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SUPREME COURT OF NEW JERSEY
Docket No. 64,722

EDWARD W. and NANCY M. KLUMPP, Plaintiffs/Petitioners, v. BOROUGH OF AVALAON, a municipal Corporation of the State of New Jersey, Defendant/Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-2963-07T3 **NOTICE OF MOTION OF NEW JERSEY LAND TITLE ASSOCIATION IN SUPPORT OF MOTION TO BE ADMITTED AS AMICUS CURIAE**

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COUNSEL:

PLEASE TAKE NOTICE that the undersigned attorney for the New Jersey Land Title Association hereby moves before the Supreme Court of New Jersey for leave to appear as amicus curiae in support of Petition for Certification.

PLEASE TAKE FURTHER NOTICE that application will be made to allow amicus' New Jersey Land Title Association to file the enclosed Brief in support of Petition for Certification, to participate in any oral argument and to allow amicus to participate fully in any further proceedings.

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Attorneys for **New Jersey Land Title Association**

BY: _____
MICHAEL J. FASANO, ESQ.
For The Firm

DATED: October 1, 2009

SUPREME COURT OF NEW JERSEY
DOCKET NO. 64,722

EDWARD W. and NANCY M. KLUMPP, Plaintiffs/Petitioners, v. BOROUGH OF AVALAON, a municipal corporation of the State of New Jersey, Defendant/Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-2963-07T3 CIVIL ACTION On Appeal From: Superior Court of New Jersey Law Division: Cape May County Docket No.: L 651-04

BRIEF OF PROPOSED AMICUS CURIAE NEW JERSEY LAND TITLE ASSOCIATION IN SUPPORT OF OF PETITION FOR CERTIFICATION

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STATEMENT OF THE APPLICANT'S SPECIAL INTEREST, INVOLVEMENT OR EXPERTISE

The New Jersey Land Title Association (hereinafter "NJLTA") seeks to be admitted as amicus curiae in the present matter. The NJLTA is a trade association which, pursuant to its by-laws, is "organized to advance the common interest of all those engaged in the field of evidencing title to real property, conveyancing and insuring interests therein...". NJLTA, among other things: provides continuing education on matters involving conveyancing, title searching and other matters involving title to real property. It also certifies title professionals who have exhibited a proficiency in the knowledge of title insurance and a dedication to the profession. Finally, NJLTA participates in litigation involving matters related to real property, conveyancing and the title industry. With respect to its involvement in litigation as it affects real property, that involvement in this area has often yielded a profound benefit to the public at large. NJLTA has been at the forefront of litigation brought to force the implementation of procedures by county clerks and registers to effectuate the prompt recording of instruments affecting title to property. While such litigation helps protect title insurers against claims due to intervening judgment liens attaching while the recording of deeds is delayed, it also helps the public at large by

protecting innocent purchasers of real estate against liens for which they should not be responsible.

NJLTA has been admitted as amicus in over fifteen reported decisions, most recently in the Supreme Court cases of Panetta v. Equity One, Inc., 190 N.J. 307 (2007), Township of Middletown v. Simon, 193 N.J. 228 (2008); Shotmeyer v. New Jersey Realty Title Ins., Co., 195 N.J. 72 (2008) and Burnett v. County of Bergen, 198 N.J. 408 (2009).

The interest of the New Jersey Land Title Association herein deals with the integrity of the land recording system in this State. The land records maintained in each county are relied upon by purchasers, mortgagors and others in their transaction involving real estate. That system gives assurance - not only to those in the business of insuring title to real estate - but to those purchasing, mortgaging and transacting in billions of dollars of real estate dealings each year, that their title is, indeed, good. Not surprisingly, the integrity of that system had been held to be a "paramount" state interest by the Supreme Court. Cox v. RKA Corp., 164 N.J. 487, 497 (2000). The Appellate Division's opinion, however, resolved a title issue in a fashion that completely undermines the integrity of the system of recording and searching titles. In the past Appellate Court decisions which burden the system of searching land records have been specifically disapproved by this Court.

Sonderman v. Remington Const. Co., Inc., 127 N.J. 96 (1992). The implications of the present decision are far more serious. The particulars of the problem are discussed below.

PROCEDURAL HISTORY

NJLTA adopts the Procedural History as set forth in Petitioner's Petition for Certification.

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)[1]. The Klumpps acquired fee simple title to the Property on January 19, 1960. (Aa400). They constructed a single family home on the Property in the spring of 1960. (Aa2; Aa220). Access to the Property at that time was provided by 75th Street. (Aa2) (Aa401).

The dwelling was destroyed by a northeast storm in March 1962. (Aa2). 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) (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

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

hurricanes. No notice was given to the Klumpps of the adoption of these resolutions. (Aa401). The resolutions did not purport to "seize" the Klumpps' property or other properties.

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). Vague allegations were made upon "information and belief" that related indirectly to issues of maintenance of the dune generally. (Aa150 to Aa153). But proof of physical occupation is non-existent in the record. The property has existed and exists today as a natural, vegetated, undeveloped dune environment. (Aa222-Aa223;Aa339). 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) (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 confirm access, but the Borough failed to respond (Aa29; Aa32; Aa34; Aa36). As a result, the Klumpps filed a Verified Complaint against the Borough on November 18, 2004. (Aa1-Aa7).

The Klumpps moved for summary judgment on May 11, 2005 (Aa56) asserting that a private access easement to their land could not - as a matter of law - be affected by the 1969 street vacation. In its response filed on July 27, 2005 (Aa141), the Borough, for the first time ever, asserted that Avalon had physically taken the Klumpp property in 1962, in the aftermath of the March 1962 storm (Aa151.) This was contrary to a position maintained by the Borough as late as 1997. (Aa132).

Title searches of the land records showed the Klumpps as record fee simple title owners of the Property (Aa 347). No recorded documents indicate that the Borough of Avalon, or anyone else than the Klumpps own 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)[2] and "the 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 nonetheless found that Avalon had 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.

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

QUESTION PRESENTED, ERRORS COMPLAINED OF AND REASONS WHY CERTIFICATION SHOULD BE GRANTED

POINT ONE

CERTIFICATION SHOULD BE GRANTED SINCE THE MATTER IN CONTROVERSY IS A MATTER OF SIGNIFICANT PUBLIC IMPORTANCE AND THE DECISION OF THE APPELLATE DIVISION HEREIN WITH SUPREME COURT PRECEDENT.

R. 2:12-4 provides:

> Certification will be granted only if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court or is similar to a question presented on another appeal to the Supreme Court; if the decision under review is in conflict with any other decision of the same or a higher court or calls for an exercise of the Supreme Court's supervision and in other matters if the interest of justice requires. Certification will not be allowed on final judgments of the Appellate Division except for special reasons."

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

The case under review deals with an issue of significant concern to both the title industry and to the general public. That issue involves - among other things - the integrity of the land recording system. The New Jersey Supreme Court has noted that the land recording system "was designed to compel the recording of instruments affecting title, for the ultimate purpose of permitting purchasers to rely upon the record title and to purchase and hold title to lands within this State with confidence." Palamarg Realty Co. v. Rehac, 80 N.J. 446, 453 (1979). Over $107 billion dollars of land transfers were made in New Jersey in reliance upon that system in just 2008 alone.[3] It is thus not surprising that New Jersey case law "is replete with concerns for the 'integrity of record title and the stability of the recording system.'" Island Venture Associates v. New Jersey Dept. of Environmental Protection, 359 N.J. Super. 391, 396-397 (App. Div. 2003). (cases collected).

The decision under review strikes at the very heart of the recording system. Point One of this brief will address the nature of the recording system and title searching. Point Two will address Supreme Court precedent regarding that system. Point Three will demonstrate the fashion in which the lower court's decision undermines the purpose of the land recording

[3]Statistics from 2008 Statistical Data Report of the New Jersey Land Title Insurance Rating Bureau on file with the New Jersey Department of Banking and Insurance.

system. Point Four will suggest an alternative resolution.

POINT ONE

A TITLE SEARCH IS CONDUCTED TO ASSURE GOOD TITLE TO REAL ESTATE BY THOSE PURCHASING OR OTHERWISE INVESTING IN REAL ESTATE AND IT INVOLVES A SEARCH OF SPECIFIC PUBLIC RECORDS.

A purchase of land is one of the most expensive and important investments that a citizen can make. McDonald v. Mianecki, 79 N.J. 275, 288 (1979). A clear title search can assure a purchaser of land that title to the property is marketable.[4] Fineberg, Handbook of N.J. Title Practice, § 7701 (3d Ed. 2003). This greatly facilitates the free transferability of land. Montville Tp. v. Block 69, Lot 10, 74 N.J. 1, 25 (1977). The basics of the process by which the search is conducted was succinctly described in the case of Howard Sav. Bank v. Brunson, 244 N.J. Super. 571, 577 (Ch. Div. 1990). There the court noted:

> "In this regard, this court has had the benefit of the uncontroverted certification of Lawrence J. Fineberg, resident vice-president and associate regional counsel of defendant Chicago Title, an attorney fully familiar with the custom, practice and procedure of title searching in New Jersey. Fineberg states that the 'customary period for title searching is to go back 60 years to a warranty deed' in order to establish an unbroken chain of title for the premises in question. Once the searcher has gone back at least 60 years, he 'adverses' each successive owner in the chain of title

[4] Marketability is variously defined as New Jersey decisions as title being "salable or merchantable", Bierman v. Walbaum, 102 N.J.L. 368 (E&A 1926) or reasonably free from challenge, Gaub v. Nassau Homes, 53 N.J. Super. 209, 233 (App. Div. 1958).

> for the time period during which that owner held title in order to discover liens, restrictions, conveyances to third parties and the like which would encumber title. In performing the adversing task, Fineberg continues, '[i]t has long been the practice of New Jersey title searchers to check the alphabetical indices under the name of each owner of record to see whether he executed any instruments which would create adverse interests in the particular property.'"

In other words, title is taken back 60 years to make sure it is valid. Then - as to each owner found to have owned the land during those 60 years - title is searched again, this time it is specifically focused on each successive owner for the period that each such owner held title. Fineberg, Handbook of N.J. Title Practice, § 803 (3d Ed. 2003). That subsequent search is for the purposes of assuring that no liens, encumbrances or other defects occurred during each owner's period of ownership. Fineberg, supra. This is called "adversing" in the language of the title industry. Howard Sav. Bank, supra. As to each such owner "adversed," numerous public record books are searched including books of deeds, assignments, federal tax liens, lis pendens, mortgages, releases, construction liens, financing statements, discharges, general liens, judgments, notices of settlements. Fineberg, § 806 (3d Ed. 2003).

After such a search - if the risk insuring the title is acceptable - a title insurance policy can be issued. Fineberg, § 1065 (3d Ed. 2003, revised in 2005 and 2007).

But the description above is simply a description of the mechanics of searching various types of land records maintained in this State. It begs the question. How does one determine which records - of all the records maintained by the State - must be searched in order to assure marketability of title? That issue, however, has been addressed and answered by the Supreme Court. It is discussed in Point Two below.

POINT TWO

SUPREME COURT PRECEDENT STATES THAT COURTS SHOULD LOOK TO "THE CUSTOMS AND USAGES OF THE CONVEYANCING BAR AND TITLE COMPANIES..." WHEN DETERMINING DISPUTES AFFECTING TITLE TO REAL ESTATE.

The Recording Act is contained in Title 46 of the New Jersey Statutes. It allows certain documents affecting real estate to be recorded for the "purpose of permitting purchasers to rely upon the record title and to purchase and hold title to lands within this state with confidence." Palamarg Realty Co. v. Rehac, 80 N.J. 446, 453 (1979). It contains statutes establishing priority. N.J.S.A. 46:21-1. It contains statutes indicating the effect of the non-recordation of documents. N.J.S.A. 46:22-1. It also contains a non-exclusive list of documents that may be recorded. N.J.S.A. 46:16-1. But there are crucial things that it does not do. It does not, for instance, provide rules, guides or instructions on which records need to be searched in order to determine the state of title to real

estate. Palamarg, supra at 461. As the Court noted in Palamarg:

> "No statute has ever mentioned search, much less indicated the time or records over which it must extend . . ." Palamarg, supra.

This question is significant since some documents – as a matter of law – are *not* recordable under the Recording Act but nonetheless may affect title to real estate. Fineberg, § 806 (3d Ed. 2003, revised in 2005 and 2007). Such records include, for instance, municipal taxes and municipal assessments or Superior Court judgments. Fineberg, supra at § 807. That creates a problem. How – when faced with the constellation of various public records available for search – does a title searcher determine which records to actually search? The Supreme Court has recognized this conundrum and provided guidance. In a fashion reminiscent of the development of the common law, the Supreme Court has told the lower courts to look to "… the customs and usages of the conveyancing bar and title companies…." Palamarg, supra. This principle was affirmed in the more recent case of Sonderman v. Remington Const. Co., Inc. 127 N.J. 96, 110 (1992) where the Court quoted the following passage with approval:

> [T]he various New Jersey legislatures which have dealt with the Recording Act have spelled out a broad policy and have left it to the searchers, conveyancers, and courts to construct a system of title searching within the bounds delineated by that policy, and to maintain that system in a good and workable order.

Accordingly, the Supreme Court, in answering the question posed above, adopted a pragmatic approach. The Court has instructed lower courts to look to the customs and practices of the title industry for guidance in determining the methodology of searching and the records to which searches must be extended. It did that for the purpose of making sure that the system is maintained in a good a workable order. As will be argued in Point Three below, the Appellate Division's decision runs directly counter to that command. More significantly, it would necessitate a system of searching which not only is contrary to the practice of title searchers, but which is truly incapable of determining marketability of title under any circumstances.

POINT THREE

THE APPELLATE DIVISION'S DECISION NECESSITATES A SYSTEM OF SEARCHING WHICH IS NOT ONLY CONTRARY TO THE CUSTOMS OF THE INDUSTRY BUT INCAPABLE OF EFFECTUATION UNDER ANY CIRCUMSTANCES.

The present law suit was filed on November 18, 2004. In that suit Plaintiffs sought to compel the Borough of Avalon to give the Plaintiffs access to their property. The Appellate Division dismissed the suit. They apparently held that as of November 19, 2004, the Borough of Avalon was the actual owner of the property by "inverse condemnation" and that Plaintiff possessed only "bare legal title" which apparently gave Plaintiff no effective ownership rights.

Thus, the decision did two things.

One, it created a new form of real estate ownership previously unknown in the law. A person could now own "bare title" to real estate. He or she could be subject to payment of taxes and subject to liability for damages if a person was injured on the land, but he or she would have no real benefits of ownership.

Two, the decision cast doubts on title of property owners throughout the State. This is discussed immediately below.

Suppose, for instance, that instead of having filed suit on November 19, 2004 - Plaintiffs had entered into a contract to sell the property. The title searcher or attorney searching the title would find that the deeds recorded in the County Clerk's office showed that Plaintiffs hold title. The tax records in the Tax Assessor's office would show that the property was assessed to the Plaintiffs. Importantly, the search have would not have turned up either a lis pendens or a declaration of taking indicating the existence of a condemnation action. Fineberg, §§ 3402, 3403 (3d Ed. 2003, revised in 2005 and 2007). Title would come up clear. In fact, not one single search normally conducted by a title searcher would show any problem with Plaintiffs' title to the property. The purchasers would be bona fide purchasers without notice of any claim against the property, who took their title free from the claims of others. Venetsky v.

West Essex Bldg. Supply Co., 28 N.J. Super. 178, 187-188 (App. Div. 1953). However, after the purchase, if the new owners attempted to develop the property, those owners would find out three things. One, they could not develop the property in any way due to municipal regulation. Two - under the Appellate Division's formulation - they could not bring suit for inverse condemnation since the statute of limitations had run on the claim. Three, they would have no claim under their title insurance policy due to standard exclusions for police power regulations. Fineberg, supra at §§ 3402, 3403. Although, they might technically "own" the property, the new owners' "ownership" would serve only to expose them to those types of liabilities generally faced by landowners - it would not confer on them any cognizable benefit.

The problem actually goes much deeper than just that. Even persons who own - but are not seeking to sell undeveloped property - are put at risk by the decision under appeal. Such owners would not only run the risk that the property could not be developed owing to regulatory enactments - including regulations of which they are not aware - they run the additional risk that if six years has passed since the enactment of such regulations they will be unable to obtain compensation for their loss. The reason is that the "condemnation" stripping them of their rights is found to have taken place on the date

when the ordinances or regulations were enacted.[5]

Furthermore, there is no way for prospective buyers to uncover these risks through title searches. Title searches do not include searches of municipal ordinances. Fineberg, supra at §§ 806-807. Nor is it even possible that an expanded title search would uncover such a risk. The codification of ordinances by municipalities is discretionary. N.J.S.A. 40:49-4. Even if title searchers reviewed those municipal codes which are codified, and even if they also filed Open Public Record Act requests as to those towns maintaining uncodified ordinances, N.J.S.A. 47:1A-1 et seq., that would - for the reasons set forth below - only create more uncertainties.

Often, the determination as to whether a "taking" has occurred is not even possible absent some sort of proceeding establishing how the ordinance effectuating same will be applied. Pennell v. City of San Jose, 485 U.S. 1, 9-10 (1988). And no title company would offer insurance based upon a guess as how regulations will be interpreted and applied in the future. That is fundamental flaw with the decision below. The very purpose of the Recording Act and of title searching is to allow purchasers to be assured that the title they purchasing is good. Island Venture Associates, supra. To protect the recording

[5]Although the Appellate Division stated that the municipality physically possessed the property since 1962, there was scant evidence in the record to support that conclusion. See e.g. Aa150-153. (conclusionary allegations based upon information and belief).

system, the Supreme Court has - in the past - specifically disapproved of lower court decisions which have placed undue burdens upon the task of determining the quality of title.

For instance, in Sonderman v. Remington Const. Co., Inc., 244 N.J. Super. 611 (App. Div. 1990), an owner of land had failed to file a judgment vacating a tax foreclosure with the County recording officer. Instead, it was only filed in the court wherein the vacation of the judgment was obtained. Sonderman, supra at 614-617. The objection was raised that such a filing was not proper notice, since title searchers traditionally do not search for vacations of judgment filed outside of the recording officer's records. Sonderman, supra at 616. The Appellate Division held that title searchers had an obligation to search "all dockets and records" in order to uncover a possible application for a relief from a judgment, since such applications are commonplace in tax foreclosures. Sonderman, supra at 616-617.

On certification, the Supreme Court specifically disapproved that portion of the Appellate Division's decision. The court repeated Palamarg's admonition that title searching practices should be decided in reference to the "custom and practice" of title searching in order to maintain the integrity of the system in a "good and workable order." Sonderman v. Remington Const. Co., Inc., 127 N.J. 96, 110 (1992). The court

found no reason in Sonderman to depart from that principle. Sonderman, supra at 110, 111. Here, however, the effect of the Appellate Division's decision on the workability of the system is far more profound. The decision below does not just add burdens to the task of determining the state of title, it makes that determination a complete impossibility. It is respectfully submitted that a more workable way of addressing the problem is set forth in Point Four below.

POINT FOUR

THE STATUTE OF LIMITATIONS FOR AN INVERSE CONDEMNATION CLAIM SHOULD BE THE SAME AS THAT FOR ADVERSE POSSESSION AND A CLAIM SHOULD NOT BE DEEMED TO HAVE ACCRUED UNTIL AN APPLICATION FOR DEVELOPMENT HAS BEEN DENIED.

A. THE STATUTE OF LIMITATIONS FOR INVERSE CONDEMNATION SHOULD BE THE STATUTE FOR ADVERSE POSSESSION.

Different statutes of limitations for inverse condemnation have been applied by different courts to reflect the law of this State. The appropriate limitation has been held to be six years under N.J.S.A. 2A:14-1, Raab v. Borough of Avalon, 392 N.J. Super. 499, 503 (App. Div. 2007); forty-five days under R. 2:4-1(b), Joseph L. Muscarelle, Inc. v. State, by Dept. of Transp., 175 N.J. Super. 384, 394 (App.Div. 1980); or either six years or two years, 287 Corporate Center Associates v. Township of Bridgewater, 101 F.3d 320, 324 (3rd Cir. 1996). But the New Jersey Supreme Court has never ruled as to which statute of

limitations applies in inverse condemnation cases. See Russo Farms, Inc. v. Vineland Bd. of Educ., 144 N.J. 84, 113 (1996). The Court has specifically reserved on that issue. Russo Farms, supra.

American Law Reports surveyed the law of several states as to the statute of limitations in inverse condemnation cases. 26 A.L.R. 4th (1983). The varied treatment of the issue yielded only one conclusion. 26 A.L.R. 4th § 2 (1983). In the absence of any statute providing an express limitation, either the statute of limitations for adverse possession would apply or no limitations period at all would apply. 26 A.L.R. 4th § 2 (1983). Most jurisdictions apply the statute for adverse possession. The reason for this is straightforward. Until a property is lost by adverse possession, the owner should have a right to recover it. Petersen v. Port of Seattle, 618 P.2d 67 1980 (Wash. 1980). Another court used similar reason. A "taking" is no "mere trespass", it is - as the Appellate Division implied below - a complete negation of the rights of the actual owner. Podesta v. Linden Irrigation District, 296 P.2d 401, 410 (Cal. App. 1956). See also DiSanto v. City of Warrenville, 376 N.E.2d 288, 295-296 (Ill. App. 1978).

The court should apply that rule here. Since the type of land is an undeveloped sandy beach, the statute should be the sixty-year statute. See N.J.S.A. 2A:14-30; Spiegle v. Borough of

Beach Haven, 116 N.J. Super. 148, 157-158 (App. Div. 1971)(unimproved beach front property); Island Holding Co. v. Leeds, 122 N.J. Eq. 272, 284-285 (Ch. 1937)(salt marsh).

B. THE STATUTE SHOULD NOT COMMENCE TO RUN UNTIL THE AUTHORITY SEEKING TO FORECLOSE A CITIZEN'S RIGHT TO COMPENSATION FOR A TAKING HAS FILED A DOCUMENT IN THE LAND RECORDS INDICATING THE EXISTENCE OF A TAKING

A physical occupation of land puts the world on notice that the rights of the record owner are in doubt. J & M Land Co. v. First Union Nat. Bank, 166 N.J. 493, 509 (2001). Similarly, this State's eminent domain legislation requires notice when the State seeks to condemn. It requires the filing of a complaint and service upon a party to bind the owners. N.J.S.A. 20:3-9. Further, in condemnation cases the statutes positively mandate the filing of a lis pendens upon land and go on to say that in the absence of a lis pendens, the proceedings are not binding upon third parties. N.J.S.A. 20:3-10. Notice is thus specifically required to address the very defect of which Plaintiffs complain herein. Under what logic should a municipality be allowed to engage in "condemnation by ambush" through the mere passage of an ordinance?

In a non-physical occupation case, a municipality should be disallowed from asserting the bar of limitations unless certain notice conditions are met. Unless a municipality records - with the county's recording officer - and serves notice of its intent

to do so, it should be prevented from asserting the bar of limitations based upon the mere date of passage of an ordinance. If such a rule were adopted by this Court, it would prevent what happened here - "adverse possession by ambush." While it is true that this result is skewed in favor of the landowner - it should be so skewed. This court has repeatedly held that in dealing with the citizenry, the State and its subdivisions must "turn square corners." F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 426-427 (1985). Our eminent domain statutes certainly require "square corners." Municipalities should be required to do the same. It is respectfully submitted that this Court should so rule.

CONCLUSION

Upon the law and facts as set forth above. It is respectfully submitted that the decision of the Appellate Division should be reversed.

Respectfully submitted,

MICHAEL J. FASANO, ESQ.

Dated: September 30, 2009