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SUPREME COURT OF NEW JERSEY

EDWARD W. and NANCY KLUMPP, Plaintiffs-Appellants, v. BOROUGH OF AVALON, Defendant-Respondent.	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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MOTION TO APPEAR AS AMICUS CURIAE PURSUANT TO R. 1:13-9

PLEASE TAKE NOTICE that Pacific Legal Foundation (PLF) hereby moves pursuant to New Jersey Rule of Court 1:13-9 for leave to

appear as amicus curiae in this matter, and to file the enclosed brief in support of Plaintiff-Appellants. A brief in support of this Motion is attached herewith.

DATED: October 16, 2009.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on this date, an original and eight (8) copies of the MOTION TO APPEAR AS AMICUS CURIAE PURSUANT TO R. 1:13-9, were sent via Federal Express to be filed with the following:

Clerk of the Supreme Court
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25 West Market Street
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I further certify that on this date, two (2) copies of the MOTION TO APPEAR AS AMICUS CURIAE PURSUANT TO R. 1:13-9, were sent via the United States Postal Service to the following:

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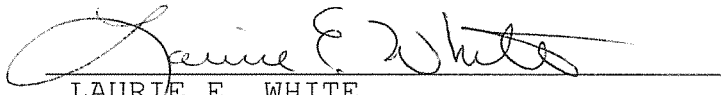
DATED: October 19, 2009.



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SUPREME COURT OF NEW JERSEY

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APPLICATION OF PACIFIC LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS, EDWARD W. AND NANCY KLUMPP

Pursuant to New Jersey Rule of Court 1:13-9, Pacific Legal Foundation (PLF) respectfully requests leave to appear as amicus curiae in support of Plaintiffs-Appellants, Edward and Nancy Klumpp. PLF was founded 36 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF engages in research and litigation over a broad spectrum of public interest issues in state and federal courts, representing

thousands of supporters nationwide, including in New Jersey, who believe in limited government, property rights and free enterprise. For 36 years, PLF has been litigating in support of individuals' rights to make reasonable use of their private property. *Kelo v. City of New London, Connecticut*, 545 U.S. 469 (2005); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

PLF believes that its expertise in the area of property rights can provide this Court with a unique perspective on the issues presented in this case. In particular, PLF attorneys seek to provide the Court with an analysis of the doctrine of inverse condemnation, as it has been applied in other jurisdictions outside of New Jersey. PLF also seeks to offer the Court guidance concerning when Plaintiffs-Appellants' claim for a taking ripened.

PLF applies to this Court for leave to participate in this action only through the filing of this brief, which will accompany this Application, and respectfully requests permission to file the brief immediately.

For the foregoing reasons, PLF's Application to Appear as Amicus Curiae should be granted.

DATED: October 16, 2009.

Respectfully submitted,

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PROOF OF SERVICE

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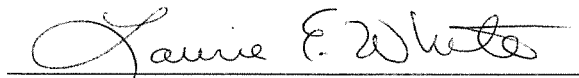

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INTRODUCTION

Pacific Legal Foundation (PLF) appears as amicus curiae to urge the Supreme Court of New Jersey to grant the Plaintiffs-Appellants' Petition for Certification.

QUESTIONS PRESENTED

Amicus curiae Pacific Legal Foundation addresses the following questions raised in this petition:

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

2. When does a property owner have a ripe inverse condemnation claim against a regulatory authority?

STATEMENT OF THE CASE

Edward and Nancy Klumpp lost their home in a 1962 storm which caused substantial damage along the New Jersey shoreline. Appendix (App) at 2.[1] In the wake of the storm, the Borough of Avalon passed a series of resolutions purportedly authorizing the construction and maintenance of sand dunes along the shoreline. App. at 174, 178. The Borough then entered the Klumpps' property to remove debris from the storm and to construct protective sand

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

dunes. App. at 220, 222-23. The Borough did not initiate eminent domain proceedings. App. at 74, 178, 401.

In 2003, the Klumpps applied for a permit with the New Jersey Department of Environmental Protection (DEP) to rebuild their house. App. at 2. They were told that their application could not be considered until they could demonstrate that they had current access to the property. App. at 26-27.

All vehicular access had been closed off in 1969 when the Borough closed the only street servicing the property. App. at 23. When it became apparent that the Klumpps could not build upon their property without establishing current access, they petitioned the Borough to reopen the portion of the road that had been closed. App. at 29, 32, 34, 36. When the Borough failed to respond, the Klumpps filed suit against the Borough asserting their perpetual and indefeasible right of private access to their property. *Id.*

In its answer, the Borough admitted that the Klumpps were the owners of the property, but raised a separate defense claiming "title by operation of law under N.J.S.A. 2A:14-30 and under the common law doctrine of adverse possession." App. at 37. On the Borough's motion for summary judgment, the Klumpps' claim was dismissed. *Klumpp v. Borough of Avalon*, 2007 WL 208534, *4 (N.J. Super. Ct. App. Div. Jan. 29, 2007). The trial court found that the Borough "stole" the property; however, despite finding that

there was a "continuing trespass," it applied a six-year statute of limitations for a trespass claim. *Id.*

In the first of two decisions, the Appellate Division reversed the trial court, finding that the statute of limitations relied on by the court was inapplicable. *Id.* at 5. Instead, the appellate court found that, as owners of the property, the Klumpps were entitled to prosecute their claim for access to their property, because they have a perpetual right of access. *Id.* at 6. Notwithstanding that holding, the appellate court concluded that it remained an open question as to whether the Borough could allow access to the property in light of its regulatory scheme and contractual obligations with regard to the dunes it had constructed in 1962. *Id.*

On remand in 2008, the trial court determined that the Borough could not allow access to the property. Transcript of Hearing of January 17, 2008 (TR) at 49:13-16. Yet the trial court also determined that the Borough had taken the property through "inverse condemnation" in 1962. Tr. at 58:4-14. As a result, the court found that the lack of access had no prejudicial effect on the Klumpps. Tr. at 52:9-10. The Klumpps appealed the finding that the Borough had taken their property through inverse condemnation. In their second and last decision, the appellate court affirmed the trial court's judgment on July 31, 2009. *Klumpp v. Borough of*

Avalon, 2009 WL 2341554, *4 (N.J. Super. Ct. App. Div. July 31, 2009). The Klumpps then filed their petition in this Court.

ARGUMENT

I

CERTIFICATION SHOULD BE GRANTED BECAUSE THE KLUMPPS RAISE IMPORTANT AND SUBSTANTIAL CONSTITUTIONAL ISSUES IN THEIR PETITION

The Klumpps' Petition for Certification meets the standard of Rule of Court 2:2-1 because it raises substantial questions of constitutional law concerning their due-process and just compensation rights under the Fifth and Fourteenth Amendments to the United States Constitution. The question of whether the government may take private property through inverse condemnation is not only a fundamental question of constitutional jurisprudence, but also is a matter that potentially may affect every landowner in the State of New Jersey. Relatedly, this case concerns the question of when a landowner may raise a viable takings claim. It is important that this Court resolve these questions in order to reaffirm the exclusively remedial nature of inverse *condemnation—i.e.*, as a procedure for protecting property owners, not for effecting government seizures of private property. It is also important that this Court clarify ripeness requirements for taking claims.

For these reasons, PLF respectfully encourages this Court to accept the Klumpps' Petition for Certification, and to consider their case on the merits in this appeal.

II

GOVERNMENT CANNOT TAKE PROPERTY THROUGH INVERSE CONDEMNATION

The Appellate Division erred in holding that the Borough had taken the Klumpps' property through inverse condemnation. It is hornbook law that a taking cannot occur through inverse condemnation. *See* John Martinez & Michael Libonati, *Local Government Law: Part III. Powers of Local Governments § 16:50. Regulatory Takings - The Taking Issue Defined* (2009); *see also Greenway Development Co., Inc. v. Borough of Paramus,* 163 N.J. 546, 553, 750 A.2d 764, 767 (2000) ("In an inverse condemnation action, a landowner is seeking compensation for a de facto taking of his or her property."); *Thornburg v. Port of Portland,* 376 P.2d 100, 106 (Or. 1962) (inverse condemnation is a cause of action); *Michigan Dep't of Transp. v. Tomkins,* 749 N.W.2d 716, 728 (Mich. 2008) ("There is no dispute that an inverse condemnation claim and an actual, partial taking differ in form."); *Nat'l Compressed Steel Corp. v. Unified Government of Wyandotte County/Kansas City,* 38 P.3d 723, 728-29 (Kan. 2002) (inverse condemnation is initiated by a landowner to seek compensation for a taking). An inverse condemnation, "[i]n contrast to a taking, is an assertion that the

challenged governmental action is actually an exercise of eminent domain for which the governmental entity has failed to commence condemnation procedures." *Local Government Law: Part III. Powers of Local Governments § 16:50. Regulatory Takings - The Taking Issue Defined; see also* Black's Law Dictionary 845 (8th ed. 2004) (defining inverse condemnation as "an action brought by a property owner for compensation from a governmental entity that has taken the owner's property without bringing formal condemnation proceedings").

Inverse condemnation is "'a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.'" *United States v. Clarke*, 445 U.S. 253, 257 (1980) (quoting D. Hagman, *Urban Planning and Land Development Control Law* 328 (1971)). Courts across the country hold this view of the doctrine of inverse condemnation. *See Thornburg*, 376 P.2d 106 (Inverse condemnation is an action brought against a governmental entity to recover the value of property taken without formal exercise of the power.); *Jefferson County v. Southern Natural Gas Co.*, 621 So. 2d 1282, 1287 (Ala. 1993) ("'Inverse condemnation' refers to a legal action against a governmental authority to recover the value of property that has been taken by that governmental authority."); *Animas Valley Sand and Gravel,*

Inc. v. Bd. of County Comm'rs of County of La Plata, 38 P.3d 59, 63 (Colo. 2001) ("Inverse condemnation is a claim for relief brought by a landowner against a government defendant."); *Bonanza, Inc. v. Carlson*, 9 P.3d 541, 547 (Kan. 2000) (Inverse condemnation is an action initiated by the landowner, not the government condemner.).

Inverse condemnation does not effect or result in a taking; it is a procedure that is not even available until after a taking has occurred. *State Through Dep't of Transp. and Dev. v. Chambers Inv. Co., Inc.*, 595 So. 2d 598, 603 (La. 1992) ("The action for inverse condemnation provides a procedural remedy to a property owner seeking compensation for land already taken or damaged."); *Williams v. State ex rel. Dep't of Transp.*, 998 P.2d 1245, 1252 (Okla. Civ. Ct. App., Div. 3, 2000) (holding that plaintiff must first establish a taking has occurred in order to prevail in an inverse condemnation action); *see also* American Jurisprudence, *Remedies of Owners; Inverse Condemnation*, 27 Am. Jur. 2d Eminent Domain § 742 (2d. ed., 2009) (the cause of action is available only when property "has been taken"). It is therefore inappropriate to say that an inverse condemnation is conceptually one and the same as a taking. *See, e.g., Tomkins*, 746 N.W.2d at 728 (holding that an inverse condemnation claim differs from an actual or partial taking); *Iowa Coal Min. Co., Inc. v. Monroe County*, 555 N.W.2d 418, 431 (Iowa 1996) (recognizing inverse condemnation as a cause of action predicated upon a wrongful taking without just

compensation); *District of Columbia Redevelopment Land Agency v. Dowdey*, 618 A.2d 153, 164-65 (D.C. 1992) (inverse condemnation is a proceeding to recover just compensation where government has taken private property). There is a great difference between the actual taking of a property which demands just compensation under the Fifth Amendment, and the cause of action through which landowners may seek enforcement of this constitutional principle. *See Clarke*, 445 U.S. at 256 (landowner's right to bring an inverse condemnation claim arises from the "self-executing character" of the Fifth Amendment's prohibition on the taking of private property without just compensation).

To ignore the distinction between inverse condemnation and the act of a governmental taking, is to confuse the remedy with the ailment. Just as the cause of action for wrongful death is not the same as the act of wrongfully killing another, the inverse condemnation cause of action is not the same as the act of wrongfully taking private property without just compensation. In the same way as it would be inappropriate to say "a death has occurred through the wrongful death action," it would be inappropriate to say that "a taking has occurred through inverse condemnation."

When the exercise of police powers or a physical appropriation amounts to a taking without just compensation, the landowner may then bring an inverse condemnation claim. *See Moroney v. Mayor and*

Council of Borough of Old Tappan, 268 N.J. Super. 458, 465 (N.J. Super. Ct. App. Div. 1993) (holding that inverse condemnation claim does not ripen until after the taking occurs and administrative remedies are pursued to the determination of a final judgment of a property's permitted use). A taking may occur in only one of three ways, and a "taking by inverse condemnation" is not one. *See Clarke*, 445 U.S. at 256 (stating that a taking may occur by regulatory action, the condemnation process, or physical appropriation); *see also Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (a regulation may take property if it goes too far).

First, a public entity may take a property by virtue of its police powers in what is called a regulatory taking. *See Gardner v. New Jersey Pinelands Comm'n*, 125 N.J. 193, 205 (1991) (applying regulatory takings analysis in New Jersey). Second, a public entity may take a property through formal condemnation proceedings pursuant to the state's eminent domain powers. *See Township of West Orange v. 769 Associates, LLC*, 198 N.J. 529, 537 (2009) (property may be taken through formal condemnation process). Third, a public entity might effectuate a taking by physical appropriation. *See Lorio v. City of Sea Isle City*, 88 N.J. Super. 506, 509 (N.J. Super. Law Div. 1965) (If property is appropriated to public use, landowners must be justly compensated through the eminent domain procedures).

Accordingly, the inverse condemnation claim has developed in our constitutional jurisprudence specifically to give the aggrieved landowner a remedy to recover just compensation for a taking of his property when condemnation proceedings have not been instituted. *Clarke*, 445 U.S. at 257. "Inverse condemnation is a device which forces a governmental body to exercise its power of condemnation, even though it may have no desire to do so." *Hoyle v. City of Charlotte*, 172 S.E.2d 1, 8 (N.C. 1970) (citations omitted) (inverse condemnation compels the government to initiate condemnation proceedings). Whereas the direct condemnation proceeding is initiated by the public entity in order to acquire title in accordance with the mandates of due process and N.J.S.A. 20:3-19, inverse condemnation is a proceeding initiated "inversely" by the landowner after the taking has already transpired. *See* N.J.S.A. 20:3-26(c).

A few courts have used the term "inverse condemnation" loosely, collapsing the distinction between inverse condemnation and the taking that it is meant to remedy. *See, e.g., Cheyenne Airport Bd. v. Rogers*, 707 P.2d 717, 729 (Wyo. 1985) (referring to situations in which the government "effectively takes or destroys a private interest in property" as being inverse condemnations, but nonetheless recognizing inverse condemnation as a tool serving "to confine formal exercises of the sovereign power of eminent domain"). Yet, most courts clearly view inverse condemnation as

being simply a cause of action, which may never be initiated by a public entity. *See Nat'l Compressed Steel Corp.*, 38 P.3d at 728-29 (inverse condemnation can be initiated only by the landowner); *see also Hawkins v. City of Greenville*, 594 S.E.2d 557, 562 (S.C. Ct. App. 2004) (inverse condemnation may only be initiated against a governmental defendant).

To allow for the offensive use of inverse condemnation, so as to divest a landowner of her rights, is to ignore the legal principles upon which inverse condemnation is based. *See Clarke*, 445 U.S. at 257 ("A landowner is entitled to bring such action as a result of 'the self-executing character of the constitutional provision with respect to compensation.'") (citations omitted). Inverse condemnation is a shield to protect the landowner from an unconstitutional taking; it may only be used to secure the landowner's rights under the Fifth Amendment. *See Nat'l Compressed Steel Corp.*, 38 P.3d at 728-29 (inverse condemnation is an action against a governmental defendant). The doctrine cannot be used by government to legitimize the stealing of private property. *Id.*

In this case, the Borough entered the Klumpps' property without receiving permission and without exercising its eminent domain powers. The Borough took no formal action to take the property and, as a government entity, could not have taken it through inverse condemnation. *See Local Government Law: Part III. Powers of Local Governments § 16:50.* The Klumpps owned the

property in fee simple and never filed an inverse condemnation claim. Therefore, there was no inverse condemnation.

The lower courts apparently viewed *Raab v. Borough of Avalon*, 392 N.J. Super. 499 (N.J. Super. Ct. App. Div. 2007), as controlling authority on the inverse condemnation issue, despite the fact that the Klumpps' suit was not an inverse condemnation action. Inverse condemnation was improperly raised by the Borough as a defense to the Klumpps' assertion of a right of private access to their property. In reliance on *Raab*, the lower courts concluded that the Klumpps should have brought an inverse condemnation claim against the Borough in the 1960s, and that, somehow, inverse condemnation occurred when they took no such action. *See Klumpp*, 2009 WL 2341554, *4 (applying *Raab*).

Inverse condemnation cannot occur without an affirmative act on the part of the landowner, and the Klumpps have not raised an inverse condemnation claim to date. Accordingly, *Raab* should be distinguished from this case because it was an action brought by property owners for inverse condemnation (*Raab*, 392 N.J. Super. at 502), whereas in this case, the Klumpps have asserted a private right of access to their property. Moreover, *Raab* should be further distinguished from any takings claim that the Klumpps might now raise in view of the Borough's denial of their right of private access. *Id.* The inverse condemnation claim raised in *Raab* was based upon a different takings theory than the Klumpps are

entitled to now advance. *Id.* With the denial of access to their property, the Klumpps may now pursue a ripe inverse condemnation claim on a regulatory takings theory. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001) (regulatory takings claim is ripe only when it becomes clear to what extent a property may be used); *see also Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim.").

III

THE KLUMPPS' TAKINGS CLAIM AGAINST THE BOROUGH RIPENED ONLY IN 2009

The Klumpps' taking claim became ripe in 2009, and no sooner. Until the government denies a landowner the right to build upon her property, she has not ripened her takings claim and, therefore, cannot pursue an inverse condemnation cause of action. *See Palazzolo*, 533 U.S. at 620 (landowner may not establish a taking before land use authority has the opportunity to decide and explain the reach of a challenged regulation); *see also Toll Bros., Inc. v. State of N.J., Dep't of Envtl. Protection*, 242 N.J. Super. 519, 531-32 (N.J. Super. Ct. App. Div. 1990) (holding that a landowner must pursue certain administrative remedies before raising an inverse condemnation claim) (citing *Paterson Redevelopment Agency v. Schulman*, 78 N.J. 378, 384-88, *cert. denied* 444 U.S. 900 (1979). An inverse condemnation claim is ripe only once there has

been a final determination as to how the property may be used. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985) (takings claim is not ripe until there is a definite and final determination concerning the permissible use of the property). Therefore, the Appellate Division erred in holding that the Klumpps should have brought an inverse condemnation action in the 1960s, for such an action could not have been adjudicated at that time. *Id.*

It was not until 2003 that the Klumpps applied for permits to rebuild their home, and as of 2004, the Borough had not definitively determined whether the Klumpps could access—let alone use—their property. *See Klumpp*, 2007 WL 208534, *6 (finding that it was unclear whether the Klumpps could even access the property).

Following the passage of certain resolutions in 1962, purporting to allow the Borough to enter the Klumpps' property and install dunes, the Borough created a complex regulatory scheme, creating substantial doubt as to whether the Klumpps could make further use of their property. *Id.* When the Klumpps applied for permits to rebuild, the New Jersey Department of Environmental Protection (DEP) informed them that it would not consider their permit application until they could demonstrate that they had current access to their property. App. at 26-27. Since all vehicular access had been terminated pursuant to an ordinance in 1969, the Klumpps petitioned the Borough to reopen the only road

servicing their property. App. at 29, 32, 34, 36. When the Borough refused, they brought this suit to regain access. App. at 1-7.

The Appellate Division held that the Klumpps have a private right of access to their property, but stated that "we are of the view that the related question of whether the Borough has the ability to provide or authorize such access cannot be answered on this record." 2007 WL 208534, *6. Thus, the Appellate Division found that it remained an open question as to whether the Borough could allow the Klumpps access to their property in light of its regulatory scheme and contractual obligations. *Id.* When the case was remanded, it was definitively determined, in 2008, that the Borough could not allow the Klumpps access. Tr. at 49:13-16.

The appellate court's 2009 decision, affirming the trial court, represents the moment when the Klumpps could first raise an inverse condemnation claim to challenge the Borough's regulation of their property. Under *Williamson County*, their claim was then ripe because they had received a final decision on how they might use their property. *See Palazzolo*, 533 U.S. at 620 (permissible uses of a property must be known to a reasonable degree of certainty before taking ripens); *see also Moroney*, 268 N.J. Super. at 465 (taking occurs at the time landowners receive adverse decision regarding permissible uses of their property). With the 2009 decision, it was clear that the Klumpps could not attain current

access to their property and, therefore, it was clear that they could not receive the necessary building permits from the DEP.

Had the Klumpps raised an inverse condemnation claim earlier, it would have been dismissed as premature. *See, e.g., Toll Bros., Inc.*, 242 N.J. Super. at 531-32 (denying inverse condemnation action for failure to adequately pursue administrative remedies to the final determination of the permitted use of a property). Their inverse condemnation claim would have been dismissed on ripeness grounds, for failure to attain a final decision as to whether and how they could use the property. *See Moroney*, 268 N.J. Super. at 465 (holding that inverse condemnation claim cannot be adjudicated until landowner has pursued administrative remedies to a final decision on the permitted use of the property). While there is a six-year statute of limitations for an inverse condemnation claim, the cause of action cannot accrue until a taking has occurred. N.J.S.A. 2A:14-1. Since it is well established that a regulatory taking claim is not ripe until there is a final decision on the permissible use of the property, the Klumpps could not be time barred from bringing an inverse condemnation action until after that determination was finally made in 2008, and affirmed in 2009. *See Japanese War Notes Claimants Ass'n of Philippines, Inc. v. United States*, 373 F.2d 356, 358 (Ct. Cl. 1967) (a cause of action cannot accrue until all events entitling plaintiff to bring an action have occurred); *see also Norco Const., Inc. v. King County*,

801 F.2d 1143, 1146 (9th Cir. 1986) ("claim does not accrue until the relevant government authorities have made a final decision on the fate of the property"); *Corn v. City of Lauderdale Lakes*, 904 F.2d 585 (11th Cir. 1990) (cause of action accrued with final decision of state appellate court invalidating zoning ordinance).

Moreover, the Klumpps were under no affirmative duty to rebuild or to challenge the Borough's regulatory scheme at any earlier date. *Annunziata v. Millar*, 241 N.J. Super. 275, 288 (N.J. Super. Ch. 1990) (quoting William Blackstone, *Commentaries on the Laws of England* § 191, at 239 (William Carey Jones ed., 1916)) (The property owner enjoys the rights of "free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."). As fee simple owners of the property, they were at liberty to choose when and if to rebuild, subject only to applicable land use controls imposed by the Borough and the State of New Jersey. *Id.* at 288 (fee simple owner of property may "do with his property what he wills"). When the Klumpps chose to seek building permits, they were choosing to challenge the Borough's regulation of their property. When it became clear that the regulatory scheme, as applied to their permit application, denied them of all use and enjoyment of their property, they then had a ripe takings claim. *See Palazzolo*, 533 U.S. at 620 (taking claim is ripe when administrative remedies are exhausted). Thus, their cause of action for inverse

condemnation only accrued in 2009, when the Appellate Division affirmed the trial court's determination that the Borough could not allow the Klumpps access to their own property. *Id.*

CONCLUSION

For the foregoing reasons, the Klumpps' Petition for Certification should be granted, and the decision of the Appellate Division should be reversed.

DATED: October 16, 2009.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on this date, an original and eight (8) copies of the BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLANTS, EDWARD AND NANCY M. KLUMPP, were sent via Federal Express to be filed with the following:

Clerk of the Supreme Court
Supreme Court of New Jersey
Richard J. Hughes Judicial Complex
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I further certify that on this date, two (2) copies of the BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLANTS, EDWARD AND NANCY KLUMPP, were sent via the United States Postal Service to the following:

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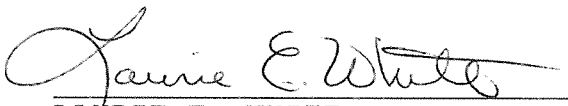

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