THE “TAKING” OF THE LONG BRANCH PROPERTIES REPRESENTED BY MTOTSA IS UNCONSTITUTIONAL BY FEDERAL AND STATE STANDARDS AND IS AN ABUSE OF THE POWER OF EMINENT DOMAIN

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Point 1  Kelo v. City of New London 545 U.S. 469 (2005) represents an expanded and unjustified interpretation of the “takings clause” of the Fifth Amendment. It should not establish legal precedent in eminent domain actions for private redevelopment.

Point 2  The designation of the MTOTSA properties as “blighted” is inconsistent with the definitions of the term provided by the New Jersey Constitution and subsequent legislation. Therefore, in this case, by law and legal precedent, an eminent domain action for the purpose of redevelopment is prohibited.

Point 3  In a democratic society, the law must be responsive to the needs and desires of the constituents of that society. Recent judicial decisions and current popular opinion have denounced abuses of the powers of eminent domain in cases of private redevelopment.
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INTRODUCTION

The Bill of Rights, which consists of the first ten amendments to the United States Constitution, was designed to guarantee the basic principles of individual liberty by limiting the power of the federal government and enumerating the rights of American citizens. With recent memories of the many British violations of civil rights, the writers of the Constitution and the Bill of Rights recognized their obligation to protect Americans from the immense powers of the federal government. The right to own property and specifically, the right to own a home, is fundamental to the legal underpinnings and traditions of the United States. Theories of democracy and freedom regard this right as basic and unassailable. The founding fathers, however, did understand the necessity of an eminent domain “takings power” in cases in which the federal government would need to acquire privately owned property for “public use.” Although the constitutionality of this power is irrefutable, it is not unconditional. With this in mind, a portion of the Fifth Amendment was specifically written to safeguard the rights of property owners with the words, “nor shall private property be taken for public use, without just compensation.” U.S.C.S. Constitution, Amendment V. The Fourteenth Amendment extended this power to the states. U.S.C.S. Constitution, Amendment XIV.

In January 2001, thirty-eight homes on Marine Terrace, Ocean Terrace, and Seaview Avenue in Long Branch, New Jersey were scheduled for an eminent domain taking in order to facilitate the “public use” of economic development. Their homes were to be replaced with luxury townhouses and condominiums. Shortly thereafter, a group of these homeowners formed MTOTSA, which is an acronym representing the names of their streets, and began the legal battle to maintain their property rights.

This paper will outline the historical roots and legal precedents justifying the proposed MTOTSA taking. Over time, the accepted rationale for eminent domain actions has been evolving from “public use” to “public benefit.” However, in 2005, a deeply divided United States Supreme Court made the unprecedented decision to expand upon the constitutional power of eminent domain in order to allow a property seizure for the sole purpose of economic growth. Kelo v. City of New London, 545 U.S. 469 (2005). Of particular relevance to our arguments, the Court did allow for more stringent interpretations of eminent domain acquisitions by state judiciaries and governments. Kelo at page 489. Nevertheless, we strongly assert that the Kelo decision is a misinterpretation and unjustified expansion upon constitutional law and therefore, should not establish legal precedent for future eminent domain actions for private redevelopment, particularly regarding the MTOTSA properties in Long Branch.
In New Jersey, eminent domain actions for the purpose of economic growth through redevelopment have been limited to areas classified as “blighted.” N.J. Const., Art. VIII S3. Under this provision, the taking of the MTOTSA properties, none of which have been identified as blighted, must be proscribed by law.

By democratic principle and tradition, law must be responsive to society. The Kelo decision has elicited a surge of negative public opinion, legislation aimed at curtailing the power of eminent domain, and a number of judicial decisions prohibiting economically motivated property seizures. These strong reactions fervently support the contention that the use of the power of eminent domain must be restricted, as the writers of the Constitution intended, and would certainly not be appropriately exercised in the case of the proposed seizure of the MTOTSA properties in Long Branch.
ARGUMENT

THE “TAKING” OF THE LONG BRANCH PROPERTIES REPRESENTED BY MTOTSA IS UNCONSTITUTIONAL BY FEDERAL AND STATE STANDARDS AND IS AN ABUSE OF THE POWER OF EMINENT DOMAIN.

Point 1

KELO V. CITY OF NEW LONDON 545 U.S. 469 (2005) REPRESENTS AN EXPANDED AND UNJUSTIFIED INTERPRETATION OF THE “TAKINGS CLAUSE” OF THE FIFTH AMENDMENT. IT SHOULD NOT ESTABLISH LEGAL PRECEDENT IN EMINENT DOMAIN ACTIONS FOR PRIVATE REDEVELOPMENT.

Compelling legal precedent was set in 2005 when the United States Supreme Court ruled that an eminent domain taking for purely economic reasons was a valid “public use.” Keo v. City of New London, 545 U.S. 469 (2005). Before embracing this controversial decision made by a deeply divided Court as justification for “ takings” in Long Branch and elsewhere, it is crucial that we examine its historical and legal contexts.

The concept of eminent domain is not unique to modern times. In the English tradition, kings routinely seized the land and property of their subjects. The “ takings clause” of the Fifth Amendment to the United States Constitution is specifically designed to protect the rights of property owners from the immense, and potentially abusive, power of the government. The words “ nor shall private property be taken for public use, without just compensation,” are powerful indeed. U.S.C.S., Constitution, Amendment V. In 1868, this concept became applicable to the states with the Fourteenth Amendment:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law...
U.S.C.S., Constitution, Amendment XIV.

Although members of all three branches of government may disagree over its interpretation, they do not dispute the basic principles set forth in the U.S. Constitution. While the Supreme
Court is charged with the daunting task of interpreting the Constitution in a way that is responsive to the demands of a rapidly changing world, it is not empowered to change its fundamental tenets.

Traditionally, the power of eminent domain was called upon in order to acquire land for schools, roads, government buildings, and military installations. However, since the 1950’s it has been increasingly exercised in cases of urban redevelopment. In a landmark decision, the Supreme Court ruled that private property could be taken for the cause of slum clearance. Berman v. Parker, 348 U.S. 26 (1954). In this particular case, the Washington, D.C. Planning Commission had condemned a portion of the city as “blighted.” In fact, 64.3% of its residences had been classified as “beyond repair.” Berman at page 30. Arguing that their building was in good physical condition, the owners of a department store located within the area scheduled for redevelopment refused to capitulate to the demands of eminent domain. For the first time, the Supreme Court ruled that although a particular piece of property might not be designated as blighted itself, it may be taken through eminent domain if its location was deemed necessary for the success of the redevelopment plan as a whole. This eminent domain action was upheld by the Court as having a public purpose. It should be noted that in this particular case, the redevelopment plan provided for approximately one-third of the new residential units to be classified as “low-rent.” Presumably, this would enable a substantial number of the current residents to remain within the community and reap the benefits of the area’s redevelopment. Thirty years later, the notion of eminent domain was used to redistribute land held by a small group of people, which had effectively functioned as an oligopoly, and resulted in a hugely inflated housing market. Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984). This case represented a very unusual situation in that 47 percent of the state’s land was owned by seventy-two individuals. Hawaii Housing Authority at page 231. In taking land from this small group, a much larger percentage of the population was offered the opportunity to own property.

In 2005, the Supreme Court once again expanded the Constitutional notion of the taking of private property for “public use.” Kelo v. City of New London, 545 U.S. 469 (2005). Decreasing population and subsequent loss of tax revenue had pushed the city of New London, Connecticut into a state of economic decline. In 2000, after Pfizer, Inc., the pharmaceutical company, began to build a new research facility on the city’s outskirts, the municipal government approved a redevelopment plan with the goals of economic growth and the creation of new employment opportunities. The design allowed for the construction of a resort hotel, a conference center, a park, and new residential units. Initially, the owners of fifteen properties refused to sell their homes and yield to the demands of eminent domain. Susette Kelo and nine other owners of New London properties unsuccessfully sued the city at the trial level and then, in the Connecticut Supreme Court. Kelo v. City of New London, 843 A. 2d 500
It is important to note that none of the properties in question were ever designated as “blighted” by municipal authorities; the city’s argument hinged on the assertion that the land could be put to better use, as defined by economic development of the area. When, on June 23, 2005, the United States Supreme Court ruled with a five-to-four decision in favor of New London and endorsed an expanded definition of the notion of eminent domain, judicial history was made once again. 

Kelo v. City of New London, 545 U.S. 469 (2005). The Court had permitted the application of the power of eminent domain in order to take **privately owned** property for use in development projects designed to benefit other **private** entities. (Emphasis added).

In his majority opinion, Justice Stevens wrote, “The city has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community...” Kelo at page 483. He pointed to the Court’s history of “affording Legislature broad latitude in determining what public needs justify the use of the takings power.” Id. Justice Stevens went on to say “...nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.” Kelo at page 489. He illustrated this point by referring to states that had enacted eminent domain legislation more stringent than the guidelines imposed by the federal courts.

Justice O’Connor wrote a scathing dissent for the sharply divided Court. She described a “specter of condemnation” which threatened all property owners. Kelo at page 503. In her words, “Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory. Id. She predicted that those with “disproportionate influence and power in the political process, including large corporations and development firms” would be the ones to profit from the decision. Kelo at page 505. Similarly, in his own dissent, Justice Thomas warned that the negative effects of the decision would “fall disproportionately on poor communities.” Kelo at page 521. Regarding Justice Stevens’ suggestion that the responsibility for stricter interpretation and legislation in the area of eminent domain rested with the states, Justice O’Connor vehemently disagreed. Her response was:

This is an abdication of our responsibility. States play very important functions in our system of dual sovereignty, but compensating for our refusal to enforce properly the federal Constitution (and a provision meant to curtail state action, no less) is not among them. Kelo at page 504.

The Kelo decision also broadened the scope of eminent domain beyond the limits generally described in widely accepted secondary authority. The view that “takings of private property for strictly private uses are unconstitutional regardless of whether just compensation is paid” is accepted legal doctrine. 26 Am. Jur. 2d (Eminent Domain) s463. Additionally, the
exercise of the power of eminent domain for a private use, which may result in a public benefit, is not permissible under the takings clauses of many states. 26 Am. Jur. 2d (Eminent Domain) s468.

When courts attempt to interpret the meaning of a law, their most fundamental and important task is to determine the intention of its authors. The writers of the U.S. Constitution sought to protect ordinary citizens from potential government abuse. This theme is consistent throughout the Constitution; it is especially evident in the first ten amendments that compose the Bill of Rights. The Fifth Amendment provides for the taking of property with fair compensation for “public use.” Over time, this has evolved to include “public benefit,” such as the elimination of urban blight Berman v. Parker, (1954) and the more equitable distribution of property Hawaii Housing Authority v. Midkiff, (1984). The Kelo decision represents a much broader interpretation of the government’s power of eminent domain than has previously been made by the Supreme Court. For the first time, a municipal exercise of eminent domain for the sole purpose of expected economic growth was deemed valid. This is a huge leap from the term “public use,” which sanctions a “taking” by constitutional law. We must therefore conclude that the Kelo decision represents a departure from the basic principles of the Fifth and Fourteenth Amendments; this case must not continue to be used as legal precedent in order to further legitimize abuses of the power of eminent domain in Long Branch and elsewhere.
THE DESIGNATION OF THE MTOTSA PROPERTIES AS “BLIGHTED” IS INCONSISTENT WITH THE DEFINITIONS OF THE TERM PROVIDED BY THE NEW JERSEY CONSTITUTION AND SUBSEQUENT LEGISLATION. THEREFORE, IN THIS CASE, BY LAW AND LEGAL PRECEDENT, AN EMINENT DOMAIN ACTION FOR THE PURPOSE OF REDEVELOPMENT IS PROHIBITED.

In accordance with the Fourteenth Amendment, New Jersey’s Constitution provides property owners with the following protection from governmental misuse of the power of eminent domain:

Private property shall not be taken for public use without government compensation. Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners. N.J. Const., Art. I, Para. 20

The Eminent Domain Act of 1971 enabled corporations serving the public interest to acquire private property deemed necessary to advance general community welfare. Its language attempted to establish uniform legal prerequisites applicable to all entities with the power to condemn property in eminent domain takings. Specifically, the Eminent Domain Act of 1971 described eminent domain authority as the “power to appropriate and control private property for public benefit as public safety, necessity, convenience, or welfare requires.” N.J.S.A. 20:3-1. This is consistent with the accepted legal view of “eminent domain” as “the inherent Eminent power of a governmental agency to take privately owned property, especially land, and convert it to public use, subject to reasonable compensation for the taking.” 29A C.J.S. (Eminent Domain) s562.

Like most states, New Jersey has a long history of legally contested eminent domain takings. Certain prior cases and judicial rulings provide background information relevant to the proposed MTOTSA taking. A 1954 decision established the validity of the delegation of the right of eminent domain to a private entity, as long as the requirements of public necessity, just compensation, and due process are satisfied. Texas Pipe Line Co. v. Shelbaker, 30 N.J. Super 171 (App. Div. 1954). The exercise of eminent domain has been upheld in cases involving an

Eminent domain takings for redevelopment raise much more complicated issues. The New Jersey Constitution provides for the redevelopment of blighted areas as a “public purpose and public use, for which property may be taken or acquired.” N.J. Const., Art. VIII S3. Notably, no provision is made for private use. A key piece of information necessary for the interpretation of this constitutional provision is the definition of “blight.” New Jersey’s Blighted Area Act of 1949 contains terms such as “unsanitary, unsafe, dilapidation, obsolescence, and the prevalence of factors conducive to ill health, transmission of disease, crime and poverty” as descriptive of “blight.” N.J.S.A. 40:55-21.1. The constitutionality of this act was challenged and upheld by the New Jersey Supreme Court in 1958. Wilson v. Long Branch, 27 N.J. 360 (1958). The Blighted Area Act was later replaced with the Local Redevelopment Housing Law (LRHL) of 1992. N.J.S.A. 40A:12-A-1. The new definition of an “area in need of redevelopment” is:

A growing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein or other conditions, resulting in a stagnant or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.

Although the word “blight” was removed from the statute’s language, the term and its original meaning are commonly accepted. The constitutional provision that only blighted property can be seized for redevelopment by the power of eminent domain still stands. Forbes v. Board of Trustees, 312 N.J. Super 519 (App. Div. 1998). In fact, it is generally accepted that “…the legislature cannot authorize a taking for a strictly private purpose, without the owner’s consent, even on making compensation.” 29A C.J.S. (Eminent Domain) s142. In accordance with this principle, the New Jersey Supreme Court stated that in instances in which an eminent domain action results in a significant profit for a private entity, “heightened scrutiny” must be exercised in determining that the “underlying purpose” of the project is indeed the public interest. City of Atlantic City v. Cynwyd Investments, 148 N.J. 55 (1997). One year later, a superior court in Camden County followed this directive when deciding that a failure to meet current design standards did not cause an apartment complex to be detrimental to community welfare and thereby subject to an eminent domain action. Spruce Manor Enterprises v. Borough of Bellmawr, 315 N.J. Super 286 (Law Div. 1998).
Let us now examine the process that led to the condemnation of the MTOTSA properties under the power of eminent domain. Simply put, condemnation refers to the act of taking “private property for a public purpose under the power of eminent domain.” N.J.S.A. 20:3-2. In 1995, the City of Long Branch passed Resolution 271-95, which pinpointed its waterfront area as “in need of redevelopment.” This area included a former amusement pier, which had suffered fire damage and consisted of abandoned dilapidated buildings and a rusting water park. Using the Local Redevelopment Housing Law N.J.S.A. 40A:12-A-1, the city condemned the whole area as blighted; a redevelopment plan was designed (Long Branch, N.J., Ordinance #15-96, 1996) and adopted. (Long Branch N.J., Ordinance #5-14-96, 1996). Luxury condominiums, townhouses, and an area of restaurants and stores known as “Pier Village” now occupy the condemned waterfront area. In January 2001, thirty-eight private homes on Marine Terrace, Ocean Terrace, and Seaview Avenue were scheduled for condemnation. (Long Branch, N.J., Ordinance #2-01, 2001). The area was chosen as the site for the construction of more upscale townhouses and condominiums. A group of these homeowners formed MTOTSA, which is an acronym representing the names of their streets, and decided to fight for their homes.

A number of pertinent facts are essential to recognize at this point. Unlike the previously mentioned department store located within an area identified for redevelopment Berman v. Parker, 348 U.S. 26 (1954), the MTOTSA neighborhood is non-adjacent to the waterfront area, which was designated as blighted and has already been redeveloped. A four-lane road separates the MTOTSA homes from the waterfront area. In contrast to the deteriorating and largely vacant waterfront area, the MTOTSA properties constitute a neighborhood of concerned homeowners who care deeply about their homes and their closely knit, longstanding community. Perhaps most importantly, the MTOTSA area was not found to be “blighted” or “in need of redevelopment” by Long Branch’s Resolution 271-95. This fact is even more compelling in light of the fact that by statute, a city must record all evidence in support of its intention to condemn an area. N.J.S.A. 40A:12-A-6. It is important to emphasize here that there is binding legal precedent in New Jersey that only a “blighted” area can be taken by the power of eminent domain for redevelopment. Forbes v. Board of Trustees, 312 N.J. Super 519 (App. Div. 1998).

Although conceding that the MTOTSA area was not blighted, but deeming this as irrelevant, Monmouth County Superior Court Judge Lawrence Lawson ruled in favor of the City of Long Branch and authorized its exercise of the power of eminent domain in the case of the MTOTSA properties. Long Branch v. Brower, No. Mon-L-4987-05 (June 22, 2006) slip op. at 31, 51-52, (unpublished opinion). The case is currently being considered by the Appellate Division.
IN A DEMOCRATIC SOCIETY, THE LAW MUST BE RESPONSIVE TO THE NEEDS AND DESIRES OF THE CONSTITUENTS OF THAT SOCIETY. RECENT JUDICIAL DECISIONS AND CURRENT POPULAR OPINION HAVE DENOUNCED ABUSES OF THE POWERS OF EMINENT DOMAIN IN CASES OF PRIVATE REDEVELOPMENT.

As previously discussed, the *Kelo* decision of 2005 represents a much broader interpretation of the power of eminent domain than has ever been made before by the Supreme Court. Four of the nine justices joined a bitter dissent which criticized the Court’s relinquishment of its responsibility in the enforcement of the Fifth and Fourteenth Amendments to the Constitution. *Kelo* at page 504. While the majority opinion allowed the city of New London’s eminent domain action for the purpose of economic development, it invited the states to interpret existing or enact new protective legislation if they so chose. *Kelo* at page 489. In the more than two years since the Supreme Court’s decision was announced, many states have assumed the responsibility of restoring and defending the constitutional rights of property owners.

Examples of state courts that are re-examining their formerly indulgent attitudes toward the exercise of eminent domain power for solely economic reasons are plentiful. In 1981, Michigan’s Supreme Court ruled that the “public use” requirement of an eminent domain taking could be satisfied by the purpose of economic development. *Poletown Neighborhood Council v. Detroit*, 304 N.W. 2d 455 (Mich. 1981). This important decision allowed General Motors to take private property in order to construct an automotive assembly plant. In 2004, the Supreme Court of Michigan heard a similar case; Wayne County exerted the power of eminent domain to condemn private property for the construction of a corporate technology park. Just four months after the Supreme Court of Connecticut decided against Susette Kelo, the Supreme Court of Michigan overruled its own *Poletown* decision by refusing to authorize an eminent domain taking for economic development in the name of “public use.” *County of Wayne v. Hathcock*, 684 N.W. 2d 765 (Mich. 2004). Specifically, the court refused to define the possible positive economic effect upon a community of the acquisition of property by a private profit-seeking entity as “public use.” (Emphasis added). In 2006, the Supreme Court of Ohio
refused to allow an economically motivated eminent domain taking of a property in an unblighted area. *City of Norwood v. Horney*, 110 Ohio St. 3d 353 (2006). The court demanded that a “higher scrutiny” be employed in cases of eminent domain actions for redevelopment.

A number of post-*Kelo* decisions in New Jersey also suggest a growing intolerance for abuses of the power of eminent domain in takings for redevelopment. In 2005, New Jersey’s Appellate Division prevented the seizure for redevelopment of a building that could not be designated as “unsafe, unsanitary, dilapidated, or obsolescent” with “substantial evidence.” *ERETC v. City of Perth Amboy*, 381 N.J. Super 268 (App. Div. 2005). In the case of *Mount Laurel v. MiPro Homes, L.L.C.*, 379 N.J. Super 358 (App. Div. 2005), the court ruled that a municipality had the authority to condemn a property, which had previously been slated for residential development, for the public use of “open space.” In this instance, the power of eminent domain was used to end development. (Emphasis added). Earlier this year, a three judge appellate panel, in an unpublished opinion, disallowed the blighting of waterfront property owned by Freedman’s Bakery in Belmar. *HJB v. Borough of Belmar*, Docket No. A-6510-05T5 N.J. (App. Div. 2007). They found no correlation between an antiquated bakery design and ill effects upon community health or welfare. When the Borough of Paulsboro attempted to acquire a privately owned waterfront property for redevelopment, it identified the largely vacant land as “underutilized” and “not fully productive.” In a unanimous decision, the Supreme Court of New Jersey ruled against Paulsboro; in the court’s opinion, if “underutilization” and less than full productivity could justify an eminent domain seizure, then practically any privately owned land in the state could be taken. *Gallenthin Realty Development, Inc. v. Borough of Paulsboro*, 191 N.J. 344 (2007). Notably, the court’s reasoning echoed that of Justice O’Connor in her vehement dissent in the *Kelo* case. *Kelo* at page 503. The *Gallenthin* decision provides New Jersey courts with an effective means of equitably considering cases involving the challenge of blight designations by property owners. In fact, *Gallenthin* has already been cited in an unpublished decision to uphold a trial court ruling that a trailer park could not be designated as blighted due to a lack of substantial evidence. *LBK Associates v. Borough of Lodi*, No. A-1829-05T2 (App. Div. 2007). Of particular importance, the New Jersey Supreme Court ruling in *Gallenthin* binds the Appellate Division, which is currently considering the appeal of *Long Branch v. Brower*, No. Mon-L-4987-05 (June 22, 2006) slip op. at 31, 51-52 (unpublished opinion); this greatly anticipated decision will determine the fate of the MTOTSA properties.

The recent spate of post-*Kelo* judicial decisions barring the use of eminent domain for economically motivated takings of private property is striking. It seems that judges in New Jersey and elsewhere are determined to respect the long-held view that “the fulfillment of a constitutional requirement of just compensation does not obviate the necessity of compliance with the concept of public use.” 29A C.J.S. (Eminent Domain) s142. On the surface, the
previously discussed decisions seem to run counter to the Kelo ruling. However, it seems more likely that the state judges have taken up Judge Stevens’ suggestion that more stringent interpretation and enforcement of the “public use” criterion in the takings clause should be the responsibility of the individual states. Kelo at page 489. Since that time, according to a survey conducted by the Georgetown Environmental Law and Policy Institute, twenty-two states have enacted legislation reducing the powers of eminent domain and nine states have approved ballot questions addressing the issue. (www.gelpi@law.georgetown.edu).

On the federal level, the executive branch has sought to curtail the misuse of the power of eminent domain. On June 23, 2006, the first anniversary of the Kelo decision, President Bush issued the following powerfully worded Executive Order:

> It is the policy of the U.S. to protect the rights of Americans to their private property, including by limiting the taking of private property by the Federal Government to situations in which the taking is for public use, with just compensation, and for the purpose of benefiting the general public and not merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken. (U.S. Executive Order: Protecting the Property Rights of the American People, 2006).

The implied intention of this order is the limitation of governmental seizures to projects that truly serve the public interest, such as the construction of schools, roads, and hospitals.

In a recent law review article, the Hon. Peter G. Sheridan, U.S. District Court judge, portrayed most Americans, prior to the announcement of the Kelo decision, as oblivious to the immense power of eminent domain. 37 Seton Hall L. Rev. 307 (2007). Historically, we have trusted in our legal system to protect property rights; this decision has deeply challenged that trust. Id. Public opinion shows strong concern with eminent domain abuse. According to a 2005 Monmouth University/Gannett New Jersey poll, 67 percent of New Jersey residents would support the setting of uniform criteria for property blight designation. In a similar vein, 66 percent of New Jerseyans favor a moratorium on eminent domain takings until uniform criteria are established. Perhaps of greatest relevance here, 76 percent of New Jersey residents believe that private developers have received greater benefit from recent eminent domain actions than communities. (www.monmouth.edu/polling). Additional, and somewhat surprising, strongly negative reaction to eminent domain abuse and the Kelo decision, in particular, has come from the private sector. John Alison, CEO and chairman of BB&T Corporation, the nation’s ninth largest financial services company, announced in January 2006 that BB&T would not back any redevelopment projects by commercial developers that had been made possible by the use of eminent domain takings of private property. (www.marketwatch.com/news/story).
Clearly, society has evidenced an increasing degree of concern with the abuse of the power of eminent domain in takings for private redevelopment. In the wake of the *Kelo* decision, a number of court rulings, the executive branch of the government, public opinion, and even a leader of private industry have reacted against eminent domain misuse. We do not challenge the use of eminent domain in cases in which a property or an area actually is blighted or needed for a true public use. It is important to note, however, that in cases involving redevelopment, the practical meaning of “public use” can become distorted. Specifically, in the proposed taking of the Long Branch MTOTSA properties, if a large number of residents are forced to relocate, the original community and “public” will no longer exist. A well-established neighborhood of moderate income families will be supplanted by the owners of luxury townhouses and condominiums. This is an obvious violation of the “public use” requirement demanded by the takings clauses in the Fifth and Fourteenth Amendments to the Constitution. We do not challenge these clauses or amendments; nor do we wish to deny local, state, or the federal government the right to exercise the power of eminent domain appropriately. However, it is time to follow the true intentions of the writers of the Constitution, the plain meaning of the term “public use,” as well as the expressed wishes of the citizens of New Jersey and our country. The takings clauses were clearly designed to make communities better, not to destroy them.
CONCLUSION

Those seeking to interpret and apply law face a difficult task; they are charged with the responsibility of ascertaining the true intentions of the writers of that law. Certainly, the writers of the Fifth and Fourteenth Amendments to the Constitution never intended “public use” to mean the taking of modest homes in Long Branch, New Jersey so that they may be replaced with upscale townhouses and condominiums. However, the Constitution and the Bill of Rights were designed to endure; and so they have. The terms used are specific enough to hold meaning and yet, general enough to allow for increasingly modern interpretations of those meanings. The “takings clause,” which warrants repetition here, means exactly what it says it means: “nor shall private property be taken for public use, without just compensation.” U.S.C.S. Constitution, Amendment V.

The Kelo decision, which allowed an eminent domain seizure of private property for the sole purpose of economic development, represents a huge and unprecedented leap from the words “public use” employed in the Constitution. This decision established a prerequisite for the protection of property rights; as long as land is used in a way that the government views as economically worthwhile, the owner’s rights will be protected. In Justice O’Connor’s memorable words, the “specter of condemnation” now threatens all property owners. Kelo at page 503. She also accused the Court of the “refusal to enforce properly the federal Constitution (and a provision meant to curtail state action, no less).” Kelo at page 504. It is incumbent upon the states, at Justice Stevens’ invitation, to place “further restrictions of its exercise of the takings power.” Kelo at page 489.

In the case of the proposed MTOTSA taking, New Jersey law permits eminent domain acquisitions for economically motivated redevelopment only in instances of “blight.” N.J. Const., Art. VIII S3. Since the MTOTSA properties have not been identified as blighted, by law, they must be exempt from eminent domain seizure.

Since the Kelo decision was announced in 2005, there has been an outcry of negative public opinion, legislation aimed at limiting the power of eminent domain, and a number of judicial rulings proscribing takings for the sole purpose of economic growth. Specifically, Michigan’s Supreme Court reversed its own prior decision (Poletown Neighborhood Council v. Detroit, 304 N.W. 2d 455, Mich. 1981) by refusing to allow the taking of private property for the use of a corporate project, which possibly could have positively impacted the economic growth of the community. County of Wayne v. Hathcock, 684 N.W. 2d 765 (Mich. 2004). In New Jersey, the Supreme Court unanimously refused to allow the eminent domain seizure for
redevelopment of an “underutilized” waterfront property. Gallenthin Realty Development, Inc. v. Borough of Paulsboro, 191 N.J. 344 (2007). This decision represents a great victory for the MTOTSA homeowners since it binds the Appellate Division, which is currently considering their appeal.

The argument for preservation of neighborhood and community bears repeating here. The homes on Marine Terrace, Ocean Terrace, and Seaview Avenue comprise a longstanding, closely knit community of families of moderate means. If these homeowners are legally forced to surrender their properties to an eminent domain taking, their community will be eradicated, only to be replaced with newly-constructed, upscale townhouses and condominiums. If the original “public” no longer exists, how can we possibly satisfy the “public use” requirement for eminent domain action mandated by our Constitution?

For the foregoing reasons, in sum or in part, it is respectfully submitted that:

THE “TAKING” OF THE LONG BRANCH PROPERTIES REPRESENTED BY MTOTSA IS UNCONSTITUTIONAL BY FEDERAL AND STATE STANDARDS AND IS AN ABUSE OF THE POWER OF EMINENT DOMAIN.

Respectfully submitted,

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