

CONNELL FOLEY LLP

Richard P. DeAngelis, Jr., Esq.

Attorney ID: 028671998

56 Livingston Avenue

Roseland, NJ 07068

973.535.0500

Fax: 973.535.9217

Attorneys for Defendants-Respondents, Getzel Bee, LLC

Attorney for Defendants-Respondents, Bellevue Jackson, LLC

TOWNSHIP OF JACKSON, A  
MUNICIPAL CORPORATION IN  
THE COUNTY OF OCEAN, STATE  
OF NEW JERSEY,

Plaintiff-Petitioner,

vs.

GETZEL BEE, LLC AND STATE OF  
NEW JERSEY,

Defendants-Respondents.

SUPREME COURT OF NEW JERSEY

DOCKET NO.: 090404

APP. DIV. DOCKET NO.: A-000590-23

A-000594-23

SAT BELOW:

HON. JACK SABATINO, P.J.A.D.

HON. KATIE GUMMER, P.J.A.D.

HON. MARITZA BERDOTE BYRNE,  
J.A.D.

ON APPEAL FROM:

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION: OCEAN COUNTY

Docket No.: OCN-L-1384-23

**CIVIL ACTION**

TOWNSHIP OF JACKSON,  
Plaintiff-Petitioner,

vs.

BELLEVUE JACKSON, LLC, and  
STATE OF NEW JERSEY,  
Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: OCEAN COUNTY

Docket No.: OCN-L-1385-23

**CIVIL ACTION**

SAT BELOW:

Hon. Francis R. Hodgson, Jr., A.J.S.C.

---

**BRIEF IN OPPOSITION TO  
PLAINTIFF'S PETITION FOR CERTIFICATION**

---

*Of Counsel:*

Richard P. DeAngelis, Jr., Esq.

*On the Brief:*

Richard P. DeAngelis, Jr., Esq.  
Meredith S. Rubin, Esq.

**TABLE OF CONTENTS**

|  | <u>Page</u> |
|--|-------------|
| PRELIMINARY STATEMENT .....  | 1           |
| COUNTER-STATEMENT OF THE CASE .....  | 2           |
| PROCEDURAL HISTORY AND STATEMENT OF FACTS .....  | 4           |
| POINT I.....   | 7           |
| THE PETITION FOR CERTIFICATION DOES NOT MERIT<br>CERTIFICATION.....  | 7           |
| A. THE APPELLATE DIVISION PROPERLY REVERSED<br>THE TRIAL COURT FINDING THERE WAS NO<br>CLEARLY ARTICULATED PUBLIC USE SET FORTH<br>IN THE PUBLIC RECORD AND THAT THE STATED<br>PURPOSE OF PRESERVING OPEN SPACE WAS<br>PRETEXTUAL..... | 8           |
| B. THE DECISION OF THE APPELLATE DIVISION IS<br>NOT IN CONFLICT WITH ANY HOLDING OF THE<br>SUPREME COURT OF THE UNITED STATES, NEW<br>JERSEY SUPREME COURT OR ANY OTHER<br>APPELLATE DIVISION DECISION.....                            | 13          |
| C. THAT THE TOWNSHIP CONVEYED DEFENDANTS’<br>PROPERTY TO THE DEVELOPER IS NOT GROUNDS<br>FOR CERTIFICATION .....   | 16          |
| D. PLAINTIFF’S ARGUMENT THAT THE APPELLATE<br>DIVISION FOUND THE TOWNSHIP FAILED TO TURN<br>SQUARE CORNERS MISREADS THE COURT’S<br>HOLDING .....   | 18          |
| CONCLUSION.....  | 20          |

**TABLE OF AUTHORITIES**

**Page(s)**

**Cases**

62-64 Main St., LLC v. Mayor & Council of Hackensack,  
221 N.J. 129 (2015) .....9, 16

Berman v. Parker,  
348 U.S. 22 (1954).....15

Burnett v. Abbott,  
14 N.J. 291 (1954) .....9

F.M.C. Stores, Co. v. Borough of Morris Plains,  
100 N.J. 418 (1985) .....18

Gruber v. Mayor and Twp. Comm. of Raritan Twp.,  
73 N.J. Super. 120 (App. Div.), aff'd, 39 N.J. 1 (1962).....18

Haw. Hous. Auth. v. Midkiff,  
467 U.S. 229 (1984).....12, 14, 15, 16

Hous. Auth. of New Brunswick v. Suydam Invs., LLC,  
177 N.J. 2 (2003) .....9, 16

Kelo v. City of New London,  
545 U.S. 469 (2005).....12, 14, 16

Mt. Laurel Twp. v. MiPro Homes, LLC,  
379 N.J. Super. 358 (App. Div. 2005) .....9, 10

Mt. Laurel v. MiPro Homes, LLC,  
188 N.J. 531 (2006) .....9, 10, 11

State v. Lanza,  
27 N.J. 516 (1958) .....9, 16

State by Highway Comm’r v. Davis,  
87 N.J. Super. 377 (App. Div.), cert. denied, 46 N.J. 135 (1965).....13

State by Highway Comm’r v. Totowa Lumber & Supply Co.,  
96 N.J.Super. 115 (App.Div. 1967) .....13, 14

Tex. East. Trans. Corp. v. Wildlife Preserves,  
48 N.J. 261 (1966) .....9

Twp. of Jackson v. Getzel Bee, LLC,  
480 N.J. Super. 592 (App.Div. 2025) .....7

Twp. of W. Orange v. 769 Assocs., LLC,  
172 N.J. 564 (2002) .....9, 16

White Road HOA LLC v. Twp. of Jackson,  
Docket No. OCN-L-0723-23 .....3, 4, 17

**Statutes**

N.J.S.A. 40A:12-1 et seq. .....8

N.J.S.A. 40A:12-16.....11

N.J.S.A. 20:3-1 et seq. .....8

**Rules**

R. 2:12-4.....7

**Other Authorities**

N.J. Const. art. I, § 20 .....8, 16

N.J. Const. art. IV, § 6.....8, 16

## **PRELIMINARY STATEMENT**

In its Petition, Plaintiff, Township of Jackson (“Township” or “Plaintiff”), fails to provide any reason for the grant of certification. Plaintiff suggests a matter of general public importance by claiming the case presents a question of first impression to confirm the authority of a municipality to condemn land to exchange purportedly to preserve open space. It makes that claim based upon its agreement with the private developer, Bellevue Estates LLC (“Developer”), to exchange municipally owned lots along with lots owned by Defendants (“Defendants’ Property”), Getzel Bee LLC and Bellevue Jackson LLC (“LLCs” or “Defendants”). That agreement acknowledges Defendants’ Property is not owned by the Township. Plaintiff does not possess and has not asserted any authority to contract for the disposition of property it does not own. Moreover, the agreement was not conditioned upon inclusion of Defendants’ Property and does not limit the use of the Property after the exchange as found by the Appellate Division.

Plaintiff’s claim of preservation of open space is also unsupported by the record. While a municipality may acquire property for open space by eminent domain, our law demands a record to substantiate that stated need to avoid pretextual takings. Here, there is absolutely no record to support the Township’s claims. In its appellate brief, Plaintiff presented specific reasons for the taking which the Appellate Division noted was not only raised for the first time there but belied by the record.

Plaintiff suggests also the Appellate Division failed to apply holdings of precedential decisions cited in its opinion. However, Plaintiff ignores critical and distinguishable facts and holdings in those cases and fails to demonstrate how the Appellate Division's decision here is in conflict with the cited cases.

While a municipality is authorized to take private property, such taking must be for a valid public use. The law demands more than just a bald assertion that property is needed. There must a clearly-articulated public use for the property in the public record. There was no such record in the present matter.

Recognizing the awesome and intrusive power of government to take private property, our courts demand strict adherence to the Eminent Domain Act and the enabling legislation, in this case, the Local Land and Buildings Law. The right of a property owner to contest a taking is grounded in the federal and State Constitutions.

Here, as correctly determined by the Appellate Division, the record is devoid of any evidence of a valid public use of Defendants' Property and the Township's asserted public purpose of preserving open space was pretextual. The Appellate Division correctly applied well-settled law in reversing the decision of the trial court. For these reasons, petition for certification should be denied.

**COUNTER-STATEMENT OF THE CASE**

The Statement of the Case presented by the Plaintiff misrepresents the relevant facts underlying the decision of the Appellate Division. Plaintiff cites a

single ordinance in the record that was adopted **after** the Township filed its condemnation actions **and** while Defendants' challenges to the takings were pending. The original ordinance, cited by Plaintiff claimed the taking was for open space when in fact it was part of the proposed land exchange with the Developer.

Defendants challenged the takings alleging that the record upon which the Township filed the condemnation actions did not include any evidence that the taking was in furtherance of preserving open space. While Defendants' challenges were pending before the trial court, Plaintiff attempted to cure its error with a new ordinance that acknowledged the proposed land exchange. Defendants maintained their opposition. While the trial court ruled in favor of the Township, that decision was grounded primarily in a prior decision by the Law Division in a separate matter challenging the proposed land exchange, White Road HOA LLC v. Twp. of Jackson, Docket No. OCN-L-0723-23 ("White Road"), in which the LLCs were not parties.

Defendants' appeal followed, resulting in a reversal by the Appellate Division holding generally that: (1) there was no clearly articulated public use of Defendants' Property required to take private property; (2) the Township's purported public purpose of preserving open space was not only not supported by the record but belied by the record; (3) the Township did not have authority to enter an agreement with the Developer to exchange lands it did not own; and (4) Defendants' rights to

challenge the taking were not adjudicated in the White Road matter and could be decided only in an action filed under the Eminent Domain Act.

### **PROCEDURAL HISTORY AND STATEMENT OF FACTS**

The Township governing body adopted Ordinance 15-23 to authorize the acquisition of Defendants' Property. (Da20-23)<sup>1</sup> The preamble suggests the taking is for "the purpose of open space." (Da20) However, under "Specific Findings," the ordinance does not state how or why the Property was needed for "open space." (Ibid.) Instead, it provides only that the proposed acquisition is to "promote and protect the health, safety and welfare of residents of the Township" and that the taking is "necessary for same." (Ibid.) There is no reference to any studies or reports regarding the need for open space. Nor is there anything elsewhere in the public record regarding same.

A review of the public record revealed that the Township did not intend to use Defendants' Property for open space, but rather to flip it to the Developer, along with Township-owned parcels, in exchange for other land within the Township owned by the Developer. Such intent was memorialized by the previously adopted Ordinance No. 5-23. (Da25-26) The Developer owns two lots with about 31.5 acres. (Da46) In exchange, the Township was to provide the Developer approximately 42 acres of

---

<sup>1</sup> Da refers to Defendants' Appendix filed with the Appellate Division. Pa refers to Plaintiff's Supreme Court Appendix filed with this Court. Pb refers to Plaintiff's Brief in support of its Petition for Certification.

land it owns in another section of the municipality along with Defendants' Property. (Ibid.) Ordinance No. 5-23 acknowledged the Township did not own Defendants' Property. (Da25) The ordinance does not state that the Township intended to acquire Defendants' Property for such purpose. (Ibid.)

Ordinance 5-23 states that "it is more beneficial to the Township to obtain title to the [Developer's] property than it is for it to continue to remain the owner of the various blocks and lots currently owned by the municipality." (Ibid.) The ordinance does not provide any findings as to the purported benefit. It does not impose any limitation on the Developer's use of the municipal lands and Defendants' Property to be acquired. Nor does the ordinance provide any findings related to the proposed use by the Township of the lands after the exchange to the Developer.

The Township and Developer entered into a Contract for Exchange of Real Estate effective February 21, 2023 ("Contract"). (Da31-44) While the Contract references the Defendants' Property, it acknowledges they are not owned by Township. Consummation of the exchange was not conditioned upon the inclusion of the Defendants' Property. Nor does the Contract obligate the Township to condemn Defendants' Property. (Da33) The only contingency set forth in the Contract is that the Township adopt the land swap ordinance and vacate certain public streets. (Da39) The Contract does include any limitation on how the lands to be acquired by the Developer shall be used.

The Township filed its condemnation actions against Defendants on June 14, 2023. (Da5-9) The trial court entered an Order to Show Cause on June 15 (“OTSC”). Pursuant to the OTSC, on July 18, 2023, Defendants filed their Answers, briefs, and certifications in opposition to the Township’s authority to take their Property by eminent domain. (Da10-13) The return date of the OTSC was adjourned. On August 26, 2023, the Township adopted Ordinance No. 26-23 that again authorized the taking of Defendants’ Property, although that ordinance acknowledged the land exchange with the Developer. (Da53-54) Ordinance No. 26-23 does not provide any specific findings or citation to a record regarding open space acquisition. It does not impose any limitation on the Developer’s use of the Defendants’ Property to be acquired. Nor does the ordinance provide any findings related to the proposed use by the Township of the lands after the exchange to the Developer.

On October 20, 2023, the trial court heard oral argument on the Township’s Order to Show Cause, finding the Township is authorized to and has duly exercised its power of eminent domain and entered its Orders on October 20, 2023 to confirm the authority of the Township to take Defendants’ Property. (Da14-15) Defendants’ Notices of Appeal followed on October 26. (Da1-4) The following day Defendants filed motions with the trial court for a Stay Pending Appeal to prevent the Township’s acquisition of Defendants’ Property and conveyance of same to the Developer pending the outcome of the appeal before this Court. On November 3,

2023, the trial court entered Orders denying Defendants' Motions for a Stay Pending Appeal. (Da16)

The Appellate Division granted Defendants' Applications for Permission to file Emergent Motions for Stay Pending Appeal but ultimately denied Defendants' request for a stay.

The Appellate Division issued its decision reversing the trial court on January 31, 2025. Plaintiff filed a Notice of Petition for Certification to this Court on February 18, 2025 and then a Motion to Extend to Time, followed by its Petition on March 19, 2025.

**POINT I - THE PETITION FOR CERTIFICATION DOES NOT MERIT CERTIFICATION.**

The grounds for certification are limited to a question of general public importance, a conflict in decisions, or where the interest of justice requires. R. 2:12-4. Certification is not to be granted where there has been a final judgment of the Appellate Division "except for special reasons." Ibid.

Here, Plaintiff suggests this matter presents a question of first impression which relies on the repackaging of the factual and legal arguments rejected by the Appellate Division in its thorough and cogent decision.<sup>2</sup> Plaintiff suggests also a conflict between the Appellate Division's decisions and those of the Supreme Court

---

<sup>2</sup> Reported at Twp. of Jackson v. Getzel Bee, LLC, 480 N.J. Super. 592 (App. Div. 2025)

of the United States cited therein. But Plaintiff fails to fully explore those holdings in the context of this case. Moreover, that the Appellate Division's decision is grounded in the requirements of the applicable statutes, *i.e.*, the New Jersey Eminent Domain Act, N.J.S.A. 20:3-1 et seq.; the New Jersey Local Lands and Buildings Law, N.J.S.A. 40A:12-1 et seq.; and our well-settled case law involving government's exercise of the power of eminent domain.

**A. The Appellate Division Properly Reversed The Trial Court Finding There Was No Clearly Articulated Public Use Set Forth In The Public Record And That The Stated Purpose Of Preserving Open Space Was Pretextual.**

Only the State of New Jersey is vested with the power of eminent domain as an attribute of its sovereignty. Our State Constitution limits that power to taking property for "public use." N.J. Const. art. I, § 20 ("Private property shall not be taken for public use without just compensation.") To the extent a municipality may exercise such power, it is pursuant to a provision in the State Constitution that allows the delegation of that power, again for public use, which is within the exclusive province of the Legislature. N.J. Const. art. IV, § 6, ¶ 3 ("Any agency or political subdivision of the State or any agency of a political subdivision thereof, which may be empowered to take or otherwise acquire private property for any public highway, parkway, airport, place, improvement, or use. . . .")

This Court has consistently held that property to be acquired by eminent domain must be taken for public use. "Eminent domain is the awesome power of

the sovereign to take property for public use without the owner's consent." State v. Lanza, 27 N.J. 516, 529 (1958); Twp. of W. Orange v. 769 Assocs., LLC, 172 N.J. 564, 571-572 (2002) ("The State's power of eminent domain nevertheless is subject to several important constitutional limits: the property acquired must be taken for a 'public use'"); see also Hous. Auth. of New Brunswick v. Suydam Invs., LLC, 177 N.J. 2, 6 (2003); 62-64 Main St., LLC v. Mayor & Council of Hackensack, 221 N.J. 129, 144 (2015)).

Plaintiff is correct that a municipality is given deference when determining public use to support a taking. (Pb4) But such deference is accorded only after strict compliance with the applicable law. The Appellate Division held that "once the strict requirements of governing statutes have been met, great discretion is afforded to condemning authorities in determining what property may be taken for public use. (Pa012 (slip op. at 10 (first citing Tex. East. Trans. Corp. v. Wildlife Preserves, 48 N.J. 261, 269 (1966); and then citing Burnett v. Abbott, 14 N.J. 291, 294 (1954)).

Plaintiff is also correct that our courts have authorized the use of eminent domain to acquire property for open space. (Pb4) Indeed, this Honorable Court has held as such. Mt. Laurel v. MiPro Homes, LLC, 188 N.J. 531 (2006) (aff'g Mt. Laurel Twp. v. MiPro Homes, LLC, 379 N.J. Super. 358, 368 (App. Div. 2005) (finding the property owner there did not present evidence that could support a

finding that Mt. Laurel’s decision to condemn its property constituted an abuse of the eminent domain power).

In MiPro Homes, the municipality sought to preserve land for open space, and the trial court found the condemnation was “for a facially valid purpose, namely, the acquisition of MiPro’s tract to be held in perpetuity as a passive open space,” while noting the real purpose of the taking “was to prevent yet another residential development in a township already under severe development pressure.” MiPro Homes, 379 N.J. Super. at 368.

But the record before the court in MiPro Homes was significantly developed. There, Mt. Laurel residents had approved several referenda authorizing tax increases to ensure adequate funding for the municipality to acquire Mipro’s land. Id. at 363, 366. Additionally, the master plan provided “that the goals of the recreation and open space plan included acquisition of “the maximum amount of open space remaining in the township that can be achieved with sound use of financial resources’ and reduction of traffic congestion and costs of municipal services.” Id. at 367. The court there noted the “voluminous factual materials” the parties introduced, id. at 367, and disagreed with the trial court, emphasizing that “Mount Laurel’s residents ha[d] approved three referenda under this legislation authorizing tax levies for the acquisition of property for recreation and conservation purposes,” id. at 371-72. Mt. Laurel demonstrated “a reasonable basis for concern that additional residential

development would aggravate traffic congestion and pollution problems in the municipality and impose added stress on its school system and other municipal services.” Id. at 376. Therefore, the Appellate Division concluded Mt. Laurel did not bring the condemnation action for an illegitimate purpose such as a discriminatory reason, but for the public purpose of acquiring additional open space. Id. at 377.

There was no such record before the trial court in this matter that could demonstrate a legitimate public purpose. The record is devoid of any stated public use for Defendants’ Property or need or plan to preserve open space. As discussed infra, the most detail provided on the purported plan to preserve open space was presented by way of unsubstantiated assertions in Plaintiff’s appellate brief.

Plaintiff suggests that “[t]he only question is whether the Township had authority to condemn the [LLCs’ Property] to be exchanged for the acquisition of other land to be used for a valid public purpose.” (Pb5) As held by the Appellate Division, the Local Lands and Buildings Law does provide a municipality may exchange lands but only such lands “owned by the . . . municipality.” (Pa021 (slip op. at 19 (citing N.J.S.A. 40A:12-16)). The Township’s ordinances authorizing the exchange and the Contract with the Developer acknowledged that the Township did not own the LLCs’ Property and therefore, the Appellate Division held that the Township’s attempted exchange violated N.J.S.A. 40A:12-16. Ibid.

Next the Township argues the Appellate Division’s focus on the use of the condemned property was misplaced and that the Court should have focused on “whether the condemnation was for a valid public purpose.” (Pb6) This argument is advanced without citation to any authority. Nor does Plaintiff attempt to refute the holding of the Appellate Division, that even where the transfer of property may be permitted in furtherance of a public use or purpose, “the requirement that the land condemned be used for some public purpose remains.” (Pa015 (slip op. at 13 (first citing Kelo v. City of New London, 545 U.S. 469, 477 (2005); and then citing Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984)).

As to the alleged public purpose here, the Appellate Division found:

[T]he record before us is bereft of any indication as to the use of the condemned lots, other than what is, in essence, currency, to exchange for open space. It is undisputed the land-swap contract does not impose any limitation or restriction on the Developer’s use of the condemned property and none of the ordinances state the Intended use of [the Defendants’ Property].

[Pa013 (slip op. at 11).]

Recognizing the record upon which the Township authorized the action was devoid of any evidence to support the taking, Plaintiff impermissibly attempted to create a record on appeal that the Appellate Division properly rejected.

Although the Township, **in its opposition brief and for the first time, argues the condemnation of Lots 84 and 90 will serve a “public benefit”** including recreation, environmental preservation, economic benefits, and easement of traffic congestion by combining the

condemned properties with land the Township already owns and exchanging it for more desirable land elsewhere, **its attempt to equate this vague public benefit with the public use requirement is belied by the record**, which demonstrates the Developer is not restricted in its use of the condemned lots in any fashion.

[Pa015 (slip op. at 13 (emphasis added)).]

The Appellate Division found also that the Township's asserted public purpose of preserving open space was pretextual. (Pa022-023 (slip op. at 20-21))

Plaintiff raises essentially a factual controversy, but even a cursory review of the record reveals no controversy at all. The record is devoid of any evidence of a valid public use to justify the taking of Defendants' Property. More importantly, it was satisfactorily resolved by the Appellate Division, and Plaintiff has failed to provide any reason to grant certification.

**B. The Decision Of The Appellate Division Is Not In Conflict With Any Holding Of The Supreme Court Of The United States, New Jersey Supreme Court Or Any Other Appellate Division Decision.**

Plaintiff seeks support for its position in two New Jersey cases State by Highway Comm'r v. Davis, 87 N.J. Super. 377 (App. Div.), cert. denied, 46 N.J. 135 (1965) and State by Highway Comm'r v. Totowa Lumber & Supply Co., 96 N.J. Super. 115 (App. Div. 1967), but there is no comparison in the facts and Plaintiffs' reliance is completely inapposite. The takings there were for public road projects and were necessary to provide access to property that would otherwise be landlocked as a result of the projects. In Davis, the Appellate Division found that "[t]he State

reasonably exercised [its] discretion . . . by taking only the land needed for the freeway and then unlocking the resulting large landlocked areas by condemnation of land for this access road. Davis, 87 N.J. Super. at 380. In Totowa Lumber the Appellate Division reversed and remanded the decision the trial court to determine whether a proposed alternative to provide access after the project was practical and feasible because the trial court made no findings in that regard. Totowa Lumber, 96 N.J. Super. at 123. But the court there held that taking an easement to create a right-of-way for the benefit of property deprived of all or of some means of access to an existing way by reason of the project is a valid public use. Id. at 122 (citations omitted). In the present matter, there was no showing that the taking was for such public use or any public purpose.

Plaintiff argues also the Appellate Division did not follow the holdings of the Supreme Court of the United States in Kelo and Midkiff. Here again, its arguments are unavailing. The Appellate Division cited these cases in recognition of limited circumstances where the Supreme Court affirmed the right to take property to convey to others. (Pa014 (slip op. at 12)) But critical in those decisions was the fact that the property taken was pursuant to specific state statutes that authorized such takings and the land acquired was put to the public use approved under those statutes.

In Kelo, the city approved a “carefully considered” development plan under state law. The Court there distinguished the context of such “an integrated

development plan” from a situation in which a condemning authority could make “a one-to-one transfer of property” from one citizen to another. 545 U.S. at 486-87. The latter type of condemnation “would certainly raise a suspicion that a private purpose was afoot.” Id. at 487. It is only “[o]nce the question of the public purpose has been decided” that a condemning authority is granted the discretion to assess the size or character of a project. Id. at 489 (quoting Berman v. Parker, 348 U.S. 22 (1954)).

In this matter, as discussed supra, Plaintiffs never met the public purpose requirement. Nor was there any evidence to support the Township’s purported plan of open space preservation in the record, which the Township now attempts to liken to the “integrated development plan” that had been fully approved by the city council in Kelo and presented before the trial court. Id. at 473-74. Ordinance 5-23, the ordinance that authorized the land exchange with the Developer, did not provide any findings as to the purported benefit of the exchange; imposed no limitation on the Developer’s use of the municipal properties; and did not state the proposed use of Defendants’ Property after the exchange to the Developer. (Da25-26).

In Midkiff, the Supreme Court considered whether taking title to property owned by lessors and transferring it to lessees would violate the Public Use Clause of the Fifth Amendment to the United States Constitution. The proposed public use was pursuant to state law to “reduce the concentration of ownership of fees simple

in the State” and “reduce the perceived social and economic evils of a land oligopoly traceable to” monarchs. 467 U.S. at 231, 241-42. In discussing the abandonment of the “literal requirement” that property must be used by the general public, the Supreme Court there reasoned that merely because “property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose.” Id. at 243-44. However, the public use analysis in that case concerned the land that was actually condemned, which was the same land that was being transferred to lessees.

As the Appellate Division appropriately recognized in this matter, land being condemned must be taken for a public use. (Pa012 (slip op. at 10)); see also N.J. Const. art. I, § 20; N.J. Const. art. IV, § 6, ¶ 3; Lanza, 27 N.J. at 529; 769 Assocs., 172 N.J. at 571-572; Suydam Invs., 77 N.J. at 6; 62-64 Main St., 221 N.J. at 144. Plaintiff argues that the “reasoning of the Appellate Division below is in direct conflict with the holdings of [Kelo and Midkiff].” (Pb10) Plaintiff’s selective reading of those cases misses the underlying holdings – as cited by the Appellate Division below – that the condemned land be used for some public purpose.” (Pa015 (slip op. at 13) (first citing Kelo, 545 U.S. at 477; and then citing Midkiff, 467 U.S. at 244)).

**C. That The Township Conveyed Defendants’ Property To The Developer Is Not Grounds For Certification.**

Plaintiff attempts to negate or distract from its constitutional violations by making the argument set out in Point II of its brief that it already conveyed the LLC Property to the Developer. (Pb12). Defendants were not made aware of the Township's conveyance to the Developer until July of 2024, long after the trial court and Appellate Division had denied the LLCs' requests for a stay of the proceedings and months after the Appellate Division briefing on the merits was completed.

Plaintiff argues that because it went ahead and conveyed Defendants' Property to the Developer "the remedy in this matter remains unknown." (Pb12) Plaintiff does not bother to try and suggest how its unfounded claim is grounds for certification. It cites no authority. Worse still, it misses the point of the Appellate Division's reversal rendering the taking and subsequent conveyance ultra vires. The argument is essentially that the Township had no authority to take the property and then convey it, but did so anyway, so "let bygones be bygones."

Plaintiff also makes passing reference to the White Road matter alleging the trial court upheld the land exchange with the Developer to justify its disregard for the pending appeal of the trial court's order in the condemnation action. (Pb12) But that same argument was rejected by the Appellate Division that found: (1) the Township's agreement to convey the LLCs lots that it did not own was unlawful; (2) the decision in White Road could not preclude a challenge to the condemnations; (3) Defendants were not a party to that litigation or in privity with any party; and (4)

White Road did not address the Township's ability to condemn the LLCs' property. (Pa018-022 (slip op. at 16-20))

The fair and just resolution of this matter has been determined by the Appellate Division. If the Township and Developer refuse to abide by the Appellate Division's decision, Defendants have recourse to vindicate their rights, but that question is not before this Court.

**D. Plaintiff's Argument That The Appellate Division Found The Township Failed To Turn Square Corners Misreads The Court's Holding.**

Plaintiff argues the Appellate Division erred in finding the Township failed to turn square corners in its negotiations with Defendants. (Pb12) But this misstates the appellate court's holding as to the application of the square corners doctrine established by this Court in F.M.C. Stores, Co. v. Borough of Morris Plains, 100 N.J. 418 (1985). The holding by the Appellate Division focused on the failure of the Township to establish a valid public use for the taking.

In F.M.C. this Court held that when "dealing with the public, government must 'turn square corners.'" Id. at 436 (citing Gruber v. Mayor and Twp. Comm. of Raritan Twp., 73 N.J. Super. 120 (App. Div.), aff'd, 39 N.J. 1 (1962)). This Court recognized also that in condemnation matters "government has an overriding obligation to deal forthrightly and fairly with property owners." Ibid. (citations omitted) The Appellate Division found that obligation extends in a proposed condemnation to "providing a clearly articulated statutorily authorized use for the

property set forth in the public record.” (Pa013 (slip op. at 11)) Indeed, this is necessary to avoid having local officials “violat[ing] private property rights at any time for any reason—or for no reason—untethered to the public use requirement.” (Pa016-017 (slip op. at 14-15))

Plaintiff argues the Appellate Division erred further by relying on Ordinance 15-23 that initially authorized the taking of Defendants’ properties. (Pb13) It argues further that Ordinance 26-23 is the “only ordinance that should be of issue, and the only ordinance in effect. . . .” (Pb13) To accept this argument asks this Court – as it did the Appellate Division – to pay no regard to Ordinance 15-23 relied upon when the condemnation complaints were filed. Moreover, it would require the Court to ignore that Ordinance 26-23 was adopted only **after** Defendants raised their challenge to the taking while the order to show cause was still pending. Contrary to Plaintiff’s assertions in its Petition, Ordinance 26-23 did not establish the proposed taking was for the preservation of open space and, as found by the Appellate Division, the record below was barren as to the issue of open space.

Incredibly, the Township suggests in its Petition – for the first time – that the Ordinance 15-23 did not state the LLCs’ property would be utilized for open space. But that is precisely what the ordinance stated claiming the taking was “so that the Township . . . shall have access onto, over and through said privately owned real property for the purpose of open space.” (Da19) But by that time, the Township had

already authorized the transfer of Defendants' Property to the Developer. (Da24, Da30) Only after facing Defendants' challenge to the taking did the Township acknowledge the proposed exchange with the Developer in Ordinance 26-23, but still perpetrated the unsubstantiated claim that the taking was for the preservation of open space. (Da53) It is no surprise that Plaintiff asks this Court to overlook the misleading Ordinance 15-23. Importantly, the Appellate Division considered the both ordinances and found that the Township's assertions that the condemnation was for open space was pretextual and that the Township failed to deal fairly and forthrightly with the property owners. (Pa022 (slip op. at 20))

Here again, Plaintiff has failed to provide any reason to grant certification.

### **CONCLUSION**

The Appellate Division's decision was based upon well-settled condemnation law. Plaintiff has failed to demonstrate that this appeal presents a matter of general public importance or conflicts with any decisions. Accordingly, for the reasons set forth herein, Plaintiffs' petition for certification should be denied and the Appellate Division's decision should stand.

**CONNELL FOLEY LLP**

Attorneys for Defendants-Respondents,  
Getzel Bee LLC and Bellevue Jackson LLC

By: 

Richard P. DeAngelis, Jr.

Date: April 3, 2025