuable use of land resources. That the public might later be deprived of the use of such land by operation of the statute of limitations imposes upon municipalities the burden of continual inspection of all public lands. Such a burden would be prohibitive and contrary to the public interest.¹²⁷

For purposes of defining a "public use," some state courts have applied the concept of the "public" more restrictively than have other states. In those states, the "public" refers to more than just the inhabitants of the municipality. It includes all of the citizens of the state generally.¹²⁸ The Illinois Supreme Court noted that "the public right and public use must be in the people of the state at large, and not in the inhabitants of a particular local district."¹²⁹ This being the case, the court held that the claimant could adversely possess part of a schoolhouse lot because, while the lot was dedicated to educational purposes, it was used only by the student-citizens of the municipality, and not by the citizens of the state in general.¹³⁰ Following this line of analysis, it was held subsequently that a municipal parking lot was not dedicated to a public use, and thus a portion of it could be adversely possessed.¹³¹

Oklahoma courts have reached the opposite conclusion as to school land:

127. *Id.* at *2.

128. *See Brown v. Trustees of Schools*, 79 N.E. 579, 580 (Ill. 1906).

129. *Id.* at 580; *see also Sears v. Fair*, 397 P.2d 134, 137 (Okla. 1964) ("The test as to whether a matter is a public right or a private right appears to be whether the right is such as to affect the public generally or to merely affect a class of individuals within the political subdivision.").

130. *See Brown*, 79 N.E. at 581 ("The people of the state in general have no interest, in common with the inhabitants of a school district, in the schoolhouse site or the proceeds of it. The use and the right are confined to the particular local district, and . . . the statute of limitations was a good defense.").

131. *See Wanless v. Wraight*, 559 N.E.2d 798, 801 (Ill. App. Ct. 1990). *But cf. Savoie v. Town of Bourbonnais*, 90 N.E.2d 645, 649 (Ill. App. Ct. 1950) (finding that a ditch built to drain a public highway and keep it open for traffic was sufficiently public to protect it from adverse possession and stating that "public rights or uses are those in which the public has an interest in common with the people of such municipality, whereas private rights or uses are those which the inhabitants of a local district enjoy exclusively, and the public has no interest therein").

The ownership of school property is generally in the local district or school board as trustee for the public at large. Such property occupies the status of public property and is not to be regarded as the private property of the school district by which it is held or wherein it is located.¹³²

Because school land in Oklahoma is deemed to be held in a public capacity, it is not subject to adverse possession.¹³³

The changing nature of a municipal government's role is well illustrated by a New Hampshire case which examined a parcel of land and its use from the founding of the Republic to the present.¹³⁴ The court held that municipally owned land along the Atlantic Ocean originally maintained as open space (originally for an ox common and cow common, and then later for fishermen's use) had been held in a governmental capacity.¹³⁵ It is unlikely that many local governments will maintain ox or cow commons today, but parks, open spaces, wetlands, and other low-level uses are more popular and necessary than ever. It is important that the law not be locked in to an artificial and obsolete definition of "governmental" functions.

II. THE GOVERNMENTAL/PROPRIETARY DISTINCTION SHOULD BE ELIMINATED IN FAVOR OF FULL PROTECTION FOR MUNICIPALLY OWNED LAND

Those who argue against the governmental/proprietary distinction in tort law generally favor its abandonment so as to broaden the imposition of liability on the municipality for the negligence of its agents.¹³⁶ Recognizing that "a primary concern of the judiciary [is] to protect the individual against unjust governmental activity,"¹³⁷ this expansion of municipal liability in the tort arena appears to make sense. It seems unjust not to compensate an injured person simply because of the identity of

132. *James v. Union Graded Sch. Dist. No. 2*, 207 P.2d 241, 244 (Okla. 1949) (quoting 47 AM. JUR. *Schools* § 65).

133. *See Merritt Indep. Sch. Dist. No. 2 v. Jones*, 249 P.2d 1007, 1008-09 (Okla. 1952).

134. *Town of Hampton v. Palmer*, 153 A.2d 796 (N.H. 1959).

135. *See id.* at 801.

136. *See supra* notes 32-33 and accompanying text.

137. *Austin v. Mayor of Baltimore*, 405 A.2d 255, 271 (Md. 1979) (Cole, J., dissenting).

the party causing the harm.¹³⁸ Having said this, however, it does not follow that the abandonment of this distinction in the adverse possession area should render all municipal land subject to adverse possession.

The considerations involved in protecting municipal land ownership are vastly different than those related to the compensation of persons injured by negligent municipal agents. In the adverse possession context, the claimant is seeking title to government-owned land merely based on his use and occupancy of that land for a period of time. There is no suggestion that the government has somehow caused the claimant harm.¹³⁹ Instead, the claimant actually seeks to harm the public (or at least his fellow municipal residents) by taking a public resource—land owned by the municipality—for himself without compensation.

That different considerations lie behind municipal tort and adverse possession cases is demonstrated by the courts' differing analyses of the governmental/proprietary distinction in the two contexts. In cases involving alleged adverse possession of municipal land held for purposes of a public road or highway, the courts have held that such ownership is governmental in nature.¹⁴⁰ In contrast, many courts have held that the maintenance of streets and public ways is a "private proprietary obligation of municipal corporations"¹⁴¹ for purposes of liability for negligence.¹⁴² It is significant, however, that very few courts addressing the possible adverse possession of municipal property have cited to tort cases when analyzing the governmental/proprietary function issue, or vice versa.¹⁴³

Given the difficulties and uncertainties inherent in the governmental/proprietary distinction, it makes sense to

138. *See id.*

139. Cases involving estoppel, in which a claimant seeks title based on the affirmative actions and representations of the municipalities' agents, are distinguishable from cases of "pure" adverse possession. Some states will allow such claims even though adverse possession would not be permitted. *See Sioux City v. Johnson*, 165 N.W.2d 762, 767-68 (Iowa 1969); *Halverson v. Village of Deerfield*, 322 N.W.2d 761, 767 (Minn. 1982).

140. *See State v. Simpson*, 397 P.2d 288 (Alaska 1964); *Town of Chouteau v. Blankenship*, 152 P.2d 379, 383 (Okla. 1944); *Town of West Seattle v. West Seattle Land & Improvement Co.*, 80 P. 549, 550 (Wash. 1905); *Thurston v. City of Forest Park*, 89 S.E.2d 509, 511 (Ga. 1955).

141. *Mayor of Baltimore v. Eagers*, 173 A. 56, 59 (Md. 1934).

142. *See id.* at 60; *City of Tallahassee v. Kaufman*, 100 So. 150, 152 (Fla. 1924).

143. *But see Mount v. Curran*, 657 P.2d 392, 395 (Alaska 1982) ("[W]e have refused to adopt [the governmental/proprietary distinction] in the context of governmental tort liability."); *Barnard v. Gaumer*, 361 P.2d 778, 781 (Colo. 1961) (holding that plaintiff had not established the elements for adverse possession of a city park, but noting that adverse possession may be established under Colorado tort law).

abandon it in the tort context to the benefit of injured claimants. Thus, municipalities should be universally liable in tort. These difficulties and uncertainties also support abandoning the distinction in the property context. However, in this area, the abandonment should be in favor of protection for all municipally owned land, regardless of the capacity in which it is held. More courts should follow the lead of the Minnesota Supreme Court, which expressly refused to distinguish between governmental and proprietary uses and agreed with the city that "lands held by a municipality are, by definition, appropriated to public use."¹⁴⁴

A. The Loss of Municipally Owned Land Through Adverse Possession Occurs in a Substantial Number of Cases and Threatens Numerous Parcels of Land

Upon learning of the doctrine of adverse possession, the typical law student assumes it to be one of those interesting relics from the days of the frontier, with little, if any, relevance for a practitioner today.¹⁴⁵ How much more unlikely and uncommon, the reader asks, is adverse possession against a municipality? In fact, the large number of cases discussed in this article, many of which are as recent as the 1980's, illustrate that this is not an uncommon problem.

Statistics from some major U.S. cities help put the picture into perspective. In January 1995, New York City owned nearly 3,000 rental buildings, many of which had been taken from landlords who had stopped paying real estate taxes.¹⁴⁶ By 1995, Baton Rouge, Louisiana had acquired some 6,000 tax-reverted parcels.¹⁴⁷ In early 1995, the city of Fort Worth, Texas identified 771 "surplus properties," most of which were vacant lots or

144. *Fischer v. City of Sauk Rapids*, 325 N.W.2d 816, 818 (Minn. 1982). The *Fischer* court, however, did recognize an exception to this rule where "the municipality has abandoned the use of the land and is therefore estopped from asserting a claim to it." *Id.* at 819.

145. See Sprankling, *supra* note 66, at 873 n.279. ("Judging by the surprise expressed by most first year law students upon introduction to the doctrine [of adverse possession], I suspect that only a small group of owners has knowledge of the law.") This author's experience corresponds with that of Professor Sprankling.

146. See Lloyd Chrein, *Unhappily Ever After—Good Intentions Can't Save Some Landlords from Losing Their Buildings*, NEWSDAY, Jan. 13, 1995, at D1.

147. See Adrian Angelette, *Assessor Sees Tax Income to be Tapped*, BATON ROUGE ADVOC., Nov. 8, 1995, at 12A.

deteriorating structures.¹⁴⁸ In October 1996, the city of Newark, New Jersey auctioned off ninety city properties, most of which had been seized for non-payment of taxes.¹⁴⁹

Given the large number of parcels held by municipal owners, it is reasonable to expect that some of them will be overlooked by municipal employees. This fact does not diminish the value of the parcels as assets held by the municipality, as they ultimately may be put to public use or sold with the proceeds applied to public needs.

The sheer number of parcels held by municipalities is not the only significant factor. The potential value of those parcels to a municipality is also striking. Two recent sales in California serve as examples. Foster City agreed to sell land to a high tech company for \$24.5 million.¹⁵⁰ The city had acquired that land in a foreclosure sale for \$5.1 million, and had paid another \$4.2 million in outstanding assessments and fees.¹⁵¹ Because the city had not actually dedicated the land to any specific public use, and later sold it to a private company, many states would have treated it as proprietary land subject to adverse possession.¹⁵²

Similarly, the city council of Westminster, California voted to sell a deteriorated school auditorium built in the 1920s for \$630,000, which will partially fund a new community arts center.¹⁵³ Some states have a rule that a sale of land to a private individual demonstrates that the land was not held for public use.¹⁵⁴ Under such a rule, Westminster's land would have been subject to loss through adverse possession, and its value lost to the city.

This phenomenon of large numbers of municipally held parcels, many of which are quite valuable, is another reason legislatures should consider extending protection from adverse possession to all municipal land. When land is taken for non-payment of taxes, the municipality now has an asset it did not

148. See Jack Z. Smith, *Fort Worth Studies Plan to Get Homes for Surplus Lots*, FORT WORTH STAR-TELEGRAM, Mar. 8, 1995, at 26.

149. See Jordan, *supra* note 58, at 33.

150. See Simon, *supra* note 43, at A15.

151. See *id.*

152. See *supra* Part I.C.3.

153. See John Pope, *Westminster City Sale of Land is Back On*, L.A. TIMES, July 12, 1996, at B2.

154. See generally *Lewis v. Village of Lyons*, 389 N.Y.S.2d 674, 676 (App. Div. 1976) (holding that previous conveyance of similarly obtained parcel by village to private individuals established alienability of subject parcel and rendered it susceptible to adverse possession); *Jarvis v. Gillespie*, 587 A.2d 981, 988 (Vt. 1991) (holding that the parcel was not given to public use, as manifested by the town's conveyance to private individual, and thus was not exempt from claims of adverse possession).

plan to acquire¹⁵⁵ and less tax revenue than expected to support its services. The municipality should not be further penalized by a system that demands that it run a permanent real estate sales office (at additional taxpayer expense) or risk losing the land received in lieu of tax payments.

Because tax-reverted land ownership by municipalities is increasing, and because that land is a valuable resource for the municipalities, state legislatures should protect the land by rendering it statutorily immune from adverse possession.

B. Some Excellent Statutory Models Exist

In a few states, land owned by municipalities is expressly protected from adverse possession by statute. In Alabama, for example, the statute states simply: "There is no limitation of the time within which a county or municipal corporation may commence an action for the recovery of its lands."¹⁵⁶

Similar provisions appear in the statutes of Alaska,¹⁵⁷ Mississippi,¹⁵⁸ and Oregon.¹⁵⁹ Colorado's statute likewise provides that the statute of limitations does not apply to municipal claims for land, and then clarifies that no possession of municipal land, "no matter how long continued . . . shall ever ripen into any title, interest or right"¹⁶⁰ against the municipality.

Not surprisingly, the cases decided under these statutes have consistently held that municipally owned land is immune from adverse possession, without regard to the capacity in which it is held.¹⁶¹ This bright-line rule reduces litigation and eliminates

155. The fact that the government did not choose to acquire these specific parcels for a designated purpose may explain why so many of them are forgotten for many years.

156. ALA. CODE § 6-2-31(b) (1993).

157. See ALASKA STAT. § 29.71.010 (Michie 1996).

158. See MISS. CONST. art. IV, § 104; MISS CODE ANN. § 15-1-51 (1995).

159. See OR. REV. STAT. §§ 12.250, 275.027 (1995).

160. COLO. REV. STAT. § 38-41-101(2) (1982).

161. See *Jefferson County v. McClinton*, 293 So. 2d 294, 297 (Ala. 1974); *Bentley Family Trust v. Lynx Enters., Inc.*, 658 P.2d 761, 766 (Alaska 1983); *City of Canon City v. Cingoranelli*, 740 P.2d 546, 547 (Colo. Ct. App. 1987); *Board of Educ. v. Loague*, 405 So. 2d 122, 124-125 (Miss. 1981). In *Coos County v. State*, 734 P.2d 1348, 1360 (Or. 1987), the court held that the statute protected the county's land, even from adverse possession by the state, noting that "ORS 12.250 and ORS 275.027 are properly viewed not as limiting the ability of adverse possessors to acquire title to county lands, but as removing an impediment to the county's ability to defend its record title to real property." *Id.*; cf. *Highline Sch. Dist. No. 401 v. Port of Seattle*, 548 P.2d 1085, 1089 (Wash. 1976) (permitting adverse possession of a school district's land by a municipal

uncertainty in title. Indeed, in states with this specific statutory protection, there are very few reported decisions on the issue at all.¹⁶²

Legislation expressly immunizing municipal land from adverse possession is the simplest and most efficient method for providing such protection. Leaving the decision to the courts is fraught with difficulties. First, many courts are hesitant to change long-standing court-made rules on the principle of stare decisis.¹⁶³ Second, the courts may feel it is the legislature's role to make such a change.¹⁶⁴ Third, appellate courts are not necessarily accustomed to resolving claims of adverse possession of municipal land on a routine basis in every state.¹⁶⁵ If no claimant or municipality chooses to pursue an appeal to the state's highest court, it could be many years before the court has an opportunity to even consider changing the rule to more fully protect municipal land.

Even when presented with such a case, a court might easily resolve the case on some other ground such as lack of proof of adverse possession,¹⁶⁶ or by finding that the property had not been dedicated to a public use.¹⁶⁷ Given the somewhat random

airport authority because "[h]owever valid the policies which underlie the rule against acquisition of municipal properties when the claimant is a private party, nothing favors its application where another unit of government seeks to acquire the property interest."); Melvin P. Parker, 78 So. 2d 477, 481 (Miss. 1955) ("Regardless of the extent and quality of the adverse possession exercised over the lots after their acquisition, under the facts in this case, the appellants were not entitled to claim therefor until title passed again into private ownership.").

162. There were no reported cases under the statute in Alabama, only one case in Colorado, *City of Canon City v. Cingoranelli*, 740 P.2d 546 (Colo. 1987), and only two cases in Alaska. See *Bentley Family Trust v. Lynx Enters.*, 658 P.2d 761 (Alaska 1983); *Mount v. Curran*, 657 P.2d 392 (Alaska 1982). All of the reported cases held that the statute did not run against a municipality.

163. See, e.g., *City of Los Angeles v. City of San Fernando*, 537 P.2d 1250, 1281 (Cal. 1975) ("The doctrine of stare decisis applies with special force to rules of property on which those engaged in business transactions have relied in gauging the probable returns on their acquisitions and investments."). But see *McBryde Sugar Co. Ltd. v. Robinson*, 504 P.2d 1330, 1335 (Haw. 1973), *adhered to on reh'g*, 517 P.2d 26 (Haw. 1973) ("This court . . . has 'rejected a doctrine of disability at self-correction.' We believe that the doctrine of stare decisis is subordinate to legal reasons and justice and we should not be unduly hesitant to overrule a former decision when to do so would bring about what is the considered manifest justice." (citation omitted)).

164. See *Alder v. Salt Lake City*, 231 P. 1102, 1103 (Utah 1924) ("If the exception [to municipal immunity for torts involving non-governmental functions] is to be extended to parks and playgrounds, the Legislature and not the courts should determine the question.").

165. For example, 35 years passed between the Connecticut Supreme Court's two landmark decisions in 1955 and 1990. See *supra* text accompanying notes 89 and 101.

166. See *Barnard v. Gaumer*, 361 P.2d 778, 781 (Colo. 1961).

167. See *Meshberg v. Bridgeport City Trust Co.*, 429 A.2d 865, 868-69 (Conn. 1980).

manner in which cases are presented to appellate courts, it is far more sensible for state legislatures to confront the problem directly and resolve it clearly, once and for all.

States considering the option of protecting municipal land from adverse possession should therefore consider adoption of a statute that parallels those of Alabama and Colorado.

C. Partial Protection for Municipal Land Is Not Sufficient

1. *Several State Statutes Provide Protection for Specific Categories of Municipal Land*—A number of state legislatures have elected to provide express protection from adverse possession only for municipal land dedicated to specific purposes.¹⁶⁸ By far the most widely protected areas are that of roads and highways.¹⁶⁹ As discussed above, roads and highways have historically been considered inherently governmental by the courts for purposes of adverse possession analysis¹⁷⁰ and have consistently been protected by courts even in the absence of statutes.¹⁷¹ Not content to leave such protection to the courts, however, many state legislatures have adopted statutes preventing adverse possession of all or some of the following: roads, public ways, highways, streets and alleys, sometimes even a public park or square.¹⁷²

168. See *supra* note 7.

169. See *supra* note 121.

170. This differs from the treatment of roads and highways in tort claims. See *supra* Part I.B.

171. See *supra* Part I.C.

172. See ARK. CODE ANN. § 22-1-201(a) (Michie 1996) ("public thoroughfare, road, highway, or public park"); KY. REV. STAT. ANN. § 413.050(1) (Michie 1992) ("street, alley or other public easement"); MICH. COMP. LAWS ANN. § 247.190 (West 1990) ("public highways"); MICH. COMP. LAWS ANN. § 600.5821 (West 1987) ("public highway, street, alley, or any other public ground"); MINN. STAT. ANN. § 541.01 (West 1988) ("public way . . . [or] square"); NEB. REV. STAT. § 25-202(1) (1995) ("public road, street, or alley"); N.C. GEN. STAT. § 1-45 (1996) ("public road, street, lane, alley, square or public way"); OR. REV. STAT. § 221.750 (1995) ("streets, highways, [or] parks"); UTAH CODE ANN. § 78-12-13 (1996) ("streets, lanes, avenues, alleys, parks or public squares"); VT. STAT. ANN. tit. 19, § 1102 (1987) ("highway"); WIS. STAT. ANN. § 893.29(2)(c) (West 1997) (protecting land held "for highway purposes, including but not limited to widening, alteration, relocation, improvement, reconstruction and construction"). While not directly protecting municipal land from adverse possession, Oklahoma provides: "The title to streets, roads and public ways within the limits of a municipality which have been dedicated and accepted by the municipal governing body is held by the municipality in trust for public use and enjoyment." OKLA. STAT. tit. 11, § 36-101 (1991).

Schoolhouses and school lands have been specifically immunized from adverse possession by statute in some states.¹⁷³ This parallels the protection provided to such lands in the original grants of land from the United States to the states upon their admission to the Union.¹⁷⁴ In the absence of such statutes, a few courts have concluded that land used for school purposes benefits only the local community, is not dedicated to "the public," and is, therefore, subject to adverse possession.¹⁷⁵

Another category of municipal land use that a few states have chosen to protect statutorily is that involving waterworks and other public utilities.¹⁷⁶ Massachusetts amended its statute in 1987 to prevent adverse possession of land "held for conservation, open space, parks, recreation, water protection, wildlife protection or other public purpose."¹⁷⁷

Not surprisingly, the straightforward guidance provided by these statutes has made it simple for the courts to resolve claims of adverse possession. If the land is covered by the statute, then adverse possession is not permitted.¹⁷⁸

Despite the statutes straightforward application, it is not entirely clear what rationale motivated these state legislatures to adopt these limited and piecemeal statutes. That is, why is a "public thoroughfare, road, highway, or public park"¹⁷⁹ more deserving of statutory protection than land around the courthouse, city hall, or municipal park? And why does a public utility deserve more statutory protection than the town square, the library and the department of public works?

Whenever a statute applies to a narrow category of land, a danger exists that the public, the attorneys, or the courts will

173. See LA. CONST. art. 9, § 4(B) ("Lands and mineral interests of . . . a school board . . . shall not be lost by prescription."); 735 ILL. COMP. STAT. ANN. § 5/13-111 (West 1993) (immunizing "school and seminary lands" from the seven-year statute of limitations applicable to adverse possession under color of title, but subjecting this land to adverse possession under the longer, general 40-year statute); N.H. REV. STAT. ANN. § 477:34 (1992) ("No person shall acquire by prescription a right to any part of a . . . schoolhouse or church lot . . . by fencing . . . or in any way occupying it adversely for any length of time.").

174. See Latovick, *supra* note 5, at 952-63.

175. See *supra* text accompanying notes 128-31.

176. See ARK. CODE ANN. § 22-1-202 (Michie 1996) ("municipal waterworks"); CAL. CIV. CODE § 1007 (West 1982) ("land, water, water right, easement, or other property whatsoever dedicated to a public use by a public utility"); MINN. STAT. ANN. § 541.01 (West 1988) ("levee"); UTAH CODE ANN. § 17A-2-534 (1995) ("[A]ny canal, ditch, or the like . . . shall be deemed a public use and for a public benefit.").

177. MASS. GEN. LAWS ch. 260, § 31 (1996).

178. See *Neyland v. Hunter*, 668 S.W.2d 530, 532 (Ark. 1984); *Averett v. Utah County Drainage Dist. No. 1*, 763 P.2d 428, 430 (Utah Ct. App. 1988).

179. ARK. CODE ANN. § 22-1-201(a) (Michie 1996).

overlook it and permit protected municipal land to be lost through adverse possession.¹⁸⁰ A statute which uniformly exempts all municipal land from adverse possession, regardless of the use to which it is put, would eliminate this problem. A broad, uniform statute is preferable to the piecemeal approach which protects one or two types of land but leaves others of arguably equal importance to the municipality unprotected.

In short, state statutes taking a piecemeal approach to protection from adverse possession could be simplified and made more consistent by adopting a rule protecting all municipal land from adverse possession. The statutes of Alabama and Colorado could serve as models for legislatures contemplating such legislation.¹⁸¹

2. Two State Statutes Expressly Permit Adverse Possession of Municipal Land—Two states have statutes that seem to subject municipal land of any character to adverse possession. Florida's statute subjects municipalities to the same statutes of limitations that apply to civil actions generally.¹⁸² Wisconsin's statute provides specifically that title to land held by a municipality "may be obtained by adverse possession" if the adverse user holds the property for more than twenty years.¹⁸³ Wisconsin's statute, however, does exempt from adverse possession highways held by the state or a political subdivision.¹⁸⁴

Somewhat surprisingly, the Florida courts have held that municipal land held for a public purpose is not subject to adverse possession, no matter how long the possession continues.¹⁸⁵ Despite the clear language of the statute, which would seem to make no exceptions, the Florida cases have been

180. See generally Latovick, *supra* note 5, at 969–72 (arguing that some state courts have ignored their own state's adverse possession laws). Mistakes as to the law of adverse possession have been more frequent than might be supposed.

181. See discussion *supra* Part II.B.

182. See FLA. STAT. ANN. ch. 95.011 (Harrison 1996) ("A civil action . . . including one brought by . . . a political subdivision of the state, [or] a municipality, . . . shall be barred unless begun within the time prescribed in this chapter . . .").

183. WIS. STAT. ANN. § 893.29(1) (West 1997) (providing that adverse possession is available against "the state or a city, village, town, county, school district, sewerage commission, sewerage district or any other unit of government within this state").

184. See *id.* § 893.29(2)(c) (protecting from adverse possession property held "for highway purposes, including but not limited to widening, alteration, relocation, improvements, reconstruction and construction").

185. See *Waterman v. Smith*, 94 So. 2d 186, 189 (Fla. 1957).

consistent since 1957 in affirming that land dedicated for public use cannot be acquired by adverse possession.¹⁸⁶

The Wisconsin courts, on the other hand, have been inconsistent in applying the statute of limitations. In an unpublished opinion, *Van de Castele v. St. Thomas Aquinas Congregation*, the Wisconsin Court of Appeals noted that "St. Thomas could not have acquired by adverse possession any property dedicated by the city of Milwaukee for public use."¹⁸⁷ However, in so holding, the court relied on a 1922 decision of the Wisconsin Supreme Court,¹⁸⁸ which predated Wisconsin's 1931 adoption of its statute expressly allowing adverse possession of municipal land.¹⁸⁹ The existence of contrary statutory authority adopted after the time of the cited case limits the relevance of *Van de Castele*.

More recently, the Wisconsin Court of Appeals permitted adverse possession of a state highway despite its public dedication.¹⁹⁰ In another case the same court held that the plaintiff had failed to establish adverse possession of a basement under a city street because he had not met the applicable forty-year statute of limitations.¹⁹¹ If this alleged encroachment had been barred because the street was dedicated to a public

186. See *id.* at 189; *Bonifay v. Garner*, 503 So. 2d 389, 395-96 (Fla. Dist. Ct. App. 1987); *Seaside Properties, Inc. v. State Road Dep't*, 190 So. 2d 391, 394 (Fla. Dist. Ct. App. 1966); *Laube v. City of Stuart*, 107 So. 2d 757, 760-61 (Fla. Dist. Ct. App. 1958).

187. *Van de Castele v. St. Thomas Aquinas Congregation*, No. 79-1960, 1980 WL 99512, at ***4 (Wis. Ct. App. Dec. 9, 1980).

188. *Klinkert v. Racine*, 188 N.W. 72, 73 (Wis. 1922) (holding that the city held title to an alley in its governmental capacity and that adverse possession was not possible because the city had no power to convey title to the alley for private use).

189. See WIS. STAT. ch. 79, § 3 (1931) (allowing adverse possession of "any real estate" (emphasis added)); WIS. STAT. ANN. § 893.29(1) (West 1997); 65 Op. Wis. Att'y Gen. 207, 210-13 (1976).

190. See *Wisconsin Dep't of Transp. v. Black Angus Steak House, Inc.*, 330 N.W.2d 240, 241-42 (Wis. Ct. App. 1983). The court noted the following:

When the statutory language is clear and unambiguous, no rule of judicial construction is permitted, and this court must implement the express intent of the legislature by giving the language its ordinary and accepted meaning. . . . [the relevant statute] clearly provides that a person has the statutory right of adverse possession against state property if the statutory requirements are met. The statute makes no exception for state highway property.

Id. at 241. Following this decision, the Wisconsin legislature amended its statute to expressly protect highways from adverse possession. See WIS. STAT. ANN. § 893.29(2)(c) (West 1997).

191. See *Petropoulos v. City of West Allis*, 436 N.W.2d 880, 882-83 (Wis. Ct. App. 1989).

use and was therefore immune from adverse possession,¹⁹² it would not have been necessary for the court to rely on the applicable time period for occupancy. It is not entirely clear, then, whether municipal land dedicated to a public use is immune from adverse possession in Wisconsin.

Whatever one's position on adverse possession of municipally owned land, the law ought to be clear. Where the statutes say one thing but the courts feel free to follow common law exceptions, the inconsistency in the system is untenable. The legislatures in these two states should reconsider their statutes in light of the judicially created uncertainty.

Simply clarifying the question of whether land devoted to public use is immune from adverse possession, however, is not sufficient to solve the problem. The difficult issue of defining just what uses are "public" enough to merit protection remains, as does the problem of losing valuable municipal property without compensation because it has been deemed proprietary in its capacity.

As discussed above, adoption of a statute protecting all municipal land from adverse possession would be most appropriate for at least four reasons. First, such a rule is readily understood and easily administered.¹⁹³ Second, it would eliminate the current confusion as to whether land dedicated to a public use is immune from adverse possession. Third, it would avoid the difficulties described in Part I.C.3 above, relating to the determination of which uses are, in fact, "public." Fourth, it would protect valuable municipal assets from loss to aggressive trespassers.¹⁹⁴

CONCLUSION

The time has come to abolish the governmental/proprietary distinction in adverse possession cases and to prevent adverse possession of any municipally owned land, regardless of the

192. The *Petropoulos* court held that the 40-year statute in effect at the time the occupancy began was controlling, as opposed to the 20-year statute adopted in 1979. See *id.* at 882. Therefore, the 1983 amendment protecting highways was not relevant.

193. See *supra* notes 157-67 and accompanying text.

194. Certainly if it were any municipal asset other than land being taken by these trespassers, the trespassers would be considered thieves and prosecuted as such. It is only the peculiarities of the adverse possession rules, developed to protect the land title system from stale claims as to land ownership, that protect those who would take municipal property for themselves without paying for it.

capacity in which it is held. State legislatures in those states where municipal land is not fully protected should adopt a statute providing that all municipal land is immune from adverse possession. The statutes in Alabama and Colorado can serve as models for such new legislation.

Failing such a simple but comprehensive approach, the courts should, at a minimum, expand the categories of land deemed to be held in a governmental capacity to reflect changes in the role of municipal governments and modern recognition of the value of undeveloped land. Whether done by accident or design, municipalities should not be punished for leaving land in its natural state. A better approach would be for the courts to adopt the reasoning of the Minnesota Supreme Court that "lands held by a municipality are, by definition, appropriated to public use,"¹⁹⁵ and are, therefore, immune from adverse possession.

195. *Fischer v. City of Sauk Rapids*, 325 N.W.2d 816, 818 (Minn. 1982) (holding that adverse possession against the government is not allowed under the state's statutory scheme).

