

ANN F. KIERNAN, ESQ.
210 New York Avenue
New Brunswick, NJ 08901-1716
732-846-3201
Attorney for *Amicus Curiae* National Association of
Home Builders

<p>EDWARD W. and NANCY M. KLUMPP, Plaintiffs-Appellants, v. BOROUGH OF AVALON, Defendant-Respondent.</p>	<p>SUPREME COURT OF NEW JERSEY Docket No. A-49-09 CIVIL ACTION NOTICE OF MOTION FOR LEAVE TO APPEAR AS <i>AMICUS CURIAE</i> PURSUANT TO R. 1:13-9</p>
--	---

To: Richard M. Hluchan, Esq.
Hyland Levin, LLP
Attorneys for Plaintiffs-Appellants
Plaza 1000, Suite 400
Main Street
Voorhees, NJ 09043

Michael J. Donohue, Esq.
Gruccio Pepper DeSanto and Ruth, PA
Attorneys for Defendant-Respondent
8717 East Landis Avenue
PO Box 1501
Vineland, NJ 08362

PLEASE TAKE NOTICE that the National Association of Home Builders ("NAHB"), by and through its undersigned counsel, hereby moves for an order pursuant to Rule 1:13-9 granting it leave to appear as *amicus curiae* in this case, and to file a brief in support of the Plaintiffs-Appellants. In support of this motion,

NAHB relies on the January 11, 2010 certification of Christopher Whitcomb and on the supporting letter brief, submitted herewith.



ANN F. KIERNAN, ESQ.

Attorney for *Amicus Curiae* National
Association of Home Builders

Of Counsel:

Rafe Petersen, Esq.
Kyrus L. Freeman, Esq.
Holland & Knight LLP
2099 Pennsylvania Ave., N.W., Suite 100
Washington, D.C. 20006
(202) 862-5978

Dated: January 12, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this date, two (2) copies of this Notice of Motion for
Leave to Appear as Amicus Curiae, certification of Christopher Whitcomb, and the
supporting letter brief were served this day via Express Mail on the following:

Richard M. Hluchan, Esq.
Hyland Levin, LLP
Attorneys for Plaintiffs-Appellants
Plaza 1000, Suite 400
Main Street
Voorhees, NJ 09043

Michael J. Donohue, Esq.
Gruccio Pepper DeSanto and Ruth, PA
Attorneys for Defendant-Respondent
8717 East Landis Avenue
PO Box 1501
Vineland, NJ 08362

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.



ANN F. KIERNAN
Attorney for *Amicus Curiae* National
Association of Home Builders

DATED: January 12, 2010

ANN F. KIERNAN
ATTORNEY AT LAW

210 NEW YORK AVENUE ~ NEW BRUNSWICK, NJ 08901-1716
T:732-846-3201 ~ F 732-875-0658 ~ E: ann@kiernanlaw.net
W:www.kiernanlaw.net

January 12, 2010

Supreme Court of New Jersey
Hughes Justice Complex
25 West Market Street
P.O. Box 970
Trenton, NJ 08625-0970

Re: **Klumpp v. Borough of Avalon**
Docket No. A-49-09

**Letter Brief of the National Association of Home Builders In
Support of Motion for Leave to Appear as *Amicus Curiae***

Honorable Justices:

The National Association of Home Builders ("NAHB") submits this letter brief in support of its Motion for Leave to Appear as *Amicus Curiae*.

Procedural History and Factual Background

In January of 1960, Edward and Nancy Klumpp ("Klumpps") bought and took possession of land designated as Block 74.03, Lots 2, 4, and 6 in the Borough of Avalon. (Pa5)¹ The Klumpps then built a home on their property, with access provided via 75th Street. *Id.* However, in March, 1962, parts of Avalon were struck by a severe costal storm which caused catastrophic

¹ "Pa__" refers to the Petition for Certification filed by Richard M. Hluchan, Attorney for Plaintiffs-Appellants Edward and Nancy M. Klumpp.

damage to properties near the Atlantic Ocean and, unfortunately, destroyed the Klumpps' home. (Pa6)

After the storm, and without any actual notice to the Klumpps, on August 15, 1962 the Borough passed Resolution 62-102 and Resolution 62-103 which authorized the Borough to regrade and reconstruct beach and dune areas on both publicly and privately owned properties affected by the storm, including the Klumpps' property. *Id.* Moreover, in 1969, the Borough adopted an ordinance, again, without providing any actual notice to the Klumpps, which vacated the portion of 75th Street which provided access to the Klumpps' property. (Pa7) Nevertheless, since January 19, 1960, the Borough has sent real estate tax bills to the Klumpps for the property, and the Klumpps have paid each of those tax bills. (Pa8) The Official Map of the Borough of Avalon has, since January 19, 1960, designated the property as privately owned land, and not as tax exempt publicly owned property. *Id.*

In March 2003, the Klumpps applied to the New Jersey Department of Environmental Protection (DEP) for a permit to reconstruct a dwelling on their property. (Pa7). DEP informed the Klumpps, however, that it could not consider the Klumpps' application until they established "current access" to the property. *Id.* In response, the Klumpps contacted the Borough to confirm access, but the Borough failed to respond, which resulted in the Klumpps filing a Verified Complaint against the Borough on November 18, 2004. *Id.*

The Klumpps moved for summary judgment, asserting that a private access easement to their land could not be created by the 1969 street vacation. *Id.* The Borough argued in response that Avalon had physically taken the Klumpps' property in 1962 after the storm. (Pa8)

The trial court ultimately found that Avalon seized the Klumpps' property in 1962, 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. (Pa12)

The Appellate Division affirmed, believing that "inverse condemnation has occurred and that the Borough is the true owner of the property." *Id.*

Legal Argument

NAHB's Participation as *Amicus Curiae* is Timely, and Will Assist This Court in Resolving an Issue of Public Importance, Without Prejudice to Either Party.

The New Jersey courts apply a "liberal standard for permitting *amicus* appearances," *Pfizer v. Director, Div. of Taxation*, 23 N.J. Tax 421, 424 (Tax Ct. 2007), and NAHB's application for leave to appear as an *amicus curiae* satisfies the standards set forth in Rule 1:13-9. Rule 1:13-9 states, in pertinent part:

An application for leave to appear as *amicus curiae* in any court shall be made by motion in the cause stating with specificity the identity of the applicant, the issue intended to be addressed, the nature of the public interest therein and the nature of the applicant's special interest, involvement or expertise in respect thereof. The court shall grant the motion if it is satisfied under all of the circumstances that the motion is timely, the

applicant's participation will assist in the resolution of an issue of public importance, and no party to the litigation will be unduly prejudiced thereby.

Amici curiae must accept the case before the court as presented by the parties and cannot raise issues that have not been raised by the parties themselves. *Tice v. Cramer*, 133 N.J. 347, 355 (1993). As set forth below, the NAHB's application for leave to appear *amicus curiae* satisfies these criteria.

As demonstrated in the supporting Certification signed by Christopher M. Whitcomb, Esq., NAHB Senior Counsel, ("Certification"), NAHB is a Washington, D.C.-based trade association whose mission is to enhance the production of housing in the United States, and to advocate on behalf of the building industry. (Cert.¶2). Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent and affordable housing. (*Id.*). As the voice of America's housing industry, NAHB helps promote policies that will keep housing a national priority. Founded in 1942, NAHB is a federation of more than 800 state and local associations, including 5 in New Jersey. (Cert.¶3).

About one-third of NAHB's 200,000 members are home builders and/or remodelers, and its builder members construct approximately 80 percent of the new homes constructed each year in the United States. The remaining members are associates working in closely related fields within the housing industry, such as mortgage finance and building products and services. (*Id.*)

To effectuate its mission, NAHB strives to create an environment in which all Americans have access to the housing of their choice. (Cert.¶4). Toward this end, NAHB is a vigilant advocate in the Nation's courts, and it frequently participates as a party litigant and *amicus curiae* to safeguard the property rights and interests of its members, such as in *Mount Laurel Twp. v. MiPRO Homes, LLC*, 188 N.J. 531 (N.J. 2006). (Cert.¶4). Other recent cases in which NAHB has so participated include: *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *Tony Ashburn & Son, Inc. v. Kent County Reg'l Planning Comm'n*, 962 A.2d 235 (Del. 2008); and *Oddo Dev. Co., Inc. v. City of Leawood*, No. 09-3123 (10th Cir. 2009).

This appeal, in which the question before the Court is "May a municipality occupy a property and obtain title through inverse condemnation without initiating condemnation proceedings under the Eminent Domain Act, N.J.S.A. 20:3-1 to -50?" presents important constitutional property rights issues, and this Court's decision will have a wide-ranging impact on the development of takings law in the United States.

NAHB believes its experience can provide this Court valuable guidance regarding how federal and state courts apply the doctrine of inverse condemnation, and an overview of the well-established due process requirements the government must satisfy to deprive individuals of their property. (Cert. ¶5)

Specifically, NAHB's *amicus* brief will demonstrate that the court below misapplied existing U.S. Supreme Court and various state court precedent which clearly establish that inverse condemnation is a cause of action *by a property owner against a governmental defendant* to recover the value of property which has been taken by the governmental defendant without formal exercise of its eminent domain power. Thus, this Court will be compelled to likewise hold that a municipality *cannot* occupy a property or obtain title through inverse condemnation without initiating condemnation proceedings pursuant to the applicable eminent domain statute. NAHB's *amicus* brief will also offer this Court an analysis of decisions which indicate when takings claims ripen for court review. (Cert. ¶6)

No party to this litigation will be unduly prejudiced by allowing NAHB to appear *amicus curiae*. The motion is timely, as certification was granted only two months ago and the date for oral argument in this case has yet to be set. NAHB's *amicus* brief, which will be submitted by the date established by the Court, will address the legality of the Appellate Division's decision based upon prior case law. In accordance with *Tice v. Cramer, supra*, 133

N.J. at 355, NAHB's submission will therefore be within the confines of the issues presented by the parties and will not raise any additional issues.

NAHB seeks leave to participate in this action only through the filing of a brief, and does not request permission to present oral argument.

Conclusion

Therefore, for the reasons set forth herein, NAHB respectfully urges that its Motion For Leave to Appear As *Amicus Curiae* be granted. NAHB further respectfully requests that the Court set a date in mid-February, 2010 by which NAHB must file its *amicus curiae* brief.

Respectfully submitted



ANN F. KIERNAN, ESQ.
Attorney for *Amicus Curiae* National
Association of Home Builders

Of Counsel:

Rafe Petersen, Esq.
Kyrus L. Freeman, Esq.
Holland & Knight LLP
2099 Pennsylvania Ave., N.W., Suite 100
Washington, D.C. 20006
(202) 862-5978

cc: Richard Hluchan, Esq.
Michael J. Donohue, Esq.

ANN F. KIERNAN, ESQ.
210 New York Avenue
New Brunswick, NJ 08901-1716
732-846-3201
Attorney for *Amicus Curiae* National Association of
Home Builders

EDWARD W. and NANCY M. KLUMPP, Plaintiffs-Appellants, v. BOROUGH OF AVALON, Defendant-Respondent.	SUPREME COURT OF NEW JERSEY Docket No. A-49-09 CIVIL ACTION CERTIFICATION OF CHRISTOPHER M. WHITCOMB IN SUPPORT OF MOTION FOR LEAVE TO APPEAR AS <i>AMICUS CURIAE</i> PURSUANT TO R. 1:13-9
---	---

Christopher M. Whitcomb, of full age, deposes and says:

1. I am Senior Counsel at the National Association of Home Builders ("NAHB"). I am authorized to submit this certification in support of NAHB's motion for leave to appear as *amicus curiae* in this matter. Except as expressly stated or necessarily implied, I have full personal knowledge of the facts stated in this certification.

2. NAHB is a Washington, D.C.-based trade association whose mission is to enhance the production of housing in the United States, and to advocate on behalf of the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent and affordable housing.

As the voice of America's housing industry, NAHB helps promote policies that will keep housing a national priority.

3. Founded in 1942, NAHB is a federation of more than 800 state and local associations, including 5 in New Jersey. About one-third of NAHB's 200,000 members are home builders and/or remodelers, and its builder members construct approximately 80 percent of the new homes constructed each year in the United States. The remaining members are associates working in closely related fields within the housing industry, such as mortgage finance and building products and services.

4. To effectuate its mission, NAHB strives to create an environment in which all Americans have access to the housing of their choice. Toward this end, NAHB is a vigilant advocate in the Nation's courts, and it frequently participates as a party litigant or *amicus curiae* to safeguard the property rights and interests of its members, as in *Mount Laurel Twp. v. MiPRO Homes, LLC*, 188 N.J. 531 (N.J. 2006). Other recent cases in which NAHB has so participated include: *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005);; *Tony Ashburn & Son, Inc. v. Kent*

Count Reg'l Planning Comm'n, 962 A.2d 235 (Del. 2008); *Oddo Dev. Co., Inc. v. City of Leawood*, No. 09-3123 (10thCir. 2009).

5. This appeal, in which the question before the Court is “May a municipality occupy a property and obtain title through inverse condemnation without initiating condemnation proceedings under the Eminent Domain Act, N.J.S.A. 20:3-1 to -50?” presents important property rights issues, and this Court’s decision will have a wide-ranging impact on the development of takings law in the United States. NAHB believes its experience can provide this Court valuable guidance regarding how federal and state courts apply the doctrine of inverse condemnation, and an overview of the well-established due process requirements the government must satisfy to deprive individuals of their property.

6. Specifically, NAHB’s *amicus* brief will demonstrate that both the trial judge and the Appellate Division misapplied long-standing U.S. Supreme Court and various state court precedents which clearly establish that inverse condemnation is a cause of action *by a property owner against a governmental defendant* to recover the value of property which has been taken by the governmental defendant without formal exercise of its eminent domain power. NAHB’s *amicus* brief will also offer this Court an analysis of decisions which indicate when takings claims ripen for court review.

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.



Christopher M. Whitcomb

DATED: January 11, 2010