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TOWNSHIP OF JACKSON,  
Plaintiff-Respondent,  
  
vs.  
  
BELLEVUE JACKSON, LLC, and  
STATE OF NEW JERSEY,  
Defendants-Appellants.

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
Docket No. A-000594-23

ON APPEAL FROM:  
Law Division, Ocean County  
Docket No.: OCN-L-1385-23

SAT BELOW:  
Hon. Francis R. Hodgson, Jr., A.J.S.C.

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**BRIEF ON BEHALF OF DEFENDANT-APPELLANT  
BELLEVUE JACKSON, LLC**

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## PRELIMINARY STATEMENT

Defendant-Appellant Bellevue Jackson, LLC (“Bellevue Jackson”), appeals the decision of the trial court allowing Plaintiff-Respondent, Township of Jackson (“Township”) to proceed with the taking of private property. Defendant-Appellant Getzel Bee, LLC (“Getzel Bee”), appeals in the companion matter under Docket No. A-000590-23.

On May 9, 2023, the Township adopted Ordinance 15-23 that authorized the condemnation of Bellevue Jackson’s and Getzel Bee’s (collectively, “Defendants”), private properties purportedly for open space, in the absence of any public record to support the claim. Rather, a review of documents in the public record at the time these actions were initiated demonstrated that the Township intended to convey the Defendants’ properties to a private developer in a proposed land swap with no requirement as to the use of either property.

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 be an unambiguous public record in support of the purported need for and proposed use of the property. The right of a property owner to contest a taking is grounded in the federal and State Constitutions. Recognizing the awesome and intrusive power of condemnation to deprive property rights, our



courts demand strict adherence to the Eminent Domain Act and the enabling legislation, in this case, the Local Land and Buildings Law.

Here, the record is devoid of any direct evidence of a valid public use of Defendants' properties. The ordinance authorizing the acquisition suggests in the preamble that it is for open space, but there are no specific findings related to such purported use. In fact, it is clear the property will not be used for open space as the Township seeks to take Defendants' properties to exchange them – along with other Township-owned lots—to a private developer, Bellevue Estates LLC (“Developer”), for land owned by the Developer. By way of this exchange, the Township seeks to stop the development of religious based schools in areas of the Township where such use is permitted “as of right” under the Township’s Land Use Development Regulations. As to Defendants’ properties, it is presumed that the religious schools would be built there although such use is not permitted under the Township’s regulations. Nor is there any limitation on what the Developer may do with Defendants’ properties after acquiring same in the land swap.

Only after Defendants challenged the Township’s authority to take their properties by eminent domain did the township acknowledge in this proceeding that the purpose of the taking was for the land swap. While the Township has an agreement in place for a swap of other municipally owned lots, that agreement

acknowledges the Township does not own Defendants' properties. That agreement is not conditioned upon inclusion of Defendants' lots. Nor does that agreement limit the use of the subject property by the Developer after the land swap.

While the law allows local government to take property for open space, it requires also a showing of local action to substantiate that stated need to avoid pretextual takings. Here, there is absolutely no record to support the Township's claims. The Township will argue its rights to take the property were settled in another litigation that challenged the ordinances that authorized the land swap. But Defendants were not a party to that challenge. That matter did not address the claims raised herein that may only be resolved in condemnation action as required by the Eminent Domain Act. Defendants have an absolute right to challenge the Township's power to take its property by eminent domains, and the trial court failed to undergo the inquiry required to determine whether this attempted taking has complied with all statutory and constitutional requirements.

For these reasons, Defendants respectfully request that this Court reverse the trial court's orders appointing condemnation commissioners and authorizing Plaintiff to take Defendants' properties.

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

On April 25, 2023, the Township governing body introduced Ordinance 15-23 to authorize the acquisition of property, including that owned by Getzel Bee shown as Lot 90 in Block 21601 on the Township’s Official Tax Map and owned by Bellevue Jackson shown as Lot 84 in Block 21601 (the “Properties”). (Da20-23)<sup>1</sup> The ordinance was adopted May 9, 2023. (Da21) 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 properties are 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 reveals the Township does not intend to use Defendants’ Properties 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 in Ordinance No. 5-23 adopted by the Township on February 14, 2023. (Da25-26) The Developer owns two

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<sup>1</sup> Da = Defendants/Appellants’ Appendix

lots with about 31.5 acres and as of February 2023 was seeking approvals to construct four religious education institutions that are permitted “as of right” under the Township’s land use regulations. (Da46) In exchange, the Township will provide the Developer approximately 42 acres of land it owns in another section of the municipality along with Defendants’ Properties that are referenced in Ordinance No. 5-23 with a statement that the Township does not own the Property, but the ordinance does not state that the Township intends to acquire Defendants’ Properties for such purpose. (Da25).

Ordinance 5-23 suggests the lands to be exchanged are of “substantially equal value” and that “it is more beneficial to the Township to obtain title to the Bellevue Estates LLC property than it is for it to continue to remain the owner of the various blocks and lots currently owned by the municipality.” (Da25) 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’ properties 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 includes Defendants’ lots and acknowledges they are not owned by Township

closing is not expressly conditioned upon the inclusion of lots. Nor does the Contract obligate the Township to condemn Defendants' lots. As to potential condemnation, the contract provides that the parties "do not have knowledge that the Property is affected by or subject to any pending or threatened (i) condemnation proceedings...." (Da35) The only contingency set forth in the Contract is that the Township adopt the land swap ordinance and vacate certain public streets. (*See* Da39) The Contract does include any limitation on how the lands to be acquired by the Developer shall be used.

On March 28, 2023, the Township adopted Ordinance 7-23 to amend Ordinance 5-23 and added a certain lot that had been inadvertently omitted. (Da46-47) Ordinance 7-23 does not provide any additional findings as to the purported benefit of the exchange to the public or how the lands to be acquired by the Township will be used.

Defendants' Properties and all lots owned by the Township are located in an Industrial Zone that does not include school or religious institutions as a permitted principal use. (*See* Da18)

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 and 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' properties, although this ordinance acknowledges the land swap. (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' properties 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 and Commissioners, finding the Township is authorized to and has duly exercised its power of eminent domain and entered its Orders on October 23, 2023 to confirm the authority of the Township to take Defendants' properties. (Da14-15); (1T)<sup>2</sup> On October 26, 2023, Defendants filed Notices of Appeal. (Da1-4)

On October 27, 2023, Defendants filed Motions on Short Notice for a Stay Pending Appeal to prevent the Township's acquisition of Defendants' properties and

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<sup>2</sup> 1T = transcript of October 20, 2023

2T = transcript of November 3, 2023

conveyance of same to the private 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)

On November 7, 2023, Defendants filed Applications for Permission to file Emergent Motions for a Stay Pending Appeal before this Court, which this Court granted. This Court then denied these motions.

This appeal follows.

## **LEGAL ARGUMENT**

### **POINT I**

**THE TRIAL COURT ERRED IN CONCLUDING THE TOWNSHIP ARTICULATED A VALID PUBLIC USE AS THE TOWNSHIP'S PURPORTED USE IS A MERE PRETEXT AS THE TOWNSHIP HAS FAILED TO DEMONSTRATE HOW THE PROPERTY WILL BE USED AFTER A LAND SWAP WITH A PRIVATE DEVELOPER.**

**(Raised below: 1T22-24)**

**A. In order for the Township to take private property, it must articulate a valid public purpose to do so.**

The issue on appeal is whether the trial court erred in finding the Township articulated a valid public purpose for Defendants' Properties.

“Eminent domain is the power of the State to take private property for public use.” *State v. Lanza*, 27 N.J. 516, 529 (1958). This power “is subject to several important constitutional limits: the property acquired must be taken for a ‘public use,’ the State must pay ‘just compensation’ in exchange for the property, and no person shall be deprived of his or her property without due process of law.” *Twp. of W. Orange v. 769 Assocs., LLC*, 172 N.J. 564, 571 (2002) (first citing *N.J. Const.* art. I, ¶ 20; and then citing *State v. Heppenheimer*, 54 N.J.L. 268, 272 (1892)).

It is well established that statutes granting the power of eminent domain are to be given strict construction because, by definition, they derogate the private property rights so comprehensively protected by the federal and State constitutions. *See State v. Highway Comm’r v. Maas & Waldstein Co.*, 83 N.J. Super. 211, 217 (App. Div. 1964).

Under the New Jersey Local Lands and Buildings Law, a municipality may acquire property by eminent domain for public use. The statute states:

Any county, by resolution, or any municipality, by ordinance, ***may provide for the acquisition of any real property***, capital improvement, or personal property:

- (1) **By purchase, gift, devise, lease, exchange, condemnation, or installment purchase agreement;**
- (2) **Subject to lawful conditions, restrictions or limitations as to its use by the county or municipality, provided the governing body accepts**



**such lawful conditions, restrictions or limitations.**

When any county or municipality shall have acquired any real property, capital improvement or personal property upon any lawful condition, restriction or limitation, it is hereby authorized to take such steps as may be necessary and proper to the compliance by the county or municipality with such lawful conditions, restrictions or limitations.

[*N.J.S.A.* 40A:12-5(a) (emphasis added).]

Thus, any property acquired by eminent domain must be for public use. *Twp. of W. Orange v. 769 Assocs., LLC*, 172 N.J. 564, 571 (2001) (quoting *State v. Lanza*, 27 N.J. 516, 529 (1958)).

New Jersey courts have left no doubt as to the obligations imposed on government when invoking the power of eminent domain. When exercising the power of eminent domain, the government has an obligation to “turn square corners.” *F.M.C. Stores, Co. v. Borough of Morris Plains*, 100 N.J. 418, 426 (1985). Moreover, it has “an overriding obligation to deal forthrightly and fairly with property owners.” *Id.* at 426-27; *see also Jersey City Redevelopment Agency v. Costello*, 252 N.J. Super. 247, 257 (App. Div. 1991); *Rockaway v. Donofrio*, 186 N.J. Super. 344 (App. Div. 1982); *State v. Siris*, 191 N.J. Super. 261 (App. Div. 1983). That obligation includes providing a clearly articulated statutorily authorized use for the property set forth in the public record. Otherwise, government officials

would be able to violate private property rights at any time for any reason – or for no reason.

**B. The Township’s purported public purpose of open space appears to be a mere pretext for the actual use of the properties following the land swap with a private developer.**

In *Borough of Essex Fells v. Kessler Institute for Rehabilitation, Inc.*, the Borough sought to condemn land for the stated purpose of building a public park. 289 N.J. Super. 329, 331 (Law Div. 1995). But the Borough’s Master Plan and public meetings revealed no need for additional parkland; instead, public statements made clear that the condemnation was intended to stymie the construction of a politically unpopular rehabilitation center. *Id.* at 339–40. *Hester v. Miller*, is also instructive. There, the Highway Department sought to condemn a tract of land for two reasons (1) in order to transplant shrubs and trees from a tract of land the Department had formerly used as a nursery but which the State was turning into an office building, and (2) to potentially erect service buildings at some point in the future. 11 N.J. Super. 264, 269 (Law Div. 1951). The Law Division rejected the taking because the Department’s statute did not give it authority to condemn for these purposes. *Id.* at 269–70.

The articulation of a present public use to justify a condemnation is the essential first step in determining whether a condemnor is exceeding its statutory

authorization or operating in bad faith. A prospective condemnor must demonstrate why it is taking a property at that time. Here, prior to filing and during the “bona fide negotiations” period required by *N.J.S.A. 20:3-6*, the Township alleged the taking was in the public interest for open space without acknowledging the land swap. Only after challenged by the defendants did the Township acknowledge the swap with the Developer, but still the public record is devoid of any meaningful indication of how the subject properties will be utilized by the Township and there are no limitations on the Developer’s use of the property it is receiving.

It was therefore improper for the trial court to find the Township is taking the property for open space based only on Ordinance No. 15-23. (1T22-6) There is no evidence in the record to confirm that is the Township’s planned use for the property given the Township’s agreed-upon land swap with a private developer. The use for the land is still unknown, and therefore the trial court erred in finding a valid public purpose for the taking of Defendants’ private property.

**C. The record here is entirely lacking in facts to support a legitimate public purpose, unlike the extensive record before this Court in *Mt. Laurel v. Mipro Homes, LLC*, 188 N.J. 531 (2006).**

Before the trial court, the Township here relied on the open space preservation case *Mt. Laurel v. Mipro Homes, LLC*, 188 N.J. 531 (2006). (See 1T17-13 to 18-1). There, the Supreme Court affirmed this Court’s holding in which it reversed the trial

court because “Mipro did not present evidence that could support a finding that Mount Laurel’s decision to condemn its property constituted an abuse of the eminent domain power.” *Mt. Laurel Twp. v. Mipro Homes, LLC*, 379 N.J. Super. 358, 368 (App. Div. 2005). In that case, the Township 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,” but the Township’s “real purpose” “was to prevent yet another residential development in a township already under severe development pressure.” *Id.* at 367.

But the record before the court in that case was significantly developed, as opposed to the record here. 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 Planning Board adopted a master plan, “which stated 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 Appellate Division 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. Moreover, the Township had 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 Court 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 here that could demonstrate a legitimate public purpose. The record is devoid of any stated public use for Defendants’ Properties. The Contract between the Township and Developer does not constrain the Developer’s use of the Properties. (*See* Da30-44) The Properties may be used for whatever purpose subject to obtaining appropriate land approvals.

Given the lack of a record before the trial court upon which to find a legitimate public purpose, Defendants are likely to succeed on the merits.

## POINT II

**RES JUDICATA DOES NOT BAR THIS ACTION BECAUSE THE EMINENT DOMAIN ACT PROVIDES THE EXCLUSIVE FORUM FOR THE ADJUDICATION OF ALL ISSUES RELATED TO THE GOVERNMENT’S EXERCISE OF THE POWER OF EMINENT DOMAIN.**

**(Raised below: 2T16-17)**

In opposition to Defendants' motion for a stay pending appeal, the Township relied on the argument that all issues in this matter were resolved by an order entered in the matter *White Road HOA, LLC V. Twp. of Jackson*, Docket No. OCN-L-723-23. On March 23, 2023, an action was filed in the matter captioned *White Road, HOA, LLC v. Twp. of Jackson*, Docket No. OCN-L-723-23 challenging Ordinance 5-23 and 7-23. On September 8, 2023, the trial court in the *White Road, HOA, LLC* matter dismissed the plaintiffs' complaint. But that decision has no bearing on Defendants' right to challenge this condemnation action against their Properties.

The Township argued below that collateral estoppel prevented Defendants from asserting the Township failed to establish a proper public use in order to take Defendants' Properties. Defendants presume the Township will argue same in this motion. This argument is erroneous because it is only under the Eminent Domain Act in which the Legislature established the exclusive procedure for the acquisition of property by eminent domain and the right of property owners to contest the government's authority to take their property. The White Road action was a challenge to the Ordinance granting the swap that was not contingent upon inclusion of the Defendants' properties. The right to take issue was not and could not have been disposed of there.

The Eminent Domain Act resulted from the findings by the Eminent Domain Revision Commission (“Commission”) in 1962. The Commission recommended a statute creating a “uniform practice and procedure for the exercise of the power of eminent domain, equally applicable to all bodies vested with such power.” *County of Monmouth v. Wissell*, 68 N.J. 35, 38 (1975) (citing to *Report of the Eminent Domain Revision Commission* 6-7 (1965)). Governor Cahill, who oversaw the passage of the Eminent Domain Act, also recognized the necessity for uniformity on laws enabling government entities to take private property for a public purpose. *Wissell, supra*, 68 N.J. at 40. The Governor agreed that the legislation would “make uniform the legal requirements for all entities and agencies having the power to condemn” and which “would increase protection to the citizen whose property is condemned.” *Id.* Among the proposals, the Governor recommended that “this act shall apply to every agency, authority, company, utility or any other entity having the power of eminent domain exercisable within the State of New Jersey.” *Id.* at 41. It was the result of these cumulative actions by the government that led to the passage and adoption of the language in the Eminent Domain Act.

The Eminent Domain Act provides uniform procedures to be applied to ensure that Constitutional requisites are met and to “*increase protection to the citizen whose property is condemned.*” *City of Atl. City v. Cynwyd Invs.*, 148 N.J. 55, 68

(1997) (emphasis added). Under *N.J.S.A.* 20:3-5, the Superior Court has jurisdiction of all matters in condemnation, and “*all matters incidental thereto and arising therefrom.*” *Id.* (emphasis added). The Eminent Domain Act applies “[w]henver any condemnor shall have determined to acquire property pursuant to law . . . *but cannot acquire title thereto or possession thereof by agreement with a prospective condemnee*, whether by reason of disagreement concerning the compensation to be paid or *for any other cause, the condemnation of such property* and the compensation to be paid therefor, and to whom payable, *and all matters incidental thereto and arising therefrom shall be governed*, ascertained and paid by and in the manner provided *by this act.* . . .” *N.J.S.A.* 20:3-6 (emphasis added). Under the Eminent Domain Act an “action” is defined under the Eminent Domain Act as the legal proceeding in which: 1) property is being condemned or required to be condemned; 2) the amount of compensation to be paid for such condemnation is being fixed; 3) the persons entitled to such compensation and their interests therein are being determined; and 4) all other matters incidental to or arising therefrom are being adjudicated. *N.J.S.A.* 20:3-2(g).

The procedure governing the [condemnation] action shall be in accordance with the rules.” *N.J.S.A.* 20:3-7(a). The Court Rules governing condemnation provide that “[a]n action in condemnation shall be brought in the Superior Court in



a summary manner pursuant to R. 4:67.” R. 4:73-1. “The summary nature of the proceedings authorized by the rule should not be construed as in any way precluding the condemnee from an appropriate opportunity to object to the proposed condemnation.” Pressler & Verniero, *Current N.J. Court Rules*, cmt. 4 on R. 4:73-1 (citing *Bergen Cnty. v. S. Goldberg & Co.*, 39 N.J. 377 (1963)).

“The power of condemnation being in derogation of property rights, it is required to be strictly construed and all statutory prerequisites must be established to sustain its exercise.” *New Jersey Highway Auth. v. Currie*, 35 N.J. Super. 525, 540 (App. Div. 1955). The Eminent Domain Act provides the exclusive process when government invokes the awesome power of condemnation and for property owners to challenge such actions. The Legislature did not authorize the piecemeal adjudication of the rights afforded to property owners facing condemnation, which, would deny the Owners the protections, rights and remedies established under the Eminent Domain Act. The Township must not be permitted to circumvent this process.

When invoking the power of eminent domain, government is obligated to “turn square corners.” *F.M.C., supra*, 100 N.J. 418, 426 (1985). Our courts have long held that when implicating its condemnation power, “government has an overriding obligation to deal forthrightly and fairly with property owners.” *Ibid.*

(citing *Rockaway v. Donofrio*, 186 N.J. Super. 344 (App. Div. 1982)). This maxim is especially true in the context of a public agency's taking of private land for redevelopment. *Costello, supra*, 252 N.J. Super. at 257. A municipality may not conduct itself so as to achieve or preserve any kind of bargaining or litigational advantage over the property owner, *F.M.C, supra*, 100 N.J. at 427; *Costello, supra*, 252 N.J. Super. at 257.

In the *White Road, HOA, LLC* matter, the court did not adjudicate this condemnation matter; Defendants have every right under the law to challenge this condemnation action. The Township may not circumvent the requirement of adjudicating a condemnation action as required by the Eminent Domain Act. The *White Road, HOA, LLC* court did not render any determination as to whether the Township complied with all statutory condemnation requirements. Moreover, it has “an overriding obligation to deal forthrightly and fairly with property owners.”

The Township is obligated to provide a clearly articulated statutorily authorized use for the subject property set forth in the public record. *See F.M.C., supra*, 100 N.J. at 426-27; *see also Jersey City Redevelopment Agency v. Costello, supra*, 252 N.J. Super. at 257. Otherwise, government officials would be able to violate private property rights at any time for any reason – or for no reason.

The articulation of a present public use to justify a condemnation is the essential first step in determining whether a condemnor is exceeding its statutory authorization or operating in bad faith. A prospective condemnor must demonstrate why it is taking a property at that time. Here, prior to filing and during the “bona fide negotiations” period required by *N.J.S.A. 20:3-6*, the Township alleged the taking was in the public interest for open space without acknowledging the land swap. Only after challenged by the defendants did the Township acknowledge the swap with the Developer, but still the public record is devoid of any meaningful indication of how the subject properties will be utilized by the Township and there are no limitations on the Developer’s use of the property it is receiving.

Clearly the Township failed to articulate such a proper public purpose for the taking, and trial court improperly found the Township sufficiently stated it had a proper public purpose to preserve the open space.

### **POINT III**

**THE TRIAL COURT FAILED TO CONDUCT AN EVIDENTIARY HEARING DURING AND THEREFORE DEPRIVED DEFENDANTS OF THE OPPRTUNITY TO OBJECT TO THE CONDEMNATON.**

**(Raised below: 1T24)**

The importance of affording property owners a full and fair opportunity to protect their property from government overreach is best summarized as follows:

It must be remembered that the power to take property through eminent domain is one of the most intrusive aspects of sovereignty. Historically, land has been both the basis and symbol of wealth and still occupies a special place in our law. Real estate is also frequently irreplaceable because of its uniqueness. Thus, the state should not be heard to complain when the property owner seeks the fullest vindication of the rights of ownership.

[*State by Com'r of Transp. v. D'Onofrio*, 235 N.J. Super 348, 353 (Law Div. 1989)]

As a result of an objection to the right to take, the Court must first determine whether the Township properly exercised its powers of eminent domain. *N.J.S.A.* 20:3-8; *State v. N.J. Zinc Co.*, 40 N.J. 560, 572 (1963); *State v. Orenstein*, 124 N.J. Super. 295, 298 (App. Div. 1973). That process includes a full evidentiary hearing when any party objects to the right to condemn. *R.* 4:67-5. *Bergen Cnty.*, *supra*, 39 N.J. at 380-81. Indeed, the adjudication of the right to condemn is a final adjudication. *N.J.S.A.* 20:3-2(j); *R.* 2:2-3; *State by Comm'r of Transp. v. Hess Realty Corp.*, 226 N.J. Super. 256, 261 (App. Div. 1988), *certif. denied*, 113 N.J. 383, *aff'd*, 115 N.J. 229 (1989), *cert. denied*, 493 U.S. 964 (1989); *N.J. Zinc*, *supra*, 40 N.J. at 572; *Tennessee Gas Transmission Co. v. Hirschfield*, 38 N.J. Super. 132 (App. Div. 1955); *Twp. of W. Windsor v. Nierenberg*, 285 N.J. Super. 436, 440 n.1 (App. Div. 1955), *rev'd on other grounds*, 150 N.J. 111 (1996). As such, the summary nature of condemnation proceedings “should not be construed as in any way precluding the

condemnee from an appropriate opportunity to object to the proposed condemnation.” Pressler & Verniero, *Current N.J. Court Rules*, cmt. on R. 4:73-1 (citing *Bergen Cnty. v. S. Goldberg & Co.*, 39 N.J. 377 (1963)).

Where there is an objection to the right to take and the property owner challenges the public use assertion by the condemnor, there must be an evidentiary process. R. 4:67-5; R. 4:73-1; *Bergen Cnty.*, *supra*, 39 N.J. at 380-81; *see also Bridgewater v. Yarnell*, 64 N.J. 211, 215 (1974) (involving appeal of a denial of stay sought by the defendant property owner challenging the right of a municipality to take private property pursuant to *N.J.S.A. 20:3-11*, in which the Supreme Court reversed and remanded the matter to the trial court “for a further hearing at which plaintiff must present its proofs orally in support . . . subject to cross-examination and with the right in defendants to present further proofs if desired”).

The trial court denied Defendants’ request for a hearing finding that defendants did not make a sufficient case of arbitrary action to create a genuine issue of fact. (1T24:20-24) Defendants cited to the public record that, before they raised an objection to the taking, had a single sentence to suggest the taking was for “open space.” (Da20) After Defendants raised their objection, the Township went back and adopted a new ordinance, but still there is no evidence to support the alleged use of Defendants’ property for open space. Indeed, the contract upon which the

Township relies does not bind the developer as to the use of Defendants' properties and there is nothing in the public record to suggest how the lands received by the Township under the proposed land swap will be utilized. Clearly an evidentiary hearing is required so the Township may present proofs in support of its claims, subject to cross examination. *See Bridgewater v. Yarnell, supra*, 64 N.J. at, 215.

**CONCLUSION**

In light of the foregoing, Defendants respectfully request that this Court reverse the trial court's order permitting the Township to proceed with the taking of Defendants' private property.

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Jackson, LLC

By: /s/ Richard P. DeAngelis, Jr.  
Richard P. DeAngelis, Jr.

Dated: February 12, 2024

TOWNSHIP OF JACKSON

Plaintiff-Respondent,

vs.

BELLEVUE JACKSON, LLC and  
STATE OF NEW JERSEY

Defendant-Appellant.

SUPERIOR COURT OF  
NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO.: A-000594-23

*CIVIL ACTION*

ON APPEAL FROM:  
LAW DIVISION, OCEAN COUNTY  
DOCKET NO.: OCN-L-1385-23

SAT BELOW:  
Hon. Francis J. Hodgson, Jr. J.S.C.

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**AMENDED BRIEF OF PLAINTIFF-RESPONDENT,  
TOWNSHIP OF JACKSON**

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**PRELIMINARY STATEMENT**

Appellant is utilizing this litigation in order to try to obtain leverage for the eventual payment for the acquisition of the property. In order to do so, it is making many false and misleading statements.

The Ordinance which initiated the exchange of property with Bellevue Estates, LLC, and therefore the acquisition of the property owned by the Defendant is set forth at Ordinance 5-23. Notwithstanding Defendant's assertion that there is not any "direct evidence of a valid public use of Defendants' properties", that simply is not correct. In Ordinance 5-23, (Pa8) filed herewith, the Respondent Township Council is clear that the purpose of the acquisition is to "promote and protect the health, safety, and welfare of the residents of the Township" .... In addition, the Ordinance adopted spawned the eventual adoption of Ordinance 15-23 (Pa31). Notwithstanding the assertions of the Appellant in its brief, clearly the public purpose for the acquisition of Appellant's property was amply provided. This is the truth, notwithstanding the fact that Appellant has asserted in its brief that which was approved by the adoption of Ordinance 5-23 "is not conditioned upon inclusion of Defendants' lots". That is simply not true.

Ordinance 5-23 (Pa8) provides in part that the Township will convey all the properties listed on Exhibit "A" to the contract. Exhibit "A" includes the Appellant's property, Lot 84 in Block 21601. That is clear and without dispute and cannot

reasonably be denied. The contract which was made part of and therefore authorized by Ordinance 5-23 provides in part:

The property to be exchanged from Township to Bellevue is referred to on the attached Scheduled A consisting of multiple tax blocks and lots in Jackson, New Jersey.

In addition, the contract provides in part, at Section 2(b)(1):

“Bellevue is acquiring title to two of the Township parcels that it does not own”. One can easily see by reviewing Schedule A attached to the contract that there is an asterisk next to lots “not owned by Township”. However, those lots are to be conveyed by the Township to the developer. Two of the lots are the lots which are the subject of this litigation. Appellant has always been aware of that.

In addition, Appellant clearly had the opportunity to intercede in the litigation, which is referenced in Appellant’s trial brief, and was venued before Judge Must. That litigation was finalized and Judge Must found that the “mother ordinances” were “not arbitrary, capricious or unreasonable”. He found that there was a public purpose for the adoption of those Ordinances.

As can be seen by reviewing the Appellant’s trial brief to Judge Hodgson (Pa42 See Pages 2, 4 and 12), Appellant was aware that the litigation before Judge Must was still then pending and was aware that the issue of the “proposed exchanges” was “even legal”. Appellant, however, chose not to intercede or participate in that litigation. As a result, we respectfully suggest that it is estopped



from attempting to allege that collateral estoppel does not apply, for the reasoning detailed herein.

Appellant also alleges in its brief that the Township has “exceeded its statutory authorization” and is “operating in bad faith”. Attached hereto are numerous letters (Pa35) that were forwarded to initially the property owner, and thereafter to the Appellant’s attorney, attempting to acquire the property without need of instituting eminent domain proceedings. There is no allegation that the Plaintiff failed to follow the statutory requirements which permit the acquisition of the property through eminent domain proceedings. Therefore, the allegation that the Township was “exceeding its statutory authorization” or “operating in bad faith” is simply not true.

There is no evidence to sustain that allegation.

We will prove herein that the Township has properly adopted the Ordinance which has permitted the acquisition of the property. The Ordinance adopted clearly serves a public purpose which has been properly defined in the contract and in the Ordinance. As can be seen by reviewing the attachments (Pa7), Appellant’s property is landlocked. One cannot “get there from here”. It was purchased by the Appellant and, in accordance with the appraisal that the Township has acquired, the Appellant stands to earn many times the value of its investment. Appellant hardly can complain that it has been damaged or that it has suffered “irreparable damage”.

**PROCEDURAL HISTORY AND STATEMENT OF FACTS**

In order to limit unnecessary expenditure of time and effort, we incorporate the Procedural History and Statement of Facts set forth in Defendant's Brief, with the understanding that the arguments set forth therein are of course not accepted by the Respondent and should be disregarded by this Honorable Court.

**LEGAL ARGUMENT**

**POINT ONE**

**THE TOWNSHIP HAS CLEARLY ARTICULATED A VALID PUBLIC PURPOSE FOR THE ACQUISITION OF THE PROPERTY**

**A. Legal Standard of Review**

Under New Jersey law, the exercise of eminent domain is permitted only for a “public use.” The Township of Jackson's actions fall squarely within the ambit of this requirement, aiming to serve the community's need for open space, environmental preservation, and recreational areas (N.J.S.A. 20:3-1 et seq.). The broad discretion afforded to municipalities in determining what constitutes a public purpose is well-established. See City of Atlantic City v. Cynwyd Investments, 148 N.J. 55, 68 (1997).

The cornerstone of eminent domain law in New Jersey is the requirement that property may only be taken for a “public use.” This standard is not a narrow or restrictive one; rather, it encompasses a broad range of purposes deemed to benefit the public. The New Jersey Supreme Court has consistently upheld the principle that determinations of what constitutes a public use should be given considerable deference when made by local municipalities, recognizing their unique position to understand the needs and aspirations of their communities. City of Atlantic City, *supra*, at Page 68. The legal framework allows for a wide interpretation of public

use, including but not limited to, public health, safety, and welfare improvements, environmental preservation, and the creation of recreational spaces.

Furthermore, the New Jersey statutes and case law explicitly support the use of eminent domain for acquiring lands to preserve open space, which directly contributes to the public's environmental and recreational well-being. See N.J.S.A. 20:3-1 et seq. The Appellate Division has further elaborated on this point by recognizing that the preservation of open space serves multiple public purposes, including providing aesthetic beauty, recreational opportunities, and environmental benefits, all of which enhance the quality of life for New Jersey's residents Mt. Laurel Twp. v. MiPro Homes LLC, 379 N.J. Super. 358 (App. Div. 2005).

In the case at hand, Jackson Township's decision to acquire the property owned by Appellant was driven by a recognized and pressing need to expand the Township's open space to prevent unchecked development, protect natural resources, and provide areas for public recreation. The Township's actions are thus squarely within the ambit of public use as defined by New Jersey law and supported by a substantial body of precedent that affirms the broad discretion granted to municipalities in determining the public use of properties within their jurisdiction.

By engaging in the process to acquire these lands for open space preservation, Jackson Township is acting in the best interest of its residents, fulfilling statutory mandates, and adhering to the legal standards set forth by both the state legislature

and judiciary. The Appellant's challenge to the public purpose of the Township's actions disregards the broad and inclusive definition of public use under New Jersey law and undermines the critical role of open space in promoting public health, environmental sustainability, and community well-being.

**B. Evidence of Public Purpose**

Contrary to the Appellant's assertion, the Township's decision to acquire the property in question was based on a demonstrable and pressing need for open space to prevent overdevelopment, preserve the environment, and provide recreational areas for the public. It is abundantly clear that the record provides the Township believed it more appropriate and better planning for proposed religious dormitories to be constructed by a third party be relocated to property that the Township currently owns, which borders the common boundary line with Lakewood. The students who would be residing in the dormitory would undoubtedly be traveling to religious schools in Lakewood. By providing for the land exchange and thereby conveying that property to the developer, traffic issues, traffic expenses, as well as other related issues could be easily avoided.

At the same time, the Township agreed to accept and acquire property owned by the developer, which is located more in the center of town, where most of the population is living. That property will be preserved for recreational and open space

purposes. Clearly, the public purpose is served by this Agreement and is easily understood by the public and This Honorable Court.

Jackson Township's Master Plan, along with other planning documents, consistently identifies the preservation of open space as a key objective. The acquisition of the property owned by the Appellant aligns with these strategic priorities, providing clear evidence of the Township's long-term commitment to open space preservation. The Master Plan highlights the need to protect natural resources, provide outdoor recreational activities, and manage growth in a sustainable manner, all of which are served by the proposed property acquisition.

The property in question has been identified as a critical area for conservation due to its ecological significance and potential for recreational use. By acquiring this land, Jackson Township aims to prevent overdevelopment, which poses risks to local ecosystems, contributes to urban sprawl, and diminishes the quality of life for residents. The preservation of the parcel as open space is a proactive measure to ensure sustainable development patterns and protect the community's environmental health and recreational needs for generations to come.

The evidence supporting the public purpose behind the acquisition of the property is multi-faceted, drawing from environmental science, community engagement, strategic planning, and sustainability principles. This comprehensive body of evidence not only justifies the Township's actions but also exemplifies the

meticulous care and due diligence exercised to ensure that the public interest is served in the most effective and meaningful way.

The Township of Jackson has determined that the condemnation in question is necessary to preserve open space within the Township. Given the broad definition of “public use,” it is not essential that the entire community or even any considerable portion of the community directly enjoy or participate in the condemned property for the taking to constitute a “public use.” State v. Totowa Lumber, 96 N.J. Super 115 at 121 (“The number of people who will participate in or benefit by the use for which the property is condemned is not determinant of whether the use is or is not a public one.”) (quoting County of Essex v. Hindenlang, 35 N.J. Super at 479, 491). Further, the fact that a private party may benefit from the taking does not render the taking private and not for “public use.” See County of Ocean v. Stockhold, 129 N.J. Super. 286, 289 (App.Div.1974); State v. Buck, 94 N.J. Super. 84, 88 (App.Div.1967) (holding that although private interests may be served by condemnation, overarching question is whether purpose of taking is in public interest).

Courts will generally not inquire into a public body’s motive concerning the necessity of the taking or the amount of property to be apportioned for public use. Riggs v. Long Beach Tp., 109 N.J. 601, 613 (1988); Alsip Park Dist. v. D & M Partnership, 252 Ill. App.3d 277, 192 Ill. Dec. 80, 85, 625 N.E.2d 40, 45 (1993).

The New Jersey Supreme Court has made it abundantly clear that a municipality may use its power of eminent domain to preserve open space regardless of development potential. In Mt. Laurel v. MiPro Homes, LLC, a municipality brought a condemnation action as part of its open space acquisition program against landowner that was planning to develop a subdivision on the subject property. Mount Laurel Tp. v. MiPro Homes, L.L.C., 188 N.J. 531, 910 A.2d 617 (2006). The Supreme Court held that the municipality had the statutory power to condemn property for open space, which property was set to be developed as a residential subdivision, as a valid exercise of its eminent domain power. The Court found that the municipality's motive in seeking to limit development, and thereby the overcrowding of schools, traffic congestion and accompanying pollution, was consistent with the motive driving public interest in the open space acquisition.

The purpose of condemnation here is for the protection of open space within the Township of Jackson. Ordinance 26-23 (Pa45) makes this abundantly clear. The Ordinance authorizes "the taking of a fee acquisition of property which is currently privately owned [. . .] for the purpose of open space." The Ordinance specifically finds that:

The Township Council finds that the acquisition will promote and protect public health, safety, and welfare of residents of the Township, and further find that any purchase or taking by eminent domain of any and all property interests necessary for the same are all in



furtherance of a public use and purpose. This Ordinance will permit the Township to exchange the subject properties, along with surrounding properties, to protect and maintain open space within the Township. The Township has entered into a contract for the exchange of land. Such contract includes the exchange of the subject parcels. The purpose of the land exchange is to provide open space for the residents of Jackson township. The land exchange, with the inclusion of these two subject properties, will permit the township to preserve open space in a desirable location of the Township. The location of the open space which will be made possible by adoption of this Ordinance and condemnation of the subject parcels, will create open space in a centrally located portion of the Township, creating open space to be utilized by residents. The Township of Jackson has determined that this condemnation best serves the Township of Jackson and promotes public use of open space within the municipality.

[Ord. 26-23.]

Just as Mount Laurel did in the MiPro Homes, LLC, case, Jackson Township has determined that preserving open space within the municipality is in the public interest of Jackson Township. In MiPro Homes, LLC, the Supreme Court cited N.J. Dept. of Env'tl. Prot., Smart Growth, at <http://www.state.nj.us/dep/antisprawl/> (last modified Nov. 14, 2005). There, the NJDEP stated that New Jersey is the “nation’s most densely populated state, and the most development.,” and that “[i]ll-conceived land use and poorly designed development threatens our vital drinking-water supplies, devours our open space, spoils our landscape and creates traffic congestion that pollutes our air.” Here, the Township of Jackson has determined that through

its power of eminent domain, and its power to enter into a land-exchange contract, the Township is able to preserve open space in a desirable area within the Township to allow residents to utilize the open space and promote a planning scheme which promotes the use of the newly obtained open space.

Lastly, no argument has been made by Appellant concerning the fair market value of the property. Certainly, the Township is willing, ready and able to compensate the Appellant for the full fair market value of the subject properties.

## **POINT II**

### **THE LAND EXCHANGE ARRANGEMENT IS LEGALLY SOUND AND FURTHERS THE PUBLIC INTEREST**

#### **A. Legitimacy of Land Exchanges in Eminent Domain Proceedings**

Land exchanges, when executed to achieve a valid public purpose, are fully supported by New Jersey law. The arrangement between Jackson Township and Bellevue Estates, LLC does not detract from the public use of the acquired property but rather enhances it by ensuring that the most strategically valuable lands are preserved for public use. See Twp. of West Orange v. 769 Assocs., LLC, 172 N.J. 564, 571 (2002).

Land exchange arrangements, within the context of eminent domain proceedings, are not only permissible under New Jersey law but are also a testament to a municipality's commitment to strategically managing public resources for the maximum benefit of its community. The legal foundation for such arrangements is

rooted in the principle that local governments possess the discretion to make decisions that best serve the public interest, including the optimization of land use to meet public needs. See Borough of Essex Fells v. Kessler Institute for Rehabilitation Inc., 289 N.J. Super. 329, 331 (Law Div. 1995).

The practice of exchanging parcels of land with private entities is a nuanced mechanism that allows municipalities to acquire properties that are more suited to public purposes, such as open space preservation, while ensuring that the overall public utility of the land is maximized. This is particularly relevant in cases where the existing public land may not serve the community's needs as effectively as the land to be acquired through the exchange. The legal validity of such exchanges is predicated on the resulting use being unequivocally for the public's benefit, a standard that Jackson Township meets in this case.

Jackson Township's contract with Bellevue Estates, LLC exemplifies a strategic and thoughtful approach to land management that aligns with established legal principles. The exchange enables the Township to acquire land that offers greater environmental, recreational, and public utility compared to the properties currently owned. This is not a mere reallocation of resources but a significant enhancement of the public realm, directly contributing to the Township's open space goals and providing long-term environmental and recreational benefits to its residents.

Critically, land exchange arrangements are scrutinized to ensure that the public interest is the primary beneficiary of the exchange. In the case at hand, the Township has demonstrated through careful planning and public consultation that the land acquired through the exchange will serve vital public purposes. These include the preservation of natural habitats, the expansion of public recreational spaces, and the safeguarding of the community's environmental quality. The transparency of the process and the clear delineation of the public benefits arising from the exchange underscore its legitimacy and alignment with the legal and ethical standards governing the use of eminent domain for public purposes.

Moreover, the land exchange with Bellevue Estates, LLC is structured to ensure that the public gains tangible and significant benefits from the exchange. The properties to be acquired by the Township are strategically chosen to enhance the public's access to natural and recreational resources, thereby fulfilling the overarching goal of eminent domain: to promote the public good. This strategic use of eminent domain authority to facilitate a land exchange demonstrates Jackson Township's commitment to utilizing all available mechanisms to enhance the quality of life for its residents, firmly grounding the arrangement within the legal framework that supports such innovative approaches to public land management.

## **B. Public Benefits of the Land Exchange**

The agreement with Bellevue Estates, LLC facilitates the Township's acquisition of lands better suited for public recreation and environmental preservation. In addition, the Township has now provided for the construction of religious dormitories, a permitted use, in an area which is closer to the schools in which the students will be attending, bordering the common boundary line with Lakewood Township. That will clearly and positively affect traffic issues, transportation costs to the Township Board of Education and other concerns of the Township and its residents. This strategic exchange is a prudent use of the Township's authority, ensuring that public goals are met efficiently and effectively.

The land exchange arrangement between Jackson Township and Bellevue Estates, LLC is a paradigm of forward-thinking municipal governance that prioritizes the long-term welfare of its citizens. This strategic exchange is not merely a transaction, but a comprehensive plan designed to significantly enhance the Township's public and environmental landscape. The benefits of such an arrangement are manifold, directly serving the public interest in several key areas:

### **1. Enhanced Recreational Opportunities**

By acquiring land more suited for parks, trails, and recreational facilities, the Township directly responds to the community's need for accessible and diverse recreational options. This exchange ensures that residents have ample space for

outdoor activities, contributing to the overall health and wellness of the community. The creation or expansion of public parks and recreational areas fosters a sense of community, encourages physical activity, and provides a sanctuary for residents to enjoy nature.

## **2. Environmental Preservation**

The properties acquired through the exchange are selected based on their ecological value, offering opportunities for habitat conservation, biodiversity preservation, and the protection of water resources. By prioritizing lands with significant environmental attributes, Jackson Township commits to the stewardship of its natural resources, ensuring these lands are preserved for future generations. This strategic conservation effort aligns with broader environmental goals, including climate resilience and the mitigation of urban sprawl.

## **3. Strategic Urban Planning**

The land exchange facilitates smarter urban planning by allowing the Township to direct development in a manner that balances growth with conservation. Through this arrangement, Jackson Township can ensure that development occurs in areas best suited for it while preserving critical open spaces. This approach to urban planning enhances the livability of the Township, reduces environmental impact, and supports sustainable growth patterns.

#### **4. Community Engagement and Public Support**

The process leading to the land exchange has involved significant community engagement, ensuring that the public's voice is heard and that the resulting benefits align with the community's desires and needs. This transparent process builds trust in municipal decisions, fosters community support for public projects, and ensures that the outcomes of the swap reflect the community's values and priorities.

#### **5. Economic Benefits**

Beyond the immediate environmental and recreational benefits, the land exchange has the potential to positively impact the local economy. Increased access to high-quality open spaces can enhance property values, attract tourism, and stimulate local businesses, especially those related to outdoor recreation and eco-tourism. By investing in the community's natural and recreational assets, Jackson Township sets the stage for sustainable economic growth that benefits all residents.

In conclusion, the land exchange arrangement between Jackson Township and Bellevue Estates, LLC is a strategic action that leverages the Township's eminent domain powers to secure tangible, long-term benefits for the public. This initiative exemplifies responsible and innovative municipal governance, aiming to enhance the quality of life for residents, preserve the community's environmental heritage, and guide sustainable development. The clear public benefits of this exchange

underscore its legality and the appropriateness of the Township's approach, firmly justifying the support of this Honorable Court.

### **POINT III**

#### **THE TOWNSHIP HAS COMPLIED WITH ALL PROCEDURAL REQUIREMENTS FOR EMINENT DOMAIN PROCEEDINGS**

##### **A. Adherence to Eminent Domain Procedures**

Jackson Township has meticulously followed the procedural mandates set forth in the New Jersey Eminent Domain Act including proper notice, public hearings, and opportunities for objection. N.J.S.A. 20:3-1 et seq., The assertion of procedural deficiencies by the Appellant is unfounded and unsupported by the record.

Jackson Township's actions in pursuing the eminent domain process to acquire the property owned by the Appellant has been in strict compliance with the procedural and substantive requirements outlined in New Jersey's Eminent Domain Act. N.J.S.A. 20:3-1 et seq. This meticulous adherence underscores the Township's commitment to transparency, fairness, and the rule of law.

Central to the eminent domain process is the requirement to provide proper notice to property owners and the general public. Jackson Township has gone above and beyond in this regard, ensuring that the affected party was given ample notice of the proposed taking and the reasons behind it. The Township conducted public hearings that allowed for community input and provided a forum for the property



owner to voice its concerns and objections. These hearings were not merely procedural formalities but were conducted in a spirit of genuine engagement and transparency.

In compliance with N.J.S.A. 20:3-6, the Township undertook a fair and impartial appraisal of the property in question, aiming to determine its market value accurately. Based on the appraisal, Jackson Township made bona fide offers to the property owner, reflecting the fair market value of its property. This process demonstrates the Township's commitment to ensuring that the property owner is justly compensated for its loss, in accordance with the constitutional requirement of just compensation.

Recognizing the significant impact of eminent domain actions on property owners, Jackson Township has provided multiple opportunities for the affected party to challenge both the taking and the compensation offered. This process ensures that the Township's exercise of eminent domain undergoes rigorous scrutiny, safeguarding the rights of property owners.

Throughout the eminent domain process, Jackson Township has meticulously documented all steps taken, from initial notices and appraisal to public hearings and judicial proceedings. This comprehensive record-keeping serves not only as a legal requirement but also as a demonstration of the Township's commitment to accountability and transparency.

At every stage of the eminent domain process, Jackson Township has acted in full compliance with state laws and judicial precedents governing such takings. The Township's actions have been guided by a clear understanding of its legal obligations and a commitment to upholding the rights of property owners while pursuing the public good.

Jackson Township's procedural conduct in the eminent domain process exemplifies strict adherence to the legal requirements established by New Jersey law. This adherence ensures that the process is conducted fairly, transparently, and with due respect for the rights of this affected party. The Township's actions, therefore, merit affirmation by this Honorable Court, recognizing the legality and propriety of the eminent domain proceedings undertaken.

**B. Opportunity for Fair Hearing and Objection**

The Township has clearly followed the strict requirements set forth at N.J.S.A. 20:3-1 et seq. In fact, The Honorable Francis Hodgson, Jr., A.J.S.C., specifically held that the Township had complied with all of the requirements in order to proceed with a condemnation acquisition. (Pa1) Throughout the process, the defendant was afforded ample opportunity to voice objections and was provided with an opportunity for a fair and transparent hearing. The trial court's decision to proceed with the condemnation was based on a comprehensive evaluation of the facts, the law, and the public interest, fully satisfying due process requirements.

Jackson Township's commitment to due process and fairness is further exemplified by the extensive opportunities provided to the property owner to object to both the condemnation itself and the compensation offered. This approach not only meets the legal requirements but also reflects the Township's dedication to a transparent and equitable eminent domain process.

From the outset, Jackson Township has ensured that the property owner has the right to object to the condemnation proceedings and to seek judicial review of both the decision to condemn and the amount of compensation offered. This right is a fundamental aspect of the eminent domain process, safeguarding property owners' interests and allowing for the resolution of disputes through the judicial system.

Throughout the eminent domain process, Jackson Township has maintained a transparent decision-making process. All steps, from initial proposals to final decisions, have been documented and made available to the public, ensuring that the process is open to scrutiny and that the rationale behind decisions is clear and understandable.

The eminent domain proceedings conducted by Jackson Township have been subject to legal and judicial safeguards designed to protect the rights of property owners. These include the right to legal representation, the opportunity to present evidence and arguments in court, and the possibility of appealing decisions deemed unfavorable. These safeguards are essential components of a fair and just eminent

domain process, ensuring that property owners have access to legal recourse and protection.

The opportunities for fair hearing and objection provided by Jackson Township throughout the eminent domain process exemplify the Township's adherence to the principles of due process and fairness. By ensuring that the property owner has ample opportunity to voice its concerns and by responding to these concerns in a constructive and fair manner, the Township upholds the highest standards of justice and equity. These practices not only meet but exceed the procedural requirements for eminent domain proceedings, warranting this Appellate Court's affirmation of the Township's actions.

#### **POINT IV**

#### **APPELLANT'S APPEAL MUST BE DISMISSED BASED UPON THE DOCTRINE OF RES JUDICATA AND COLLATERAL ESTOPPEL.**

Effectively, Judge Must's Order is the ruling governing this litigation. (Da70). That is the result of the doctrine of collateral estoppel being imposed on the Defendants in this litigation. In the current litigation, Appellant has asserted that Plaintiff has not shown a public purpose for the acquisition of the properties owned by the Appellant. That simply doesn't make sense. While the rules of res judicata are applicable only when a final judgment is rendered, for purposes of issue preclusion, "final judgment" includes any prior adjudication of an issue in another

action that is determined to be sufficiently firm to be accorded preclusive effect.

**Restatement (Second) of Judgments §13 (1982)**. The comments to section 13 emphasize that issue preclusion is applicable when it is determined “that the decision to be carried over was adequately deliberated and firm, even if not final in the sense of forming the basis for a judgment already entered.” Hills Dev. Co v. Twp. of Bernards, 103 N.J. 1, 59 (1986). Unlike res judicata, the effectiveness of collateral estoppel “does not require the entry of a judgment, final in the sense of being appealable.” In re Brown, 951 F.2d 564, 569 (3d Cir. 1991). (emphasis in bold).

Collateral estoppel is closely related to the doctrine of res judicata which prevents a party from asserting a claim or cause of action after it is the subject of a final judgment. While res judicata deals with questions of law, collateral estoppel can apply to issues of law or fact.

In the companion case, Judge Must has rendered a valid final judgment with regard to the particular legal issue of whether the Ordinance which authorize the land exchange contains a sufficient public purpose so that it is not arbitrary, capricious or unreasonable. One of the purposes of the collateral estoppel doctrine is to prevent litigants such as the Appellant in these matters from using the trial court to attempt to reverse an adverse interest. See IES vs. Sunny Kim, Superior Court of New Jersey, Appellate Division (Docket No.: A-1698-2 decided January 23, 2023); Oliveri vs. Y.M.F. Carpet Inc., 186 N.J. 511 (2006).

Judge Must has ruled that the Ordinances authorizing the exchange of properties with Bellevue Estates, LLC were valid, not arbitrary or capricious, therefore serving a public purpose.

The Ordinance which is the subject of this litigation simply carries through with the intent and purpose of the original Ordinances, which were found to be valid and serve a public purpose. Therefore, the doctrine of collateral estoppel clearly is controlling in this matter.

The doctrine of collateral estoppel, or issue preclusion, prevents a party from relitigating issues that were adjudicated in a prior lawsuit. In Re Docteroff, 133 F.3d 210, 214 (3d Cir. 1997). The Appellant had the opportunity to contest Judge Must's ruling by joining in that litigation. It chose not to do so. Collateral estoppel exists to promote judicial consistency, encourage reliance on court decisions, and protect parties from being forced to relitigate the same issues in multiple lawsuits. Allen v. McCurry, 449 U.S. 90, 94 (1980).

Under New Jersey law, a party seeking to invoke the doctrine of collateral estoppel must demonstrate that: (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the

earlier proceeding. Wildoner v. Borough of Ramsey, 316 N.J. Super. 487, 506 (App. Div. 1998) (citing In Re Dawson, 136 N.J. 1, 20 (1994)).

The doctrine of precluding a claim by a non-party is applicable in the present case as outlined in Taylor v. Sturgell, 553 U.S. 880 (2008). The general rule against nonparty claim preclusion is subject to exceptions where: (1) person agrees to be bound by determination of issues in action between others; (2) there is pre-existing substantive legal relationship between person to be bound and party to judgment, e.g. preceding/succeeding property owners, bailee/bailor, assignee/assignor; (3) nonparty was adequately represented by someone with same interests who was party, as in properly conducted class action or suit brought by trustee, guardian or other fiduciary; (4) nonparty assumed control over litigation; (5) nonparty serves as proxy for party; or (6) special statutory scheme expressly forecloses successive litigation by nonlitigants and is otherwise consistent with due process. U.S.C.A. Const. Amend. 5. Taylor v. Sturgell, 553 U.S. 880, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008).

In this case, the Appellant's strategic decision not to intervene in the initial litigation before Judge Must is pivotal. The Appellant had the opportunity to be a part of the earlier litigation and chose not to participate. This decision effectively aligns with the principle that a non-party who had the chance to join an earlier suit but opted not to do so may be bound by the decision in that suit. The rationale behind

this exception is grounded in the notion that a party should not be allowed to bypass the consequences of a legal judgment simply by choosing not to participate, especially when it had a fair opportunity to do so.

Therefore, precluding the issue of the validity of the ordinances in the current litigation does not infringe upon traditional notions of due process. The Appellant, by its own strategic choice, waived the right to challenge the Ordinances' validity in that separate litigation. This waiver is consistent with the principle of judicial efficiency and the prevention of duplicative litigation. It is imperative that this Court recognizes the significance of this strategic decision and the appropriateness of applying preclusion in this context.

The ruling by Judge Must in the companion case, affirming the validity of Ordinances 5-23 and 7-23, is pivotal and binding in the context of this litigation. This scenario exemplifies a classic case for the application of the doctrine of collateral estoppel or issue preclusion. Collateral estoppel prevents a party from relitigating issues that have been conclusively determined in a previous lawsuit, as established in In Re Docteroff, 133 F.3d 210, 214 (3d Cir. 1997) and further supported by Allen v. McCurry, 449 U.S. 90, 94 (1980). See also Wildoner v. Borough of Ramsey, 316 N.J. Super. 487, 506 (App. Div. 1998), for the criteria to determine if collateral estoppel should be invoked.



In the prior case, Judge Must's decision addressed the legality and public purpose of the Ordinance, which is the very issues contested in the present litigation. As we have demonstrated, Appellant is simply wrong when it alleges that the contract language which was authorized by the adoption of Ordinance 5-23 does not include the Appellant's lot and does not fully explain the public purpose for the acquisition of the properties. The facts, therefore, meet all the prerequisites for the application of collateral estoppel. By this doctrine, the Appellant's challenge to the Ordinance's validity is precluded. The final judgment in the companion case is sufficiently firm and deliberated, meeting the Restatement (Second) of Judgments §13 (1982) criteria, to be accorded preclusive effect in the present case.

In addition to the doctrine of collateral estoppel, this Court's adherence to the principle of stare decisis further mandates upholding Judge Must's decision. Stare decisis requires courts to follow established precedent in deciding cases with similar facts and legal issues. This doctrine not only ensures consistency and predictability in the law but also reinforces the integrity and authority of judicial decisions.

Judge Must's ruling in the companion case, which established the validity of Ordinances 5-23 and 7-23, is not merely a precedent but also a well-reasoned judicial determination that thoroughly examined the legality and public purpose of these ordinances. By upholding this decision, this Court will be honoring the principles of legal stability and continuity that are central to stare decisis. Moreover, deviating

from this precedent without a compelling reason or significant change in circumstances would undermine the consistency that is essential to the legal system and could lead to uncertainty and erratic jurisprudence.

In light of the procedural history and facts presented, Judge Must's decision aligns with the legal and factual context of this case. It represents a judicious application of law to the circumstances surrounding the enactment and implementation of the Ordinances. Upholding his decision would not only be in keeping with the principle of stare decisis but would also affirm the soundness of the legal process that led to the adoption of these Ordinances and the actions taken by the Township pursuant to them.

This Honorable Court, therefore, has a compelling obligation to uphold the validity of Judge Must's decision, as veering away from this precedent would disrupt the legal certainty and predictability that stare decisis aims to preserve. Such adherence is particularly pivotal in cases like the present one, where the legal framework and policy implications have far-reaching effects on public administration and governance.

It cannot be denied that the Appellant could have interceded in litigation before Judge Must which resulted in the affirmation and approval of the Ordinance that eventually spawned the acquisition of Appellant's property. It certainly knew about the litigation. It is quoted in its trial brief (Pa42). It chose not to do so.

Therefore, we respectfully submit that it is too late for it to claim that it is not collaterally estopped as a result of Judge Must's decision. One simply cannot stand on the sidelines and choose not to participate in the game when they have the opportunity to do so, and then complain that your team lost the game because they didn't play well enough.

As a result, we assert that the Appellant effectively but wrongly alleges a cause of action for which relief cannot be granted. The adoption of the Ordinances authorizing the land exchange has been affirmed and found to be valid. Therefore, Appellant does not have any realistic argument to persuade this Court to stop the Township from continuing to acquire the remaining lot which is the subject of the land exchange.

**POINT V**

**THE TOWNSHIP'S OBLIGATION TO FULFILL ITS CONTRACTUAL AGREEMENTS WITH BELLEVUE ESTATES, LLC NECESSITATES THE ENFORCEMENT OF THE ORDINANCES**

The Township's contractual obligations to Bellevue Estates, LLC, as delineated in the Ordinances, are legally binding and essential to uphold. The enforcement of these Ordinances is not only a matter of legal obligation but also one that significantly impacts on the public interest. The contractual exchange, which includes the acquisition of open space and the reduction of traffic congestion, clearly serves the public good. Such governmental actions aimed at enhancing public

welfare are consistent with legal precedents that support the enforcement of valid governmental decisions and contractual commitments.

As expressed herein and as expressed in the Ordinances and contract, the Township believe it is more prudent to enter into an exchange of properties so that the religious dormitories would be located in an area which would decrease traffic, school bus expenses, and congestion for the residents of the Township. That is because the students in the dormitories would undoubtedly be attending school in Lakewood Township, not Jackson Township. In addition, the Township found this to be an excellent opportunity to create approximately 40 acres of open space in the center of town.

Furthermore, the legal and financial implications for the Township in failing to meet these obligations are severe. Potential litigation and financial losses stemming from a breach of contract with the Appellant would not only harm the Township but also its residents and taxpayers. This underscores the necessity of enforcing the Ordinances, in alignment with the legal precedent and public interest.

#### **POINT VI**

#### **THE TOWNSHIP SHOULD NOT BE PROHIBITED FROM CONTINUING TO HONOR ITS CONTRACTUAL OBLIGATIONS WITH BELLEVUE ESTATES, LLC.**

Clearly, the Township has a contractual obligation to Bellevue Estates, LLC to exchange property. If the Township is constrained from conveying the property,

it will be subject to litigation initiated by Bellevue Estates, LLC. As a result, the Township, its residents and taxpayers, will be harmed.

The purpose of Ordinances 5-23 and 7-23 is to acquire open space for the benefit and pleasure of the Township, citizens and taxpayers. Effectively, the property exchange will result in Bellevue Estates, LLC constructing religious-related improvements on properties which the Township found would be in the best interest of its residents in terms of diminishing traffic issues, congestion, etc. The open space to be acquired by the Township is geographically centered in the Township of Jackson, so that it can be enjoyed more easily and more often by the Township residents. To delay the implementation of the Ordinances, including the Ordinances authorizing the acquisition of the property owned by Bellevue Estates, LLC, would cause unnecessary hardship and expenses for the Township and its residents.

### **CONCLUSION**

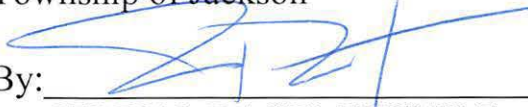
In conclusion, the application of collateral estoppel in this case precludes the relitigating of issues already determined by a competent court. Appellant has had every opportunity to intercede in the original matter before Judge Must at which time the Ordinances authorizing the exchange of properties were contested. It chose not to do so. Therefore, it should not be allowed to complain about that now.

The Township's contractual obligations and the public interest it serves necessitate the enforcement of the Ordinances. Respondent has amply demonstrated

that the acquisition of the Appellant's property has been properly undertaken in accordance with the strict provisions and requirements of the Eminent Domain Act. In addition, we respectfully submit that the public purpose in exchanging properties with Bellevue Estates, LLC is amply demonstrated, and cannot be reasonably objected to.

We therefore respectfully request that the Appellant's appeal be dismissed, with prejudice.

Respectfully Submitted,  
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Attorneys for Plaintiff/Respondent,  
Township of Jackson

By:   
\_\_\_\_\_  
JERRY J. DASTI, ESQUIRE

Dated:

MARCH 11, 2024

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TOWNSHIP OF JACKSON,  
Plaintiff-Respondent,  
vs.  
BELLEVUE JACKSON, LLC, and  
STATE OF NEW JERSEY,  
Defendants-Appellants.

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
Docket No. A-000594-23

ON APPEAL FROM:  
Law Division, Ocean County  
Docket No.: OCN-L-1385-23

SAT BELOW:  
Hon. Francis R. Hodgson, Jr., A.J.S.C.

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**REPLY BRIEF ON BEHALF OF DEFENDANT-APPELLANT  
BELLEVUE JACKSON, LLC**

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## PRELIMINARY STATEMENT

The Appellate Brief by Plaintiff, Township of Jackson (“Township” or “Plaintiff”), opens with an ad hominem attack alleging Defendant Bellevue Jackson, LLC and Getzel Bee, LLC, defendant in the companion case under Docket No. A-00590-23 (collectively, “Defendants”), have made “many false and misleading statements.” Despite Plaintiff’s inflammatory language, it fails to cite to any part of the record to support this baseless claim. It is undisputed that the alleged “open space” acquisition was initially premised on a single line in the authorizing ordinance that states the taking is “for the purpose of open space.” There were not at that time – or any time since – any public hearings, studies, reports or public comments cited by the Township to support the stated purpose.

Only *after* Defendants filed their opposition to the taking did Plaintiff adopt a subsequent ordinance that acknowledged the real need for Defendants’ properties to facilitate the land swap with a private developer Bellevue Estates LLC (“Developer”). While that Ordinance cites to the preservation of open space, it again fails to cite to the basis for the conclusion, purported need and planned use of land as “open space.” It is also undisputed that the contract with the Developer does not require the Township to take Plaintiffs’ properties. Nor does the contract limit the Developer’s use of the property to be acquired under the swap, that would include Defendants’ parcels. The Township states the Developer will build dormitories for

religious schools, which, it argues, is a permitted use. However, the Township fails to cite to any provision in the code to support its assertion. Yet Defendants included the applicable zoning ordinance in their appendix and such use is not permitted in the subject zoning district.

Not only is there no record cited by the Township in initiating this condemnation action, but Plaintiff's brief goes well beyond the record before the trial court in its appellate brief. Plaintiff makes several arguments as to an alleged "public benefit" including recreation, environmental preservation, economic benefits and easing traffic congestion. However, these supposed findings were not cited by the Township in any ordinance and not presented to the trial court below. The Township suggests also that there was significant community engagement in the process, but there is no such record of any meetings, hearings or public comment. Nor was there any evidence of this public input presented to the trial court. Indeed, the Township does not cite to page in the appendices filed with this Court. The trial court denied Defendants' request for an evidentiary hearing in their right to take challenge. As such, that court had before it only the barren record comprised of the ordinances. It is that record alone that is before this Court.

Plaintiff also impermissibly seeks to inject in this challenge to the authority to take the issue of just compensation. That the Township has acknowledged its obligation to pay constitutionally mandated just compensation has no bearing this

appeal. Likewise, that the Township has complied with the procedural requirements of the Eminent Domain Act is of no moment here. The only issue is whether the Township has demonstrated a valid public use for the taking of Defendants' private property. It has not, and as such the trial court's orders appointing condemnation commissioners and authorizing Plaintiff to take Defendants' properties must be reversed.

## LEGAL ARGUMENT

### POINT I

#### **PLAINTIFF MAY NOT RETROACTIVELY CREATE A RECORD IN ITS APPELLATE BRIEFING IN A TRANSPARENT ATTEMPT TO TRY AND SATISFY THE STANDARDS ESTABLISHED IN *Mt. Laurel Twp. v. Mipro Homes, L.L.C.*, 379 N.J. Super. 358 (App. Div. 2005).**

In Points I and II of its brief, Plaintiff argues that the Township has “a clearly articulated . . . valid public purpose” for the taking that it suggests “furthers the public interest.” (Pb11-23) As expected, Plaintiff relies heavily on this Court’s decision in *Mt. Laurel Twp. v. Mipro Homes, L.L.C.*, 379 N.J. Super. 358 (App. Div.), *aff’d*, 188 N.J. 531 (2005), for the proposition that it has the authority to condemn Defendants’ properties for open space. However, as explained in Defendants’ initial appellate brief, the record before the trial court and Appellate Division in that case included an extensive and detailed record that supported the stated concern by the municipality regarding residential development and the loss of open space, and how those concerns mirrored the State’s public policy concerns. *See*

*id.* at 375-76. There is no such record in this matter presently before the Court. Plaintiff does cite to anything in the record below to support its contention that the taking “was driven by a recognized and pressing need to expand the Township’s open space to prevent unchecked development, protect natural resources, and provide areas for public recreation.” (Pb12). The Township for the first time has raised such expansive justifications for its allegation that it needs Defendants’ properties to preserve open space in its appellate brief. The Township’s lofty and unsubstantiated language about environmental concerns, economic benefits, and more are not tied to anything particular about the Township at all. Nor is there any citation to the record to support these claims.

This Court in *Mipro* recognized that the municipality there “had a reasonable basis for concern” about adding residential development to the area after the Department of Environmental Protection (“DEP”) “recognized” that the acquisition of the site promoted slowing down development after the DEP approved a grant for the acquisition. 379 N.J. Super. at 376. Moreover, there was evidence of a longstanding concern about maintaining open space and the Appellate Division relied on very specific numbers regarding Mount Laurel’s rapid population growth and years of careful consideration by the municipality to slow that growth down. *Id.* at 362-63.

Plaintiff's brief here only cites to the State public policy concerns to which the Court in *Mipro* cited. But the Township is unable to cite to any document in the trial court record – or in the municipal record – regarding its newfound rationale to justify the taking of private property. Yet, Plaintiff now argues this Court should affirm based on certain “public benefits” that include:

1. “Enhanced Recreational Opportunities” for parks, trails and recreational facilities to meet community need. (Pb21)
2. “Environmental Preservation” to preserve lands with ecological value, habitat preservation, and protect water resources. (Pb22)
3. “Strategic Urban Planning” to facilitate smart growth. (Pb22)
4. “Community Engagement and Public Support” suggesting significant community engagement in a transparent process. (Pb23)
5. “Economic Benefits” suggesting open space will attract tourism. (Pb23)

The Township fails to cite to the record to show that the Township considered any of these factors in seeking to condemn Defendants' properties, nor were these considerations before the court below.

Plaintiff is attempting to retroactively justify a “public use” based upon the unfounded assertions of counsel. The only “evidence” in the record concerning the basis for the taking of Defendants' private property by eminent domain is Ordinance 15-23 (Da20) that authorized the taking, which does not address any of the benefits now cited by the Township. Ordinance 26-23 (Da25) was adopted only after

Defendants filed with the trial court opposition to the taking and also fails to include any reference to the purported bases for the taking now advanced by the Township.

The Township relies also on Ordinance Nos. 5-23 and 7-23, authorizing the land swap, but neither includes citations to any record or includes specific findings referring to open space and the alleged benefits to the Township. (Da25-26; 46-47)

Plaintiff also argues that the proposed use of the swapped land to the Developer for religious dormitories is a permitted use in the properties' zone. (Pb22) Plaintiff does not cite to the record in support of this assertion. (*See ibid.*) This is because it is belied by the Township code. Defendants included the Township's Zoning Ordinance listing permitted principal uses for this zoning district in their Appendix. (Da50-52) It is clear that neither school nor religious-related uses are permitted in the Industrial Zone. (*See ibid.*) Moreover, as discussed in Point III *infra*, there is no restriction on the Developer's use of the land it is to gain under the swap. Assuming *arguendo* it is to construct religious dormitories, that cannot be "a prudent use of the Township's authority," to "ensur[e] that public goals are met efficiently and effectively," as Plaintiff suggests. (Pb22)

The only evidence in the record regarding the municipality's considerations for a public use are the ordinances adopted by the Township. Those ordinances do not suggest any of these benefits raised in Plaintiff's brief were considered by the Township. The trial court denied Defendants' request for an evidentiary hearing,



(1T24:20-24), so it was that limited record upon which the lower court affirmed the Township's right to take Defendants' properties. It is that same limited record now before this Court, which may not include the after-the-fact conceptions crafted by Plaintiff's counsel.

Appellate courts have the power to set aside a condemnation "for an apparently valid public purpose" when "the real purpose is otherwise," and this Court should exercise that power here. *Casino Reinvestment Dev. Auth. v. Banin*, 320 N.J. Super. 342, 345 (Law. Div. 1998) (citing *Essex Fells v. Kessler Inst. Of Rehab.*, 289 N.J. Super. 329, 338-39 (Law Div. 1995)).

## POINT II

### **THE TOWNSHIP'S COMPLIANCE WITH PROCEDURAL REQUIREMENTS OF THE EMINENT DOMAIN ACT AND OFFER TO PAY CONSTITUTIONALLY MANDATED JUST COMPENSATION ARE NOT PROPER CONSIDERATIONS IN THIS RIGHT TO TAKE CHALLENGE.**

Plaintiff argues in Point III of its brief that it complied with the procedural mandates of the Eminent Domain Act. (Pb24) It also advises the Court that it is willing to compensate Defendants for the fair market value of the subject properties. (Pb18; 25). Whether the Township is willing to pay just compensation is irrelevant for purposes of a challenge to the right to take – not to mention that just compensation is constitutionally mandated under Article I, paragraph 20 of the New Jersey Constitution and Fifth Amendment to the Constitution of the United States of

America. But the Township takes it even a step further by arguing that its offer was such that “Appellant stands to earn many times the value of its investment.” (Pb9) Here again, the Township does not provide any citation to the record below because this was not at issue below, nor would it have been a permissible consideration in a challenge of the condemnor to take the property. As such, this Court should disregard these arguments.

### POINT III

#### **COLLATERAL ESTOPPEL DOES NOT APPLY WHERE THE EMINENT DOMAIN ACT AUTHORIZES THE EXCLUSIVE FORUM TO ADJUDICATE ALL ISSUES RELATED TO A GOVERNMENT TAKING.**

Plaintiff argues in Point IV of its brief that Defendants are barred from challenging the right to take under the doctrines of *res judicata* and collateral estoppel as a result of the trial court’s decision in *White Road, HOA, LLC v. Twp. of Jackson*, Docket No. OCN-L-723-23, that challenged the land swap ordinances. (Pb 28) In reply, Defendants rely on their argument set forth in Point II of their initial Appellate brief (Db14-20), but would reiterate that the Eminent Domain Act provides the exclusive mechanism to address all issues related to a taking. It is simply unreasonable that Defendants ought to have been expected to “defend” a condemnation action against their private properties in an action commenced by another party against the Township filed months before the Township authorized the

taking of Defendants' properties. (Da20; 68). Plaintiffs assert that Defendants should have joined that action (Pb32), but Defendants could not have duly exercised their right to challenge the Township's acquisition of their properties granted by the Eminent Domain Act via that matter. Indeed, the ordinances challenged there did not authorize the takings. (Da25; 45) Defendants have every right to challenge the Township's subsequently filed condemnation action to take their private property.

The trial court below in this matter did not – and could not – hold that Defendants were precluded from raising the issue of valid public use because of the decision in *White Road, HOA*. Nor did the court below here specifically rely on the decision in *White Road, HOA* to find there was a public use. In the court's October 20, 2023 oral opinion, the court referred to the proposed Developer of the religious institution's reasoning for preferring Defendants' properties to be the preferred location of the development, but that did not mean Defendants were barred by the doctrine of collateral estoppel from asserting their argument. (*See* 1T15-1 to 7; 24-5 to 12). The trial court merely said it did not find Defendants' argument "persuasive." (1T24-9 to 12).

Thus, collateral estoppel is not a valid reason to reject Defendants' argument on appeal. Defendants are not barred from challenging the Township's proof of a valid public use for the condemnation.

## POINT IV

### **A CONTRACTUAL OBLIGATION TO A PRIVATE PARTY IS NOT A VALID PUBLIC USE AND THE CONTRACT HERE DOES NOT REQUIRE THE TAKING OF DEFENDANTS' PROPERTIES.**

The Township in Points V & VI of its brief alleges “contractual obligations” to Bellevue Estates, LLC” but does not cite to any provision in the contract regarding the alleged “obligation.” (Pb35) Instead, the Township reverts back to the alleged “public benefit” arguments without any citation to the record in support thereof. For example, the Township argues the contract, “which includes the acquisition of open space and the reduction of traffic congestion, clearly serves the public good.” (Pb35) The Township also offers potential public benefits such as: “decreas[ing] traffic, school bus expenses and congestion.” (Pb36) But once again, there is no citation to the appendix in support, presumably because neither the contract nor ordinances that authorized the swap address such claims. The Township also introduces the concept of “legal and financial implications” (Pb36) that are not cited in the record because they were not before the trial court.

While the Township argues that it “[c]learly . . . has a contractual obligation to [the Developer]” (Pb36), it does not cite to any contractual provision that requires it to take Defendants’ properties. And it is not as if the parties did not contemplate the issue of other parties being in possession of the lots listed in both the ordinance

authorizing the land swap or the contract with the Developer. The schedule of lots indicated the subject lots, along with two others, were not owned by the municipality. (Da28; 48) Paragraph 6(e) of the contract stated that “[e]xcept as set forth in Paragraph 11(a) below, there are no parties in possession of any portion of the Property....” (Da35) Paragraph 11(a) notes a use and occupancy agreement in place at the Bellevue Property. (Da39) But Paragraph 11(c) includes obligations of the Township that is limited to vacating certain streets. (Da39) Neither that provision, nor any other in the contract, requires the taking of Defendants’ property.

The Township argues further that “it will be subject to litigation initiated by [the Developer].” (Db36-37) But such supposition is not sufficient to authorize the taking of private property.

### **CONCLUSION**

For the foregoing reasons and the reasons stated in Defendants’ Appellate Brief, Defendants respectfully request that this Court reverse the trial court’s Order permitting the Township to proceed with the taking of Defendants’ private properties.

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