NO.

IN THE SUPREME COURT
OF THE UNITED STATES

Henry Raab and Clara Montagna,
Petitioners,

v.

The Borough of Avalon, *et al.*
Respondents,

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

Frederick W. Schmidt, Jr.,
Counsel of Record
Frederick W. Schmidt, Jr., L.L.C.
106 N. Main Street, Unit D
P.O. Box 120
Cape May Court House, NJ 08210
Telephone: 609-465-2300
Email: *fws.law@comcast.net*

QUESTIONS PRESENTED FOR REVIEW

1. Whether the law as applied to this case conflicts with *U. S. v. Clarke,* which held that formal condemnation is the condemnor's way to acquire title and that inverse condemnation is for property owners to obtain just compensation not for the condemnor to obtain title?

2. Whether the two trial court, two appellate division decisions and three supreme court orders denied Petitioners due process by retroactively applying N.J. decisional law that did not interpret N.J.S.A.. 2A:14-1 to include inverse condemnation for a taking of property without due process or just compensation until 1996?

3. Whether the New Jersey Supreme Court denied of Petitioners' right to equal protection guaranteed by the 14th amendment by failing to grant equity to Petitioners based on *Klumpp v. Avalon* decided June 22, 2010, before denying Petitioners' appeal on June 30, 2010 and motion for reconsideration on October 7, 2010?

4. Whether the recent N. J. Appellate Division solution for a due process lack of notice problem in *Harrison Redevelopment Agency v. DeRose* should be utilized to protect Petitioners' right to due process?

5. Whether the facts of this case support two entirely different conclusions about whether Avalon took Petitioners' property?

LIST OF ALL PARTIES

1) Henry Raab and Clara Montagna, Petitioners (Plaintiffs below),

2) The Borough of Avalon, Respondent (Defendant and Third Party Plaintiff, below),

3) The State of New Jersey Department of Environmental Protection, (DEP) (Third Party Defendant below). (All third party claims by Avalon against the DEP were dismissed June 6, 2005 and not appealed.)

TABLE OF CONTENTS

BRIEF

APPENDIX INDEX

Order and Opinions

TABLE OF AUTHORITIES

Cases Page Nos.

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED IN THE CASE BY THE COURTS

1. The trial Court Order and Opinion dated June 6, 2005, denying Petitioners just compensation by reason of a statute of limitation (no citation) (A-51).

2. The first Appellate Division decision dated April 30, 2007 denying Petitioners' appeal is reported at 392 N.J. Super. 499, 921 A. 2d 470 (A.D. 2007) (A-29)

3. The first Order of the New Jersey Supreme Court Dated September 7, 2007, denying Petitioners' appeal and Petition for Certification is reported at 192 N.J. 475. (A.D. 2007) (A-27)

4. The trial Court motion Judgment and Opinion dated April 25, 2008 denying Petitioners' request to expunge the Cape May County Clerk's records of the first Order and Opinion of the trial Court and entering Declaratory Judgment, sua sponte and without notice to Petitioners, validating the automatic vesting of title to Petitioners property in Avalon, upon expiration of the six year statute of limitation for just compensation and the July 18, 2005 recordation in the County Clerk's office.(no citation). (A-18)

5. The Second Appellate Division decision dated July 29, 2009, denying Petitioners' appeal, was not published, but can be found at 2009 WL 2224033 (N.J. Super. A.D.). (A-3)

6. The second Order of the New Jersey Supreme Court dated June 30, 2010, denying Petitioners' second appeal and petition for certification 202 N.J. 231, 996 A.2d 1039, (2010).(A- 1)

7. The third Supreme Court of New Jersey Order dated October 7, 2010 denying Petitioners' Motion for Reconsideration, is not reported. (A- 62)

BASIS FOR JURISDICTION

Petitioners assert that the U.S. Supreme Court has jurisdiction pursuant to 28 USC § 1257, and the Court may grant a petition for a writ of certiorari to review the final three decisions of the New Jersey Supreme Court time barring just compensation pursuant to N.J.S.A. 2A:14-1, and approving automatic vesting of title in Avalon without notice to Petitioners, all of which denied Petitioners' right to due process and just compensation required by the 5th and 14th Amendments of the U.S. Constitution.

The first Appeal and Petition for Certification was denied on September 7, 2007 based on N.J.S.A. 2A:14-1, judicially amended to include inverse condemnation for just compensation. (A -27)

Second appeal and Petition for Certification was denied on June 30, 2010, confirming a process of automatic vesting of Petitioners' title to lots to Respondent, Avalon. (A-1)

A motion for reconsideration of second appeal and Petition for Certification was denied on October 7, 2010. (A-62)

CONSTITUTIONAL PROVISIONS

US Constitution 5th Amendment set forth below:

> *No person shall* be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor *be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation*. (Emphasis added.)

US Constitution 14th Amendment, Section 1 set forth below:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall make or*

> *enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.* (Emphasis added.)

New Jersey Constitution Art. 1, §1 set forth below:

1. All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness.

New Jersey Constitution Art. 1, §20 set forth below:

20. *Private property shall not be taken for public use without just compensation*. Individual and or private corporation shall not be authorized to take private property for public use without just compensation first made to the owners. (Emphasis added.)

STATUTES

> *N.J.S.A. 2A:14-1 Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property,* for replevin of goods or

> chattels, for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this Title, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, *shall be commenced within 6 years next after the cause of any such action shall have accrued.*

N.J.S.A. 20:1-1. Inability to acquire land by agreement with owner (see appendix A-190)

N.J.S.A. 20:3-5 Eminent Domain jurisdiction (see appendix A-191).

N.J.S.A. 20:3-6 Application of Eminent Domain Act (see appendix A-191).

N.J.S.A. 46:16-1.1 permits the recordation of any judgment *affecting title* to real property without notice to property owner in County Clerk's office (see appendix A-198).

N.J.S.A. 46:22-1. Protects grantees of recorded deeds from subsequent unrecorded judgements, deeds and mortgages (see appendix A-199).

N.J.S.A. 54:4-31. Requires that an abstract of any deed for property to be mailed to assessor in that

municipality together with the name and address of the grantee (see appendix A-199).

STATEMENT OF THE CASE

FACTS

1. In 1961, Petitioners' predecessor in title, Tri-Guy Holding Company, Inc. (Tri-Guy) acquired the lots subject to this action from Avalon by exchanging, at Avalon's request, eroding vacant undeveloped lots previously purchased from Avalon (A-131) for the vacant undeveloped lots herein. (A-126)

2. After a March 1962 northeast storm devastated the New Jersey coastline causing significant erosion of the beaches and leaving them littered with debris from destruction of beach front homes, Avalon adopted Resolution #62-102 on August 15, 1962. (A-183) This resolution was filed in the Avalon clerk's office, but never published or served upon Tri-Guy. It did not identify either the affected properties or their owners. The Resolution authorized Avalon enter immediately upon property to be used as protective barriers to take control and possession thereof, and to do such acts as may be required, including removing, destroying or otherwise disposing of any property located thereon without first paying any compensation therefor.

The resolution also made clear that nothing in this resolution shall be construed to deny any person who has interest in any property which has been possessed by the Borough of Avalon the right to

obtain therefor just compensation to the extent that such property shall have been taken by the Borough. The resolution also made clear that no compensation shall be granted to any individual to the extent that the action of the Borough of Avalon did not amount to a taking of property, pursuant to a proper exercise of police power.

3. Avalon never sent Tri-Guy, any notice indicating whether they had taken its property or whether they had simply engaged in a police power action to cleanup the debris and replenish the beach.

4. Avalon adopted Resolution 62-103 (A-188) on August 15, 1962 indicating that because of the oncoming of hurricane season it was necessary t*o construct protective barriers in the form of sand dunes between 13th and 80th streets* immediately and dispense with advertisements for bids because of the urgency such construction demands. The resolution did not identify the properties or the owners that were affected. This resolution was never published or served on Tri-Guy. All of the streets run from the bay to the ocean beaches.

5. On September 19, 1962, Avalon adopted Resolution 62-117 (A-185) referring to a state of emergency as a result of the March 1962 storm and also indicated for the purpose of providing protective barriers required for the protection of life and property the Mayor was authorized to contract for construction of protective barriers for the protection of life and property of the municipality. *The resolution resolved that as public safety requires, the*

owners shall be given five (5) days notice of such entry. The record contains no evidence of such notice to Tri-Guy. The resolution further stated that *the municipality shall . . . b. acquire all lands, easements, right-of-way or other areas within the municipality, if required in connection with the work undertaken.* (A-185) This resolution did not identify the affected properties or their owners or even the areas affected. This resolution was never published or served on Tri-Guy nor was Tri-Guy ever given a five day notice of entry from Avalon. Avalon never advised Tri-Guy that they were required by Resolution 62-117 to acquire their lands or an easement. More importantly, Avalon never notified Tri-Guy that they had taken Tri-Guy's property or an easement on their property.

6. The record does not reflect what activity was conducted on the Tri-Guy lots.

7. On April 29, 1965, Tri-Guy sent a letter to the Mayor of Avalon (A-181) stating that that "on April 26, we visited the lots with the intention of building a home, and we found that the sand barrier in on the property in question and we cannot, therefore, build on those lots." Tri-Guy went on to request an exchange of its lots for three other lots, but no agreement was reached regarding an exchange. Avalon did not admit a taking, at this time.

8. Avalon continued to carry the lots on its tax roll and continued to tax the lots and accept payments without ever indicating that Avalon had taken them. N.J.S.A. 54:4-31 (A-199) requires the County Clerk

to provide an abstract of every recorded deed transferring title to real property to that municipality's tax assessor, within which the property is located so that the tax collector could substitute the new grantee and send tax bills to the new grantee. Tri-Guy transferred title of the lots to its three shareholders by deed recorded on May 1, 1969 and tax bills were sent to the new grantees and paid, without any objection from Avalon or that Avalon had taken the lots. (A-135)

9. The three original Tri-Guy shareholders engaged an attorney to inquire, by letter dated July 13, 1983, if Avalon wanted to purchase the lots and Avalon responded by letter from its Administrator dated July 21, 1983, indicating that Avalon did not want to acquire the lots (A-179), but did not indicate that they had taken the lots.

10. When one of the original Tri-Guy shareholders deceased, his executrix and the other surviving shareholders transferred title to Petitioners by deed recorded on July 9, 1997 and the tax collector commenced sending them tax bills and accepting payment without ever indicating that Avalon had taken the lots. (A-140)

11. In 2002, Avalon entered into a State Aid Agreement with the New Jersey Department of Environmental Protection (DEP) regarding beach replenishment, which identified Petitioners' lots necessary to be acquired for the project, but no one told Petitioners of the need for Avalon to take the lots. (A-150) (A-173)

12. Finally, by letter dated March 16, 2001 Petitioners engaged counsel to again see if Avalon wanted to purchase the lots or permit construction on them. Petitioners never received a response from Avalon or any indication from Avalon they had taken Petitioners' lots in 1962. (A-175)

13. The first and only notice of a taking by Avalon was the filing of the Amended Answer to Petitioners' Complaint on January 3, 2005 denying Petitioners title and claiming title in Avalon by forfeiture.(A-70)

14. The Petitioners continued to be taxed and paid them for forty-three years before learning that their property had been taken by Avalon and title vested in Avalon automatically in 1962 without notice, when their right to inverse condemnation for denial of due process and just compensation were time barred in 1971, by a trial Court order and opinion entered on June 5, 2005. (A-51)

15. Avalon recorded the June 5, 2005 order and opinion of the trial Court in the County Clerk's office on July 18, 2005 claiming title to Petitioners' lots was affected by the order and vested title in Avalon as of 1962, retroactively.

PROCEEDINGS BELOW

1. Petitioners filed an inverse condemnation complaint on April 26, 2002, (A-97) claiming that Respondent Avalon had "taken" Petitioners real property as a result of physical possession and numerous ordinances over time prohibiting

development east of the dune line where Petitioners' property is located, vacating the street right- of-way and implementing a beach fee program by ordinance. Petitioners raised the 5th Amendment of the U.S. Constitution urging that their property was taken without due process and without payment of the just compensation. The Complaint also cited the New Jersey Constitution Art. 1 §1 requiring due process and Art. 1 §20 requiring just compensation for a taking and the 5th and 14th Amendments of the U.S. Constitution.

2. Respondent filed an Answer and Separate Defenses on June 10, 2004.

3. Respondent filed an Amended Answer and Counter Claim on January 3, 2005 and for the first time denied that Petitioners owned their property and that claimed it had been forfeited as a mater of law. Avalon also asserted counter claims for adverse possession, prescriptive easement and constructive easement pursuant to the "Public Trust Doctrine". (A-70)

4. Respondent, moved for Summary Judgment (prior to completion of discovery) based on N.J.S.A. 2A:14-1, a statute limiting the time within which an aggrieved party must assert a cause of action listed in the statute or lose the right to do so. (A-190)

5. The trial Court then identified a letter dated April 29, 1965 from Tri-Guy to the then Mayor of Avalon, (A-181) which stated: "On April 26, we visited the lots with the intention of building a home,

and we found a sand barrier on the property in question and we cannot, therefore, build on the lots." and concluded that Tri-Guy knew that its property had been taken. (A-181) The Judge correctly held that Petitioners did not dispute the letter, but he incorrectly implied that Petitioners understood their property had been taken in the legal sense or that title to their property would automatically vest in Avalon after six years.

6. The trial Court applied N.J.S.A. 2A:14-1 to Petitioners' inverse condemnation cause of action for the taking of real property without due process or just compensation, ruling that it time barred the complaint in 1971, even though Petitioners' cause of action was not mentioned in the text, until a 3rd Circuit Court of Appeals in 1996 judicially amended the plain language of the statute to include inverse condemnation, even though not mentioned. (A-51)

7. The trial Court entered an order dated June 5, 2005 dismissing Petitioners' claims, with prejudice. The Judge did not address the issue of title to the property. All of Avalon's counterclaims for adverse possession, prescriptive easement and a public trust doctrine easement were dismissed by the trial Court.

8. Avalon's attorney, recorded the trial Court's order and opinion in the Cape May County Clerk's office on July 18, 2005 certifying that they affected title to the property taken by Avalon by Resolution 62-102 and 62-103 and automatically vested title in Avalon as of August 15, 1962, (citing N.J.S.A. 46:16-1.1, as

the authority for recordation) without any notice to Petitioners, since the statute required none. (A-51)

9. Petitioners appealed to the Appellate Division of the Superior Court on July 19, 2005, unaware of the recordation of the order and opinion in the County Clerk's office.

10. Petitioners learned of the recordation vesting title in Avalon in October 2005, but the Appellate Division had jurisdiction and thus, Petitioners were unable to address title with the trial Court or Appellate Division. Consequently, Petitioners entered into a tolling agreement, which specifically preserved the issue of automatic vesting of title until after all appeals. (A-64)

11. The Appellate Division decided the first appeal on April 30, 2007 and held *that the physical taking of real property by a government agency, without compliance with the statutory safeguards established by the Legislature for the lawful exercise of the power of eminent domain, constitutes an act of inverse condemnation and that a cause of action against a governmental defendant to recover the value of the real property that was taken by inverse condemnation is governed by N.J.S.A. 2A:14-1 and must be commenced within six years from the date of accrual, which is defined as the date the landowner becomes aware or, through the exercise of reasonable diligence should become aware, that he or she had been deprived of all reasonably beneficial use of the property* and affirmed the trial Court decision. (A-29)

While the Appellate Division decision claimed that the Respondent, Avalon's lot exchange program was adopted in 1962, that finding is not supported by the record. Tri-Guy exchanged lots acquired from Avalon in 1961. Nothing in the record suggests that Avalon advised Tri-Guy of a physical taking or that the lot exchange program was designed to provide just compensation for a taking. Moreover, the decision confirms that property owners were required to continue paying taxes and Petitioners and their predecessors paid the taxes until the recordation. (A-29) (Taxes paid have never been refunded.)

The Appellate Division also confirmed that Tri-Guy deeded the subject property in 1969 to the three shareholders. (A-29)

The Appellate Division also found that by letter, dated July 21, 1983 from Respondent, Avalon, to the attorney representing the shareholders that it was *not interested in purchasing the property*. (A-29)

The Appellate Division also recognized the sale by the two remaining shareholders and the Executrix of the Estate of the third shareholder on June 14, 1997 to Petitioners, but ignored their rights under N.J.S.A. 46:22-1 that provided protection against unrecorded claims of title. (A-29)

The Appellate Division recognized the March 16, 2001 letter to Respondent, Avalon offering the property for sale to anyone or Avalon and

alternatively requesting a permit to construct of a single family residence on Petitioners' lots. (A-29)

12. The New Jersey Supreme Court denied Petitioners appeal and request for certification on September 7, 2007 without comment. (A-27)

13. Pursuant to a tolling agreement, on March 24, 2008 (A-64), Petitioners filed a motion to expunge the July 18, 2005 recordation of the trial Court's order and opinion dated June 6, 2005. The trial Court motion Judge acknowledged that neither the recorded order nor opinion dealt with the issue of title, but he proceeded to deny the motion on April 25, 2008 and sua sponte, without notice to Petitioners, amended Avalon's Complaint and granted Declaratory Judgment, in favor of Avalon (A-18), even though Avalon never asserted a claim for legal title under the Eminent Domain Act or requested a declaratory judgment in its counterclaims.

14. Petitioners second appeal to the Appellate Division was denied on July 28, 2009. (A-3)

15. Petitioners' appeal and petition for certification to the New Jersey Supreme Court was denied on June 30, 2010, without comment. (A-1)

16. Petitioners' motion for reconsideration was denied by the New Jersey Supreme Court by order filed on October 7, 2010, without comment. (A-62)

REASONS FOR GRANT OF CERTIORARI

I. THE LAW AS APPLIED TO THIS CASE CONFLICTS WITH *U.S. V. CLARKE,* WHICH HELD THAT FORMAL CONDEMNATION IS THE CONDEMNOR'S WAY TO ACQUIRE TITLE AND THAT INVERSE CONDEMNATION WAS FOR PROPERTY OWNERS TO OBTAIN JUST COMPENSATION NOT FOR THE CONDEMNOR TO OBTAIN TITLE.

A. In *U.S. v. Clarke*, 455 U.S. 253, 100 S.Ct. 1127 (1980) this Court held that 25 U.S.C. 357 meant that the term condemned in the statute referred to a judicial condemnation proceeding and did not authorize condemnation by "physical occupation". *Id. at 253 & 1128* This Court further held that the lands could only be acquired in a formal condemnation action by condemnor. *Id. at 254 & 1128.* Thus this Court reversed the 9th Circuit Court of Appeals decision that permitted acquisition by inverse condemnation. *Id. at 255 & 1129.*

In support of this ruling, this Court explained that a condemnation is an action filed by the condemnor to effect a taking and "acquire title" and that an inverse condemnation is a cause of action filed by the property owner against a governmental agency to recover the "value of the property". *Id. at 255 & 1129, 256 & 1129 and 257 & 1130.* While the decision clearly shifted the burden of discovery of a taking to property owners, it did not say that failure to discover the taking should relieve the condemnor of liability or that there must be a statute of limitation for an inverse condemnation action based on lack of due process and denial of just

compensation. Moreover, no rule should favor the condemnor that violates the U.S. Constitution.

U.S. v. Clarke does not authorize the automatic vesting of title in Avalon, let alone by reason of a retroactive application of a statute of limitation judicially amended in 1996 to time bar inverse condemnation for a taking of real property without due process or just compensation.

II. THE TWO TRIAL COURT, TWO APPELLATE DIVISION DECISIONS AND THREE SUPREME COURT ORDERS DENIED PETITIONERS DUE PROCESS BY RETROACTIVELY APPLYING N.J. DECISIONAL LAW THAT DID NOT INTERPRET N.J.S.A. 2A:14-1 TO INCLUDE INVERSE CONDEMNATION FOR A TAKING OF PROPERTY WITHOUT DUE PROCESS OR JUST COMPENSATION UNTIL 1996.

If Tri-Guy or its successors had consulted an attorney between 1962 and 1996, that attorney would have found the 5th and 14th Amendments to the U.S. Constitution and Art 1 §1 and §20 of the N.J. Constitution, which both prohibit a taking of real property without due process or payment of just compensation. He also would have found N.J.S.A. 20:1-1 *et seq*. (Eminent Domain Act in force until 1971 (A-190) when it was repealed and replaced by N.J.S.A. 20:3-1 et. seq.) and N.J.S.A. 20:3-5 & 6, (A-191) both of which clearly provide a *mandatory* due process course of action for Avalon to acquire legal title to real property and pay just compensation to the property owner.

The attorney would have reviewed N.J.S.A. 2A:14-1 (A-190) and found that while it time limited a taking of personal property, it made no mention of taking real property or inverse condemnation for a taking of real property without due process or just compensation.

This attorney would have easily concluded that due process under the New Jersey and U.S. Constitutions requires use of the Eminent Domain Act by Avalon to acquire real property.

If the Attorney then reviewed decisional law, he would have found *Watson v. Jersey City*, 84 N.J.L. 422, 423, 86 A. 402 N.J. (E & A 1913) that found no time limit on collection of a just compensation judgment and *Morey v. Essex County*, 94 NJL 427, 428, 110 A. 905 (E & A 1920), which characterized Essex County's use of a strip of Plaintiff's land for road widening as a continuous trespass, time limited to the last six years prior to the property owners suit for compensation for trespass.

Consequently, the U.S. Constitution, Eminent Domain Act (EDA) and decisional law would not have alerted Petitioners to a possible loss of due process and just compensation, if a taking had occurred between 1962 and 1971. The most that one could have been discerned from such inquiry is that Avalon might be guilty of a trespass and damages limited to the last six years prior to suit.

On June 25, 1982, *Harisdan v. City of East Orange,* 187 N.J. Super. 65, 69, 453 A. 2d 888, 890 (A.D. 1982) held that a declaration of blight was not a tortious act or injury for limitation purposes and no cause of action accrued as the date of the declaration of blight.

In the matter of *Russo Farms, Inc. v. Vineland Board of Education*, 280 N.J. Super. 320, 325, 655 A 2d 447, 450 (A.D.1995), the Court held that flooding from construction of a school caused crop damage on an adjacent privately owned property and was a continuing nuisance, time limited to the last six years by N.J.S.A. 2A:14-1 affirmed in part and reversed in part, 144 N.J. 84, 675 A. 2d. 1077 (1996) (issue not raised on appeal).

Subsequently, on November 27, 1996, the Third Circuit Court of Appeals decided 2*87 Corporate Center Associates v. Township of Bridgewater*, 101 F.3d 320, (1996), and held that an inverse condemnation action under the 5th Amendment is subject to N.J.S.A. 2A:14-1, and stated that "Although the statute does not explicitly reference inverse condemnation actions, New Jersey decisional law indicates it is the proper statute of limitations in such cases." *Id. at 324.* Citing *Russo Farms, Inc. v. Vineland Board of Education* 280 N.J. Super. 320, 325, 655 A 2d 447, 450 (A.D.1995) a continuing nuisance case and *Harisdan v. City of East Orange* 187 N.J. Super. 65, 69, 453 A. 2d 888, 890 (A.D. 1982) a continuing trespass case. This ruling judicially amended the statute to time bar an inverse condemnation action for a taking of real

property without due process or just compensation, even though not mentioned in the statute.

Even if, Petitioners or their predecessors knew of the case, they would not have known that this new 1996 judicial amendment would be retroactively applied to their inverse condemnation claim.

III. THE NEW JERSEY SUPREME COURT DENIED THE PETITIONERS' RIGHT TO EQUAL PROTECTION GUARANTEED BY THE 14TH AMENDMENT BY FAILING TO GRANT EQUITY TO PETITIONERS BASED ON *KLUMPP V. AVALON* DECIDED JUNE 22, 2010, BEFORE DENYING PETITIONERS' APPEAL ON JUNE 30, 2010 AND MOTION FOR RECONSIDERATION ON OCTOBER 7, 2010.

Klumpp v. Avalon, 202 N.J. 390, 997 A 2d 967 (2010) is a companion case to *Raab and Montagna v. Avalon* their appeal and petition for certification was before the N.J. Supreme Court at the same time and was decided June 22, 2010, 8 days prior to the denial of Petitioners appeal. The N.J. Supreme Court accepted the Appellate Division's finding that *Klumpp's* land was taken by physical seizure in 1962 in the aftermath of the March, 1962 northeast storm *(id. at 403 & 974)* that also devastated Petitioners' property one block north. However, after confirming the earlier decisional law adding inverse condemnation for a taking of real property without due process or just compensation to N.J.S.A. 2A:14-1, *Id. at 409 & 978* (in spite of the plain language

rule of statutory interpretation) and then denied Avalon its benefit, because of the concealment of a taking from the *Klumpps* was not equitable. *Id. at 414 & 981*. However, equity should have motivated the Court to set the date of compensation as the date its opinion. As it stands, Avalon violated the constitutional rights of the *Klumpps*, but received more equity than the *Klumpps*, when it set the date of taking as 1962, in spite of a long standing universal rule that denies equity to one without clean hands.

The facts are virtually the same as those in Petitioners case, except for that Court's claim that Avalon had directly notified Tri-Guy of the land swapping program is not supported by anything in the record. In 1961, Tri-Guy was asked, by Avalon, to swap lots they owned on 9th Street in Avalon, which were eroding, for the lots subject to Petitioners' action (A-126 and A-131the deeds used for the swap or exchange.) and that is how they knew of the lot exchange program. Nothing in the record below even suggests that the program was created to compensate takings by Avalon and there is no proof that Avalon suggested to Tri-Guy that was the reason the land swap or exchange program was created.

Likewise, there is no proof in the record that Tri-Guy understood Avalon had effected a taking of their lots or that title would automatically vest in Avalon by virtue of N.J.S.A. 2A:14-1, judicially amended in 1996 to time limit an inverse condemnation action for at taking without due

process or just compensation. Neither Avalon nor Petitioners could know of the time limit prior to 1996 and could not have known that it would be retroactively applied to a 1962 taking.

The N.J. Supreme Court made a cogent observation about the process:

> "Although physical invasion and physical taking of real property by a governmental entity ought to be notice sufficient to awaken property owners to act to protect their interest in receiving compensation for the taking, *government also should provide some other form of notice to affected property owners before, and surely after, a physical taking. It should go without saying that turning such square corners is minimally what citizens should be able to expect from their government when such drastic action is visited on property owners.*" *Id. at 413 & 980*.

So after realizing the due process need for notice, the Court failed to require such "other form of notice" to both the *Klumpps* and Petitioners.

IV. THE N. J. APPELLATE DIVISION RECENTLY SOLVED A DUE PROCESS LACK OF NOTICE PROBLEM AND THE *DeROSE* SOLUTION SHOULD BE UTILIZED TO PROTECT PETITIONERS' RIGHT TO DUE PROCESS.

In 2008, the N.J. Appellate Division decided *Harrison Redevelopment Agency v. DeRose,* 398 N.J. Super. 361, 942 A. 2d 59 (A.D. 2008) interpreting a due process challenge to the validity of the Local Redevelopment and Housing Law (LRHL) (N.J.S.A. 40A:12-1 *et seq*.) and in particular N.J.S.A. 40A:12A-6.a., b.(2) and b.(3).

This statute requires publication of a notice to all affected property owners or all persons interested in the proposed boundaries, once a week for two weeks at least ten days prior to a planning board hearing on consideration of a proposed redevelopment of an area and notice also mailed to the last known owner of each parcel within the proposed redevelopment area at least ten days prior.

However, it does not require the "municipal governing body to provide individual advance notice to an owner that it is considering designating his or her property for redevelopment, and thus may take that property in the future through the power of eminent domain. *Id. at 367 & 62*. Nor are property owners entitled under L.R.H.L. to individual notice after a governing body approves such a designation, unless the owner had previously filed a written objection while the proposed redevelopment plan was being preliminarily evaluated by the local planning board". *Id. at 367 &62.*

> The Appellate Division thereafter, held that: "unless a municipality provides the property owner with contemporaneous written notice that

> fairly alerts the owner that 1) his or her property has been designated for redevelopment, 2) the designation operates as a finding of public purpose and authorizes the municipality to acquire property against the owner's will, and 3) informs the owner of the time limits within which the owner may take legal action to challenge that designation, an owner constitutionally preserves the right to contest the designation, by way of affirmative defense to an ensuing condemnation action. Absent such adequate notice, the owner's right to raise such defenses is preserved, even beyond the forty-five days after the designation is adopted." *Id. at 367, 368 & 62, 63*.

The Appellate Division further stated:

> By so ruling, we endeavor to harmonize the terms and objectives of the L.R.H.L. with those of the Eminent Domain Act, N.J.S.A. 20:3-1 to 50, and our Rules of Court. Such a harmonized reading of the applicable statutes and rules also ensures that our redevelopment laws pass muster under the Due Process Clause of the Federal Constitution and separation of powers principles under the State Constitution. It also relieves property owners and the public at large of the burdens of engaging in premature litigation, so that owners are not forced

> to go to court unless and until they received fair and adequate notice of the municipality's adverse determination and of its right to take their properties. *Id. at 368 & 369 & 63*.

Petitioners urge this Court to impose a written notice requirement to property owners of a taking in order to avoid the confusion in this case and ensure due process for all.

V. THE FACTS OF THIS CASE SUPPORT TWO ENTIRELY DIFFERENT CONCLUSIONS ABOUT WHETHER AVALON TOOK PETITIONERS' PROPERTY.

A. The trial Court and Appellate Division decisions concluded that Avalon intended to take and did take Petitioners' land in 1962, without just compensation, and that Petitioners knew that by April 29, 1965 and had an obligation to take action within six years by April 29, 1971 or be time limited by N.J.S.A. 2A:14-1.

In order to believe this result, one must believe that Avalon intentionally violated the New Jersey and U.S. Constitutions and the mandatory requirements of the Eminent Domain Act (N.J.S.A. 20:3-5 and 6) and therefore, denied Petitioners' "just compensation" and "due process". Moreover, one must also believe that Avalon went to extraordinary effort to conceal their illegal, unconstitutional and fraudulent conduct from Petitioners and their predecessors in title by pretending Petitioners still

owned the property, a myth perpetuated by Avalon's 1) continuous taxation of the property, 2) non objection to the subsequently recorded deeds, 3) failure to inform Petitioners' predecessors of a taking when their attorney inquired about sale to Avalon in 1982, 4) listing Petitioners property as necessary to be acquired in the 2002 State Aid Agreement (A-150) and 5) failure to inform Petitioners' attorney in 2001 that Avalon owned the lots as of 1962.

One would have to believe that Avalon intentionally engaged in a fraudulent scheme designed to trick Petitioners and their predecessors in title into believing they still owned the property, so that Avalon would not be sued for a taking without due process, just compensation and continuing the concealment for about 43 years, until January 3, 2005, when the Amended Answer by Avalon denied Petitioners' ownership and asserted that title had been forfeited by operation of law.

One has to believe that when Tri-Guy wrote to Avalon in 1965, it understood Avalon had taken the property and noticed itself that it had six years to sue under N.J.S.A. 2A:14-1, which did not list inverse condemnation, for a taking of real property without due process or just compensation as a time limited cause of action.

One would also have to believe that Petitioners and their predecessors in title were foolish enough to continue paying taxes, transfer title twice by deed in 1969 and 1997 and hire an

attorney, if they knew that Avalon already owned the property.

One would also have to believe that Petitioners had the ability to foresee that the 3rd Circuit Court of Appeals would add language to N.J.S.A. 2A:14-1, in 1996 time barring an inverse condemnation action for a taking real property, without due process or just compensation, because of a judicial policy favoring time limiting even though the statute plainly did not include the added language.

B. Alternatively, Avalon did not ever take Petitioners' property until the recordation of the first trial Court order and opinion dated June 5, 2005 in the County Clerk's office on July 18, 2005 (A-51) or the date the second trial Court motion order and opinion declared Petitioners' title automatically vested in Avalon and validated the July 18, 2005 recordation claiming title for Avalon as of 1962 by reason of automatic vesting. (A-18)

Resolution #62-102 indicated that Avalon's conduct could be a taking for which just compensation would not be denied or a police power action for which no compensation would be paid. (A-183)

Resolution #62-117 stated that Avalon shall acquire all land or easements required for constructing protective barriers. Since Avalon did not condemn the Petitioners' property, one could conclude Avalon's conduct was a valid police power

action so notice of taking was not necessary and also Avalon did not need Petitioners' lots for the construction of protective barriers, so no notice of taking was necessary. (A-185)

Keep in mind that Avalon's cleanup and beach replenishment benefited the property owners and was not proof of a taking if it was a police power action.

Moreover, N.J.S.A. 2A:14-1 was not judicially amended to time bar Petitioners' cause of action until 1996, so Avalon could not have known the statute would bar the claim in 1971.

In order to believe there was no taking in 1962 one need only remember that Avalon never took action to acquire Petitioners' property by the Eminent Domain Act or by any other cause of action. That explains why Avalon 1) continued taxing the lots and accepting payment without objection, 2) changed its tax assessment rolls to reflect new ownership of the lots without objection, 3) never told the attorneys for Petitioners or their predecessors that Avalon owned the lots, 4) listed the lots to be acquired in the 2002 state aid agreement and 5) only claimed title by forfeiture in the Amended Answer dated January 3, 2005.

CONCLUSION

1. Avalon never noticed Tri-Guy or Petitioners of a taking. Avalon had a mandatory due process obligation to notice a condemnee of a taking.

Avalon's Resolution #62-102 indicated Avalon's action was either a taking or a valid police action and Avalon had an obligation to inform property owners, if they took their property.

2. Avalon's conduct of taxing, accepting payment and not informing the property owner's attorney of a taking concealed a taking, if one actually occurred.

3. Judicial amendment of N.J.S.A. 2A:14-1 in 1996 was not warranted in light of the plain language of the statute, the U.S. and N.J. Constitutions and the N.J. Eminent Domain Act.

4. Retroactive application of a judicially amended N.J.S.A. 2A:14-1 denied due process and just compensation.

5. Avalon's fraudulent concealment of an alleged taking does not warrant any saving grace by equity and was inequitable treatment of Petitioners.

6. The N.J. Courts' concept of automatic vesting of title upon expiration of a time limit for filing a complaint conflicts with the time honored goal of this State's land title recording system designed to create an accurate up to date record of grantees.

7. Avalon first advised Petitioners or their predecessors in title of a physical seizure of their lots in 2005, when it filed an amended answer to the complaint on January 3, 2005 denying Petitioners ownership and indicating that their lots were forfeited, thereby denying Petitioners due process.

8. This concept also conflicts with Federal and State statutory law requiring notice of seizure and forfeitures under criminal statutes, therefore, protecting the constitutional rights of criminals while denying constitutional rights of law abiding citizens in light of illegal and fraudulent conduct by a condemnor like Avalon.

In closing, Petitioners urge that this Court protect the Constitutional rights of innocent property owners from the loss of due process and just compensation rather than approving an automatic vesting of title while ignoring the Eminent Domain Act that is designed to ensure due process. This Court should not strip innocent property owners of their constitutional rights, especially in light of Avalon's fraudulent conduct of concealment of a taking, if one actually occurred.

If left to stand, the decision below will set a bad precedent and that will be utilized by both other public entities in New Jersey and other states to avoid their Constitutional obligation to pay just compensation.

This Court could reverse the finding of a taking based on Avalon's failure to admit a taking and its conduct of taxing the lots and the lack of evidence of an intent to take the property or alternatively rule that if a taking occurred, it was on July 18, 2005 when the trial Court order and opinion dated June 5, 2005 was recorded in the County Clerk's office or alternatively, this Court could consider imposing the "*DeRose*" solution ordered in *Harrison Redevelopment Agency v. DeRose* and require a

personal written notice of a taking without due process or just compensation and preserve the land owner's rights until a formal condemnation is filed, if no due process notice is given.

Respectfully submitted

Frederick W. Schmidt, Jr.,
Counsel of Record
Frederick W. Schmidt, Jr., L.L.C.
106 N. Main Street, Unit D
P.O. Box 120
Cape May Court House, NJ 08210
Telephone: 609-465-2300
Email: *fws.law@comcast.net*