EDWARD W. and NANCY M. KLUMPP, Plaintiffs-Appellants, v. BOROUGH OF AVALON, Defendant-Respondent.	SUPREME COURT OF NEW JERSEY DOCKET NO. 64,722 ON PETITION FOR CERTIFICATION FROM FINAL DECISION OF THE SUPERIOR COURT, APPELLATE DIVISION Sat Below: Lisa, Sapp-Peterson and Alvarez, JJAD

PETITION FOR CERTIFICATION

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QUESTIONS PRESENTED

May a municipality, consistent with the federal and state constitutional proscriptions against taking property without due process of law and without paying just compensation, utilize inverse condemnation to avoid the eminent domain process and obtain title to land without paying for it?

Is the remedy of inverse condemnation, which was designed to provide just compensation to landowners when privately owned land is taken by the government, available only to landowners and not to municipalities?

Where an owner is vested with fee simple title to land, and a municipality has occupied the land but failed to satisfy the legal requirements to take the land by either eminent domain or adverse possession, is the owner entitled to a judgment of ejectment against the municipality?

PRELIMINARY STATEMENT

This case presents an example of outrageous abuse of the eminent domain power by the Borough of Avalon.

Notwithstanding the finding of the court below that Avalon took land owned by Plaintiffs Edward W. and Nancy M. Klumpp "without any semblance of due process or compliance with statutory requirements" (Pa8)[1] and without paying any just compensation as required by the federal and state constitutions,

[1] "Pa____" refers to the Appendix to this Petition.

the court divested the Klumpps of title to their land and entered judgment vesting title in the Borough of Avalon. The court did so under the rubric of "inverse condemnation," finding that notwithstanding undisputed fee simple title held by the Klumpps, "the Borough is the true owner of the property" because "the Borough has been in possession of the land since 1962." (Pa11).

The decision below is based upon a fundamental misunderstanding of the inverse condemnation cause of action. Inverse condemnation is a remedy designed to provide just compensation to **landowners** whose land has been improperly taken by the government without complying with due process of law through the Eminent Domain Act. In an inverse condemnation action, the aggrieved landowner who has demonstrated a taking of land by the government obtains redress in the nature of mandamus to compel the institution of condemnation proceedings by the government, ultimately leading to the payment of just compensation.

There is no authority for the proposition, espoused by the court below, that inverse condemnation may be utilized by a municipality to take land without complying with the provisions of the Eminent Domain Act, and without paying just compensation. The inverse condemnation remedy, designed to protect landowners,

cannot be used by municipalities to steal land in violation of a landowner's constitutional rights.

PROCEDURAL HISTORY

Plaintiffs, the Klumpps, filed a Verified Complaint against Defendant Borough of Avalon on November 18, 2004, seeking declaratory and injunctive relief restoring access to their property which was removed when Avalon vacated that portion of 75th Street which previously provided access. (Aa1 to Aa36).[2] The Borough's Answer "admitted" that the Klumpps own the property in question.(Aa37). After a period of discovery, the parties filed cross motions for Summary Judgment. (Aa56; Aa141).

The trial judge granted the Borough's Cross-Motion,finding that the Klumpps were not entitled to access to their land because the Borough had seized the land in 1962.(Aa219).

The Klumpps appealed to the Superior Court, Appellate Division. (Aa226). On January 29, 2007, the Appellate Division reversed the trial court, and remanded for further proceedings. (Aa228). The Appellate Division held that the Klumpps enjoy a "perpetual and indefeasible" right of private access to their land, which cannot be taken away by the Borough, as per Highway Holding Co. v. Yara, 22 N.J.119, 128 (1956).(Aa238). Because, however, Avalon changed its position and claimed that the Borough, and not the Klumpps, owns the property in question, and alleged that various impediments may exist to the Borough's

[2] "Aa____" refers to the Appendix for Plaintiffs-Appellants, which was agreed to by the Klumpps and the Borough.

ability to allow the Klumpps private access to their property, the appellate court remanded for further proceedings.(Aa241).

Upon remand, the Klumpps filed their First Amended Complaint. (Aa243). Count I seeks a declaratory judgment that the Klumpps have the right of access to their property, as the Appellate Division has already found. Counts II and III note that the Borough claims that it seized and has been in "possession" of the Klumpp property since 1962, and thus seeks a judgment ejecting the Borough from any further trespass on the property. The Borough answered and counterclaimed, alleging that the Borough effectuated a physical taking of the property in 1962, and that therefore the Borough, not the Klumpps, now owns the property and accordingly the Klumpps are not entitled to access. (Aa279).

The parties entered into a Stipulation of Facts (Aa400) and based upon those stipulated facts, stipulated documents, and depositions, the trial judge conducted a plenary hearing on January 17, 2008. The court decided that Avalon physically seized the Klumpp property in 1962, and that title to the land is now vested in the Borough. On January 29, 2008, final judgment was entered in favor of Avalon, declaring that:

> Defendant's actions in occupying and including the Property in its dune area . . . constituted a taking of the Property **vesting title thereto in Defendant** . . . [Aa405][emphasis added].

On July 31, 2009, the Appellate Division affirmed, finding that Avalon is the "true owner" (Pa11) of the property, based

upon "principles of inverse condemnation," (Pa12) even though Avalon acted "without any semblance of due process or compliance with statutory requirements." (Pa8). The fact that the Klumpps "have legal title does not refute that conclusion," according to the Appellate Division. (Pa11).

On August 17, 2009, the Klumpps filed a Notice of Appeal (Pa15) and Notice of Petition for Certification (Pa18) with the Supreme Court, as per Deerfield Estates v. Township of East Brunswick, 60 N.J. 115, 120 (1972).

STATEMENT OF FACTS

The Klumpps are the owners of 9,000 square feet of oceanfront land designated as Block 74.03, lots 2, 4, and 6 (the "Property"), located at the easterly end of 75th Street in Avalon (Aa9; Aa220). The Klumpps acquired fee simple title to the Property on January 19, 1960. Stipulation of Facts (hereinafter "Stip") ¶ 2 (Aa400). They constructed a single family home on the Property in the spring of 1960, and utilized the dwelling as a summer home during the summers of 1960 and 1961. (Aa2; Aa220) (Stip ¶ 3). Access to the Property at that time was provided by 75th Street. (Aa2) (Stip ¶ 8); Aa401).

The dwelling was destroyed by a northeast storm in March 1962. (Aa2) (Stip ¶ 7; Aa401). In the aftermath of the storm, the Borough, by adoption of Resolution 62-102 (August 15, 1962) (Aa174) and Resolution 62-103 (August 15, 1962)(Aa178) (Stip ¶ 9; Aa401) coordinated removal and disposal of debris, and reconstructed the beach and sand dunes on both publicly owned and

privately owned beachfront land in order to provide protection against future storms and hurricanes. No notice was given to the Klumpps of the adoption of these resolutions. (Stip ¶ 10; Aa401). Nothing in these resolutions evidences any intent to permanently "seize" the Klumpp Property, which is not even mentioned in the resolutions.

While Borough employees may have trespassed upon the Klumpp Property in order to remove debris and/or construct dunes, there is no evidence that the Borough has continuously physically occupied the Property. (Aa220; Aa222-Aa223). Since the destruction of the Klumpps' home in 1962, there have been no structures or fences erected upon the Property. (Aa222-Aa223;Aa339). The property exists today as a natural, vegetated, undeveloped dune environment. Id. See photo of property (Aa222-Aa223) and survey (Aa220). The parties stipulated that "The Property has been vacant from the March [1962] storm until the present." (Aa401).

On September 3, 1969, the Borough adopted an ordinance which vacated 75th Street adjacent to the Property. (Aa23) (Stip ¶ 15; Aa402). The vacation deprived the Klumpps of any access to their Property via public streets and left the Property landlocked by the beach area owned by the Borough. Currently, there is no vehicular access to the Property, and the Property can only be accessed by pedestrians by crossing the Borough-owned vacated portion of 75th Street. (Aa220)

In March 2003, the Klumpps applied to the New Jersey Department of Environmental Protection (DEP) for a permit under

the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 et seq. to reconstruct a dwelling on the Property(Aa2). DEP informed the Klumpps that it could not consider their CAFRA application until they establish "current access" to the Property. (Aa26; Aa27). In response, the Klumpps contacted the Borough to seek access, but the Borough failed to respond (Aa29; Aa32; Aa34; Aa36). As a result, the Klumpps filed the Verified Complaint against the Borough on November 18, 2004. (Aa1-Aa7).

The Klumpps moved for summary judgment, on May 11, 2005 (Aa56) asserting their "perpetual and indefeasible" right of private access to their land notwithstanding the 1969 street vacation. In its response filed on July 27, 2005 (Aa141), the Borough, surprisingly, for the first time ever, took the position that Avalon had physically taken the Klumpp property in 1962, in the aftermath of the March 1962 storm (Aa151). Avalon contends that the Borough now owns the Klumpp property and as such the Klumpps have no need for access.

The Borough produced no document to support its claim that the Borough intended to permanently seize the Klumpp property in 1962. Indeed, **there is no proof that the Borough ever claimed to own the Klumpp property prior to July 27, 2005** when it filed its cross-motion. In fact, the Borough's Answer to the complaint "admitted" that the Klumpps own the Property. (Aa37).

The Borough's own actions over the past 47 years belie any claim of ownership by Avalon. The Borough's tax records have at all times since 1960 listed the Klumpps as the owners of the Property, and the Borough has sent real estate tax bills to the

Klumpps from 1960 to the present date.(Stip ¶ 20; Aa402). The Klumpps have paid every one of those tax bills. Id.

The Klumpp Property has, at all times from 1960 to the present, appeared on the Official Map of the Borough as privately owned land, as contrasted with the surrounding beach area which is designated as "Public Beach Exempted" from taxation. (Stip ¶ 21; Aa403). See map at Aa 330.

As recently as July 16, 2002, the Avalon Tax Assessor sent a letter to the Klumpps referencing the Property, addressing them as "Dear Property Owner." (Aa397). The letter notified the Klumpps of the upcoming revaluation of the Property, and states that "At the conclusion of the program you will be notified by mail of the valuation of **your property**." [emphasis added]. Id.

In 1997, the Klumpps' then attorney wrote to the Borough of Avalon arguing that Avalon had "taken" the Property (not physically but by regulation), and claiming that the Borough was liable to pay the Klumpps just compensation. (Aa180). Avalon's municipal attorney replied (Aa132), contending that the ordinances vacating 75th Street and creating a dune ordinance "are entitled under the laws of this state to a presumption of validity," (Aa132), and denied that any taking had occurred. (Aa132). Most significantly, nowhere in his letter did Avalon's attorney assert that Avalon had in any way previously physically taken the Klumpp Property by seizure, pursuant to Resolutions 62-102 and 62-103, as Avalon now asserts. Indeed, he never even mentioned those Resolutions.

On July 24, 2002, just two years before the instant litigation was initiated, Avalon adopted a resolution (Aa353) authorizing the Borough to enter into a State Aid Agreement with DEP in order to perform continuing beachfill and dune enhancement projects along the oceanfront. (Aa357). Attachment B to the Agreement sets forth a schedule of privately owned land for which "perpetual easements will be acquired for public access and use." (Aa370). Among the properties for which Avalon conceded in the agreement that easements would be necessary was the Klumpp Property, Block 74.03, Lots 2, 4, and 6, which is expressly listed. (Aa370). At no time has Avalon, or the Corps of Engineers, ever requested an easement from the Klumpps, nor have they ever granted an easement for any such work or to allow anyone to set foot on their property. (Aa338-Aa339). Clearly, Avalon would not have conceded that it needed an easement over the Klumpp Property if in fact Avalon already owned the land by virtue of seizure in 1962.

Finally, a title search confirmed that as a matter of public record, the Klumpps continue to be the record fee simple title owners of the Property (Aa 347). The deed by which the Klumpps acquired the Property on January 19, 1960, is the last filed and recorded document conveying ownership of the Property. (Aa347). There are no other documents of record indicating that the Borough of Avalon, or anyone other than the Klumpps, has an ownership interest in the Property. (Aa348).

After considering this record, the trial court agreed that Avalon "never claimed title or formally asserted any ownership or

possessory rights to the [Klumpp] property before filing its Answer in this matter." (Tr. 49:16-18)[3]. The trial court found that

> For the continuous period from 1962 to the initiation of this litigation, the Defendant formally recognized Plaintiffs' title to the property, occasionally communicating with the Plaintiff as the owner thereof, annually assessing real estate taxes in a nominal amount on the property, and listing the property in its municipal records as being owned by the Plaintiff. Defendant's first claim of title to the property came with the filing of the counterclaims in this matter . . . . [Tr. 49:19 to 50:3]

The trial court found that Avalon

> **took the property from Plaintiff without any semblance of due process or compliance with statutory requirements and without affording any compensation for the taking.** Defendant maintained and reinforced the fact of Plaintiffs' legal title by continuing to send them tax bills and list the property as privately owned . . . . [Tr. 53:2-7.] (emphasis added).

The trial court further found that even though Avalon did not construct or place any physical improvements on the Klumpp Property "in the classic sense," Avalon "took exclusive possession and control of the property in 1962 and has maintained it since as a part of Defendant's dune area." (Tr. 53:17-22). The court agreed that Avalon "never sought or obtained any easement or other permission from Plaintiff for the use or

[3] "Tr____" refers to the transcript of the plenary hearing conducted by the trial court on January 17, 2008.

occupancy of the property as required by law . . ." (Tr. 55:2-8.)

Notwithstanding these facts, however, the court found that Avalon had engaged in a "taking by a seizure" of the Klumpp Property in 1962 and has occupied the Property since then. (Tr. 57:10-11.) The court held that Avalon's actions in seizing the property, "especially without any semblance of due process and while affirmatively as well as by implication denying the legal implications of its actions constituted a taking of the property and Plaintiff therefore had the responsibility to take timely action with respect thereto." (Tr. 58:5-11.) In other words, the court found that Avalon had seized the Klumpp Property in 1962; and that the Klumpps should have been aware of the taking, and should have filed a claim for just compensation within six years pursuant to N.J.S.A. 2A:14-1, even though Avalon failed to physically or permanently occupy the Property, never notified the Klumpps of the taking, and continued to treat the Klumpps as owners of the Property for the next 47 years.

On this basis, the trial court equated "possession" with "title" and entered final judgment declaring that title to the Property is vested in the Borough. (Aa404).

The Appellate Division affirmed, believing that "inverse condemnation has occurred, and that the Borough is the true owner of the property." (Pa11). While acknowledging that the Klumpps have title to the Property, the court declared that "The fact that Plaintiffs have legal title does not refute [the inverse condemnation] conclusion." (Pa11). According to the Appellate

Division, "Principles of inverse condemnation control here." (Pa12).

ARGUMENT

Point I: The Transfer of Title to the Property From the Klumpps to Avalon Violated the Klumpps' Fundamental Constitutional Rights.

The judgment below wrongly rewarded Avalon with vested title to the Klumpp Property, even though Avalon acted "without any semblance of due process or compliance with statutory requirements." (Pa8). In a miscarriage of justice, the judicial process was utilized by Avalon in order to literally steal the Property from the Klumpps, in violation of fundamental constitutional rights.

The United States and New Jersey Constitutions both provide that the State may not deprive any person of property without due process of law. US Const., amend.XIV; NJ Const., Art.I,para.1. Moreover, landowners are required to be paid just compensation when the government takes their property. US Const., amend. V; NJ Const., Art.I, para.20; Mansoldo v. State, 187 N.J. 50, 58 (2006). This Court has stated that protection from governmental takings under the New Jersey Constitution is coextensive with protection under the Federal Constitution. Pheasant Bridge Corp. v. Tp. Of Warren, 169 N.J.282, 296(2001), cert. denied, 535 U.S. 1077, 122 S.Ct.1959, 152 L.Ed.2d 1020 (2002).

The courts below were absolutely correct in finding that Avalon acted to take the Klumpp property "without any semblance of due process or compliance with statutory requirements." (Pa8).

Absent a voluntary agreement with a landowner to purchase land, a municipality may only acquire property by complying with the Eminent Domain Act, N.J.S.A. 20:3-1 et seq., or through adverse possession. Avalon never commenced an eminent domain action to legally acquire the Klumpp property. Moreover, it would be impossible for Avalon to acquire the property by adverse possession, since the statutorily required period of possession, 60 years, has not passed.[4] N.J.S.A. 2A:14-30 (60 years actual possession required for woodlands or uncultivated tracts); see J&M Land Company v. First Union National Bank, 166 N.J. 493 (2001).

In the wake of the 1962 storm, the Legislature adopted emergency legislation, N.J.S.A. App.A:9-51.5, to enable oceanfront municipalities to enter and "take control and possession" of land needed for shore protection projects. This statute required municipal resolutions adopted pursuant to such authority to "designate the properties required" for such projects. Resolutions 62-102 and 62-103, adopted by Avalon in 1962 pursuant to this statute, utterly failed to designate the Klumpp Property or any other properties which it intended to control or possess.[5]

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[4] The Klumpps submit that it is unconstitutional for a municipality to obtain land by adverse possession, since that would violate the federal and state constitutional mandate that "just compensation" be paid. This court has not yet addressed this issue. Randolph Town Center v. County of Morris, 374 N.J. Super. 448 (App. Div. 2005), aff'd in part and vacated in part, 186 NJ 78 (2006).

[5] Had Avalon identified the Klumpp Property for taking in the resolution, the obligation to commence an eminent domain

Since Avalon utterly failed to comply with the statutory prerequisites, there is simply no basis in either the Constitution or law to justify the judgment below which transferred title in the Klumpp Property to the Borough. The lower courts wrongly relied upon inverse condemnation as the basis for their action. The Appellate Division erroneously believed that "Principles of inverse condemnation control here." (Pa12). The decision below represents a fundamental misunderstanding of inverse condemnation.

Point II Inverse Condemnation is a Landowner Remedy Which Cannot be Used by Municipalities to Avoid Compliance with the Eminent Domain Act.

In actuality, **inverse condemnation is a remedy designed only to protect a landowner** who seeks to be paid just compensation when the government has taken his property. In the Matter of Jersey Central Power and Light Company, 166 N.J. Super. 540, 544 (App. Div. 1979). Thus,

> An appropriation of property by a governmental entity or private corporation having power of eminent domain without its having undertaken to condemn or pay compensation to the landowner for the taking, can be redressed by the **owner's action in the nature of mandamus to compel institution of condemnation proceedings.** [Id., emphasis added].

As such, "Condemnation proceedings are normally initiated by the condemning authority. **Inverse condemnation proceedings are initiated by the landowner, hence the "inverse" label**. (Id.,

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action would have been triggered. Lorio v. City of Sea Isle City, 88 N.J. Super. 506 (Law Div. 1965).

emphasis added). Greenway Development Co. v. Bor. Of Paramus, 163 N.J. 546, 553 (2000); Van Dissel v. Jersey Central Power & Light, 181 N.J. Super. 516, 525-26 (App. Div. 1981). The Eminent Domain Act is the vehicle through which a landowner may seek condemnation and just compensation. Rohaly v. State, 323 N.J. Super. 111, 115 (App. Div. 1999).

In New Jersey, N.J.S.A. 20:3-26(c) is the statutory authorization for an inverse condemnation action by a landowner. Under this statute, a landowner who believes that a municipality has taken his land may sue to "compel condemnation." Id. If indeed a taking is found, the municipality is then required to initiate condemnation proceedings and comply with the requirements under the Eminent Domain Act. Under N.J.S.A. 20:3-19, the municipality would have to file a "declaration of taking" to obtain the right to both possession and title to the land. Under N.J.S.A. 20:3-21, title to the land only vests in the condemning municipality when a declaration of taking, commissioners' report, or voluntary agreement is filed and recorded with the county clerk. It is undisputed that Avalon has never complied with these requirements to obtain title to the Klumpp Property.

In the present case, the Appellate Division acknowledged at length that inverse condemnation is a landowner's remedy.(Pa10). Inexplicably, however, the court then stood the concept of inverse condemnation on its head and allowed it to be utilized by the Borough in order to obtain the Klumpps' Property without complying with any statutory prerequisites and without paying for

it. The court simply and erroneously assumed that since "The Borough has been in possession of the land since 1962 . . . inverse condemnation has occurred, and . . . the Borough is the true owner of the property." (Pa11).

There is absolutely no legal support for this holding or for the proposition that a municipality may utilize inverse condemnation to bypass the prerequisites of the Eminent Domain Act and obtain privately owned land retroactive to 1962 without paying for it. Even if Avalon proved that it has been in continuous possession of the Property since 1962, it would still have to comply with the above statutory prerequisites to be vested with title. Neither court below, nor the Borough, have cited any authority which allows a municipality to utilize the landowner's remedy of inverse condemnation as a shortcut to take title to land from a landowner.

It must be remembered that this is not an inverse condemnation case – the Klumpps never sued Avalon for inverse condemnation. Rather, they simply sought to regain the "perpetual and indefeasible" access which had been vacated, and to eject the Borough from any claimed possession of their Property. In this regard, the case of Raab v. Borough of Avalon, 392 N.J.Super.499 (App. Div.), certif. denied 192 N.J.475 (2007), is distinguishable. Raab was an inverse condemnation action initiated by a landowner to recover just compensation. Nothing in Raab suggests that Avalon is empowered to take title to the Klumpps' Property by inverse condemnation.

In sum, if Avalon desires to take the Klumpp Property, it must initiate an eminent domain action to do so. Even if Avalon has been in possession of the Property since 1962, inverse condemnation simply does not entitle Avalon to vested title to the Property.

Point III: Since the Klummps Have Fee Simple Title to the Property, They Were Entitled to a Judgment Ejecting Avalon

Both courts below believed that Avalon has been in continuous possession of the Property since 1962, and that somehow such possession provided the basis to divest the Klumpps of title and to vest such title in Avalon. The courts confused the concepts of possession and title, which are separate and distinct concepts under the Eminent Domain Act. See N.J.S.A. 20:3-17,-19,-21; See Township of Readington v. Solberg Aviation Co., ____ N.J.Super.____ 2009WL2513665(App. Div. 2009). (Slip Op. at 60-61). Possession, even for a 47 year period, does not automatically result in vested title absent compliance with the Eminent Domain Act.

Significantly, both courts below conceded that the Klumpps have fee simple title to their Property, although they characterized it as "bare legal title." (Pa11). As such, if Avalon was truly in possession of the Klumpps' Property as a trespasser, and has not satisfied the 60 year adverse possession requirement, the Klumpps are entitled to judgment ejecting the Borough from their land pursuant to N.J.S.A. 2A:35-1. See J&M Land Co. v. First Union National Bank, 166 N.J. 493, 517-19 (2001) (title holder entitled to ejectment where adverse

possession is interrupted prior to 60 years). Dismissal of the ejectment claim was clear error. See Bd. of Commerce of Somerville v. Johnson, 36 N.J. Eq. 211 (Ch. 1882) (even holder of "bare legal title" is sufficient to maintain action in ejectment). Rather than vest title to the Property in Avalon, the court should have ejected Avalon and restored possession to the fee simple titleholder, the Klumpps.

CONCLUSION

For the foregoing reasons, the Supreme Court should grant the Petition for Certification, and enter an Order: 1) reversing the judgment of the Appellate Division; 2) ordering that the Klumpps are vested with fee simple title to the Property; 3) issue an Order of Ejectment barring the Borough of Avalon from any possession or trespass on the Property; and (4) ordering Avalon to provide access to the Property.

Respectfully submitted,
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Edward W. and Nancy M. Klumpp

By:_____
Richard M. Hluchan

CERTIFICATION

I hereby certify pursuant to R. 2:12-7(a) that this Petition for Certification presents a substantial question and is filed in good faith, and not for purpose of delay.

Dated: August 27, 2009

_____
Richard M. Hluchan, Esq.

CERTIFICATION OF SERVICE

I, Christine Serratore, a legal secretary with the law firm of Hyland Levin, LLP, hereby certify that true and correct copies of the within Petition for Certification were filed by U.S. mail with the Clerk of the Supreme Court and served upon the following counsel by U.S. mail:

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I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: August 31, 2009

_____
Christine Serratore