

NEW JERSEY STATE BAR ASSOCIATION
New Jersey Law Center
One Constitution Square
New Brunswick, New Jersey 08901
(732) 937-7505

EDWARD W. and NANCY M. KLUMPP, Plaintiffs, vs. BOROUGH OF AVALON, Defendant	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
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BRIEF AMICUS CURIAE OF
NEW JERSEY STATE BAR ASSOCIATION

Counsel:

Richard H. Steen, Esq.
President-Elect
New Jersey State Bar Association
One Constitution Square
New Brunswick, NJ 08901
(732) 249-5000

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
QUESTIONS PRESENTED	1
INTEREST OF THE AMICUS	1
STATEMENT OF FACTS	1
ARGUMENT	2
A Claim For Just Compensation Due To Taking By Physical Occupation Does Not Ripen Or Accrue Before All Events Which Fix Government Liability Have Occurred And The Property Owner Knows Or Should Have Known Of The Government Actions	2
CONCLUSION	10

TABLE OF AUTHORITIES

CASE LAW

Federal Cases

<u>Applegate v. United States</u> , 25 <u>F. 3d</u> 1579 (Fed. Cir. 1994) ...	8, 9
<u>Boling v. United States</u> , 220 <u>F. 3d</u> 1365 (Fed. Cir 2000)	7
<u>Loretto v. Teleprompter Manhattan CATV Corp.</u> , 458 <u>N.S.</u> 419 (1982)	3, 4
<u>Lucas v. South Carolina Coastal Council</u> , 505 <u>U.S.</u> 1003 (1992)	2
<u>Northwest Louisiana Fish & Game Preserve Commission</u> , 446 <u>F. 3d</u> 1285 (Fed. Cir. 2006)	7
<u>St. Bernard Parish v. United States</u> , 88 <u>Fed. Cl.</u> 528 (2009)	7
<u>United States v. Dickenson</u> , 331 <u>U.S.</u> 745 (1942)	6, 7
<u>Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City</u> , 473 <u>U.S.</u> 172 (1985)	5

State Cases

<u>Gardner v. New Jersey Pinelands Commission</u> , 125 <u>N.J.</u> 193 (1991)	2
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Questions Presented

Amicus curiae New Jersey State Bar Association (NJSBA) will address the following question raised or directly implicated by this appeal:

1. When does a claim for taking by physical occupation ripen so that the court and the property owner may assess the extent of the taking and determine damages therefore?

Interest of the Amicus

The mission of the NJSBA is to promote the professional interests of its members, and in that regard, to promote fairness in the administration of justice. This case concerns NJSBA because it raises serious issues concerning the rights of property owners to fair notice and opportunity to respond before property rights are taken. The convoluted factual history and variety of legal claims raised in the courts below demonstrate the need for a clarifying decision by this Court.

Statement of Facts

NJSBA relies upon the Statement of Facts presented in Appellant's petition for certification.

ARGUMENT

A CLAIM FOR JUST COMPENSATION DUE TO TAKING
BY PHYSICAL OCCUPATION DOES NOT RIPEN OR ACCRUE
BEFORE ALL EVENTS WHICH FIX GOVERNMENT
LIABILITY HAVE OCCURRED AND THE PROPERTY OWNER
KNOWS OR SHOULD HAVE KNOWN OF THE GOVERNMENT ACTIONS

The NJSBA agrees with the other *amicus* that inverse condemnation is a remedy available only to the property owner for government appropriation of property. If the Borough of Avalon did not take the Klumpp property by inverse condemnation, its actions must still be characterized before the competing claims can be addressed.

Government may condemn property through formal proceedings initiated under the Eminent Domain Act of 1971, N.J.S.A. 20:3-1 et seq. It may also take property through regulation which denies all economically beneficial uses or unreasonably interferes with the owner's reasonable investment-backed expectations. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Gardner v. New Jersey Pineland Commission, 125 N.J. 193, 205 (1991). Government may also take property through permanent physical occupation. Both regulation and physical occupation are implicated by the Borough's actions. The Borough trespassed on the Klumpp property in 1962 and again in 1991 to remove debris, reconstruct the beach and to construct sand dunes. It regulated the property by adopting a road vacation ordinance in 1969, by adopting ordinances prohibiting sand removal or redistribution and by adopting an ordinance placing the property in a public use zone. Despite this multi-faceted

approach, the Appellate Division found that the taking had been accomplished in 1962 by physical possession of the Klumpp property. This finding mooted the question of whether a regulatory taking had also occurred. (Slip op. at 7.) For this reason, the NJSBA addresses only the physical occupation claim.

In Loretto v. Teleprompter Manhattan CATV Corp, 458 U.S. 419 (1982), the United States Supreme Court declared the installation of cables to provide cable TV service to tenants to be a permanent physical occupation authorized by government and thus a taking requiring just compensation. Id. at 438. The Court distinguished temporary invasions from permanent occupation of property, holding that when a physical intrusion reaches the "extreme form of a permanent physical occupation", a per se taking would always be found. Id. at 426. Construction of a dam which permanently flooded private property was offered as an example of severe and permanent occupation which required compensation. A requirement that shopping centers allow petition activity was offered as an example of a temporary and limited invasion which would not be compensable.

The permanence and exclusivity of government occupation is thus the touchstone for determining whether government occupation of land affects a taking. Not every physical invasion will be considered a taking. Temporary or intermittent occupation of property is subject to a complex balancing process for evaluating whether a taking has occurred. Id. at 436, n.12.

The question here is whether the Borough invaded and permanently occupied the Klumpp property when it constructed a protective dune in 1962. Although the Borough certainly invaded the property and temporarily occupied it, the record does not reveal that the Borough interfered with the Klumpp's physical possession and use of the property. Borough employees clearly trespassed on the Klumpp property in order to remove debris, regrade the beach, and construct a dune after the 1962 storm. However, none of the usual indicia of permanent occupation were proven. The Borough constructed no building or other structure, including a fence, on the Klumpp property. The parties stipulated that, "The Property has been vacant from the March [1962] storm until the present." No one crosses or occupies the site on a daily basis. Although the public beach path from the end of 75th Street to the beach does encroach upon a small portion of the property, this hardly rises to the level of permanent occupation of the entire tract. The photo of the site simply depicts vacant land, with no indicia of occupation by anyone. It was not until July 27, 2005 that the Borough asserted that it had physically appropriated the property in 1962 and not until 2009 that there was a final decision that access by the Klumpps was properly denied by the Borough. After constructing the dune on the Klumpps' property, the Borough listed the Klumpps as owners on Borough tax records; sent real estate tax bills to them; revalued their property; denied physically seizing the property; and entered into an agreement with

the State for beach and dune enhancement in which it listed the Klumpps as owners of affected property. Clearly, no final decision regarding permanent occupation of the property occurred until the Appellate Division confirmed the Borough's denial of access. The NJSBA believes that a taking claim based upon a physical invasion or occupation cannot ripen until the government entity has communicated the permanence of its occupation of property and its intent to bar all use by the property owner. This rule, which is applied to regulatory takings, serves the purpose of allowing the regulatory authority to decide and explain the reach, or extent, of the challenged regulation by defining the limits of permitted development. Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985). Any other rule would leave the Klumpps with the obligation to assert a claim for inverse condemnation before the Borough had made a final decision that it considered its temporary physical invasion to have established dominion and control of the Klumpp property.

The test for accrual suggested by the NJSBA conforms with the "stabilization doctrine" applied to damage claims under the Tucker Act. United States v. Dickinson, 331 U.S. 745 (1947) involved construction of the Winfield Dam which had caused water levels to rise resulting in permanent flooding and erosion on plaintiff's land. The flooding occurred through a continuous and gradual process over a period of years. The Court found that the statute of limitations did not begin to run when the dam first impounded

water nor when the dam was fully operable and the land partially submerged. Rather, since the flooding was a continuous and gradual process, plaintiff was allowed to postpone suit until the situation became stabilized. The Court reasoned that enforcement of the Fifth Amendment, which expresses a principle of fairness, required flexible application of technical rules regarding accrual of causes of action. By choosing not to take the land through some affirmative act, the Court found that the government had effectively left it up to the property owner to determine precisely when the physical taking occurred: "When the government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really taken." Id. at 749.

The stabilization doctrine announced in Dickinson has been refined through application by the federal courts. The determination of when the situation has adequately stabilized to allow the cause of action to accrue is a highly fact intensive one which varies with each case. Accrual is properly found when all events which fix the government's alleged liability have occurred and the property owner was or should have been aware of their existence. Northwest Louisiana Fish & Game Preserve Commission v. United States, 446 F. 3d 1285 (Fed. Cir. 2006), citing Boling v. United States, 220 F. 3d 1365 (Fed. Cir. 2000). In Northwest Louisiana Fish & Game Preserve Commission, the Army Corps. of

Engineers was alleged to have constructed a project which caused a taking of private property by limiting the ability of the Fish & Game Commission to control vegetative growth along Black Lake. Since the growth of vegetation was a slow natural process over a period of time, the Court found the taking claim had not accrued until the vegetation in fact caused the northern part of the lake to be inaccessible. Id. at 1286. See also St. Bernard Parish v. United States, 88 Fed. Cl. 528, 552-55 (Fed. Cir. 2009). (Private property owners who experienced flooding in 2005 and intermittent reoccurring flooding as a result of the construction, operation and maintenance of the Mississippi River-Gulf Outlet channel were subject to a continuing process of physical events which did not stabilize until many years after potential adverse effects of construction and operation of the channel were known.)

One factor considered by the federal courts in determining whether circumstances have adequately stabilized is whether there has been any conduct by the government which might dissuade a landowner from filing an action for just compensation. Applegate v. United States, 25 F. 3d 1579 (Fed. Cir. 1994) involved the construction by the Army Corps. of Engineers of a project to create a deep water harbor on Florida's east coast. The Corps. dredged a channel through several barrier islands and constructed two jetties which resulted in the interruption of sand flow which had been replenishing forty one miles of beaches. The result was a gradual receding of the shoreline south of the harbor and erosion and

inundation threatening home sites on plaintiff's property. The question posed was whether the landowners should have filed suit shortly after noticeable changes on their property began to appear.

The Court, applying the stabilization doctrine, found that certain government action after construction of the jetties delayed accrual of the claim. After the jetties were constructed, funding was authorized to restore the damaged beaches but restoration was delayed over fifteen years while beach renewal continued to be promised to the property owners. The Court found that the government's delays in providing promised mitigation justified the landowners' delay in initiating suit. Due to government promises, the landowners did not know when or if their land would be permanently destroyed and there was justifiable uncertainty about the permanency of the erosion and resulting taking. The date on which the government last promised to repair the damaged beaches was found to be the date when the statute of limitations began to run, since this was the date that the plaintiffs could be reasonably certain that the government had no intention of restoring the beach to its original condition and damage became permanent. Id. at 1582.

Applying the stabilization doctrine to the within case requires a determination of when the last action occurred fixing the Borough's liability and when the Klumpps knew or should have known that their property had been permanently taken. As suggested by the Klumpps and the other *Amicus*, this action did not occur

until the Appellate Division confirmed that the Borough could not provide access for the Klumpps' private use. Furthermore, the Borough's conduct in sending real estate tax bills to the Klumpps from 1960 through the present, listing the property on the official map as privately owned land, revaluing the property, expressly denying in 1997 that the property had been taken and in listing the Klumpp property as privately owned land for which a perpetual easement was required to allow maintenance of the dune, were all actions which had the practical effect of dissuading the Klumpps from filing an action for just compensation. The NJSBA urges this Court to apply the stabilization doctrine enunciated by the Federal Courts in a flexible manner so that the State and Federal constitutional guarantees against government taking of property without just compensation are fairly applied under the circumstances of this case.

CONCLUSION

For the foregoing reasons, the decision of the Appellate Division should be reversed.

Respectfully submitted,

By: Richard H. Steen /Sab
Richard H. Steen, Esq.
President-Elect,
New Jersey State Bar Association

Dated: 2/4/10

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