

**Solberg Aviation Company v. Township of Readington**

**Docket No.: HNT-L-435-07**

**Plaintiff's Motion for Summary Judgment**

**Defendant's Motion for Summary Judgment**

**Returnable: September 7, 2016**

**Opposed**

**I. PARTIES & RELIEF SOUGHT**

Plaintiff, Solberg Aviation Company, by and through its counsel, Laurence B. Orloff, Esq. of Orloff, Lowenbach, Stifelman & Siegel, P.A., has filed a Motion for Summary Judgment.

Defendant, Township of Readington, by and through its counsel, Adam Derman, Esq. and Lauren R. Tardanico, Esq. of Chiesa, Shahinian & Giantomasi, PC, has filed a Cross Motion for Summary Judgment.

Defendant, Township of Readington, by and through its counsel, Adam Derman, Esq. of Chiesa, Shahinian & Giantomasi, P.C., has filed an opposition to the Plaintiff's motion for Summary Judgment.

**II. PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS<sup>1</sup>**

In Plaintiff's Motion for Summary Judgment the Plaintiff relies upon the following Statement of Material Facts:

1. Ordinance #18-2007 ("Subject Ordinance") was adopted by the Township of Readington on June 7, 2007. [Exh. C at ¶ 17; Exh. D]<sup>2</sup>

2. At the time of the adoption of the Subject Ordinance, Readington owned in fee -- by virtue of a Declaration of Taking -- 624 of the 726± acres comprising Solberg Airport, and development rights to the remaining 102± acres. [Exh. A]

3. The Subject Ordinance creates what it designates as a Historic District Sub-Area ("Sub-Area") comprising the aforesaid 102± acres. [Exh. D at Section C.2]

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<sup>1</sup> The Court has adopted the Plaintiff's version of their undisputed facts, verbatim, for the purposes of the record.

<sup>2</sup> All references to "Exh. \_\_\_" are to the exhibits appended to the Certification of Matthew T. Aslanian, Esq. dated June 23, 2016 served with this motion.

4. The Sub-Area is identical to the 102 acres condemned by Readington Township in September and October, 2006 and described in the Declaration of Taking of October 4, 2006 as the “Airport Facilities Area”. [Exh. A at Exh. A]

5. The Sub-Area created by the Subject Ordinance is the only portion of the 726± acre Solberg Airport property upon which aviation related activities may be undertaken. [Exh. D at Section G]

6. The Subject Ordinance prohibits airport or aviation related activities on any of the 726± acres beyond the 102 acres. [Exh. D at Section G; Exh. UU]

7. The Superior Court (Hon. Paul W. Armstrong), after a full trial, found and concluded that the condemnation of all 726± acres, was improper and comprised an unconstitutional and illegal taking of the Solberg property, and invalidated the taking in its entirety, with fee simple title reverting to Solberg Aviation Company as to all of the acreage. [Exh. E at 1, 53-54]

8. The Superior Court (Hon. Paul W. Armstrong), after a full trial, also found and concluded, *inter alia*, that Solberg Aviation Company has the right with respect to all of the lots and blocks comprising the approximately 726± acres “to develop or otherwise utilize the aforesaid property for any use involved with or incidental to the ownership and operation of an airport in accordance with the laws and regulations of the State of New Jersey and the United States . . .”. [Exh. E at 53-54]

9. The Subject Ordinance, if enforced, would not allow Solberg Aviation Company to use the airport property in accordance with Judge Armstrong’s findings and conclusions. [Exh. D at Section E, G; Exh. UU; Exh. DDD at 78:21-25]

10. In 1999, Solberg Aviation Company received conditional approval from the NJDOT and FAA of a proposed Master Plan and Airport Layout Plan involving an extension of the existing runway and other improvements and expansion of the airport. [Exh. E at 14]

11. The Subject Ordinance, if enforced, would not allow potential implementation of the aforesaid Master Plan and Airport Layout Plan and would not allow, *inter alia*, the extension of the existing runway at Solberg Airport. [Exh. WW at 25:7-26:7; Exh. DDD at 80:24-82:19]

12. Solberg Airport was founded by Thor Solberg, Sr., a world-renowned aviator who contributed to pre-and post-aeronautical achievements, and who was designated by President Franklin D. Roosevelt as a “Great American” for his achievements and contributions to security of the United States. In or around 1939, he began accumulating various contiguous parcels to

comprise over 700 acres of land, separated only by public roads, to create Solberg Airport. In 1941, the Township of Readington adopted a resolution granting permission for the operation of a “commercial airport” on the acreage that it now occupies. [Exh. E (May 4, 2015 Opinion of the Hon. Paul W. Armstrong) at 8-9]

13. Well established as a general aviation facility, Solberg Airport is devoted to the needs of both recreational and business aircraft. Both the Federal Aviation Administration (“FAA”) and the New Jersey Department of Transportation Division of Aeronautics (“NJDOT”) designated Solberg Airport as a “reliever airport” in 1990. [*Id.* at 10]. Reliever status arises from the federal and state recognition of the potential to utilize the airport to relieve congestion at major regional airports, and plays a role in making federal funding available, along with state funding, for improvements. [*Id.*]

14. Solberg Airport is currently comprised of 744 acres, more or less, that are dedicated, designed, and set aside for aviation uses. [Exhs. G, H]. It includes three runways, which are described by reference to the direction each end of the particular runway faces. [Exh. YY; Exh. ZZ]. It has a runway designated as Runway 4-22, which is the main runway and is paved to 3000 feet. Solberg Airport also has two cross wind runways, one designated as Runway 10-28 and the other as Runway 13-31. [*Id.*]. Several buildings house various airport activities, including a modest main terminal with office space, and connected warehouse space for aircraft maintenance procedures.

15. Solberg Airport is licensed by the NJDOT under the category of “fixed wing aeronautical facility” as “Airport - Public Use”. [Exhs. G, H].

16. Solberg Airport has been licensed by the NJDOT as such an airport comprised of in excess of 700+ acres for decades. [Exhs. FFF, G].

17. The NJDOT contracted to acquire the airport in 2002, executing an Agreement which recited that “the Solberg Hunterdon Airport is comprised of several parcels of real property, which total approximately 745 acres located in Readington Township and Hunterdon County,” and further confirmed that “the Airport is and has been a vital aeronautical facility and a significant component in the New Jersey State Airport System Plan and the National Plan for Integrated Airport Systems for more than 60 years.” [Exh. L]. And in its press release announcing the Agreement, NJDOT reaffirmed that Solberg airport “is a 745 acre facility.” [Exh. XX].

18. Solberg Airport is not limited to the 102 acres. [Exh. YY].

19. Solberg Airport hosts several blimps, which moor at the airport outside of the 102 acres zoned as airport. [Exhs. YY, EEE, FFF]. Each airship that moors at Solberg Airport requires, for safety reasons, several acres around which to moor because of wind speed and direction. [*Id.*]. Several blimps have traditionally used the airport -- one of the few in the area with sufficient land to permit the mooring -- at any given time during the spring and summer months as a base of operations, by mooring at the airport between trips. [Exhs. EEE, FFF]

20. Solberg Airport also has historically had a third cross-wind runway, designated as Runway 10-28. [Exh. ZZ at 24:4-10, 41:9-10, 44:18-45:5; 45:20-47:17; Exh. G].

21. Runway 10-28 falls outside of the 102 acres Historic Airport Sub-Area designated in Ordinance #18-2007 (the "Subject Ordinance"). [Compare Exh. YY with Exh. GGG].

22. Runway 10-28 has existed on Solberg Airport at various points and for the majority of the past three decades, and its existence was recognized by the FAA and the NJDOT, as the cited Airport Layout Plans and Form 5010s demonstrate. [Exh. ZZ at 24:4-10, 41:9-10, 44:18-45:5; 45:20-47:17; Exh. G].

23. Solberg Airport commissioned a draft Airport Layout Plan in 2004 that depicted a slightly repositioned Runway 10-28. [Exh. AAA].

24. In December, 2015, the FAA concluded an airspace study for Runway 10-28. [Exh. BBB (FAA report)].

25. The existing Airport Layout Plan for Solberg Airport includes Runway 10-28. [Exh. YY].

26. In 1983, the New Jersey Legislature enacted the Airport Safety and Hazardous Zoning Act ("ASZA"), which authorized the Commissioner of Transportation to adopt rules and regulations to specify permitted and prohibited land uses within airport safety zones. N.J.A.C. 6:1-85 required each municipality that contained any part of an airport safety zone to enact an ordinance incorporating standards promulgated by the Commissioner. Shortly after the passage of the ASZA, Solberg applied for and received grant funding from the NJDOT to pave the entire licensed length of the runway, 3,735 feet. After approval for construction, the Township unilaterally issued a stop work order, stating it would not permit paving the main runway beyond 3,000 feet. [Exh. E at 11]

27. Readington strongly opposed the ASZA legislation, petitioning the NJDOT to exempt the Township because it believed the ASZA removed decisions better left for local officials regarding airport expansion ("Home Rule"). Despite its legal obligation, the Township failed to

pass an ordinance that complied with N.J.S.A. 6:1-85, but rather lobbied and petitioned to have the ASZA declared unconstitutional. [Exh. E at 11]

28. In the late 1980s, it appeared that the Linden Airport might close. A feasibility study prepared by representatives of the FAA, NJDOT and local officials determined that SHA was qualified as a potential replacement site. The Township vehemently opposed the position taken by the FAA. Despite the opposition, the Solbergs wrote to the Mayor of Linden on May 30, 1990, confirming their willingness to accept the transfer of aircraft from Linden Airport. The plan eventually fell through, and ongoing tensions between the Solbergs and detractors increased. [Exh. E at 11-12]

29. In August 1990, the first threat of condemnation occurred during a Township meeting involving Township officials Ron Monaco and Steve Mirota, Township attorney William Savo, and Thor Solberg Jr. During a heated exchange between officials and Thor Solberg Jr., the Township made it clear that the Township could condemn the airport and threatened the Solberg's livelihood by putting them out of business, if they so desired. During the August 1990 meeting, the following recorded exchange took place:

[Solberg]: [Y]ou're taking away my livelihood

[Monaco]: No, we're not

[Mirota]: Not necessarily.

[Solberg]: You know that's what—you want to take the land.

[Monaco]: We haven't done that yet.

[Solberg]: It's our land.

[Savo]: Let me tell you what our options are. We could go down ther[e] tomorrow, right? And [take] just enough to put the airport out of business. I wouldn't say anything.

[Exh. E at 11]

30. In September 1990, Solberg requested, and was approved, funding from the FAA to expand the main airport runway from 1,800 feet to 3,000 feet. In 1995, and against sharp criticism from the NJDOT, the Township's Board of Education decided to site an elementary school directly adjacent to the airport. Subsequently, the Township Committee encouraged petitioning in opposition of runway length expansion and adopted several resolutions opposing any increase in SHA's runway length over the next several years. [Exh. E at 11-12]

31. In 1997, SHA released a Final Draft Master Plan and an Airport Layout Plan that provided detailed recommendations for airport development, estimated construction costs, and set forth a schedule of improvements over a twenty-year planning period. SHA recommended a new

4,890 foot long replacement runway, a full parallel taxiway, paving and extension of a crosswind runway, parking facility improvement, additional hangars, an automated weather observation station, a precision instrument approach and an approach lighting system. The Township immediately challenged SHA and filed lengthy letters with the FAA, NJDOT as well as numerous government officials. The Township passed Resolution R-97-18, challenging the SHA master plan, arguing that the current state of the airport provided adequate safety for existing aircraft and expansion would be highly inappropriate to create a commercial airport in a rural residential zone. [Exh. E at 12-13]

32. Solberg released a Final Draft Master Plan and an Airport Layout Plan in 1997 that provided the detailed recommendations for airport development. This plan included a new 4,890 foot runway, a parallel taxiway, and other improvements, which were subsequently conditionally approved and elaborated upon by NJDOT and the FAA. In reaction to the scope of that plan, the Township elected to “draw a line in the sand” and “do whatever it takes right now legally to make sure that [SHA] never becomes a jetport.” [Exh. E at 26]

33. In March 1999, the FAA and NJDOT gave conditional approval to the Airport Layout Plan, pending the successful completion of the environmental assessment. Shortly thereafter, the Mayor of Readington wrote to the NJDOT to protest this decision and stated that the Township would “do everything in its power to maintain the status quo of the airport.” In the following years, the Township commissioned voluminous environmental reports provided by experts and township committees. The Township amended its 1990 Master Plan, recommending that the most effective way to preserve the environmentally valuable land of SHA would be through acquisition by the Township. These amendments were the first time that the Township labeled the land that SHA occupied as a “critical environmental impact area.” The property was also listed in Readington Township Open Space Inventory and Recommendations for Preservation, in its Greenways properties, and was identified as being environmentally vulnerable. SHA was never recommended for acquisition prior to these amendments. [Exh. E at 14]

34. On April 11, 2002, the Solbergs entered into an Agreement with the NJDOT for the sale of SHA. The Agreement set a base price of \$22,000,000 subject to negotiation, and contingent upon obtaining a financing commitment from the FAA. The Agreement described the airport as comprising approximately 745 acres. [Exh. L]

35. The Township vehemently opposed any airport expansion, wrote to the Governor's office, and continuously corresponded with NJDOT regarding their future plans after the purchase of SHA. [Exh. E at 14]

36. The Agreement with NJDOT eventually fell through, and the Township continued to strategize as to how acquire SHA. [Exh. E at 14]

37. Judge Armstrong found that "general aviation airports, including Solberg Airport, serve a valuable public purpose." [Exh. E at 36]

38. Judge Armstrong also made the following additional findings with respect to State policy vis-à-vis Solberg Airport, its public purpose, and its role in general aviation:

Solberg-Hunterdon is a general aviation airport. The FAA defines general aviation (GA) as operations of aircraft not covered by rules that govern air carriers or charter aircraft. See, 49 U.S.C. 40101 et. seq. Our national system of airports, heliports, and seaplane bases was developed to provide communities with access to a safe and adequate public system of general aviation airports. General Aviation Airports: A National Asset, U.S. Dept. of Transportation Federal Aviation Administration, May 2012 at 4. The nation's general aviation airports focus mainly on more specialized services that airlines cannot provide. In 2009, nonairline operators at these general aviation airports spent over \$12 billion, flying an estimated 27 million flights for emergency medical services, aerial firefighting, law enforcement, and border control, agricultural functions, flight training, time-sensitive air cargo services, business travel, and scheduled services. *Id.* at 5.

Federal, state, and local governments have invested in a system of general aviation airports since the beginning of the 20<sup>th</sup> century. Ibid. This airport system is interconnected and interdependent and was included in the National Plan of Integrated Airport Systems because these locations were deemed important to the federal system and are open to the public. Ibid. Having such a well-developed system of general aviation airports throughout the country supports commerce while also providing a safety net of airports to support emergency aircraft diversions when necessary due to mechanical issues, medical emergencies, deteriorating weather conditions or other unforeseen circumstances. Ibid. Solberg-Hunterdon airport is one such example, and serves as one of only eleven reliever airports in the state. [Exh. E at 37].

\* \* \* \*

The record substantiates the importance of general aviation and Solberg Airport's role in particular. The Defendant offered documentary and testimonial evidence, which this Court found persuasive in its determination of public purpose. The objective evidence demonstrated that general aviation generates over a billion dollars in revenue and creates thousands of jobs across the state. It has a substantial economic impact on communities and contributes directly to local business transportation capability. The evidence also demonstrated that New Jersey's general aviation infrastructure provides many health, welfare, and social benefits: emergency medical services, schools, fire and emergency services, law

enforcement, tour operators, and traffic surveillance directly benefit from general aviation airports.

[Exh. E at 38]

39. Judge Armstrong also issued findings derived from other State documents, plans, and studies, in support of his conclusion that restraining Solberg Airport to 102 acres was contrary to public policy and New Jersey State aviation policy:

The New Jersey State Airport System Plan (NJSASP) was the subject of extensive testimony. [D-601]. The first plan was issued in 1992 and discussed the economic benefits of general aviation and aviation system planning, the development of a “core system” of airports and the “need to have sufficient land available when airport expansion or new facilities are required.” *Id.* at I-1-8.

The most recent plan was released by the New Jersey Department of Transportation in 2008 and recommended that Solberg Airport be “considered” for an upgrade to an “advanced service airport” facility from a “general service” facility. [D-631 at 7-27]. The report further recommended that Solberg be immediately classified as a “priority service airport,” which would open it up for development. *Id.* at 7-41. In the corresponding press release, the Transportation Commissioner stated that the report’s “key strategy is the preservation of the existing system of public use airports in New Jersey.” These public use airports bring “extensive benefits to the State economy,” including more than 18,000 aviation-related and aviation-dependent jobs with an estimated payroll of at least \$624.7 million. *Ibid.* This plan was consistent with the findings in New Jersey’s Long-Range Transportation Plan and the Federal Aviation Administration’s National Plan.

[Exh. E at 41-42]

40. Judge Armstrong went on to adopt the Appellate Division’s observation that “limiting the airport’s capacity to remain economically competitive is thus at cross purposes to the goal of airport preservation,” and further found that the taking of all but 102 acres:

is also at cross purposes with the important government and public purposes discussed. The evidence demonstrates that both the State of New Jersey and the United States incorporate the potential expansion of the airport as necessary to the aviation infrastructure of the region. To limit such through condemnation of the lands within the airport safety zone would be “contrary to express State purposes” and therefore be in conflict with higher authority. *Id.* at 320.

[Exh. E at 45]

41. In invalidating the taking by Readington of even those parcels “outside of the immediate airport zone”, Judge Armstrong noted that:



The evidence presented by both parties shows that there is continued uncertainty about whether any particular block and lot falls outside the airport's zone of operations. Such specific determinations are contingent upon the final layout of the airport and the implementation of one of the proposed plans. As the Township has not established that any specific block and lot would fall outside this zone in the proposed alternative runway development plans, the Court must find that there is a conflict with the government's interest in keeping the airport viable.

[Exh. E at 47]

42. Within a year of NJDOT enactment of regulations requiring the removal of Solberg Airport's status as a "non-conforming" use, Readington township attorney William B. Savo petitioned NJDOT for blanket exemption from the ASZA for Readington. [Exh. M]. NJDOT denied Readington's requests. [Exh. N].

43. Following those attempts, in 1986 NJDOT reiterated to Readington the need to adopt an ASZA ordinance. [Exh. P]. NJDOT made clear that the deadline for adopting an ordinance had passed, that ample time had been provided for its adoption, and that Readington was obligated to provide a copy of its proposed ordinance to the Division of Aeronautics. [*Id.*].

44. Responding to the NJDOT in November, 1986, Readington's Township Clerk sent a proposed ASZA ordinance to the Division of Aeronautics ("1986 ASZA Ordinance"). [Exhs. Q, R]. Despite the Clerk's assurance, the 1986 ASZA Ordinance was not adopted and no other ASZA ordinance was enacted at that time.

45. Readington's draft 1986 ASZA Ordinance submitted to NJDOT would have recognized that Solberg Airport was not restricted to 102 acres, but rather encompassed that land "within the lot boundaries occupied on the date of this ordinance." [Exh. Q at p. 2, § 13.3.1 "Uses permitted by right"].

46. The 1986 ASZA Ordinance would, further, have set up **three** runway subzones, recognizing the existence of the third runway, Runway 10-28. [Exh. Q].

47. NJDOT advised Readington that the ordinance that had been submitted was acceptable and compliant with the ASZA regulations, N.J.A.C. 16:62. [Exhs. S, T]. But Readington did not adopt the 1986 Ordinance. [Exh. U].

48. Readington continued to maintain its opposition to the ASZA, and organized community opposition as well as political lobbying to that effect. [Exh. V]

49. Readington's opposition to the ASZA ordinance was supposedly grounded in its belief that it was improper for NJDOT to "usurp" Readington's zoning powers and that Readington's prerogatives should take precedence over those of the State. [Exh. W].

50. In a letter dated May 11, 1987, received by Solberg, but ostensibly sent to the entirety of the Township, the Mayor asserted that the Township Committee “has opposed the Airport Hazard Zone designation” and made clear that the Township had “refused to rezone the area for commercial use and [had] instructed our attorney to meet with other municipalities to coordinate legal action on the homeowner’s behalf.” [Exh. V].

51. In the years following Readington’s refusal in the 1980s to adopt an ordinance to comply with ASZA, NJDOT proposed revisions to the regulations promulgated pursuant to that Act. [Exh. X]. Readington used the proposed revisions as yet another opportunity to voice its opposition to the Act in general, and opposed the new revisions also. [*Id.*] Readington offered several bases for its opposition to the ASZA, making clear that it was “opposed to defining all pre-existing structures within the clear zone as either nonconforming or conditional uses and objects to the implicit designation of an airport as a conditional or conforming use.” [Exh. X].

52. Readington very specifically grounded its opposition on the assertion that the regulations, and the statutes pursuant to which they were promulgated, were “an unconstitutional usurpation of municipal zoning powers” and further elaborated on its opposition at pages 2-3 of that letter. [*Id.*]

53. In September, 1989, NJDOT sent a follow-up letter directly to the Mayor of Readington “regarding the enforcement of the Air Safety and Hazardous Zoning rules and regulations which were amended May 15, 1989.” [Exh. Y]. The Assistant Commissioner of NJDOT, in that letter, wrote that “[s]ince we have not heard from your municipality, I want to remind you that land use ordinances implementing the standards of the amended regulations must be adopted by May 15, 1990.” [Exh. Y]. Readington did not adopt an ordinance in response.

54. About a month later, in October 1989, Readington’s attorney drafted a resolution once again requesting that Readington be exempted from the provisions of ASZA, and requested that the Clerk put it on the Township agenda for public meeting. [Exh. Z]. The resolution expressly acknowledged that townships such as Readington “were to implement [ordinances] pursuant to regulations set forth thereunder.” [Exh. Z at p. 2]. The stated purpose of the resolution included a position permitting Readington to “utilize its local zoning ordinances to assert jurisdiction over airports located within its boundaries” (presumably to the exclusion of the powers of NJDOT). [Exh. Z]

55. Shortly after the aforesaid meeting, the Clerk sent a copy of the resolution, which had been adopted by the Township Committee on October 16, 1989, to NJDOT requesting, again, exemption from the ASZA. [Exh. AA].

56. NJDOT, through its Office of Aviation, again denied Readington's exemption request, noting that there were "no provisions in the regulations which provide for the exclusion of individual townships .... Land use ordinances implementing the standards of the amended regulations must be adopted by May 15, 1990. I again offer the assistance of this office..." [Exh. BB]. On or about April 9, 1990, NJDOT sent a follow-up letter to Readington, emphasizing that the deadline for adopting "a land-use ordinance implementing the standards of the air safety and hazardous zoning rules and regulations" was "rapidly approaching." [Exh. CC].

57. Readington failed or refused to pass an ordinance before the May 1990 deadline.

58. In 1994, Readington contacted NJDOT requesting a sample ordinance upon which it could base an ASZA ordinance. NJDOT agreed to send an ordinance that adopted the regulations "by reference." [Exh. DD]. On or about November 2, 1994, NJDOT responded to Readington's request and transmitted a copy of the statute, regulations, a sample ordinance, and also a copy of the Air Safety and Zoning ordinance which it understood would be "proposed to the Readington Township committee at its regular meeting to be held November 3, 1986." [Exh. EE].

59. In January, 1995, Readington received an estimate from its long time land surveyor, Thomas L. Yager and Associates, to prepare an ASZA map with metes and bounds descriptions at Solberg Airport. [Exh. FF].

60. In May, 1995, NJDOT wrote to Readington again seeking compliance with the ASZA by adoption of an ordinance compliant with that Act. [Exh. GG]. Readington responded to NJDOT's request to adopt an ordinance, said it was working on the issue but had not yet introduced an ordinance, and announced its intention to do so in October of that year. [Exh. HH]. It did not do so.

61. On or about May 30, 1996, Julia Allen, then an aspirant for the Township Committee, wrote a letter to the editor of the Hunterdon Democrat, warning citizens that "the threat of a major expansion of Solberg Airport is real and the plan is for a large airport." [Exh. II].

62. Ms. Allen's letter also expressed the need for Readington to reassert control over the airport, noting that the ASZA supposedly "took the decision of expansion out of the hands of elected officials of all levels of government and put it in the hands of the state Department of Transportation and the Federal Aviation Administration." [Exh. II].

63. On or about March 17, 1998, NJDOT once again wrote to Readington with respect to the ASZA ordinance adoption. The letter recounted that Neil Tully, who was an Air Safety and Zoning Specialist with NJDOT, had spoken to the Township attorney. [Exh. JJ]. Mr. Tully recounted that he had told the Township attorney in July, 1997, that the draft ordinance submitted to the NJDOT “complied with the requirements established in N.J.A.C. 16:61.1 et seq.”, and advised that NJDOT had reviewed and approved the delineation of the ASZA drawn by the town surveyor. The letter concluded with the following plea: “Please advise me of the status of this matter. I, again, offer my services to assist you with this endeavor. If you need additional information, please contact me at (609) 530-2900.” [Exh. JJ].

64. At the Township Committee meeting on April 6, 1998, Committeeman Ronald Monaco announced he had received a letter from NJDOT concerning the ASZA and that it was their understanding that the “Township did not have an approved copy of the ordinance.” [Exh. KK at p. 5]. The Committee at the time “discussed the possibility of placing the Hazard Zone ordinance on the agenda for the next meeting,” but no such steps were taken.

65. At a Readington Township Committee meeting on June 1, 1998, the Mayor noted with respect to the ASZA ordinances that Readington considered, that “the committee felt that the ordinance in its present form might not provide the protection that we think we need from runway expansion. The appropriate language is being worked on and more information should be forthcoming shortly.” [Exh. LL at p. 4; Exh. MM at p. 4].

66. On or about April 15, 1999, Neil Tully of NJDOT wrote to Mayor Allen, in furtherance of a telephone conversation they had that morning. Mr. Tully requested “a meeting with you to discuss the adoption of an Air Safety and Zoning ordinance by Readington Township.” Mr. Tully noted that the Township had delineated the ASZA as required and “has drafted an acceptable ordinance but never adopted it.” [Exh. NN]. Ms. Allen met with Mr. Tully in response to this letter, but the meeting did not result in the adoption of an ASZA ordinance by Readington. [Exh. OO].

67. At a May 3, 1999, Township Committee meeting, Readington officials discussed with residents NJDOT’s conditional approval of the Solberg Airport Layout Plan. At that meeting, a Resolution was introduced, R-99-48, and unanimously passed, which provided the following: state authorities had not appropriately responded to municipal concern, the plans in the master plan are unsubstantiated; the “Township of Readington is resolutely opposed to the establishment of a commercial airport in a totally residential zone”; and “the Township Committee of the Township

of Readington remains resolutely opposed to the lengthening of the existing paved runway and will oppose the proposed expansion of Solberg Airport by all means possible.” [Exh. RR at pp. 7-9; Exh. SS].

68. A copy of the Resolution was sent by the Township Clerk to various state and federal officials. [Exh. TT].

69. As the May 3, 1999 minutes reflect, Township Committee members represented “that the Committee has been working in opposition to the proposed expansion since 1983 and there have been victories along the way. For example, the pavement on the runway would be longer than it is if it weren’t for the Committee’s efforts,”; that the “Committee will fight the expansion on every conceivable front”; and, according to Mayor Allen, that the only one who could stop the proposed expansion was “James Weinstein, the Commission[er] of the Department of Transportation.” [Exh. RR at pp. 32-33].

70. NJDOT continued to follow up with Readington as it failed to adopt an ASZA ordinance. [Exh. PP]. On December 7, 1999 NJDOT sent “a follow-up to [its] letters of July 7 and August 11, 1999, concerning the adoption of an Air Safety and Zoning ordinance by Readington Township.” In that letter, Air Safety and Zoning Specialist Tully enclosed a newspaper article in which Mayor Allen was quoted as saying that the map delineating the Airport Safety Zone around Solberg is still in draft form because the Division of Aeronautics and Readington could not agree on details. This statement was false, and NJDOT called her on it. Mr. Tully wrote: “To end any question regarding this issue, enclosed is a copy of a letter dated April 28, 1997, from Mr. Yeager [sic] to Kristine Hadinger, Esq., which states that I approved the map created by Mr. Yeager [sic].” [Exh. QQ].

71. At no point in 1998, 1999, or 2000, did the Readington Township Committee take any action with regard to adopting an ASZA ordinance. [Exh. OO].

72. The Subject Ordinance defines the airport in more than one section. In section A(1), the word “airport” is defined as follows:

“As used in this Ordinance, “airport” or “airports” shall mean and refer to Solberg-Hunterdon Airport, in Readington Township, Hunterdon County, New Jersey.”

[Exh. D].

73. NJDOT licenses Solberg-Hunterdon Airport as 726+ acres. [Exh G]

74. In Section A(3) of the Subject Ordinance, however, notwithstanding the 700+ acres licensed as the airport by the NJDOT, a section of the Subject Ordinance entitled “Airport Defined” states the following:

“This Ordinance is based upon, and presumes, an airport layout for Solberg-Hunterdon Airport as described in the March 3, 2005 map prepared [by] H. Clay McEldowney, PE/LS, and identified as drawing number 5761-F. The Solberg Hunterdon Airport is depicted on this map as ‘Parcel 4’, with a gross area of 102.23 acres and a net area of 101.55 acres. The Airport has two bidirectional public use runways, runways 4/22 and runways 13/31.”

75. The same McEldowney map (Drawing No. 5761-F) (updated to April 19, 2006), was utilized to designate the “Airport Facilities Area” that was taken as to development rights in the October, 2006 Declaration of Taking. [Exh. A at Exh. A-2].

76. At Section C.2., the Subject Ordinance further denominates as a “Historic Airport Sub-Area” the same 102 acres, with reference to the same map. That section states the following:

2. Historic Airport Sub-Area: the Historic Airport Sub-area lies within the overall Air Safety and Historic Airport District. The boundaries of this sub-area encompassed the existing Solberg-Hunterdon Airport facilities and are coterminous with “Parcel 4”, as identified in the plan entitled “Map for Chambers Brook and Holland Brook Greenway”, dated March 3, 2005, prepared H. Clay McEldowney, PE/LS, and identified as drawing number 5761-F. This area is created to provide for maintenance, development and redevelopment of airport facilities related to the existing Solberg-Hunterdon Airport use.

77. The Subject Ordinance permits airport use only within the same 102-acre Historic Airport Sub-Area that was delineated in connection with the condemnation action. Permitted uses outside of the Historic Airport Sub-Area, i.e. the other 624 acres of Solberg-Hunterdon Airport that Readington attempted to condemn in fee simple, are “subject to the underlying zoning district standards”, which does not include airport uses. [Exh. D]

78. In Section G, the Subject Ordinance purports to delineate “Permitted uses outside of the historic airport subarea” and it does not permit airport uses, on property outside that Sub-Area, which is directly contrary to the Opinion and Order. Instead, Section G of the Subject Ordinance mandates that all other property addressed by the Subject Ordinance, but falling outside of the L-shaped 102-acre area, “shall be subject to the underlying zoning district standards.” [Exh. D at Section G].

79. Readington’s “underlying zoning district standards” do not, unsurprisingly, permit the use of the property for airport or aviation enterprise purposes. [Exh. UU (Readington

Township Code §148-15. AR Agricultural Residential Zone); Exh. VV (zoning map from Sullivan report)]

80. Within the 102-acre “Historic Airport Sub-Area”, the Subject Ordinance imposes the following zoning constraints:

Permitted Principal Uses:

1. Airport, provided that said airport is a licensed public use airport and has met the State and Federal regulatory requirements delineated in section B of this ordinance
2. Conservation
3. Agriculture
4. Passive recreation.

Permitted Accessory Uses:

5. Aircraft rental, charter, sales, leasing, storage and tiedown;
6. Sale of aircraft fuels, fluids, lubricants, parts, supplies and equipment;
7. Aircraft and aircraft component repair and maintenance;
8. Pilot flight schools and training;
9. Aircraft mechanic schools and training;
10. Equipment and appurtenances for aircraft communication, navigation and orientation;
11. Food and beverage vending machines, provided that any internally illuminated panels are not visible from a public right-of-way, public open space, residential use or residential property line;
12. Restaurant, not exceeding forty (40) seats;
13. Rental car, not exceeding five (5) on site rental vehicles;
14. Gift shop;
15. Sale of supplies and equipment for pilots and aircrew members, provided that there is no outdoor display of merchandise;
16. Airport museum;
17. Office, terminal, waiting room, weather briefing, and conference room facilities; and,
18. Conservation
19. Agriculture
20. Passive recreation.

[Exh. D at Sections E & G].

81. The “Regulations for Airports” include the following:

I. Regulations for Airports

Airports shall be required to meet the following regulations for airports.

1. Conformance with State and Federal Requirements: Airports shall maintain conformance with all applicable rules, regulations and lawful orders,

directives and requirements of the State of New Jersey and the United States Federal Government.

2. Ordinance Conformance: Airports shall maintain conformance with the substantive and procedural standards of the Air Safety and Historic District Ordinance and the Code of Readington Township and any deed restrictions which may apply to the airport property.
3. Landscaping and Maintenance: Areas of the Historic Airport Sub-Area not utilized by structures or paved surfaces shall be planted and maintained so as to promote a desirable visual environment and to promote good drainage and soil erosion management practices.
4. Setbacks: The minimum setback for airport buildings, structures, paving and aircraft parking shall be twenty five (25) feet from the boundaries of the Historic Airport Sub Area; the minimum setback for airport buildings, structures, paving and aircraft parking from public rights-of-way shall be fifty (50) feet; the minimum setback from the longitudinal centerline of any runway from the boundaries of the Historic Airport Sub Area shall be one hundred twenty five (125) feet.
5. Floor Area: The maximum permitted cumulative floor area for aircraft hangars and aircraft maintenance shall not exceed 150,000 square feet. The maximum permitted cumulative floor area for other permitted and accessory airport uses shall not exceed 35,000 square feet.
6. Airport Museum Incentive: The first 1,000 square feet of "airport museum" building usage at an airport shall not be counted against the maximum permitted floor area of 35,000 square feet for "other permitted and accessory uses".
7. Historic Design Incentive: If the Planning Board or Zoning Board of Adjustment determines that a proposed new airport development or redevelopment application incorporates significant design, aesthetic, and architectural features that promote and recognize the historic heritage of the airport, 10% of the floor area of such development or redevelopment shall not be counted against the maximum permitted floor area of 150,000 square feet or 35,000 square feet specified herein.
8. Aircraft Hangar Incentive: The Township finds that fully enclosed lockable aircraft hangars designed and used to accommodate a single aircraft offer superior aircraft security, aircraft protection, and minimize aircraft related "attractive nuisance" problems. Proposals for the development of new fully enclosed lockable aircraft hangars designed and used to accommodate a single aircraft, shall be permitted to exclude 10% of the floor area of such development from the tabulation of the maximum permitted floor area of 150,000 square feet specified herein.



9. Automobile Parking: The airport shall have available a sufficient amount of on airport automobile parking to accommodate airport business demands:
  - a. Airport: 1 space/every 3 outdoor tiedowns; plus 1 space for every 2,000 sf of hanger space; plus 1 space for each employee on the greatest shift
  - b. Restaurant: 1 space / 3 seats
  - c. Retail: 1 space / 300 sf
  - d. Flight School: 1 space/ 1,000 sf
  - e. Museum: 1 space / 500 sf
- 1[0]. Vehicle and Pedestrian Supervision: The airport shall provide for such on-airport fencing, signage, and supervision of vehicles and pedestrians so as to provide for the general public safety.

[Exh. D at Section I]

82. The outside draftsperson of the Subject Ordinance, Thomas Thatcher, in preparing his work, was in consultation with, inter alia, Mayor Shamey and counsel in the condemnation action, James Rhatican and Howard Cohen. [Exh. K at 71:16-73:24]

83. Mr. Thatcher received, as part of his review process, from Readington's eminent domain counsel, a copy of the Verified Complaint in eminent domain, and the Declaration of Taking. [Exh K at 97:24-98:19]

84. Julia Allan was involved in Mr. Thatcher's work in drafting the Ordinance. [Exh. K at SAPW-32]

85. Mr. Thatcher confirmed in writing that with respect to the Ordinance he (and others working on the Ordinance) were "taking direction on these matters a step at a time from Mr. Rhatican," the attorney for Readington handling the condemnation matter. [Exh. K at SAPW-37]

86. Mr. Thatcher's initial draft of the Subject Ordinance did not define the airport as being limited to the 102-acre area that was defined in the Declaration of Taking. [Compare Exh. K at SAPW-35 with Exh. K at SAPW-40]

87. Mr. Thatcher was asked to insert the definition of airport in the draft ordinance between April 10 and April 17, 2007. [Exh. K at t 117:14-119:7 and SAPW-35, SAPW-40]

88. Mr. Thatcher has testified on depositions, as he also testified at trial before Judge Armstrong, that representatives of Readington Township gave him the reference to the 102.23

acres as conditions that he should use in drafting the Ordinance because that “is what the Township considered the airport to be.” [Exh. K at 109:10-112:5 and SAPW-35, SAPW-40]

89. Various of the particular dimensions placed into the Ordinance by Mr. Thatcher, including the 150,000 square foot area maximum, and the 35,000 square foot floor area maximum, were "base conditions" that he was instructed to insert into the Ordinance, and the source appears to be the Declaration of Taking. [Exh. K at 126:11-132:18, and SAPW-45, SAPW-46]

90. With respect to the involvement of the eminent domain major players, Mr. Sullivan confirmed a telephone call regarding the Ordinance early in the drafting process, on or about February 21, 2007, with Howard D. Cohen, Esq., who was then co-counsel in the eminent domain case, regarding “airport zoning” discussing “acquisition.” [Exh. DDD at 24:10-25:11, and Exh. DDD at Sullivan-7 at p. 1705]

91. Mr. Sullivan confirmed that the subject Ordinance went well beyond the Ordinance requirements under the ASZA statute and regulations, including the various items delineating what the airport could consist of in terms of structures, floor area, etc. [Exh. DDD at 55:2-58:8].

### **III. DEFENDANT’S STATEMENT OF UNDISPUTED MATERIAL FACTS<sup>3</sup>**

Defendant relies upon the following Statement of Undisputed Material Facts in support of its Motion for Summary Judgment:

#### **A. The Parties**

1. Readington Township is a public municipal body located in the easternmost portion of Hunterdon County, New Jersey. (See Certification of Adam K. Derman, Esq. (“Derman Cert.”), Exhibit 1, Complaint, ¶ 2). Readington is organized under the “Township” form of government pursuant to N.J.S.A. 40A:63-1 et seq. (Complaint, ¶ 2).

2. Plaintiff Solberg Aviation Company (“Solberg”) purports to be a general partnership organized under the laws of the State of New Jersey with its principal place of business located at Solberg Airport, 39 Thor Solberg Road, Whitehouse Station, New Jersey. (Complaint, ¶ 1; Derman Cert., Ex. 2, T. Solberg Dep. at 8:9-23).

3. The partners with an interest in Solberg are Thor Solberg, Jr., Loraine Solberg, and Suzanne Solberg Nagle, each of whom own a one-third interest. (T. Solberg Dep. at 8:9-23).

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<sup>3</sup> Again, the Court has adopted the Defendants’ statement of material facts virtually verbatim for the purposes of the record.

4. Solberg Aviation Company, Inc. is a separate corporation, with the same owners and its function is to operate Solberg Airport, which is also located at 39 Thor Solberg Road, Whitehouse Station, New Jersey, which is within the Township. (See generally T. Solberg Dep. at 14:22-17:11).

5. Solberg owns approximately 725 acres in Readington Township. (Complaint, ¶ 13; T. Solberg Dep. at 11:18-24).

6. Of the approximately 725 acres owned by Solberg, only 102 are actually “used for active airport operations.” (Complaint, ¶ 13; Derman Cert., Ex. 3, A’Hara Dep. at 86:14-87:13; Derman Cert., Ex. 4, Habitat Evaluation and Impact Assessment dated March 11, 2010 (submitted by Solberg to Readington and identifying 102 acres as the location of airport operations); Derman Cert., Ex. 5, Ritter Dep. 79:12 - 82: 12; see also Derman Cert., Ex. 6, Letter dated March 28, 2001 from S. Nagle to the Hon. C. Louis Bassano (noting that only 10 percent of the over 700 acres owned by Solberg is used as an airport)).

7. There is no dispute that, as set forth in Solberg’s own pleading, the only place fixed wing aircraft take off and land is within a 102 acre area within the total Solberg property. (Complaint ¶ 13 (“approximately 100 acres owned by Solberg Aviation and is used for active airport operations...”); A’Hara Dep. at 86:14-87:13; T. Solberg Dep. at 40:13-41:13 (acknowledging that both runways in operation in 2007 were within the 102 acre airport area) and 48:3-8 (runways 04/22 and 3/31 are within that 102 area); Derman Cert., Ex. 7, Golaszewski Report at 2-3; Derman Cert., Ex. 8, 2007 State Inspection Report).

8. The vast majority of the Solberg land is farmland assessed, and undeveloped. (See Derman Cert., Ex. 9, Sullivan Report at 17 (Map Depicting “Existing Land Use”)).

9. Solberg applies for farmland assessments each year, and states under penalty of perjury that no commercial activity takes place on the land that is farmland assessed. (T. Solberg Dep. at 57:16-59:14 (all but the 60 acres of the total Solberg land is farmland assessed); Derman Cert., Ex. 10, Farmland Assessment Applications for 2006 and 2007). The Farmland Assessment Applications contain a Signature and Verification section, which states that “[t]he undersigned declares under the penalties provided by law, that this application, including any accompanying schedules and statements, has been examined by him (her) and to the best of his (her) knowledge and belief is true and correct. Filing of this application is also a representation that the land will continue to be devoted to an agricultural or horticultural use during the year for which farmland

assessment is requested.” (Farmland Assessment Applications for 2006 and 2007 (emphasis added)).

10. Approximately 690 acres is, and has been, farmland assessed for many years as a result of these sworn applications. (T. Solberg Dep. at 57:16-59:14 (all but the 60 acres of the total Solberg land is farmland assessed); Farmland Assessment Applications for 2006 and 2007).

11. As set forth in Solberg’s own Farmland Assessment Applications, the actual land where commercial operations take place is likely approximately 56 acres. (2007 Farmland Assessment Application; T. Solberg Dep. at 57:16-59:14).

**B. The Township Has a Well Established Master Plan and Zoning Rules.**

12. The Township has a long-standing history of exercising its authority under the MLUL and related law to preserve its character and enact zoning rules. It has adopted a 1979 Open Space Master Plan, a 1990 Master Plan, a 1998 Amendment to the Master Plan, a 1999 Open Space Plan, and a 2001 Amendment to the Master Plan, among other planning documents. (See Derman Cert., Ex. 11, 1979 Open Space Master Plan; Derman Cert., Ex. 12, 1990 Master Plan; Derman Cert., Ex. 13, 1998 Amendment to the Master Plan; Derman Cert., Ex. 14, 1999 Open Space Plan; and Derman Cert., Ex. 15, 2001 Amendment to the Master Plan). In each, the Township repeatedly expressed the importance of preserving the character of its community through preservation of open space. (See 1979 Open Space Master Plan, 1990 Master Plan, 1998 Amendment to the Master Plan, 1999 Open Space Plan, and 2001 Amendment to the Master Plan).

13. Prior to the adoption of the Ordinance, the lands at issue were zoned in the Township’s Zoning Map as “AR and RR lands.” (Sullivan Report at 15). This meant that they were designated as either “agricultural-residential” or “rural-residential,” which are zoning designations that (a) for the parcels designated as AR, a landowner was permitted to build “single-family detached homes and required a minimum set-aside of 70% of a tract for farmland or open space,” and (b) for the parcels designated as RR, a landowner was “permitted single-family detached homes and required a minimum set-aside of 50% of a tract for farmland or open space.” (Sullivan Report at 15-16).

14. At the time of the adoption of the Ordinance, airport use was not specifically permitted, although the Township has never opposed any airport use within the 102 acres where

airport operations have historically taken place and take place at present.<sup>4</sup>

15. The Ordinance effectively and reasonably balances the Township's long-standing land-use policies with the requirements of the ASZA and its regulations. (See generally Sullivan Report).

**C. The Township Adopted an Ordinance to Comply with the Air Safety and Zoning Act of 1983.**

16. In 1983, the New Jersey Legislature adopted the Air Safety and Zoning Act (defined above as the "ASZA"). (See Complaint, ¶¶ 3-4; Derman Cert., Ex. 16, N.J.S.A. 6:1-81 et seq.).

17. Pursuant to the authority granted under the ASZA, the New Jersey Department of Transportation adopted regulations enforcing the ASZA and setting certain standards for compliance with the ASZA. (Derman Cert., Ex. 17, Thatcher Dep. 29:20-30:4).

18. At the time, the official within the Department of Transportation who was primarily responsible for drafting the regulations was Thomas Thatcher, who was then the "Executive Assistant to the State Aviation Director." (Thatcher Dep. at 32:1-16).

19. The statute and accompanying regulations require, among other things, that (a) municipalities that host airports within their borders define within their zoning plan that "airports (a term defined in the statute and regulations) are not "non-conforming" uses and (b) establish safety zones that protect against obstructions for airport operations. See N.J.S.A. 6:1-85 (requiring ordinance with safety zones); Derman Cert., Ex. 18, N.J.A.C. 16:62-2.1(e) (barring municipalities from defining airports as a non-conforming use).

20. The ASZA and the ASZA Regulations do not require a local municipality to designate airport use as permitted use on all land owned by the airport's sponsor or that the host municipality anticipate unknown, future expansion of the hosted airport in deciding where to designate airport use as permitted. Rather, in order to comply with the ASZA and the ASZA Regulations, a municipality is required to (a) amend their zoning laws so that any airport uses are no longer designated as non-conforming, and (b) establish safety zones. See N.J.S.A. 6:1-85 (requiring ordinance with safety zones); N.J.A.C. 16:62-2.1(e) (barring municipalities from defining airports as a non-conforming use).

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<sup>4</sup> The references to the 102 acre area is to the area where airport use is permitted pursuant to the Ordinance. However, as set forth in Solberg's own Farmland Assessment Applications, the actual land where commercial operations take place is likely approximately 56 acres. (2007 Farmland Assessment Application; T. Solberg Dep. at 57:16-59:14).

21. In 2007, the Township retained Mr. Thatcher who had by then retired from the New Jersey Department of Transportation to draft an ordinance that was compliant with the ASZA and the ASZA Regulations. (Thatcher Dep. at 34:23-25, 34-35).

22. Mr. Thatcher worked with Michael Sullivan, the Township's long-time planning consultant. (Thatcher Dep. at 34-35; Derman Cert., Ex. 19, Sullivan Dep. at 12:3-11). In so doing, Mr. Thatcher conducted a review of ordinances adopted by other municipalities pursuant to the ASZA and determined that the Township could adopt an ordinance that "recognizes the historic significance of Solberg Airport as a genuinely historic facility and doing that within the context of the air safety zoning Ordinance." (Thatcher Dep. at 62:2-63:3; see also 142:1-146:16).

23. He also reviewed the facilities and amenities that existed at other airports in New Jersey in order to determine what amenities should be permitted, or even encouraged, at Solberg Airport. (Thatcher Dep. at 147:3-12).

24. Notably, the Ordinance not only identified all of the then-current operations as permitted uses (including where applicable airport uses), but also permitted modernization of the airport and allowed new uses not previously permitted (such as an airport, a car rental facility, and expanded hangar facilities). (Derman Cert., Ex. 20, Hearing T. at 5:19-11:10).

25. The Ordinance also delineated safety zones without regard to who owned the land. (Thatcher Dep. 148:17-150:25).

26. The safety zones delineated by the Ordinance include both land owned by Solberg and land owned by others. (Thatcher Dep. 148:17-150:25).

27. Mr. Thatcher testified that the delineation of the airport is unrelated to the delineation of the safety zones. (Thatcher Dep. at 151:1-6).

28. The Township adopted the Ordinance largely as drafted by Mr. Thatcher at a public hearing on June 6, 2007. (Complaint, ¶ 17; Hearing Tr. 67:1-14).

29. During the June 7, 2007 hearing, Mr. Thatcher explained the purpose of the Ordinance and the ways in which it brought Readington into compliance with the ASZA and the ASZA Regulations, and the representatives of the Township responded to inquiries from residents. (See generally Hearing Tr. 5:19-11:12).

30. Toward that end, at the hearing, Mr. Thatcher explained that the purpose of the Ordinance was to "satisfy the substantive, technical and procedural requirements of the State's Air Safety and Zoning Act of 1983, and ... N.J.D.O.T. airport zoning regulations." (Hearing Tr. 6:9-16).

31. At the meeting, Mr. Thatcher explained that a town with a qualifying airport, such as Readington, must adopt an ordinance meeting the ASZA and the ASZA Regulations, and that such an Ordinance would do four principal things:

One, clearly delineate the regulated airport safety zone area. Two, specify permitted and specify prohibited land uses within the airport safety zones. Three, specify the maximum heights allowable in the zone for buildings and plantings. And finally . . . coordinate local planning and zoning procedures with any applicable reviews by N.J.D.O.T.

(Hearing Tr. 7:3-14).

32. Mr. Thatcher noted that in preparing the Ordinance, he studied all thirty-two air safety zoning ordinances currently on file with the Department of Transportation (see Hearing Tr. 7:15-19), and he explained that although, given the Township's zoning for the areas surrounding the airport (AR and RR) the Township was in de facto substantive compliance with the ASZA and the ASZA Regulations, the Ordinance would bring the Township into full compliance with all four regulatory requirements. (See Hearing Tr. 8:23-9:9).

33. Mr. Thatcher also discussed that the Ordinance, among other things, recognizes the importance of the Airport in the Township's cultural and historical heritage, recognizes the regulatory standards of other state and federal agencies regulating aviation, encourages cooperation between all parties, and provides for an array of permitted airport accessory uses. (See Hearing Tr. at 10:8-11:1).

34. At the conclusion of his presentation at the hearing, Mr. Thatcher emphasized that the Ordinance not only complied with applicable law, but was proper in all respects:

I can say to you without doubt, this is the most carefully researched and detailed and documented air safety zoning ordinance in the state. It's a synthesis of the best procedures and the best practices of all the other municipalities and meets in detail the requirements of the Airport Safety Zoning Act of 1983 and the regulations of the New Jersey Department of Transportation.

(Hearing Tr. at 11:2-10).

35. Additionally, at the hearing, Mayor Shamey explained that "[t]he ordinance and the act are based upon, the runway . . . based upon measurements from the center line of the runway and measurements from the end of the runways. So, these are what they are today, and it's based on that." (Hearing Tr. 20:3-8).

36. Mr. Thatcher confirmed that “[t]he air safety zones are keyed off of by law the runway lengths and center lines” and that “[t]here is no ordinance in the state where an air safety zone is calculated as a result of airport property lines. It’s always calculated as where the runways, what’s their length.” (Hearing Tr. 34:15-20).

37. Mayor Shamey also emphasized that the Township was passing the Ordinance to bring it into compliance with state law, and that the Ordinance was crafted in such a way as to “embrace the airport and make it a part of our community.” (Hearing Tr. 32:8-22).

**D. Solberg Airport’s Long-Standing Operations Are Entirely Permitted Pursuant to the Ordinance and Expansion Would Require State and Federal Approval.**

38. Solberg Airport has been operating since 1939, and its size has remained unchanged in the several decades. (Derman Cert., Ex. 21, Solberg Airport Master Plan at § 1-1; Derman Cert., Ex. 22, October 2002 Draft Environmental Assessment (“Draft EA”) at § 2; 2007 State Inspection Report; Derman Cert., Ex. 23, 2016 FAA Airport Master Record).

39. At the time the Ordinance was adopted, Solberg Airport had two runways, Runway 04-22 and Runway 13-31, which are 3,735 and 3,440 feet long, respectively. (See 2007 Inspection State Report). Those runways remain in place today. (2016 FAA Airport Master Record).

40. Runway 10-28 was not shown on the 2007 State Inspection Report. (2007 State Inspection Report; T. Solberg Dep. at 43:17-22).

41. Runway 10-28 is admittedly not used for takeoff and landing of fixed wing aircraft. (T. Solberg Dep. at 69:10-13).

42. Notably, Solberg has for many years submitted under penalty of perjury a Farmland Assessment Application to the Township in which it successfully sought to have most of the land it owns identified as “farmland assessed,” thereby creating a significant tax benefit. (See, e.g., 2007 Farmland Assessment Application; T. Solberg Dep. at 57:16-23).

43. In these applications, Thor Solberg stated under oath that about 693 of the approximately 751 acres owned by Solberg within Readington are not being used for commercial purposes, an admission that vast majority of the property held by Solberg is not used for airport purposes but, is instead farmland on which no airport operations occur. (2007 Farmland Assessment Application; T. Solberg Dep. at 57:16-23).

44. In 1998, Solberg submitted a proposed “Airport Master Plan” to the Federal Aviation Administration (“FAA”). (A’Hara Dep. at 29:15-22; Solberg 1998 Airport Master Plan).



45. That proposal was the initial step as part of a long-term application process to expand Solberg Airport. (A'Hara Dep. at 52:21-54:5).

46. The application process was never completed. (See A'Hara Dep. at 52:21-54:5; Derman Cert., Ex. 24, New Jersey Department of Transportation Letter dated March 25, at 9 (“Every item of significant airport development is subject to an environmental review and written statement of finding by the Federal Aviation Administration”); Derman Cert., Ex. 25, FAA Letter dated October 22, 1998 at 5 (“The approval indicated by my signature is given subject to the condition that every significant item of airport development identified in the ALP may not be undertaken without appropriate environmental review and written environmental finding by the Federal Aviation Administration”); Solberg 1998 Airport Master Plan; October 2002 Draft EA at cover (identifying document as “draft”), October 2002 Draft EA at pp. 2-8 and § 3; Derman Cert., Ex. 26, Commissioner Fox Letter Dated October 29, 2002).

47. Solberg’s own aviation expert, who drafted Solberg’s Airport Master Plan, admitted that the 1998 conditional approval is out of date and no longer effective, and that if Solberg wanted to expand Solberg Airport, it would have to start the process from the beginning. (A'Hara Dep. at 55:9-56:10; Solberg 1998 Airport Master Plan).

48. In fact, Mr. A'Hara admitted during his deposition that all of the economic models and predictions upon which the Airport Master Plan was premised did not come to fruition, and that there is no current study or forecast showing a need to expand Solberg Airport. (A'Hara Dep. at 56:22-67:21).

**E. The Ordinance Permits Additional Uses at Solberg Airport and Complies with the ASZA and the MLUL.**

49. The Ordinance as drafted by Mr. Thatcher, and adopted by the Township’s governing body, addresses not only the safety zones required by the ASZA and the mandate that airport use cannot be designated as non-conforming, but also other land use controls and incentives permitted under the MLUL.

50. Specifically, the Ordinance amends the Township’s Land Development regulations as well as its Zoning Map, creating a new “overlay zone,” the “Solberg-Hunterdon Air Safety and Historic Airport District” (the “Historic Airport District”) within the Township’s existing AR Agricultural Residential Zone and the RR Rural Residential Zones. (See Ordinance at 1 (attached as Exhibit A to Solberg’s Complaint, Derman Cert., Ex. 1)).

51. All current and historic airport operations occur within the 102 acre area that is defined in the Ordinance as the Historic Airport District. (Complaint, ¶ 13; A'Hara Dep. at 86:14-87:13; T. Solberg Dep. at 40:13-41:13 (acknowledging that both runways in operation in 2007 were within the 102 acre airport area); Ritter Dep. 79:12-82:12).

52. The Ordinance, in accordance with the ASZA, makes the actual airport itself a conforming use in the Historic Airport Sub-Area of the Historic Airport District (Ordinance at §E at ¶¶ 1-4).

**DEFENDANT'S RESPONSE TO SOLBERG'S STATEMENT  
OF PURPORTEDLY UNCONTESTED FACTS**

1. Ordinance #18-2007 ("Subject Ordinance") was adopted by the Township of Readington on June 7, 2007. [Exh. C at ¶ 17; Exh. D]

**Response:** For purposes of this motion, admit.

2. At the time of the adoption of the Subject Ordinance, Readington owned in fee -- by virtue of a Declaration of Taking -- 624 of the 726± acres comprising Solberg Airport, and development rights to the remaining 102± acres. [Exh. A]

**Response:** This statement is not a statement of fact; it contains the ultimate question of law before this Court: whether "726+ acres compris[es] Solberg Airport" as the term "airport" is defined in the ASZA. Readington admits that at the time of the adoption of the Ordinance, the Declaration of Taking identified as Exhibit A to the Aslanian Certification was in effect. The ownership of the 726 acres at issue was as set forth therein. (Aslanian Cert., Exhibit A, Declaration of Taking). However, which land constitutes "Solberg Airport" depends on the context, including whether the term "airport" is being used for purposes of compliance with the Air Safety and Zoning Act ("ASZA"). The term "airport" is specifically defined in the ASZA and, therefore, for purposes of the Ordinance, Readington used that definition which includes only the 102 acres where airport use is actually conducted. As set forth in Solberg's Complaint in this action, of the 726 acres owned by Solberg, only 102 are actually "used for active airport operations." (Aslanian Cert. at Exhibit C, Complaint, ¶ 13 ("approximately 100 acres owned by Solberg Aviation and is used for active airport operations..."); Derman Opposition Cert., Exhibit 5, 2007 State Aviation Inspection Report Exhibit 6, A'Hara Dep. at 86:14-87:13; Exhibit 7, Habitat Evaluation and Impact Assessment dated March 11, 2010 (submitted by Solberg to Readington and identifying 102 acres as the location of airport operations); Exhibit 8, Ritter Dep. 79:12 - 82: 12; Exhibit 9, T. Solberg Dep. at 40:13-41:13 (acknowledging that both runways in operation in 2007 were within the 102

acre airport area) and 48:3-8 (runways 04/22 and 3/31 are within that 102 area); Exhibit 10, Golaszewski Report at 2-3; Exhibit 11, 2006 and 2007 Farmland Assessment Application (statements under oath that no commercial activity takes place on most of the 725 acres held by Solberg); see also Derman Opposition cert., Exhibit 12, Letter dated March 28, 2001 from S. Nagle to the Hon. C. Louis Bassano (noting that only 10 percent of the over 700 acres owned by Solberg is used as an airport)). And, as set forth in Solberg's own pleading, the only place fixed wing aircraft take off and land is within a 102 acre area within the total Solberg property. (Id.) At the time the Ordinance was adopted, Solberg Airport had two runways, Runway 04-22 and Runway 13-31, which are 3,735 and 3,440 feet long, respectively, and both of which are located within the 102 acre area. (See Derman Opposition Cert., Exhibit 5, 2007 Inspection State Report). Those runways remain in place today. (Derman Opposition Cert., Exhibit 15, 2016 FAA 5010). Furthermore, the vast majority of the Solberg land is farmland assessed, and undeveloped. (See Derman Opposition Cert., Exhibit 16, Sullivan Report at 17 (Map Depicting "Existing Land Use")). Indeed, Solberg applies for farmland assessments each year, and states under penalty of perjury that no commercial activity takes place on the land that is farmland assessed. (See Derman Opposition Cert., Exhibit 9, T. Solberg Dep. at 57:16-59:14 (all but the 60 acres of the total Solberg land is farmland assessed); Exhibit 11, Farmland Assessment Applications for 2006 and 2007). Approximately 690 acres is, and has been, farmland assessed for many years as a result of these sworn applications. (Id.) See also N.J.S.A. 6:1-82 (defining airport for purposes of ASZA); N.J.A.C. 16:62-1.1 (same); Readington Opposition Brief at Argument, Point II-A). The Subject Ordinance creates what it designates as a Historic District Sub-Area ("Sub-Area") comprising the aforesaid 102± acres. [Exh. D at Section C.2]

**Response:** For purposes of this motion, admit.

3. The Sub-Area is identical to the 102 acres condemned by Readington Township in September and October, 2006 and described in the Declaration of Taking of October 4, 2006 as the "Airport Facilities Area". [Exh. A at Exh. A]

**Response:** For purposes of this motion, admit. However, as set forth in Readington's Brief in Opposition to Solberg's motion for summary judgment, the reason for this is that those 102 acres comprised the areas where airport operations – take-offs and landings of fixed wing aircraft – actually take place. (See Readington Opposition Brief at Argument, Point II-A; Derman Opposition Cert., Exhibit 2, Thatcher Dep. at 139:5-16; Derman Opposition Cert., Exhibit 5, 2007 State Aviation Inspection Report).

4. The Sub-Area created by the Subject Ordinance is the only portion of the 726± acre Solberg Airport property upon which aviation related activities may be undertaken. [Exh. D at Section G].

**Response:** This statement is denied. It is further denied that this dispute is material. The term “aviation-related activities” is not defined herein, and therefore, Readington is unable to provide an additional response except to say that the terms of the Ordinance speak for themselves. Furthermore, as set forth above, and in Readington’s Brief in Opposition and Moving Briefs, “airport” use, as the term airport is used in the ASZA, is permitted within the HASA pursuant to the Ordinance. However, nothing in the Ordinance or in Readington’s other zoning regulations prevents blimp, balloon, or other similar activities from occurring outside of the HASA and Readington has never attempted to restrict such activities. (Aslanian Cert., Exhibit D, Ordinance; Derman Opposition Cert., Exhibit 9, T. Solberg Dep at 172:3-17).

5. The Subject Ordinance prohibits airport or aviation related activities on any of the 726± acres beyond the 102 acres. [Exh. D at Section G; Exh. UU]

**Response:** This statement is denied. It is further denied that this dispute is material. The term “aviation-related activities” is not defined herein, and therefore, Readington is unable to provide an addition response except to say that the terms of the Ordinance speak for themselves. Furthermore, as set forth above, and in Readington’s Brief in Opposition and Moving Briefs, “airport” use, as the term airport is used in the ASZA is permitted within the HASA pursuant to the Ordinance. However, nothing in the Ordinance or in Readington’s other zoning regulations prevents blimp, balloon, or other similar activities from occurring outside of the HASA and Readington has never attempted to restrict such activities. (Aslanian Cert., Exhibit D, Ordinance; Derman Opposition Cert., Exhibit 9, T. Solberg Dep at 172:3-17).

6. The Superior Court (Hon. Paul W. Armstrong), after a full trial, found and concluded that the condemnation of all 726± acres, was improper and comprised an unconstitutional and illegal taking of the Solberg property, and invalidated the taking in its entirety, with fee simple title reverting to Solberg Aviation Company as to all of the acreage. [Exh. E at 1, 53-54]

**Response:** Readington admits for purposes of this motion that as a result of Judge Armstrong’s Opinion in the Condemnation Action, Readington’s Declaration of Taking (Aslanian Exhibit A) was invalidated and Solberg owns in fee simple all of the 726 acres at issue. Readington notes, however, that Readington has appealed the Condemnation Action and that appeal is currently pending. With respect to the mischaracterization of the terms of Judge Armstrong’s Opinion,

Readington refers the Court to the actual opinion, the terms of which speak for themselves. (See Aslanian Cert., Exhibit E, Condemnation Action Opinion).

7. The Superior Court (Hon. Paul W. Armstrong), after a full trial, also found and concluded, *inter alia*, that Solberg Aviation Company has the right with respect to all of the lots and blocks comprising the approximately 726± acres “to develop or otherwise utilize the aforesaid property for any use involved with or incidental to the ownership and operation of an airport in accordance with the laws and regulations of the State of New Jersey and the United States . . .”. [Exh. E at 53-54]

**Response:** Readington admits for purposes of this motion that as a result of Judge Armstrong’s Opinion in the Condemnation Action, Readington’s Declaration of Taking (Aslanian Exhibit A) was invalidated and Solberg owns in fee simple all of the 726 acres at issue. Readington notes, however, that Readington has appealed the Condemnation Action and that appeal is currently pending. Readington denies that the quoted language appears on the referenced pages of Judge Armstrong’s Opinion (although it acknowledges that similar language does appear in the Opinion), and refers the Court to the actual Opinion, the terms of which speaks for itself, and which provides that Solberg’s rights to operate an airport aviation enterprise are “subject to regulation by the Division of Aeronautics of the New Jersey Department of Transportation and such other or successor governmental entity of the State of New Jersey exercising regulatory control over airports.” (See Aslanian Cert., Exhibit E, Condemnation Action Opinion at a. 53-54).

8. The Subject Ordinance, if enforced, would not allow Solberg Aviation Company to use the airport property in accordance with Judge Armstrong’s findings and conclusions. [Exh. D at Section E, G; Exh. UU; Exh. DDD at 78:21-25]

**Response:** This statement calls for a legal conclusion to which no response is required. To the extent a response is required, this statement is denied. As set forth in greater detail in Readington’s brief in opposition to this motion for summary judgment, Solberg has mischaracterized Judge Armstrong’s findings and conclusions. For example, Judge Armstrong did not require that all property owned by Solberg be designated for airport use. (Aslanian Cert., Exhibit E, Judge Armstrong Opinion in Condemnation Action; see e.g. Readington Opposition Brief at Argument, Point I-C).

9. In 1999, Solberg Aviation Company received conditional approval from the NJDOT and FAA of a proposed Master Plan and Airport Layout Plan involving an extension of the existing runway and other improvements and expansion of the airport. [Exh. E at 14]

**Response:** Readington admits for the purposes of this motion that in 1997 Solberg submitted a proposed “Airport Master Plan” to the Federal Aviation Administration (“FAA”) and that in 1998 Solberg received “conditional” approval of that plan from the FAA and the New Jersey Department of Transportation. However, as set forth in greater detail in Readington’s Opposition Brief, this conditional approval was merely an initial step as part of a long-term application process to expand Solberg Airport, which is both lengthy and far from guaranteed. (Derman Opposition Cert. Exhibit 13, Solberg 1998 Airport Master Plan; Exhibit 17, New Jersey Department of Transportation Letter dated March 25, 1999 at 9; Exhibit 18, FAA Letter dated October 22, 1998 at 5; Exhibit 6, A’Hara Dep. at 52:21-54:5; Aslanian Cert., Exhibit E, Condemnation Action Opinion at 14 (identifying approvals as conditional pending environmental assessment). Moreover, the application process was never completed and the final word from the state of New Jersey in 2002 was to reject Solberg’s plan to expand airport operations beyond where they occurred as of the adoption of the Ordinance. (See Derman Cert., Exhibit 6 A’Hara Dep. at 52:21-54:5; Exhibit 13, Solberg 1998 Airport Master Plan; Exhibit 14, October 2002 Draft EA at cover (identifying document as “draft”), at 2-8 and § 3 (limiting approval); see also Exhibit 19, Transportation Commissioner Letter Dated October 29, 2002). This final word came fully five (5) years before the Ordinance in question was adopted.

10. The Subject Ordinance, if enforced, would not allow potential implementation of the aforesaid Master Plan and Airport Layout Plan and would not allow, *inter alia*, the extension of the existing runway at Solberg Airport. [Exh. WW at 25:7-26:7; Exh. DDD at 80:24-82:19]

**Response:** This statement calls for a legal conclusion to which no response is required. Readington incorporates by reference its response to Paragraph No. 10 above. This statement is not material to this motion or this action. In any event, Solberg has no current approvals and will need to begin the approval process again. (See Derman Opposition Cert., Exhibit 6, A’Hara Dep. at 55:9-56:10).

11. Solberg Airport was founded by Thor Solberg, Sr., a world-renowned aviator who contributed to pre-and post-aeronautical achievements, and who was designated by President Franklin D. Roosevelt as a “Great American” for his achievements and contributions to security of the United States. In or around 1939, he began accumulating various contiguous parcels to

comprise over 700 acres of land, separated only by public roads, to create Solberg Airport. In 1941, the Township of Readington adopted a resolution granting permission for the operation of a “commercial airport” on the acreage that it now occupies. [Exh. E (May 4, 2015 Opinion of the Hon. Paul W. Armstrong) at 8-9]

**Response:** For purposes of this motion, Readington does not dispute the first sentence of the statement. However, Readington (a) denies, at least for purposes of the ASZA and the Ordinance at issue, that Solberg Airport comprises all of the land held by Solberg within Readington which admittedly is separated by public roads, (b) notes that Solberg has not cited to a copy of the aforesaid 1941 Township Resolution, and (c) states that none of the statements set forth in this paragraph are material to this motion or this action.

12. Well established as a general aviation facility, Solberg Airport is devoted to the needs of both recreational and business aircraft. Both the Federal Aviation Administration (“FAA”) and the New Jersey Department of Transportation Division of Aeronautics (“NJDOT”) designated Solberg Airport as a “reliever airport” in 1990. [*Id.* at 10]. Reliever status arises from the federal and state recognition of the potential to utilize the airport to relieve congestion at major regional airports, and plays a role in making federal funding available, along with state funding, for improvements. [*Id.*]

**Response:** For the purposes of this motion, admitted, but Readington denies that the statements in Paragraph 13 are material to the Court’s adjudication of this motion. Moreover, Readington notes that the term “reliever” airport is a term of art within the aviation industry and that this paragraph does not fully describe that term.

13. Solberg Airport is currently comprised of 744 acres, more or less, that are dedicated, designed, and set aside for aviation uses. [Exhs. G, H]. It includes three runways, which are described by reference to the direction each end of the particular runway faces. [Exh. YY; Exh. ZZ]. It has a runway designated as Runway 4-22, which is the main runway and is paved to 3000 feet. Solberg Airport also has two cross wind runways, one designated as Runway 10-28 and the other as Runway 13-31. [*Id.*]. Several buildings house various airport activities, including a modest main terminal with office space, and connected warehouse space for aircraft maintenance procedures.

**Response:** The first part of this statement is not a statement of fact; it contains the ultimate question of law before this Court; whether “Solberg Airport is currently comprised of 744 acres” as the term

“Airport” is defined in the ASZA. Readington admits for the purposes of this motion that Solberg owns approximately 726 acres, but denies that all 726 acres are dedicated, designed or set aside for aviation uses. (Aslanian Cert. Exhibit C, Complaint, ¶ 13 (“approximately 100 acres owned by Solberg Aviation and is used for active airport operations...”); Derman Opposition Cert., Exhibit 5, 2007 State Aviation Inspection Report; Exhibit 6, A’Hara Dep. at 86:14-87:13; Exhibit 7, Habitat Evaluation and Impact Assessment dated March 11, 2010 (submitted by Solberg to Readington and identifying 102 acres as the location of airport operations); Exhibit 8, Ritter Dep. 79:12 - 82: 12; Exhibit 9, T. Solberg Dep. at 40:13-41:13 (acknowledging that both runways in operation in 2007 were within the 102 acre airport area) and 48:3-8 (runways 04/22 and 3/31 are within that 102 area); Exhibit 10, Golaszewski Report at 2-3; see also Derman Opposition cert., Exhibit 12, Letter dated March 28, 2001 from S. Nagle to the Hon. C. Louis Bassano (noting that only 10 percent of the over 700 acres owned by Solberg is used as an airport)). Moreover, as set forth in Farmland Assessment Applications submitted to Readington by Solberg, which include statements under oath, Solberg has repeatedly admitted that airport operations do not take place on most of the property it owns within Readington. (Derman Opposition Cert., Exhibit 11, 2006 and 2007 Farmland Assessment Applications). Readington also notes that which land constitutes “Solberg Airport” depends on the context, including whether the term “airport” is being used for purposes of compliance with the ASZA. The term “airport” is specifically defined in the ASZA and, therefore, for purposes of the Ordinance, Readington used that definition which includes only the 102 acres where airport use is actually conducted. (See Response to Paragraph No. 2 above; see also Readington Opposition Brief at Argument, Point II-A). Furthermore, Readington denies that Solberg Airport comprises three runways, and denies the existence of a runway designated as “Runway 10-28.” (See Derman Opposition Cert., Exhibit 5, 2007 State Inspection Report; Exhibit 15, 2016 FAA 5010 Report).

14. Solberg Airport is licensed by the NJDOT under the category of “fixed wing aeronautical facility” as “Airport - Public Use”. [Exhs. G, H].

**Response:** This paragraph is admitted for purposes of this motion. We note, however, that Exhibit H to the Aslanian Cert. appears to be the license granted by the State of New Jersey to Solberg authorizing Solberg Airport. Readington notes that this document does not specify the size of Solberg Airport for any purpose or definition. Moreover, Exhibit G to the Solberg Airport contains several federal and state inspection reports and airport master records. Such documents are generally self-reported and, moreover, the 2007 State Aviation Inspection Report and the current



FAA Airport Master Record (FAA 5010) identify only two runways at Solberg Airport, both of which are located within the HASA. (Derman Opposition Cert., Exhibit 5, 2007 State Inspection Report; Exhibit 15, 2016 FAA Airport Master Record).

15. Solberg Airport has been licensed by the NJDOT as such an airport comprised of in excess of 700+ acres for decades. [Exhs. FFF, G].

**Response:** For purposes of this motion, Readington admits that Solberg Airport is licensed by the New Jersey Department of Transportation. With respect to the claim that Solberg's licensure is for an airport "in excess of 700+ acres," this statement is denied and Readington incorporates by references its responses to Paragraph Nos. 2 and 15 with respect to same.

16. The NJDOT contracted to acquire the airport in 2002, executing an Agreement which recited that "the Solberg Hunterdon Airport is comprised of several parcels of real property, which total approximately 745 acres located in Readington Township and Hunterdon County," and further confirmed that "the Airport is and has been a vital aeronautical facility and a significant component in the New Jersey State Airport System Plan and the National Plan for Integrated Airport Systems for more than 60 years." [Exh. L]. And in its press release announcing the Agreement, NJDOT reaffirmed that Solberg airport "is a 745 acre facility." [Exh. XX].

**Response:** For the purposes of this motion, Readington admits that Solberg has accurately paraphrased Exhibits L and XX to the Aslanian Certification (although there appear to be some differences between the quoted text and the actual documents). However, Readington states that such statements are not dispositive of the legal issue before the Court, and not material to this motion or this action. Moreover, Readington notes that a description of land to be purchased in a contract for sale and related documents is not material to the issue of where airport use must be permitted pursuant to the ASZA or the ASZA Regulations.

17. Solberg Airport is not limited to the 102 acres. [Exh. YY].

**Response:** This statement is not a statement of fact; rather is a matter of law to be decided by this Court. To the extent it is considered a statement of fact, this statement is denied. Moreover, as set forth in response to Paragraph No. 2 above, which land constitutes "Solberg Airport" depends on the context, including whether the term "airport" is being used for purposes of compliance with ASZA. The term "airport" is specifically defined in the ASZA and, therefore, for purposes of the Ordinance, Readington used that definition which includes only the 102 acres where airport use is actually conducted. As set forth in Solberg's Complaint in this action, of the 725 acres owned by

Solberg, only 102 are actually “used for active airport operations.” (Aslanian Cert. Exhibit C, Complaint, ¶ 13 (“approximately 100 acres owned by Solberg Aviation and is used for active airport operations...”); Derman Opposition Cert., Exhibit 5, 2007 State Aviation Inspection Report Exhibit 6, A’Hara Dep. at 86:14-87:13; Exhibit 7, Habitat Evaluation and Impact Assessment dated March 11, 2010 (submitted by Solberg to Readington and identifying 102 acres as the location of airport operations); Exhibit 8, Ritter Dep. 79:12 - 82: 12; Exhibit 9, T. Solberg Dep. at 40:13-41:13 (acknowledging that both runways in operation in 2007 were within the 102 acre airport area) and 48:3-8 (runways 04/22 and 3/31 are within that 102 area); Exhibit 10, Golaszewski Report at 2-3; Exhibit 11, 2006 and 2007 Farmland Assessment Application (statements under oath that no commercial activity takes place on most of the 725 acres held by Solberg); see also Derman Opposition cert., Exhibit 12, Letter dated March 28, 2001 from S. Nagle to the Hon. C. Louis Bassano (noting that only 10 percent of the over 700 acres owned by Solberg is used as an airport)). And, as set forth in Solberg’s own pleading, the only place fixed wing aircraft take off and land is within a 102 acre area within the total Solberg property. (*Id.*) At the time the Ordinance was adopted, Solberg Airport had two runways, Runway 04-22 and Runway 13-31, which are 3,735 and 3,440 feet long, respectively, and both of which are located within the 102 acre area. (See Derman Opposition Cert., Exhibit 5, 2007 Inspection State Report). Those runways remain in place today. (Derman Opposition Cert., Exhibit 15, 2016 FAA Airport Master Record). Furthermore, the vast majority of the Solberg land is farmland assessed, and undeveloped. (See Derman Opposition Cert., Exhibit 16, Sullivan Report at 17 (Map Depicting “Existing Land Use”)). Indeed, Solberg applies for farmland assessments each year, and states under penalty of perjury that no commercial activity takes place on the land that is farmland assessed. (See Derman Opposition Cert., Exhibit 9, T. Solberg Dep. at 57:16-59:14 (all but the 60 acres of the total Solberg land is farmland assessed); Exhibit 11, Farmland Assessment Applications for 2006 and 2007). Approximately 690 acres is, and has been, farmland assessed for many years as a result of these sworn applications. (*Id.*)

18. Solberg Airport hosts several blimps, which moor at the airport outside of the 102 acres zoned as airport. [Exhs. YY, EEE, FFF]. Each airship that moors at Solberg Airport requires, for safety reasons, several acres around which to moor because of wind speed and direction. [*Id.*]. Several blimps have traditionally used the airport -- one of the few in the area with sufficient land to permit the mooring -- at any given time during the spring and summer months as a base of operations, by mooring at the airport between trips. [Exhs. EEE, FFF]

**Response:** For the purposes of this motion, Readington admits that blimp operations are conducted both inside and outside the 102 acre HASA defined in the Ordinance. Readington states that none of the statements set forth in this paragraph are material to this motion or this action, because blimps are not “fixed wing aircraft.” However, Readington further states that (a) Readington has never opposed or sought to curtail such activities (Derman Opposition Cert., Exhibit 9, T. Solberg Dep. at 172:3-17); and (b) the ASZA does not require that blimp activity be explicitly designated as a permitted use. (See Readington Opposition Brief at Argument, Point II).

19. Solberg Airport also has historically had a third cross-wind runway, designated as Runway 10-28. [Exh. ZZ at 24:4-10, 41:9-10, 44:18-45:5; 45:20-47:17; Exh. G].

**Response:** It is denied that in 2007, when the Ordinance was adopted, that runway 10-28 existed. It is further denied that any other historical timeframe is material to this motion. As set forth in the 2007 State Aviation Inspection Report for Solberg Airport, as of the date the Ordinance was adopted, which is all that is material to this motion or this action, Solberg Airport had two runways. (Derman Opposition Cert., Exhibit 5, 2007 State Inspection Report; Exhibit 9, T. Solberg Dep. at 43:17-22 (acknowledging that 2007 inspection report does not list three runways) and 69:10-13 (admitting that in 2007 runway 10-28 was not used by fixed winged aircraft).

20. Runway 10-28 falls outside of the 102 acres Historic Airport Sub-Area designated in Ordinance #18-2007 (the “Subject Ordinance”). [Compare Exh. YY with Exh. GGG].

**Response:** It is admitted for purposes of this motion that portions of non-existent Runway 10-28 referenced in this statement fall outside the 102 acre HASA. It is further denied that this is material. As set forth above in response to Paragraph No. 20, as of 2007, which is all that is material to this motion or this action, runway 10-28 did not exist. Moreover, Solberg’s principal, Thor Solberg, Jr., admitted during his deposition that as of 2007 runway 10-28 was not used for operations by fixed winged aircraft and that as of 2007 runway 10-28 was not in use. (Derman Opposition Cert., Exhibit 5, 2007 State Inspection Report; Exhibit 9, T. Solberg Dep. at 43:17-22 (acknowledging that 2007 inspection report does not list three runways) and 69:10-13 (admitting that in 2007 runway 10-28 was not used by fixed winged aircraft). In any event, runway 10-28 remains non-existent. (See Derman Opposition Cert., Exhibit 15, 2016 FAA Master Report).

21. Runway 10-28 has existed on Solberg Airport at various points and for the majority of the past three decades, and its existence was recognized by the FAA and the NJDOT, as the cited Airport Layout Plans and Form 5010s demonstrate. [Exh. ZZ at 24:4-10, 41:9-10, 44:18-45:5; 45:20-47:17; Exh. G].

**Response:** It is admitted that Runway 10-28 is identified on certain documents at various points in history. It is denied that Runway 10-28 existed in 2007 when the Ordinance was adopted, or that it exists today. See responses to Paragraph Nos. 20-21, which are incorporated by reference.

22. Solberg Airport commissioned a draft Airport Layout Plan in 2004 that depicted a slightly repositioned Runway 10-28. [Exh. AAA].

**Response:** It is denied that this statement is material in any way to this motion. Readington notes that the document attached to the Aslanian Certification as Exhibit AAA is entitled “Airport Layout Plan,” but Solberg offers no evidence demonstrating the purpose, origin, or import of this document. Moreover, Readington states that this statement is not material to this motion or this action.

23. In December, 2015, the FAA concluded an airspace study for Runway 10-28. [Exh. BBB (FAA report)].

**Response:** For the purposes of this motion, admits that in December 2015 the FAA issued a Notice of Airport Airspace Analysis Determination, but Readington denies that the statements in Paragraph 24 are material to the Court’s adjudication of this motion, which relates solely to the validity of an Ordinance adopted in 2007.

24. The existing Airport Layout Plan for Solberg Airport includes Runway 10-28. [Exh. YY].

**Response:** Denied. It is further denied that this document is material because it is undisputed that it did not exist, even on paper, in 2007 when the Ordinance was adopted. (See Derman Cert., Exhibit 15, 2016 FAA Airport Mater Record), see also 2007 Exhibit 5, 2007 State Aviation Inspection Report).

25. In 1983, the New Jersey Legislature enacted the Airport Safety and Hazardous Zoning Act (“ASZA”), which authorized the Commissioner of Transportation to adopt rules and regulations to specify permitted and prohibited land uses within airport safety zones. N.J.A.C. 6:1-85 required each municipality that contained any part of an airport safety zone to enact an ordinance incorporating standards promulgated by the Commissioner. Shortly after the passage of the ASZA,

Solberg applied for and received grant funding from the NJDOT to pave the entire licensed length of the runway, 3,735 feet. After approval for construction, the Township unilaterally issued a stop work order, stating it would not permit paving the main runway beyond 3,000 feet. [Exh. E at 11]

**Response:** This paragraph is denied in part and admitted in part. With respect to Solberg's statements regarding the passage of the ASZA and the adoption of the ASZA Regulations, Readington admits that the ASZA and ASZA Regulations are validly enacted. However, Solberg's description of its application to pave additional portions of one of its two runways neither accurate nor material to this motion or this action. Specifically, the application process for approval to pave the runways was not completed because, for among other reasons, (a) Solberg was delinquent in its obligations to pay its property taxes, and (b) issues relating to the preservation of wetlands and Solberg's need to obtain an appropriate permit from the New Jersey Department of Environmental Protection. (Derman Opposition Cert., Exhibit 9, T. Solberg Dep. at 185:5-187:2). It is denied that this dispute is material to this motion.

26. Readington strongly opposed the ASZA legislation, petitioning the NJDOT to exempt the Township because it believed the ASZA removed decisions better left for local officials regarding airport expansion ("Home Rule"). Despite its legal obligation, the Township failed to pass an ordinance that complied with N.J.S.A. 6:1-85, but rather lobbied and petitioned to have the ASZA declared unconstitutional. [Exh. E at 11]

**Response:** Readington admits for the purposes of this motion that it exercised its legal and constitutional rights to oppose ASZA or its application to Readington. However, the statements in this paragraph are not material to this motion or this action. Furthermore, with respect to Solberg's statement about Readington's "legal obligation," such statements are conclusions of law for which no response is required.

27. In the late 1980s, it appeared that the Linden Airport might close. A feasibility study prepared by representatives of the FAA, NJDOT and local officials determined that SHA was qualified as a potential replacement site. The Township vehemently opposed the position taken by the FAA. Despite the opposition, the Solbergs wrote to the Mayor of Linden on May 30, 1990, confirming their willingness to accept the transfer of aircraft from Linden Airport. The plan eventually fell through, and ongoing tensions between the Solbergs and detractors increased. [Exh. E at 11-12]

**Response:** For purposes of this motion, Readington admits that Solberg has accurately summarized a portion of Judge Armstrong’s Opinion in the Condemnation Action. However, the statements in this paragraph are not material to this motion or this action. Moreover, as with all of the statements quoted from Judge Armstrong’s Opinion, Readington notes that the result in the Condemnation Action is the subject of a pending appeal.

In August 1990, the first threat of condemnation occurred during a Township meeting involving Township officials Ron Monaco and Steve Mirota, Township attorney William Savo, and Thor Solberg Jr. During a heated exchange between officials and Thor Solberg Jr., the Township made it clear that the Township could condemn the airport and threatened the Solberg’s livelihood by putting them out of business, if they so desired. During the August 1990 meeting, the following recorded exchange took place:

[Solberg]: [Y]ou’re taking away my livelihood  
[Monaco]: No, we’re not  
[Mirota]: Not necessarily.  
[Solberg]: You know that’s what–you want to take the land.  
[Monaco]: We haven’t done that yet.  
[Solberg]: It’s our land.  
[Savo]: Let me tell you what our options are. We could go down ther[e] tomorrow, right? And [take] just enough to put the airport out of business. I wouldn’t say anything.

[Exh. E at 11]

**Response:** For purposes of this motion, Readington admits that Solberg has accurately summarized a portion of Judge Armstrong’s Opinion in the Condemnation Action (which actually appears on page 12 of Aslanian Cert., Exhibit E). However, the statements in this paragraph are not material to this motion or this action. Moreover, a reading of the full text of the above-quoted excerpt from the August 1990 meeting demonstrates that this quotation does not accurately describe the content of the conversation. Furthermore, Readington notes that Solberg has not provided the Court with the full transcript to provide this context. Finally, during the trial, neither the transcript nor the audio recording of this conversation were ever admitted into evidence, a full copy of the transcript was not offered to the Court, and Readington objected to admission into evidence of the recording. (Derman Opposition, Cert., Exhibit 27, Trial Transcript Excerpt at pp. 4, 29:11-30:17; 143:1-169:11). The court in the Condemnation Action allowed the audio recording excerpt to be played in Court subject to future authentication, which never occurred. (Derman Opposition, Cert., Exhibit 27, Trial Transcript Excerpt at 29:11-30:17).

28. In September 1990, Solberg requested, and was approved, funding from the FAA to expand the main airport runway from 1,800 feet to 3,000 feet. In 1995, and against sharp criticism from the NJDOT, the Township's Board of Education decided to site an elementary school directly adjacent to the airport. Subsequently, the Township Committee encouraged petitioning in opposition of runway length expansion and adopted several resolutions opposing any increase in SHA's runway length over the next several years. [Exh. E at 11-12]

**Response:** For purposes of this motion, Readington admits that Solberg has accurately summarized a portion of Judge Armstrong's Opinion in the Condemnation Action. However, the statements in this paragraph are not material to this motion or this action. Moreover, as with all of the statements quoted from Judge Armstrong's Opinion, Readington notes that the result in the Condemnation Action is the subject of a pending appeal. Furthermore, as set forth in greater detail in Readington's Brief in opposition to this motion, Solberg does not have the needed approvals to expand its airport and its effort to obtain approvals and critically funding for such development is far from assured. (See Reading Opposition Brief at Statement of Facts, § B and Argument, Point II, and citations to the record referenced therein).

29. In 1997, SHA released a Final Draft Master Plan and an Airport Layout Plan that provided detailed recommendations for airport development, estimated construction costs, and set forth a schedule of improvements over a twenty-year planning period. SHA recommended a new 4,890 foot long replacement runway, a full parallel taxiway, paving and extension of a crosswind runway, parking facility improvement, additional hangars, an automated weather observation station, a precision instrument approach and an approach lighting system. The Township immediately challenged SHA and filed lengthy letters with the FAA, NJDOT as well as numerous government officials. The Township passed Resolution R-97-18, challenging the SHA master plan, arguing that the current state of the airport provided adequate safety for existing aircraft and expansion would be highly inappropriate to create a commercial airport in a rural residential zone. [Exh. E at 12-13]

**Response:** For purposes of this motion, Readington admits that Solberg has accurately summarized a portion of Judge Armstrong's Opinion in the Condemnation Action. However, the statements in this paragraph, which occurred fully 10 years before the Ordinance in question was adopted, are not material to this motion or this action. Moreover, as with all of the statements quoted from Judge Armstrong's Opinion, Readington notes that the result in the Condemnation

Action is the subject of a pending appeal. Furthermore, as set forth in greater detail in Readington's Brief in opposition to this motion, Solberg does not have the needed approvals to expand its airport and its effort to obtain approvals and critically funding for such development is far from assured. (See Reading Opposition Brief at Statement of Facts, § B and Argument, Point II, and citations to the record referenced therein). In addition, Readington, as a representative of its citizens, is constitutionally entitled to voice its opinion on matters effecting Readington.

30. Solberg released a Final Draft Master Plan and an Airport Layout Plan in 1997 that provided the detailed recommendations for airport development. This plan included a new 4,890 foot runway, a parallel taxiway, and other improvements, which were subsequently conditionally approved and elaborated upon by NJDOT and the FAA. In reaction to the scope of that plan, the Township elected to "draw a line in the sand" and "do whatever it takes right now legally to make sure that [SHA] never becomes a jetport." [Exh. E at 26]

**Response:** For purposes of this motion, Readington admits that Solberg has accurately summarized a portion of Judge Armstrong's Opinion in the Condemnation Action. However, the statements in this paragraph, which occurred fully 10 years before the Ordinance in question was adopted, are not material to this motion or this action. Moreover, as with all of the statements quoted from Judge Armstrong's Opinion, Readington notes that the result in the Condemnation Action is the subject of a pending appeal. Furthermore, as set forth in greater detail in Readington's Brief in opposition to this motion, Solberg does not have the needed approvals to expand its airport and its effort to obtain approvals and critically funding for such development is far from assured. (See Reading Opposition Brief at Statement of Facts, § B and Argument Point II, and citations to the record referenced therein). In addition, Readington, as a representative of its citizens, is constitutionally entitled to voice its opinion on matters effecting Readington.

31. In March 1999, the FAA and NJDOT gave conditional approval to the Airport Layout Plan, pending the successful completion of the environmental assessment. Shortly thereafter, the Mayor of Readington wrote to the NJDOT to protest this decision and stated that the Township would "do everything in its power to maintain the status quo of the airport." In the following years, the Township commissioned voluminous environmental reports provided by experts and township committees. The Township amended its 1990 Master Plan, recommending that the most effective way to preserve the environmentally valuable land of SHA would be through acquisition by the Township. These amendments were the first time that the Township labeled the land that SHA occupied as a "critical environmental impact area." The property was also listed in Readington



Township Open Space Inventory and Recommendations for Preservation, in its Greenways properties, and was identified as being environmentally vulnerable. SHA was never recommended for acquisition prior to these amendments. [Exh. E at 14]

**Response:** For purposes of this motion, Readington admits that Solberg has accurately summarized a portion of Judge Armstrong's Opinion in the Condemnation Action. However, the statements in this paragraph, which occurred fully 10 years before the Ordinance in question was adopted, are not material to this motion or this action. Moreover, as with all of the statements quoted from Judge Armstrong's Opinion, Readington notes that the result in the Condemnation Action is the subject of a pending appeal. Furthermore, as set forth in greater detail in Readington's Brief in opposition to this motion, Solberg does not have the needed approvals to expand its airport and its effort to obtain approvals and critically funding for such development is far from assured. (See Reading Opposition Brief at Statement of Facts, § B and Argument, Point II, and citations to the record referenced therein). In addition, Readington, as a representative of its citizens, is constitutionally entitled to voice its opinion on matters effecting Readington.

32. On April 11, 2002, the Solbergs entered into an Agreement with the NJDOT for the sale of SHA. The Agreement set a base price of \$22,000,000 subject to negotiation, and contingent upon obtaining a financing commitment from the FAA. The Agreement described the airport as comprising approximately 745 acres. [Exh. L]

**Response:** For purposes of this motion, Readington admits the existence of the agreement, the terms of which speak for themselves. However, the statements in this paragraph and a characterization made in an unrelated agreement are not material to this motion or this action.

33. The Township vehemently opposed any airport expansion, wrote to the Governor's office, and continuously corresponded with NJDOT regarding their future plans after the purchase of SHA. [Exh. E at 14]

**Response:** For purposes of this motion, Readington admits that Solberg has accurately summarized a portion of Judge Armstrong's Opinion in the Condemnation Action. However, the statements in this paragraph are not material to this motion or this action. Moreover, as with all of the statements quoted from Judge Armstrong's Opinion, Readington notes that the result in the Condemnation Action is the subject of a pending appeal. Furthermore, as set forth in greater detail in Readington's Brief in opposition to this motion, Solberg does not have the needed approvals to expand its airport and its effort to obtain approvals and critically funding for such development is

far from assured. (See Reading Opposition Brief at Statement of Facts, § B and Argument, Point II, and citations to the record referenced therein). In addition, Readington, as a representative of its citizens, is constitutionally entitled to voice its opinion on matters effecting Readington.

34. The Agreement with NJDOT eventually fell through, and the Township continued to strategize as to how acquire SHA. [Exh. E at 14]

**Response:** For purposes of this motion, Readington admits that Solberg has accurately summarized a portion of Judge Armstrong’s Opinion in the Condemnation Action. However, the statements in this paragraph are not material to this motion or this action. Moreover, as with all of the statements quoted from Judge Armstrong’s Opinion, Readington notes that the result in the Condemnation Action is the subject of a pending appeal. In addition, Readington, as a representative of its citizens, is constitutionally entitled to voice its opinion on matters effecting Readington.

35. Judge Armstrong found that “general aviation airports, including Solberg Airport, serve a valuable public purpose.” [Exh. E at 36]

**Response:** For purposes of this motion, Readington admits that Solberg has accurately summarized a portion of Judge Armstrong’s Opinion in the Condemnation Action. However, the statements in this paragraph are not material to this motion or this action. Moreover, as with all of the statements quoted from Judge Armstrong’s Opinion, Readington notes that the result in the Condemnation Action is the subject of a pending appeal. Nevertheless, as set forth in Readington’s brief in opposition to this motion, Judge Armstrong’s holding was in the context of a condemnation action, not an action in lieu of prerogative writs where the policy of the State is set forth in ASZA. (See, e.g., Readington Opposition Brief at Argument, Points II and III).

36. Judge Armstrong also made the following additional findings with respect to State policy vis-à-vis Solberg Airport, its public purpose, and its role in general aviation:

Solberg-Hunterdon is a general aviation airport. The FAA defines general aviation (GA) as operations of aircraft not covered by rules that govern air carriers or charter aircraft. See, 49 U.S.C. 40101 *et. seq.* Our national system of airports, heliports, and seaplane bases was developed to provide communities with access to a safe and adequate public system of general aviation airports. General Aviation Airports: A National Asset, U.S. Dept. of Transportation Federal Aviation Administration, May 2012 at 4. The nation’s general aviation airports focus mainly on more specialized services that airlines cannot provide. In 2009, nonairline operators at these general aviation airports spent over \$12 billion, flying an estimated 27 million flights for emergency medical services, aerial firefighting, law enforcement, and border

control, agricultural functions, flight training, time-sensitive air cargo services, business travel, and scheduled services. *Id.* at 5.

Federal, state, and local governments have invested in a system of general aviation airports since the beginning of the 20<sup>th</sup> century. *Ibid.* This airport system is interconnected and interdependent and was included in the National Plan of Integrated Airport Systems because these locations were deemed important to the federal system and are open to the public. *Ibid.* Having such a well-developed system of general aviation airports throughout the country supports commerce while also providing a safety net of airports to support emergency aircraft diversions when necessary due to mechanical issues, medical emergencies, deteriorating weather conditions or other unforeseen circumstances. *Ibid.* Solberg-Hunterdon airport is one such example, and serves as one of only eleven reliever airports in the state. [Exh. E at 37].

\* \* \* \*

The record substantiates the importance of general aviation and Solberg Airport's role in particular. The Defendant offered documentary and testimonial evidence, which this Court found persuasive in its determination of public purpose. The objective evidence demonstrated that general aviation generates over a billion dollars in revenue and creates thousands of jobs across the state. It has a substantial economic impact on communities and contributes directly to local business transportation capability. The evidence also demonstrated that New Jersey's general aviation infrastructure provides many health, welfare, and social benefits: emergency medical services, schools, fire and emergency services, law enforcement, tour operators, and traffic surveillance directly benefit from general aviation airports.

[Exh. E at 38]

**Response:** For purposes of this motion, Readington admits that Solberg has accurately summarized a portion of Judge Armstrong's Opinion in the Condemnation Action. However, the statements in this paragraph are not material to this motion or this action. Moreover, as with all of the statements quoted from Judge Armstrong's Opinion, Readington notes that the result in the Condemnation Action is the subject of a pending appeal. Nevertheless, as set forth in Readington's brief in opposition to this motion, Judge Armstrong's holding was in the context of a condemnation action, not an action in lieu of prerogative writs where the policy of the State is set forth in ASZA. (See, e.g., Readington Opposition Brief at Argument, Points II and III).

37. Judge Armstrong also issued findings derived from other State documents, plans, and studies, in support of his conclusion that restraining Solberg Airport to 102 acres was contrary to public policy and New Jersey State aviation policy:

The New Jersey State Airport System Plan (NJSASP) was the subject of extensive testimony. [D-601]. The first plan was issued in 1992 and discussed the economic benefits of general aviation and aviation system planning, the development of a “core system” of airports and the “need to have sufficient land available when airport expansion or new facilities are required.” *Id.* at I-1-8.

The most recent plan was released by the New Jersey Department of Transportation in 2008 and recommended that Solberg Airport be “considered” for an upgrade to an “advanced service airport” facility from a “general service” facility. [D-631 at 7-27]. The report further recommended that Solberg be immediately classified as a “priority service airport,” which would open it up for development. *Id.* at 7-41. In the corresponding press release, the Transportation Commissioner stated that the report’s “key strategy is the preservation of the existing system of public use airports in New Jersey.” These public use airports bring “extensive benefits to the State economy,” including more than 18,000 aviation-related and aviation-dependent jobs with an estimated payroll of at least \$624.7 million. *Ibid.* This plan was consistent with the findings in New Jersey’s Long-Range Transportation Plan and the Federal Aviation Administration’s National Plan.

[Exh. E at 41-42]

**Response:** For purposes of this motion, Readington admits that Solberg has accurately summarized a portion of Judge Armstrong’s Opinion in the Condemnation Action. However, the statements in this paragraph are not material to this motion or this action. Moreover, as with all of the statements quoted from Judge Armstrong’s Opinion, Readington notes that the result in the Condemnation Action is the subject of a pending appeal. Nevertheless, as set forth in Readington’s brief in opposition to this motion, Judge Armstrong’s holding was in the context of a condemnation action, not an action in lieu of prerogative writs where the policy of the State is set forth in ASZA. (See, e.g., Readington Opposition Brief at Argument, Points II and III). In addition, State aviation policy as set forth in the SASP is no definitively in favor of expansion of Solberg Airport. For example, the SASP states that although several airports in New Jersey are in need of runway lengthening, Solberg Airport is not one of them. (Derman Opposition Cert., Exhibit 28, SASP at 362 (10-12)).

38. Judge Armstrong went on to adopt the Appellate Division’s observation that “limiting the airport’s capacity to remain economically competitive is thus at cross purposes to the goal of airport preservation,” and further found that the taking of all but 102 acres:

is also at cross purposes with the important government and public purposes discussed. The evidence demonstrates that both the State of New Jersey and the United States incorporate the potential expansion of the airport as necessary to the aviation infrastructure of the region. To limit such through condemnation of the

lands within the airport safety zone would be “contrary to express State purposes” and therefore be in conflict with higher authority. *Id.* at 320.

[Exh. E at 45]

**Response:** For purposes of this motion, Readington admits that Solberg has accurately summarized a portion of Judge Armstrong’s Opinion in the Condemnation Action. However, the statements in this paragraph are not material to this motion or this action. Moreover, as with all of the statements quoted from Judge Armstrong’s Opinion, Readington notes that the result in the Condemnation Action is the subject of a pending appeal. Nevertheless, as set forth in Readington’s brief in opposition to this motion, Judge Armstrong’s holding was in the context of a condemnation action, not an action in lieu of prerogative writs where the policy of the State is set forth in ASZA. (See, e.g., Readington Opposition Brief at Argument, Points II and III).

39. In invalidating the taking by Readington of even those parcels “outside of the immediate airport zone”, Judge Armstrong noted that:

The evidence presented by both parties shows that there is continued uncertainty about whether any particular block and lot falls outside the airport’s zone of operations. Such specific determinations are contingent upon the final layout of the airport and the implementation of one of the proposed plans. As the Township has not established that any specific block and lot would fall outside this zone in the proposed alternative runway development plans, the Court must find that there is a conflict with the government’s interest in keeping the airport viable.

[Exh. E at 47]

**Response:** For purposes of this motion, Readington admits that Solberg has accurately summarized a portion of Judge Armstrong’s Opinion in the Condemnation Action. However, the statements in this paragraph are not material to this motion or this action. Moreover, as with all of the statements quoted from Judge Armstrong’s Opinion, Readington notes that the result in the Condemnation Action is the subject of a pending appeal. Nevertheless, as set forth in Readington’s brief in opposition to this motion, Judge Armstrong’s holding was in the context of a condemnation action, not an action in lieu of prerogative writs where the policy of the State is set forth in ASZA. (See, e.g., Readington Opposition Brief at Argument, Points II and III).

40. Within a year of NJDOT enactment of regulations requiring the removal of Solberg Airport’s status as a “non-conforming” use, Readington township attorney William B. Savo petitioned NJDOT for blanket exemption from the ASZA for Readington. [Exh. M]. NJDOT denied Readington’s requests. [Exh. N].

**Response:** Readington admits for the purposes of this motion that it exercised its legal and constitutional rights to oppose ASZA's application to Readington. However, the statements in this paragraph are not material to this motion or this action. Readington also incorporates by reference its response to Paragraph No. 27.

41. Following those attempts, in 1986 NJDOT reiterated to Readington the need to adopt an ASZA ordinance. [Exh. P]. NJDOT made clear that the deadline for adopting an ordinance had passed, that ample time had been provided for its adoption, and that Readington was obligated to provide a copy of its proposed ordinance to the Division of Aeronautics. [*Id.*].

**Response:** Readington admits for the purposes of this motion that Solberg has generally described certain correspondence, the terms of which speak for themselves. However, the statements in this paragraph are not material to this motion or this action.

42. Responding to the NJDOT in November, 1986, Readington's Township Clerk sent a proposed ASZA ordinance to the Division of Aeronautics ("1986 ASZA Ordinance"). [Exhs. Q, R]. Despite the Clerk's assurance, the 1986 ASZA Ordinance was not adopted and no other ASZA ordinance was enacted at that time.

**Response:** Admitted for the purposes of this motion, but Readington states that the statements in this paragraph are not material to this motion or this action.

43. Readington's draft 1986 ASZA Ordinance submitted to NJDOT would have recognized that Solberg Airport was not restricted to 102 acres, but rather encompassed that land "within the lot boundaries occupied on the date of this ordinance." [Exh. Q at p. 2, § 13.3.1 "Uses permitted by right"].

**Response:** For purposes of this motion, Readington admits that Solberg has attached as Exhibit Q to the Aslanian Certification a draft 1986 ordinance, the terms of which speak for themselves. It is undisputed that that draft Ordinance was not the Ordinance ultimately adopted by the Township fully 21 years later, and which is the subject of this motion. Therefore, the statements in this paragraph are not material to this motion or this action.

44. The 1986 ASZA Ordinance would, further, have set up three runway subzones, recognizing the existence of the third runway, Runway 10-28. [Exh. Q].

**Response:** For purposes of this motion, Readington admits that Solberg has attached as Exhibit Q to the Aslanian Certification a draft 1986 ordinance, the terms of which speak for themselves.

It is undisputed that that draft Ordinance was not the Ordinance ultimately adopted by the Township fully 21 years later, and which is the subject of this motion. Therefore, the statements in this paragraph are not material to this motion or this action.

45. NJDOT advised Readington that the ordinance that had been submitted was acceptable and compliant with the ASZA regulations, N.J.A.C. 16:62. [Exhs. S, T]. But Readington did not adopt the 1986 Ordinance. [Exh. U].

**Response:** For purposes of this motion, Readington admits that Solberg has attached as Exhibits S and T to the Aslanian Certification certain correspondence, the terms of which speak for themselves. It is undisputed that that draft Ordinance was not the Ordinance ultimately adopted by the Township fully 21 years later, and which is the subject of this motion. Therefore, the statements in this paragraph are not material to this motion or this action.

46. Readington continued to maintain its opposition to the ASZA, and organized community opposition as well as political lobbying to that effect. [Exh. V]

**Response:** Readington admits for the purposes of this motion that it opposed the ASZA and exercised its legal and constitutional rights to oppose ASZA or its application to Readington. However, the statements in this paragraph are not material to this motion or this action. Readington incorporates by reference its responses to Paragraph Nos. 27, 42, and 43.

47. Readington's opposition to the ASZA ordinance was supposedly grounded in its belief that it was improper for NJDOT to "usurp" Readington's zoning powers and that Readington's prerogatives should take precedence over those of the State. [Exh. W].

**Response:** For purposes of this motion, Readington admits that Solberg has generally described the contents of certain correspondence, the terms of which speak for themselves. Readington denies the characterization in paragraph 49 that Readington believed that its "prerogatives should take precedence over those of the State." (Aslanian Cert., Exhibit W). Further, Readington denies that the statements in Paragraph 49 are material to this motion or this action.

48. In a letter dated May 11, 1987, received by Solberg, but ostensibly sent to the entirety of the Township, the Mayor asserted that the Township Committee "has opposed the Airport Hazard Zone designation" and made clear that the Township had "refused to rezone the area for commercial use and [had] instructed our attorney to meet with other municipalities to coordinate legal action on the homeowner's behalf." [Exh. V].

**Response:** Readington admits for the purposes of this motion that Solberg has attached a May 11, 1987 letter to the Aslanian Certification directed to Solberg, the terms of which speak for themselves and which do not indicate how widely the letter was circulated. However, the statements in this paragraph are not material to this motion or this action, which related to the validity of an Ordinance adopted fully 20 years later. Readington incorporates by reference its responses to Paragraph Nos. 27, 42, and 43.

49. In the years following Readington's refusal in the 1980s to adopt an ordinance to comply with ASZA, NJDOT proposed revisions to the regulations promulgated pursuant to that Act. [Exh. X]. Readington used the proposed revisions as yet another opportunity to voice its opposition to the Act in general, and opposed the new revisions also. [*Id.*] Readington offered several bases for its opposition to the ASZA, making clear that it was "opposed to defining all pre-existing structures within the clear zone as either nonconforming or conditional uses and objects to the implicit designation of an airport as a conditional or conforming use." [Exh. X].

**Response:** Readington admits for the purposes of this motion that it exercised its legal and constitutional rights to oppose ASZA or its application to Readington. However, the statements in this paragraph are not material to this motion or this action. Readington incorporates by reference its responses to Paragraph Nos. 27, 42-43, and 50.

50. Readington very specifically grounded its opposition on the assertion that the regulations, and the statutes pursuant to which they were promulgated, were "an unconstitutional usurpation of municipal zoning powers" and further elaborated on its opposition at pages 2-3 of that letter. [*Id.*]

**Response:** Readington admits for the purposes of this motion that it exercised its legal and constitutional rights to oppose ASZA or its application to Readington. However, the statements in this paragraph are not material to this motion or this action. Readington incorporates by reference its responses to Paragraph Nos. 27, 42-43, and 50-51.

51. In September, 1989, NJDOT sent a follow-up letter directly to the Mayor of Readington "regarding the enforcement of the Air Safety and Hazardous Zoning rules and regulations which were amended May 15, 1989." [Exh. Y]. The Assistant Commissioner of NJDOT, in that letter, wrote that "[s]ince we have not heard from your municipality, I want to remind you that land use ordinances implementing the standards of the amended regulations must be adopted by May 15, 1990." [Exh. Y]. Readington did not adopt an ordinance in response.



**Response:** Readington admits for the purposes of this motion that Solberg has attached a September 1989 letter to the Aslanian Certification, the terms of which speak for themselves. Readington further admits that it exercised its legal and constitutional rights to oppose ASZA or its application to Readington. However, the statements in this paragraph are not material to this motion or this action. Readington incorporates by reference its responses to Paragraph Nos. 27, 42-43, and 50-52.

52. About a month later, in October 1989, Readington's attorney drafted a resolution once again requesting that Readington be exempted from the provisions of ASZA, and requested that the Clerk put it on the Township agenda for public meeting. [Exh. Z]. The resolution expressly acknowledged that townships such as Readington "were to implement [ordinances] pursuant to regulations set forth thereunder." [Exh. Z at p. 2]. The stated purpose of the resolution included a position permitting Readington to "utilize its local zoning ordinances to assert jurisdiction over airports located within its boundaries" (presumably to the exclusion of the powers of NJDOT). [Exh. Z]

**Response:** Readington admits for the purposes of this motion that Solberg has attached an October 1989 document to the Aslanian Certification, the terms of which speak for themselves. Readington further admits that it exercised its legal and constitutional rights to oppose ASZA or its application to Readington. However, the statements in this paragraph are not material to this motion or this action. Readington incorporates by reference its responses to Paragraph Nos. 27, 42-43, and 50-53.

53. Shortly after the aforesaid meeting, the Clerk sent a copy of the resolution, which had been adopted by the Township Committee on October 16, 1989, to NJDOT requesting, again, exemption from the ASZA. [Exh. AA].

**Response:** Readington admits for the purposes of this motion that Solberg has attached an October 1989 document to the Aslanian Certification, the terms of which speak for themselves. Readington further admits that it exercised its legal and constitutional rights to oppose ASZA or its application to Readington. However, the statements in this paragraph are not material to this motion or this action. Readington incorporates by reference its responses to Paragraph Nos. 27, 42-43, and 50-54.

54. NJDOT, through its Office of Aviation, again denied Readington's exemption request, noting that there were "no provisions in the regulations which provide for the exclusion of

individual townships .... Land use ordinances implementing the standards of the amended regulations must be adopted by May 15, 1990. I again offer the assistance of this office...” [Exh. BB]. On or about April 9, 1990, NJDOT sent a follow-up letter to Readington, emphasizing that the deadline for adopting “a land-use ordinance implementing the standards of the air safety and hazardous zoning rules and regulations” was “rapidly approaching.” [Exh. CC].

**Response:** Readington admits for the purposes of this motion that Solberg has attached certain correspondence from the New Jersey Department of Transportation to the Aslanian Certification, the terms of which speak for themselves. Readington further admits that it exercised its legal and constitutional rights to oppose ASZA or its application to Readington. However, the statements in this paragraph are not material to this motion or this action. Readington incorporates by reference its responses to Paragraph Nos. 27, 42-43, and 50-55.

55. Readington failed or refused to pass an ordinance before the May 1990 deadline.

**Response:** Readington admits for purposes of this motion that it did not pass an ASZA ordinance prior to May 1990. Readington further admits that it exercised its legal and constitutional rights to oppose ASZA or its application to Readington. However, the statements in this paragraph are not material to this motion or this action. Readington incorporates by reference its responses to Paragraph Nos. 27, 42-43, and 50-56.

56. In 1994, Readington contacted NJDOT requesting a sample ordinance upon which it could base an ASZA ordinance. NJDOT agreed to send an ordinance that adopted the regulations “by reference.” [Exh. DD]. On or about November 2, 1994, NJDOT responded to Readington’s request and transmitted a copy of the statute, regulations, a sample ordinance, and also a copy of the Air Safety and Zoning ordinance which it understood would be “proposed to the Readington Township committee at its regular meeting to be held November 3, 1986.” [Exh. EE].

**Response:** Readington admits for the purposes of this motion that Solberg has attached certain correspondence with the New Jersey Department of Transportation to the Aslanian Certification, the terms of which speak for themselves. Readington further admits that it exercised its legal and constitutional rights to oppose ASZA or its application to Readington. However, the statements in this paragraph are not material to this motion or this action. Readington incorporates by reference its responses to Paragraph Nos. 27, 42-43, and 50-57.

57. In January, 1995, Readington received an estimate from its long time land surveyor, Thomas L. Yager and Associates, to prepare an ASZA map with metes and bounds descriptions at Solberg Airport. [Exh. FF].

**Response:** Readington admits for the purposes of this motion that Solberg has attached certain correspondence with Mr. Yager, the terms of which speak for themselves. However, the statements in this paragraph are not material to this motion or this action.

58. In May, 1995, NJDOT wrote to Readington again seeking compliance with the ASZA by adoption of an ordinance compliant with that Act. [Exh. GG]. Readington responded to NJDOT's request to adopt an ordinance, said it was working on the issue but had not yet introduced an ordinance, and announced its intention to do so in October of that year. [Exh. HH]. It did not do so.

**Response:** Readington admits for the purposes of this motion that Solberg has attached certain correspondence with the New Jersey Department of Transportation to the Aslanian Certification, the terms of which speak for themselves. Readington further admits that it exercised its legal and constitutional rights to oppose ASZA or its application to Readington. However, the statements in this paragraph are not material to this motion or this action. Readington incorporates by reference its responses to Paragraph Nos. 27, 42-43, 50-57, and 59.

59. On or about May 30, 1996, Julia Allen, then an aspirant for the Township Committee, wrote a letter to the editor of the Hunterdon Democrat, warning citizens that "the threat of a major expansion of Solberg Airport is real and the plan is for a large airport." [Exh. II].

**Response:** Readington admits for the purposes of this motion that Solberg has attached certain correspondence from Ms. Allen to the Aslanian Certification, the terms of which speak for themselves. Readington further admits that it exercised its legal and constitutional rights to oppose ASZA or its application to Readington. However, the statements in this paragraph are not material to this motion or this action. Readington incorporates by reference its responses to Paragraph Nos. 27, 42-43, 50-57, and 59-60.

60. Ms. Allen's letter also expressed the need for Readington to reassert control over the airport, noting that the ASZA supposedly "took the decision of expansion out of the hands of elected officials of all levels of government and put it in the hands of the state Department of Transportation and the Federal Aviation Administration." [Exh. II].

**Response:** Readington admits for the purposes of this motion that Solberg has attached certain correspondence from Ms. Allen to the Aslanian Certification, the terms of which speak for themselves. Readington further admits that it exercised its legal and constitutional rights to oppose ASZA or its application to Readington. However, the statements in this paragraph are not material to this motion or this action. Readington incorporates by reference its responses to Paragraph Nos. 27, 42-43, 50-57, and 59-61.

61. On or about March 17, 1998, NJDOT once again wrote to Readington with respect to the ASZA ordinance adoption. The letter recounted that Neil Tully, who was an Air Safety and Zoning Specialist with NJDOT, had spoken to the Township attorney. [Exh. JJ]. Mr. Tully recounted that he had told the Township attorney in July, 1997, that the draft ordinance submitted to the NJDOT “complied with the requirements established in N.J.A.C. 16:61.1 et seq.”, and advised that NJDOT had reviewed and approved the delineation of the ASZA drawn by the town surveyor. The letter concluded with the following plea: “Please advise me of the status of this matter. I, again, offer my services to assist you with this endeavor. If you need additional information, please contact me at (609) 530-2900.” [Exh. JJ].

**Response:** Readington admits for the purposes of this motion that Solberg has attached certain correspondence with the New Jersey Department of Transportation to the Aslanian Certification, the terms of which speak for themselves. Readington further admits that it exercised its legal and constitutional rights to oppose ASZA or its application to Readington. However, the statements in this paragraph are not material to this motion or this action. Readington incorporates by reference its responses to Paragraph Nos. 27, 42-43, 50-57, and 59-62.

62. At the Township Committee meeting on April 6, 1998, Committeeman Ronald Monaco announced he had received a letter from NJDOT concerning the ASZA and that it was their understanding that the “Township did not have an approved copy of the ordinance.” [Exh. KK at p. 5]. The Committee at the time “discussed the possibility of placing the Hazard Zone ordinance on the agenda for the next meeting,” but no such steps were taken.

**Response:** Readington admits for the purposes of this motion that Solberg has attached minutes of a Readington Committee meeting to the Aslanian Certification, the terms of which speak for themselves. However, the statements in this paragraph are not material to this motion or this action.

63. At a Readington Township Committee meeting on June 1, 1998, the Mayor noted with respect to the ASZA ordinances that Readington considered, that “the committee felt that the

ordinance in its present form might not provide the protection that we think we need from runway expansion. The appropriate language is being worked on and more information should be forthcoming shortly.” [Exh. LL at p. 4; Exh. MM at p. 4].

**Response:** Readington admits for the purposes of this motion that Solberg has attached minutes of a Readington Committee meeting to the Aslanian Certification, the terms of which speak for themselves. However, the statements in this paragraph are not material to this motion or this action.

64. On or about April 15, 1999, Neil Tully of NJDOT wrote to Mayor Allen, in furtherance of a telephone conversation they had that morning. Mr. Tully requested “a meeting with you to discuss the adoption of an Air Safety and Zoning ordinance by Readington Township.” Mr. Tully noted that the Township had delineated the ASZA as required and “has drafted an acceptable ordinance but never adopted it.” [Exh. NN]. Ms. Allen met with Mr. Tully in response to this letter, but the meeting did not result in the adoption of an ASZA ordinance by Readington. [Exh. OO].

**Response:** Readington admits for the purposes of this motion that Solberg has attached minutes of a Readington Committee meeting and an April 15, 1999 letter to the Aslanian Certification, the terms of which speak for themselves. However, the statements in this paragraph are not material to this motion or this action.

65. At a May 3, 1999, Township Committee meeting, Readington officials discussed with residents NJDOT’s conditional approval of the Solberg Airport Layout Plan. At that meeting, a Resolution was introduced, R-99-48, and unanimously passed, which provided the following: state authorities had not appropriately responded to municipal concern, the plans in the master plan are unsubstantiated; the “Township of Readington is resolutely opposed to the establishment of a commercial airport in a totally residential zone”; and “the Township Committee of the Township of Readington remains resolutely opposed to the lengthening of the existing paved runway and will oppose the proposed expansion of Solberg Airport by all means possible.” [Exh. RR at pp. 7-9; Exh. SS].

**Response:** Readington admits for the purposes of this motion that Solberg has attached minutes of a Readington Committee meeting and an Ordinance to the Aslanian Certification, the terms of which speak for themselves. However, the statements in this paragraph are not material to this motion or this action.

66. A copy of the Resolution was sent by the Township Clerk to various state and federal officials. [Exh. TT].

**Response:** Readington admits for the purposes of this motion that Solberg has attached a May 7, 1999 Memorandum to the Aslanian Certification, the terms of which speak for themselves. However, the statements in this paragraph are not material to this motion or this action.

67. As the May 3, 1999 minutes reflect, Township Committee members represented “that the Committee has been working in opposition to the proposed expansion since 1983 and there have been victories along the way. For example, the pavement on the runway would be longer than it is if it weren’t for the Committee’s efforts,”; that the “Committee will fight the expansion on every conceivable front”; and, according to Mayor Allen, that the only one who could stop the proposed expansion was “James Weinstein, the Commission[er] of the Department of Transportation.” [Exh. RR at pp. 32-33].

**Response:** Readington admits for the purposes of this motion that Solberg has attached minutes of a Readington Committee meeting to the Aslanian Certification, the terms of which speak for themselves. However, the statements in this paragraph are not material to this motion or this action.

68. NJDOT continued to follow up with Readington as it failed to adopt an ASZA ordinance. [Exh. PP]. On December 7, 1999 NJDOT sent “a follow-up to [its] letters of July 7 and August 11, 1999, concerning the adoption of an Air Safety and Zoning ordinance by Readington Township.” In that letter, Air Safety and Zoning Specialist Tully enclosed a newspaper article in which Mayor Allen was quoted as saying that the map delineating the Airport Safety Zone around Solberg is still in draft form because the Division of Aeronautics and Readington could not agree on details. This statement was false, and NJDOT called her on it. Mr. Tully wrote: “To end any question regarding this issue, enclosed is a copy of a letter dated April 28, 1997, from Mr. Yeager [sic] to Kristine Hadinger, Esq., which states that I approved the map created by Mr. Yeager [sic].” [Exh. QQ].

**Response:** Readington admits for the purposes of this motion that Solberg has attached an August 1999 letter and a December 7, 1999 letter from the Department of Transportation (although no newspaper articles) to the Aslanian Certification, the terms of which speak for themselves. Moreover, Solberg has not accurately described the contents thereof, and no Department of Transportation official stated that the statements made by Ms. Allen were false. Nevertheless, the statements in this paragraph are not material to this motion or this action.

69. At no point in 1998, 1999, or 2000, did the Readington Township Committee take any action with regard to adopting an ASZA ordinance. [Exh. OO].

**Response:** Readington admits for the purposes of this motion that Solberg has attached certain trial transcript excerpts to the Aslanian Certification, the terms of which speak for themselves. Readington further admits that it exercised its legal and constitutional rights to oppose ASZA or its application to Readington. However, the statements in this paragraph are not material to this motion or this action. Readington incorporates by reference its responses to Paragraph Nos. 27, 42-43, 50-57, and 59-62.

70. The Subject Ordinance defines the airport in more than one section. In section A(1), the word “airport” is defined as follows:

“As used in this Ordinance, “airport” or “airports” shall mean and refer to Solberg-Hunterdon Airport, in Readington Township, Hunterdon County, New Jersey.”  
[Exh. D].

**Response:** Readington admits for the purposes of this motion this statement is contained within the Ordinance, but refers to the entirety of the Ordinance to provide context.

71. NJDOT licenses Solberg-Hunterdon Airport as 726+ acres. [Exh G]

**Response:** This statement is denied. Exhibit H to the Aslanian Certification is a document identified by Solberg as “Solberg Aviation Company’s license to operate the airport.” (Aslanian Cert., Exhibit H). Nowhere in that document does the State of New Jersey state that Solberg Airport consists of 726 acres or any other specific acreage. Moreover, Readington incorporates by reference its response to Paragraph No. 2. As set forth therein, and in Readington’s Opposition Brief, the ASZA contains a specific definition of airport and limits its requirement to where airport use must be permitted to areas meeting that definition.

72. In Section A(3) of the Subject Ordinance, however, notwithstanding the 700+ acres licensed as the airport by the NJDOT, a section of the Subject Ordinance entitled “Airport Defined” states the following:

“This Ordinance is based upon, and presumes, an airport layout for Solberg-Hunterdon Airport as described in the March 3, 2005 map prepared [by] H. Clay McEldowney, PE/LS, and identified as drawing number 5761-F. The Solberg Hunterdon Airport is depicted on this map as ‘Parcel 4’, with a gross area of 102.23 acres and a net area of 101.55 acres. The Airport has two bidirectional public use runways, runways 4/22 and runways 13/31.”

**Response:** Readington admits that the Ordinance contains the quoted passage but refers to the entire Ordinance to provide proper context. However, as set forth in response to Paragraph Nos. 2 and 73, and otherwise, Solberg Airport's license does not refer to its size. Moreover, the area included within the definition quoted in this paragraph is also defined as the HASA, and the HASA is where all activities that meet the ASZA definition of an airport occur. Responses to Paragraph Nos. 2 and 73 are incorporated by reference.

73. The same McEldowney map (Drawing No. 5761-F) (updated to April 19, 2006), was utilized to designate the "Airport Facilities Area" that was taken as to development rights in the October, 2006 Declaration of Taking. [Exh. A at Exh. A-2].

**Response:** For purposes of this motion, Readington admits that the map identified in this section of the Ordinance depicts the areas where developments rights were taken pursuant to the Declaration of Taking in the Condemnation Action. However, the statements in this paragraph are not material to this motion or this action. See also Readington Opposition Brief at Argument, Point II.

74. At Section C.2., the Subject Ordinance further denominates as a "Historic Airport Sub-Area" the same 102 acres, with reference to the same map. That section states the following:

2. Historic Airport Sub-Area: the Historic Airport Sub-area lies within the overall Air Safety and Historic Airport District. The boundaries of this sub-area encompassed the existing Solberg-Hunterdon Airport facilities and are coterminous with "Parcel 4", as identified in the plan entitled "Map for Chambers Brook and Holland Brook Greenway", dated March 3, 2005, prepared H. Clay McEldowney, PE/LS, and identified as drawing number 5761-F. This area is created to provide for maintenance, development and redevelopment of airport facilities related to the existing Solberg-Hunterdon Airport use.

**Response:** For purposes of this motion, Readington admits that the map identified in this section of the Ordinance depicts the areas where developments rights were taken pursuant to the Declaration of Taking in the Condemnation Action. However, the statements in this paragraph are not material to this motion or this action. See also Readington Opposition Brief at Argument, Point II.

75. The Subject Ordinance permits airport use only within the same 102-acre Historic Airport Sub-Area that was delineated in connection with the condemnation action. Permitted uses outside of the Historic Airport Sub-Area, i.e. the other 624 acres of Solberg-Hunterdon Airport that



Readington attempted to condemn in fee simple, are “subject to the underlying zoning district standards”, which does not include airport uses. [Exh. D]

**Response:** Readington admits that Solberg has generally described the Ordinance and refers to the full text of the Ordinance for its full meaning and context. To the extent Solberg has not accurately described the Ordinance in this or any other paragraph, such statement is denied and Readington refers to the full text of the Ordinance itself.

76. In Section G, the Subject Ordinance purports to delineate “Permitted uses outside of the historic airport subarea” and it does not permit airport uses, on property outside that Sub-Area, which is directly contrary to the Opinion and Order. Instead, Section G of the Subject Ordinance mandates that all other property addressed by the Subject Ordinance, but falling outside of the L-shaped 102-acre area, “shall be subject to the underlying zoning district standards.” [Exh. D at Section G].

**Response:** Readington admits that Solberg has generally described the Ordinance and refers to the full text of the Ordinance for its full meaning and context. To the extent Solberg has not accurately described the Ordinance in this or any other paragraph, such statement is denied and Readington refers to the full text of the Ordinance itself. Moreover, Solberg’s reference to any portion of the Ordinance being contrary to the decision in the Condemnation Action is denied (and is also a legal conclusion for which no response is required).

77. Readington’s “underlying zoning district standards” do not, unsurprisingly, permit the use of the property for airport or aviation enterprise purposes. [Exh. UU (Readington Township Code §148-15. AR Agricultural Residential Zone); Exh. VV (zoning map from Sullivan report)]

**Response:** For purposes of this motion, Readington admits that Solberg has attached to the Aslanian Cert. copies of certain zoning related materials, the terms of which speak for themselves. To the extent Solberg has not accurately described these materials, or any other documents, such statement is denied and Readington refers to the full text of the document itself. Moreover, the reference to “the property” is ambiguous. Furthermore, the effect of land use regulations identified herein is a legal conclusion for which no response is required.

78. Within the 102-acre “Historic Airport Sub-Area”, the Subject Ordinance imposes the following zoning constraints:

Permitted Principal Uses:

21. Airport, provided that said airport is a licensed public use airport and has met the State and Federal regulatory requirements delineated in section B of this ordinance
22. Conservation
23. Agriculture
24. Passive recreation.

Permitted Accessory Uses:

25. Aircraft rental, charter, sales, leasing, storage and tiedown;
26. Sale of aircraft fuels, fluids, lubricants, parts, supplies and equipment;
27. Aircraft and aircraft component repair and maintenance;
28. Pilot flight schools and training;
29. Aircraft mechanic schools and training;
30. Equipment and appurtenances for aircraft communication, navigation and orientation;
31. Food and beverage vending machines, provided that any internally illuminated panels are not visible from a public right-of-way, public open space, residential use or residential property line;
32. Restaurant, not exceeding forty (40) seats;
33. Rental car, not exceeding five (5) on site rental vehicles;
34. Gift shop;
35. Sale of supplies and equipment for pilots and aircrew members, provided that there is no outdoor display of merchandise;
36. Airport museum;
37. Office, terminal, waiting room, weather briefing, and conference room facilities; and,
38. Conservation
39. Agriculture
40. Passive recreation.

[Exh. D at Sections E & G].

**Response:** Readington admits that Solberg has generally described the Ordinance and refers to the full text of the Ordinance for its full meaning and context. Readington denies the characterization “zoning constraints” to describe additional uses that did not exist previously, but were added by Readington as permitted uses. To the extent Solberg has not accurately described the Ordinance in this or any other paragraph, such statement is denied and Readington refers to the full text of the Ordinance itself.

79. The “Regulations for Airports” include the following:

I. Regulations for Airports

Airports shall be required to meet the following regulations for airports.

1. Conformance with State and Federal Requirements: Airports shall maintain conformance with all applicable rules, regulations and

lawful orders, directives and requirements of the State of New Jersey and the United States Federal Government.

2. Ordinance Conformance: Airports shall maintain conformance with the substantive and procedural standards of the Air Safety and Historic District Ordinance and the Code of Readington Township and any deed restrictions which may apply to the airport property.
3. Landscaping and Maintenance: Areas of the Historic Airport Sub-Area not utilized by structures or paved surfaces shall be planted and maintained so as to promote a desirable visual environment and to promote good drainage and soil erosion management practices.
4. Setbacks: The minimum setback for airport buildings, structures, paving and aircraft parking shall be twenty five (25) feet from the boundaries of the Historic Airport Sub Area; the minimum setback for airport buildings, structures, paving and aircraft parking from public rights-of-way shall be fifty (50) feet; the minimum setback from the longitudinal centerline of any runway from the boundaries of the Historic Airport Sub Area shall be one hundred twenty five (125) feet.
5. Floor Area: The maximum permitted cumulative floor area for aircraft hangars and aircraft maintenance shall not exceed 150,000 square feet. The maximum permitted cumulative floor area for other permitted and accessory airport uses shall not exceed 35,000 square feet.
6. Airport Museum Incentive: The first 1,000 square feet of "airport museum" building usage at an airport shall not be counted against the maximum permitted floor area of 35,000 square feet for "other permitted and accessory uses".
7. Historic Design Incentive: If the Planning Board or Zoning Board of Adjustment determines that a proposed new airport development or redevelopment application incorporates significant design, aesthetic, and architectural features that promote and recognize the historic heritage of the airport, 10% of the floor area of such development or redevelopment shall not be counted against the maximum permitted floor area of 150,000 square feet or 35,000 square feet specified herein.
8. Aircraft Hangar Incentive: The Township finds that fully enclosed lockable aircraft hangars designed and used to accommodate a single aircraft offer superior aircraft security, aircraft protection, and minimize aircraft related "attractive nuisance" problems. Proposals for the development of new fully enclosed lockable aircraft hangars designed and used to accommodate a single

aircraft, shall be permitted to exclude 10% of the floor area of such development from the tabulation of the maximum permitted floor area of 150,000 square feet specified herein.

9. Automobile Parking: The airport shall have available a sufficient amount of on airport automobile parking to accommodate airport business demands:
  - a. Airport: 1 space/every 3 outdoor tiedowns; plus 1 space for every 2,000 sf of hanger space; plus 1 space for each employee on the greatest shift
  - b. Restaurant: 1 space / 3 seats
  - c. Retail: 1 space / 300 sf
  - d. Flight School: 1 space/ 1,000 sf
  - e. Museum: 1 space / 500 sf
- 1[0]. Vehicle and Pedestrian Supervision: The airport shall provide for such on-airport fencing, signage, and supervision of vehicles and pedestrians so as to provide for the general public safety.

[Exh. D at Section I]

**Response:** Readington admits that Solberg has generally described the Ordinance and refers to the full text of the Ordinance for its full meaning and context. To the extent Solberg has not accurately described the Ordinance in this or any other paragraph, such statement is denied and Readington refers to the full text of the Ordinance itself.

80. The outside draftsman of the Subject Ordinance, Thomas Thatcher, in preparing his work, was in consultation with, inter alia, Mayor Shamey and counsel in the condemnation action, James Rhatican and Howard Cohen. [Exh. K at 71:16-73:24]

**Response:** Denied. It is further denied that this dispute is material. Mr. Thatcher prepared the Ordinance primarily with the assistance of Mr. Sullivan. Both Mr. Sullivan and Mr. Thatcher testified unequivocally that with respect to ASZA issue, Mr. Thatcher was the primary author of the Ordinance and that Mr. Sullivan assisted with other aspects of the Ordinance, including its form and structure and aspects that did not related specifically to ASZA. (Derman Opposition Cert., Exhibit 3, Sullivan Dep. at 12:3-14:12). However, for purposes of this motion, Readington admits that Mr. Thatcher worked with and consulted with others to draft Readington's Ordinance.

81. Mr. Thatcher received, as part of his review process, from Readington's eminent domain counsel, a copy of the Verified Complaint in eminent domain, and the Declaration of Taking. [Exh K at 97:24-98:19]

**Response:** For purposes of this motion, Readington admits that Mr. Thatcher testified that he received a copy of the Verified Complaint and Declaration of Taking in the Condemnation Action. However, Readington states that this is not material to this motion or this action.

82. Julia Allan was involved in Mr. Thatcher's work in drafting the Ordinance. [Exh. K at SAPW-32]

**Response:** For purposes of this motion, Readington admits that Mr. Thatcher worked with others to draft Readington's Ordinance. With respect to Ms. Allen, Mr. Thatcher testified that he had "very, very little" communications with Ms. Allen, and that the longest conversation he ever had with her involved a traffic accident unrelated to this matter. (Derman Opposition Cert., Exhibit 2, Thatcher Dep. at 37:18-38:4).

83. Mr. Thatcher confirmed in writing that with respect to the Ordinance he (and others working on the Ordinance) were "taking direction on these matters a step at a time from Mr. Rhatican," the attorney for Readington handling the condemnation matter. [Exh. K at SAPW-37]

**Response:** Denied. Any reasonable reading of Mr. Thatcher's testimony demonstrates that this statement is false. For example, Exhibit SAPW to the Thatcher deposition, cited by Solberg as its sole support for this statement, is a letter from Mr. Thatcher forwarding a copy of his draft to Readington's outside planner, Michael Sullivan. Nowhere in that letter does Mr. Thatcher make the statement quoted in this paragraph. (Aslanian Cert., Exhibit K at SAPW-37). Moreover, when asked during his deposition about a statement attributed to Mr. Thatcher that "we are taking direction on these matters a step at a time from Mr. Rhatican," Mr. Thatcher denied that Mr. Rhatican was "in charge" of the process by which the Ordinance was drafted and testified that Mayor Shamey was the "point person" for the project. (Derman Opposition Cert., Exhibit 2, Thatcher Dep. at 113:4-114:18). In any event, even if true, Mr. Rhatican's alleged involvement with the drafting of the Ordinance is not material to this motion or this action.

84. Mr. Thatcher's initial draft of the Subject Ordinance did not define the airport as being limited to the 102-acre area that was defined in the Declaration of Taking. [Compare Exh. K at SAPW-35 with Exh. K at SAPW-40]

**Response:** For purposes of this motion, Readington admits that Exhibits SAPW-35 and SAPW-40 to the Thatcher Deposition (attached as part of Exhibit K to the Aslanian Cert.) are drafts of the Ordinance, the terms of which speak for themselves. Readington states that the existence of a prior draft is not material to this action or this motion.

85. Mr. Thatcher was asked to insert the definition of airport in the draft ordinance between April 10 and April 17, 2007. [Exh. K at t 117:14-119:7 and SAPW-35, SAPW-40]

**Response:** Denied. The drafting of the Ordinance was primarily conducted, with respect to ASZA issues, by Mr. Thatcher, who took comments and suggestions from others. As Michael Sullivan testified, Mr. Thatcher provided the expertise needed to draft an ordinance compliant with ASZA and that the final Ordinance is compliant with ASZA. (See Derman Opposition Cert., Exhibit 3, Sullivan Dep. at 13:14-14:12). Readington states that this paragraph is not material to this action or this motion.

86. Mr. Thatcher has testified on depositions, as he also testified at trial before Judge Armstrong, that representatives of Readington Township gave him the reference to the 102.23 acres as conditions that he should use in drafting the Ordinance because that “is what the Township considered the airport to be.” [Exh. K at 109:10-112:5 and SAPW-35, SAPW-40]

**Response:** Denied. Readington states Solberg has not accurately characterized this testimony. Mr. Thatcher testified that the issue of the “102.23 acres” was “completely irrelevant” for the work he was doing with respect to the Ordinance and that the Ordinance was compliant with ASZA. (Aslanian Cert., Exhibit K, excerpts from Thatcher Dep. at 111:8-11; Derman Opposition Cert., Exhibit 2, Thatcher Dep. at 110:5-111:11). In any event, this paragraph is not material to this action or this motion.

87. Various of the particular dimensions placed into the Ordinance by Mr. Thatcher, including the 150,000 square foot area maximum, and the 35,000 square foot floor area maximum, were “base conditions” that he was instructed to insert into the Ordinance, and the source appears to be the Declaration of Taking. [Exh. K at 126:11-132:18, and SAPW-45, SAPW-46]

**Response:** Denied. Solberg has not accurately described Mr. Thatcher’s testimony, the terms of which speak for themselves. Moreover, what a “source appears to be” is not a statement of fact. Mr. Thatcher worked with others to draft Readington’s Ordinance, including Mr. Sullivan, who had a lengthy history of addressing Readington’s land use plans and zoning ordinances – all of which are consistent with the Ordinance. (See Derman Opposition Cert., Exhibit 2, Thatcher Dep.

at 29:4-42:5; Exhibit 3, Sullivan Dep. at 12:3-14:12). In any event, this paragraph is not material to this action or this motion.

88. With respect to the involvement of the eminent domain major players, Mr. Sullivan confirmed a telephone call regarding the Ordinance early in the drafting process, on or about February 21, 2007, with Howard D. Cohen, Esq., who was then co-counsel in the eminent domain case, regarding “airport zoning” discussing “acquisition.” [Exh. DDD at 24:10-25:11, and Exh. DDD at Sullivan-7 at p. 1705]

**Response:** For purposes of this motion, Readington admits that Mr. Thatcher testified about a telephone call but did not identify anything material to this action or this motion. In any event, this paragraph is not material to this action or this motion.

89. Mr. Sullivan confirmed that the subject Ordinance went well beyond the Ordinance requirements under the ASZA statute and regulations, including the various items delineating what the airport could consist of in terms of structures, floor area, etc. [Exh. DDD at 55:2-58:8].

**Response:** For purposes of this motion, Readington admits that Solberg has attached excerpts from the deposition of Mr. Sullivan, the terms of which speak for themselves. Readington notes however, that Solberg has not accurately described Mr. Sullivan’s testimony. Mr. Sullivan testified, for example, that the Ordinance is a “more thoughtful application of the [ASZA] regulations.” (Aslanian Cert., Exhibit DDD at 55:25-56:2). Mr. Sullivan’s full testimony, even limited to the excerpts provided by Solberg, demonstrates that the Ordinance was adopted in keeping with sound planning principles and Readington’s long-standing zoning practices. (Aslanian Cert., Exhibit Exh. DDD at 55:2-58:8). Further, with respect to ASZA issues, Mr. Sullivan testified that the Ordinance complied with ASZA and the ASZA Regulations. (See Derman Opposition Cert., Exhibit 3, Sullivan Dep. at 13:14-14:12).

**READINGTON’S STATEMENT OF MATERIAL FACTS SUBMITTED IN  
OPPOSITION TO SOLBERG’S MOTION FOR SUMMARY JUDGMENT**

Readington submits the following statement of material facts in response to Solberg’s motion for summary judgment:

**A. The Adoption of ASZA and the ASZA Regulations**

1. In 1983, the New Jersey Legislature adopted the Air Safety and Zoning Act (defined above as the “ASZA”), N.J.S.A. 6:1-81 et seq. (See Aslanian Cert., Exhibit C, Complaint, ¶¶ 3-4).

2. Pursuant to the authority granted under the ASZA, the New Jersey Department of Transportation adopted regulations enforcing the ASZA and setting certain standards for compliance with the ASZA. (Derman Opposition Cert., Exhibit 2, Thatcher Dep. at 29:20-30:4).

3. At the time, the official within the Department of Transportation who was primarily responsible for drafting the regulations was Thomas Thatcher, who was then the “Executive Assistant to the State Aviation Director.” (Derman Opposition Cert., Exhibit 2, Thatcher Dep. at 32:1-16).

**B. Solberg Demanded that Readington Adopt an ASZA Ordinance Through a Mandamus Claim in the Condemnation Action.**

4. On October 4, 2006, Readington filed and served a Declaration of Taking and a Verified Complaint initiating the Condemnation Action. (Aslanian Cert., Exhibit A, Declaration of Taking; Derman Opposition Cert., Exhibit 20, Verified Complaint in Condemnation Action).

5. In response, on October 20, 2006, Solberg filed an Answer, Counterclaim and Third Party Complaint in the Condemnation Action. (Aslanian Cert., Exhibit B, Solberg Answer, Third Party Complaint, and Counterclaim in Condemnation).

6. Solberg’s Counterclaim and Third Party Complaint included a mandamus claim in which Solberg sought, for the first time, a court order requiring that Readington adopt an ASZA ordinance. (Id.)

**C. Mr. Thatcher Drafted Readington’s Ordinance After Careful Review and Analysis.**

7. After Solberg’s Counterclaim and Third Party Complaint were filed in the Condemnation Action, Readington hired Mr. Thatcher to assist it in preparing an ASZA-compliant Ordinance. (Derman Opposition Cert., Exhibit 2, Thatcher Dep. at 36:14-37:13).

8. At the time, Mr. Thatcher was the foremost expert in the State of New Jersey on the purpose and application of the ASZA and the ASZA Regulations and had by then retired from the New Jersey Department of Transportation (where he actually drafted the ASZA Regulations as an administrative official). (Derman Opposition Cert., Exhibit 2, Thatcher Dep. at 34:23-25, 34-35).



9. Mr. Thatcher worked with Michael Sullivan, Readington's long-time planning consultant. (Derman Opposition Cert., Exhibit 2, Thatcher Dep. at 34-35; Derman Opposition Cert., Exhibit 3, Sullivan Dep. at 12:3-11).

10. In so doing, Mr. Thatcher conducted a review of ordinances adopted by other municipalities pursuant to the ASZA and determined that Readington could adopt an ordinance that "recognizes the historic significance of Solberg Airport as a genuinely historic facility and doing that within the context of the air safety zoning Ordinance." (Derman Opposition Cert., Exhibit 2, Thatcher Dep. at 62:2-63:3; see also 142:1-146:16).

11. He also reviewed the facilities and amenities that existed at other airports in New Jersey in order to determine what amenities should be permitted, or even encouraged, at Solberg Airport. (Derman Opposition Cert., Exhibit 2, Thatcher Dep. at 147:3-12).

12. Notably, the Ordinance not only identified all of the then-current operations as permitted uses (including where applicable airport uses), but also permitted modernization of the airport and allowed new uses not previously permitted (such as an airport, a car rental facility, and expanded hangar facilities). (Derman Opposition Cert., Exhibit 4, Hearing Tr. at 5:19-11:10).

13. Furthermore, Mr. Thatcher testified that Ordinance reflected the then current operations at the Solberg Airport because that was what ASZA required:

Q. So if one was to draft an ordinance in order to meet the requirements of the implementing guidelines and the statute, do you look at conditions on the ground or planned expansion? Which one do you look at?

A. As it exists today?

Q. Why?

A. Because planned expansions have a way of never happening. First, there's been a planned expansion, for example, at a cross-winds runway at R.J. Miller [Airport] in Ocean City that took almost three decades to happen and that's fairly typical.

(Derman Opposition Cert., Exhibit 2, Thatcher Dep. at 139:5-16; see also Aslanian Cert., Exhibit D, Ordinance at § E, F, and I (providing for modernization and development)).

14. The Ordinance, pursuant to the ASZA, also delineated the proper safety zones, which were prescribed without regard to who owned the land subject to the safety zones restrictions, and the safety zones delineated by the Ordinance include both land owned by Solberg and land owned by others. (Derman Opposition Cert., Exhibit 2, Thatcher Dep. at 141:13-25; Thatcher Dep. 148:17-150:25; Thatcher Dep. at 151:1-6).

15. With respect to the size of the airport, Mr. Thatcher's draft Ordinance identified a 102 acre area "Historic Airport Sub-Area" or "HASA" where "airport" use (as the term "airport" is defined in the ASZA) is permitted. (Aslanian Cert., Exhibit D, Ordinance at § E).

16. At the time the Ordinance was adopted, and today, the only place where fixed winged aircraft take off and land was within the HASA. (N.J.S.A. 6:1-82; N.J.A.C. 16:62-1.1; see also Aslanian Cert. at Exhibit C, Complaint, ¶ 13; Derman Opposition Cert., Exhibit 5, 2007 State Aviation Inspection Report; Exhibit 6, A'Hara Dep. at 86:14-87:13; Exhibit 7, Habitat Evaluation and Impact Assessment dated March 11, 2010; Exhibit 8, Ritter Dep. 79:12 - 82: 12; Exhibit 9, T. Solberg Dep. at 40:13-41:13 and 48:3-; Exhibit 10, Golaszewski Report at 2-3; Exhibit 11, 2006 and 2007 Farmland Assessment Application; see also Derman Opposition cert., Exhibit 12, Letter dated March 28, 2001 from S. Nagle to the Hon. C. Louis Bassano).

17. Readington adopted the Ordinance largely as drafted by Mr. Thatcher at a public hearing on June 6, 2007. (Aslanian Cert., Exhibit C, Complaint, ¶ 17; Derman Opposition Cert., Exhibit 4, Hearing Tr. 67:1-14).

18. During the June 7, 2007 hearing, Mr. Thatcher explained the purpose of the Ordinance and the ways in which it brought Readington into compliance with the ASZA and the ASZA Regulations, and the representatives of Readington responded to inquiries from residents. Mr. Thatcher also noted that in preparing the Ordinance, he studied all thirty-two air safety zoning ordinances currently on file with the Department of Transportation. (Derman Opposition Cert., Exhibit 4, Hearing Tr. 7:15-19). (See generally Derman Opposition Cert., Exhibit 4, Hearing Tr. 5:19-11:12).

19. At the meeting, Mr. Thatcher explained that a town with a qualifying airport, such as Readington, must adopt an ordinance meeting the ASZA and the ASZA Regulations, and that such an Ordinance would do four principal things:

One, clearly delineate the regulated airport safety zone area. Two, specify permitted and specify prohibited land uses within the airport safety zones. Three, specify the maximum heights allowable in the zone for buildings and plantings. And finally . . . coordinate local planning and zoning procedures with any applicable reviews by N.J.D.O.T.

(Derman Opposition Cert., Exhibit 4, Hearing Tr. 7:3-14).

**D. The Ordinance Is Proper Because for Decades Airport Use at Solberg Airport Has Occurred Solely Within the 102 Acre HASA.**

20. Solberg owns approximately 725 acres that are either part of Solberg Airport, or adjacent to it. (Aslanian Cert., Exhibit C, Complaint, ¶ 13; Derman Opposition Cert., Exhibit 9, T. Solberg Dep. at 11:18-24).

21. Solberg Airport has been operating since 1939, and its size has remained unchanged for several decades. (Derman Opposition Cert., Exhibit 13, Solberg Airport Master Plan at § 1-1; Exhibit 14, October 2002 Draft Environmental Assessment (“Draft EA”) at § 2; Exhibit 5, 2007 State Inspection Report, Exhibit 15, 2016 FAA Airport Master Record).

22. Of the 725 acres owned by Solberg, only 102 are actually “used for active airport operations.” (Aslanian Cert. at Exhibit C, Complaint, ¶ 13; Derman Opposition Cert., Exhibit 5, 2007 State Aviation Inspection Report; Exhibit 6, A’Hara Dep. at 86:14-87:13; Exhibit 7, Habitat Evaluation and Impact Assessment dated March 11, 2010; Exhibit 8, Ritter Dep. 79:12 - 82: 12; Exhibit 9, T. Solberg Dep. at 40:13-41:13 and 48:3-8; Exhibit 10, Golaszewski Report at 2-3; Exhibit 11, 2006 and 2007 Farmland Assessment Application; see also Derman Opposition cert., Exhibit 12, Letter dated March 28, 2001 from S. Nagle to the Hon. C. Louis Bassano).

23. The vast majority of the Solberg land is farmland assessed, and undeveloped. (See Derman Opposition Cert., Exhibit 16, Sullivan Report at 17 (Map Depicting “Existing Land Use”)).

24. Solberg applies for farmland assessments each year, and states under penalty of perjury that no commercial activity takes place on the land that is farmland assessed. (See Derman Opposition Cert., Exhibit 9, T. Solberg Dep. at 57:16-59:14 (all but the 60 acres of the total Solberg land is farmland assessed); Exhibit 11, Farmland Assessment Applications for 2006 and 2007). Approximately 690 acres is, and has been, farmland assessed for many years as a result of these sworn applications. (Id.)

25. At the time the Ordinance was adopted, Solberg Airport had two runways, Runway 04-22 and Runway 13-31, which are 3,735 and 3,440 feet long, respectively, and both of which are located within the 102 acre area. (See Derman Opposition Cert., Exhibit 5, 2007 Inspection State Report).

26. Those runways remain in place today. (Derman Opposition Cert., Exhibit 15, 2016 FAA Airport Master Record).

27. The process to expand or alter an airport requires approval of both the federal government and the New Jersey Department of Transportation, and Solberg has never obtained such approvals. (See, e.g., N.J.A.C. 16:54-1.1 et seq.).

28. In 1998, Solberg submitted a proposed “Airport Master Plan” to the Federal Aviation Administration (“FAA”). (Derman Opposition Cert., Exhibit 6, A’Hara Dep. at 29:15-22; Exhibit 13, Solberg 1998 Airport Master Plan).

29. That proposal was just the initial step as part of a long-term application process to expand Solberg Airport. (Derman Opposition Cert., Exhibit 6, A’Hara Dep. at 52:21-54:5).

30. The proposed Airport Master Plan, which included a plan to lengthen the runways at Solberg Airport, was granted a “conditional approval” by the FAA and the State of New Jersey in 1998 and 1999 respectively, a status that does not include critical funding. (Derman Opposition Cert., Exhibit 6, A’Hara Dep. at 52:21-54:5).

31. The conditional approval was not an approval to build, only merely an acknowledgement that the proposed layout complied with FAA and DOT regulations. (Derman Opposition Cert., Exhibit 17, New Jersey Department of Transportation Letter dated March 25, 1999 at 9; Exhibit 18, FAA Letter dated October 22, 1998 at 5).

32. The FAA and New Jersey conditional approvals explicitly were not a finding of need or demand for airport expansion. (Id.) Indeed, that conditional approval did not provide funding for any project, and was conditioned on several additional steps, not the least of which was an “environmental assessment” (a process which includes an analysis of purpose and need). (Id.; Derman Opposition Cert., Exhibit 6, A’Hara Dep. at 52:21-54:5; Exhibit 12, Solberg 1998 Airport Master Plan).

33. The State of New Jersey, working “on behalf of the Federal Aviation Administration,” began the environmental assessment process shortly thereafter. (Derman Opposition Cert., Exhibit 14, October 2002 Draft EA at cover; Exhibit 6, A’Hara Dep. at 52:21-54:5).

34. Although the State of New Jersey circulated drafts of the environmental assessment, the process was never completed. (Derman Opposition Cert., Exhibit 6, A’Hara Dep. at 52:21-54:5; Exhibit 14, October 2002 Draft EA at cover) (identifying document as “draft”).

35. Notably, not one of the options proposed by the most recent draft environmental assessment contemplated any expansion of airport operations beyond the 102 acres currently used for airport operations. (Derman Opposition Cert., Exhibit 14, October 2002 Draft EA at 2-8).

36. The most recent “draft,” dated October 2002, rejected any plan to expand any runway at Solberg Airport and envisioned a continuation of the current location of all airport operations. (Derman Opposition Cert., Exhibit 14, 2002 Draft EA at 2-8).

37. In the State’s October 2002 Draft Environmental Assessment, the State of New Jersey stated “the Master Plan recommendations are not being considered for implementation. Rather, a substantially scaled-back option was developed for analysis in this EA Study.” (*Id.*)

38. The last response from the State of New Jersey on Solberg’s request to expand the runways at Solberg Airport, was a rejection of the request. (Derman Opposition Cert., Exhibit 6, A’Hara Dep. at 53:23-54:5; Exhibit 14, 2002 Draft EA at 2-8 and § 3; see also Exhibit 19, Commissioner Letter Dated October 29, 2002). This rejection came in 2002, fully five (5) years before the Ordinance was adopted.

39. Solberg’s own aviation expert, Alan A’Hara, who drafted not only Solberg’s Airport Master Plan but also Master Plans for several other general aviation airports in New Jersey, admitted that the 1998 conditional approval is out of date and no longer effective, and that if Solberg wanted to expand Solberg Airport, it would have to start the process from the beginning. (Derman Opposition Cert., Exhibit 6, A’Hara Dep. at 55:9-56:10; Exhibit 13, Solberg 1998 Airport Master Plan).

40. Mr. A’Hara admitted during his deposition that all of the economic models and predictions upon which the Airport Master Plan was premised did not come to fruition, and that there is no current study or forecast showing a need to expand Solberg Airport. (Derman Opposition Cert., Exhibit 6, A’Hara Dep. at 56:22-67:21).

**E. This Action in Lieu of Prerogative Writs Is Distinct from the Condemnation Action.**

41. On July 18, 2007, Solberg commenced this action in lieu of prerogative writs. (Aslanian Cert., Exhibit C, Solberg Complaint in Lieu of Prerogative Writs).

42. By Consent Order dated November 2, 2007, this action in lieu of prerogative writs was stayed, and remained stayed until after the Condemnation Action was concluded. (Aslanian Cert., Exhibit J, Consent Order dated November 2, 2007).

43. On January 16, 2008, the Superior Court, Judge Ciccone, granted Readington summary judgment in the Condemnation Action. (Derman Opposition Cert., Exhibit 21, Order dated January 16, 2008).

44. Solberg appealed, and on August 19, 2009, the Appellate Division reversed the grant of summary judgment in the Condemnation Action and remanded for trial. Readington v. Solberg, 409 N.J. Super. 282 (App. Div. 2009).

45. On May 14, 2015, after a lengthy trial, Judge Armstrong issued an Opinion in the Condemnation Action. (Aslanian Cert., Exhibit E, Condemnation Action Opinion).

46. By the time opening statements were made in the Condemnation Action on May 8, 2014, all claims in Solberg's Counterclaim and Third Party Complaint (the only pleadings in the Condemnation Action that ever mentioned ASZA or the Ordinance) had either been resolved or severed from the Condemnation Action. (Derman Opposition Cert., Exhibit 22, February 4, 2014 Order; Exhibit 23, Solberg Amended and Supplemental Counterclaim and Third Party Complaint; Aslanian Cert., Exhibit J, February 14, 2014 Consent Order).

47. On May 18, 2015, Solberg moved for summary disposition of this action in lieu of prerogative writs based upon its contention that the Opinion in the Condemnation Action, through the collateral estoppel doctrine or other theories, governed this action. (Derman Opposition Cert., Exhibits 24 and 25, Solberg Letter Brief and Reply Brief Briefs in support of motion for summary disposition).

48. By Letter Opinion dated June 10, 2015, Judge Ciccone denied Solberg's motion, holding that the two cases are separate and distinct:

The issue to be precluded is not identical. The question here is whether an ordinance brought pursuant to the Air Safety and Zoning Act is collaterally estopped from litigation due to the Court's decision in the condemnation action involving the same property. It is not. The condemnation action addressed a declaration of taking brought under the Eminent Domain Act. The circumstances may be entirely the same, but the legal issues are not. Given that this ordinance was never addressed that action, and the fact the municipal ordinances are presumptively valid, further litigation on the merits is necessary before this Court will declare it null and void.

(Derman Opposition Cert., Exhibit 1, June 10, 2015 Letter Opinion at 7).

49. The parties then undertook discovery specific to this action in lieu of prerogative writs, including the exchange of documents and interrogatories, the exchange of expert reports, and the depositions of fact and expert witnesses.

#### IV. COURT'S DECISION

##### A. PROCEDURAL HISTORY

The procedural history of this Prerogative Writs action cannot adequately be set forth without including the eminent domain action which preceded it and which clearly occasioned it.

The eminent domain action (“Main Case”) was instituted by Readington against Solberg on September 15, 2006, authorizing the taking of lots and blocks totaling approximately 726 acres. On October 4, 2006, the Township filed a Declaration of Taking and deposited more than \$21 million into the Superior Court trust fund unit. [Exh. A<sup>5</sup>; Exh. E at 1].

The Declaration of Taking condemned approximately 624 acres in fee simple; and, with respect to the balance of approximately 102 acres, to which it assigned the designation “Airport Facilities Area”, it condemned all development and easement rights except for (i) conservation and passive recreational use, (ii) agricultural use, and (iii) airport uses ancillary to a principal airport use, but with (iv) ancillary airport uses limited to (a) a single restaurant, (b) a single museum, (c) administrative offices, (d) a gift shop, (e) a lounge for transient passengers, and (f) a classroom for flying lessons (with all of (a) - (f) above limited to 35,000 square feet of area), and (g) hangar and maintenance space limited to 150,000 square feet of area. [Exh. A at 1, 2].

In its Answer contesting Readington’s authority to take its property, together with its Counterclaim and Third-Party Complaint, Solberg articulated the history of Readington’s efforts to preclude expansion of the airport, including its studied failure and refusal over 20+ years to adopt an air safety zone ordinance as mandated by State law. [Exh. B].

On May 22, 2007, with the eminent domain action pending and faced with a preliminary determination by Judge Ciccone that the “evidence is sufficient to create a *prima facie* showing that the purpose of this condemnation action is pre-textual” [Exh. I], Readington introduced the Subject Ordinance, and it was enacted on June 6, 2007 [Exh. D].

The Subject Ordinance recited in ¶A (3), that it was “based upon, and presumes, an airport layout” identical to the 102-acres designated in the eminent domain complaint as the “Airport Facilities Area”; and defined that same 102 acres as an “Historic Airport Sub-Area.” [Exh. D at ¶C(d)(2)]. Parroting in part the Declaration of Taking, the Subject Ordinance went on to label “permitted uses” as including (i) airport uses, (ii) conservation, (iii) passive recreation, and (iv) agriculture; and identified “permitted accessory uses” as including (a) a restaurant (of up to 40

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<sup>5</sup> Exhibit references are to the exhibits attached to the June 23, 2016 Certification of Matthew T. Aslanian, including in particular the various findings and conclusions of Judge Armstrong in his comprehensive opinion of May 4, 2015.

seats), (b) a museum, (c) administrative offices, comprising office, terminal, weather briefing and conference room facilities, (d) a gift shop, (e) pilot flight schools and (f) a waiting room. [Exh. D at ¶¶ (12), (14), (16), (17)]. And it limited the floor area for aircraft hangars and maintenance to 150,000 square feet and for the other permitted accessory uses at 35,000 square feet -- in short, an almost precise replica of the conditions surrounding the development rights portion of the Declaration of Taking.<sup>6</sup>

The Subject Ordinance not only specifically itemized certain “prohibited land uses” but also included therein “all uses not specifically permitted.” [Exh. D at ¶H (11)].

Having determined, in November, 2006, that Solberg had made out a *prima facie* case of an unlawful, pre-textual taking, Judge Ciccone ordered discovery in the Main Case but stayed the proceedings on the Counterclaim and Third-Party Complaint pending further order of the Court. [Exh. I].

The instant Prerogative Writs action was commenced in July, 2007 [Exh. C], but proceedings therein were stayed until 2014 and only became active after Judge Armstrong’s decision in May, 2015. [Exh. J]

Following completion of discovery in 2007 in the Main Case, including expert reports and expert discovery, both Readington and Solberg moved for summary judgment. In 2008, Judge Ciccone granted Readington’s motion and denied Solberg’s motion, and Solberg appealed. In a reported opinion in August, 2009, the Appellate Division reversed the judgment in favor of the Township and remanded for trial. *Township of Readington v. Solberg Aviation Co.*, 409 N.J. Super. 282 (App. Div. 2009). Readington’s Petition for Certification was denied by the Supreme Court.

In 2014, Judge Ciccone severed the Counterclaim and Third-Party Complaint from the balance of the Main Case, and consolidated it with this Prerogative Writs case [Exh. J] -- all of which remained in limbo while the Main Case progressed towards trial.

The Main Case proceeded to trial before Judge Armstrong in May, 2014, and was tried over the course of approximately eight months. In February and March, 2015, the parties submitted extensive post-trial briefs and reply briefs.

On May 4, 2015, Judge Armstrong issued his 54-page Opinion, [Exh. E] resulting in an order of May 20, 2015 [Exh. F] and *inter alia*, the subsequent denial of Readington’s motion for

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<sup>6</sup> The ordinance was drafted by a former NJDOT official, Thomas Thatcher, working under the supervision and over-all involvement of Readington’s lawyers prosecuting the eminent domain action, and with the particular involvement of two of the Township’s Committeepersons most directly assertive in the eminent domain matter. [Exh. K at 71:16-73:24]



reconsideration of certain aspects of the Opinion. As a result of other post-trial motions, as well as the appointment of a Special Master to recommend the allowance of statutory fees and expenses to Solberg as a consequence of Judge Armstrong's ruling, the Main Case extended into 2016, with the final order triggering the appeal process entered on April 6, 2016. (Readington has appealed Judge Armstrong's main decision, as well as certain prior and subsequent orders; Solberg has cross-appealed with respect to a very limited ruling by Judge Ciccone regarding the amount of real estate taxes to be charged to Solberg. Formal briefing in the Appellate Division has not yet commenced.).

Judge Armstrong's Opinion of May 4, 2015 [Exh. E] sets forth the extensive history of the dispute, culminating in the eminent domain proceeding, Solberg's challenges to the taking, and includes, *inter alia*, the following findings of fact and conclusions of law:

(i) Solberg Hunterdon Airport ("SHA") is located on lands owned by Solberg Aviation Company comprising 726 acres in Readington Township, which facility so impressed then-Governor Hughes in 1967 that he proposed that it become the site of a fourth metropolitan jetport -- but local opposition led to the withdrawal of the plans "to expand the airport" (at 9-10);

(ii) The airport houses, among other features, a VORTAC navigational aid, and facilities not only for piston, turbo prop and jet aircraft but also for gliders, helicopters and blimps, as well as space for model airplane enthusiasts and clubs (at 10);

(iii) On April 11, 2002, Solberg "entered into an agreement with the NJDOT for the sale of SHA", which eventually fell through (at 14);

(iv) The Township's authority to exercise zoning control over the Solberg property is constrained by state law (at 18);

(v) The ultimate authority over regulating and licensing aeronautical activities and facilities in New Jersey resides with the NJDOT Commissioner, including not only fixed-wing aircraft but also other aircraft such as airships, blimps, dirigibles, gyroplanes, gliders, helicopters, hot air or gas balloons (at 19);

(vi) It is "emphatically the case" that the condemnation of the Solberg property was motivated, or at least substantially motivated, by the desire of Township officials to limit airport expansion and to prevent SHA from becoming a jetport (at 25);

(vii) **The taking** was in direct response to Solberg's proposed Master Plan and proposed Airport Layout Plan which included a new 4,890 foot runway and other improvements

conditionally approved by the NJDOT and FAA and **“was singularly initiated to secure Township control over airport operations”** (at 26, 31);

(viii) Readington’s behavior “undermines the integrity of the municipal government’s stated public purpose behind [the eminent domain ordinance] and demonstrates bad faith,” resulting in the conclusion that **“the taking is invalid in its entirety”** (at 31);

(ix) Readington’s “shifting rationales” for the taking are “without credibility and a mere pretext and subversion of **the real objective improper purpose to gain control of the airport and the prevention of its expansion** in keeping with the FAA and NJDOT regulations” (at 32, 33);

(x) Readington’s “open space” arguments regarding SHA were here “a pretext for an unconstitutional taking that was designed to control the extent of the airport operations and to preclude and prevent the expansion of the airport” (at 35);

(xi) As included in the quoted testimony of Arlene Feldman, one of Solberg’s witnesses, the taking-away of 80% of the Solberg Airport acreage would “reduce the availability to really advance the airport, to develop the airport to accommodate the general aviation community,” and most airports “just don’t have the acreage to accommodate any future growth that Solberg would be able to accommodate” (at 39, 40);

(xii) The New Jersey State Airport System Plan (“NJSASP”), which supports the Court’s finding that Solberg Airport serves an important government interest, discusses the “need to have sufficient land available when airport expansion or new facilities are required”; and recommends that SHA be classified as a “priority service airport,” which “would open it up for development” (at 41);

(xiii) The **“taking initiated by the Township sought to expressly take control of the airport and thus directly subvert the Commissioner’s ultimate authority over aeronautical facilities”** (at 45);

(xiv) The “evidence demonstrates that **both the State of New Jersey and the United States incorporate the potential expansion of the airport as necessary to the aviation infrastructure of the region**” and that “(t)o limit such through condemnation of the lands within the airport safety zone would be ‘contrary to express state purposes’ and therefore be in conflict with higher authority” (at 45);

(xv) Even with respect to those airport parcels outside of the current facilities area and current air safety zone, their taking may impact the important public interest served by

the property, and thus their taking would conflict with “the government’s interest in keeping the airport viable,” as exemplified by the fact (as found) that **certain parcels outside of the “current Air Safety Zone are used for the takeoff and landing of non-fixed wing aircraft, such as balloons and blimps”** (at 47);

(xvi) Readington’s “open space argument” was not only brought as a pretext for the ulterior motive of precluding the airport from the expansion outlined in Solberg’s conditionally approved Master Plan, thus precluding “an important government purpose,” but also it was “**a well-designed strategy for controlling the airport’s future in its entirety**” (at 48, 49);

(xvii) As a consequence of the Court’s analysis, findings, and conclusion, not only is the taking deemed invalid and all rights of fee ownership restored to Solberg but, in connection with that fee ownership, **Solberg has the right with respect to the identified blocks and lots, totaling 726 acres, “to develop or otherwise utilize the aforesaid property for any use involved with or incidental to the ownership and operation of an airport in accordance with the laws and regulations of the State of New Jersey and the United States,** including but not limited to all such uses in effect currently and immediately prior to the condemnation,” and including specifically the following:

“1. Any and all rights to operate an airport aviation enterprise, including uses ancillary to a principal airport use (and including the annual balloon festival and other similar public events), subject to regulation by the Division of Aeronautics of the New Jersey Department of Transportation and such other or successor governmental entity of the State of New Jersey exercising regulatory control over airports”; and

“2. Any and all rights to improve, modernize, and expand the property for airport and aviation enterprise purposes, including but not limited to, construction or improvement of airport facilities and infrastructure including runways, taxiways, hangars, administration buildings, lighting, navigational aids, weather reporting equipment, and other facilities ancillary to airport use (e.g., restaurants with adequate seating, lounges, museums, gift shops, meeting or conference rooms, etc.).”

(xviii) The entirety of the foregoing determination contained in (xvii) above was incorporated verbatim into the Court’s Order of May 20, 2015 [Exh. F at ¶2 and ¶3].

This Prerogative Writs action was instituted in July, 2007, attacking the validity of Readington Ordinance #18-2007 [Exh. C]. It was stayed for a lengthy period of time while the Main Case wended its way through the trial court, to the Appellate Division, and back on remand to the trial court for trial. It was pursued actively by the parties only following Judge Armstrong’s

Opinion of May 4, 2015, and has since that time been litigated through paper discovery, fact depositions, expert reports and expert depositions.

**B. STANDARD OF REVIEW**

The New Jersey Supreme Court in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995), held that according to Rule 4:46-2, a court should grant summary judgment when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.” The Brill Court stated that, “[b]y its plain language, Rule 4:46-2 dictates that a court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a ‘genuine issue as to any material fact challenged.’” Id. at 529.

That means, therefore, that “a non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute.” Id. A determination whether there exists a “genuine issue” of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the nonmoving party. Id. at 540.

The “judge’s function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” Id. at 549 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). Thus, if the evidence “is so one-sided that one party must prevail as a matter of law ... the trial court should not hesitate to grant summary judgment.” Id. at 540.

However, the trial court should not grant summary judgment when the matter is not yet “ripe” for such consideration, as where discovery has not yet been completed. See Velantzas v. Colgate-Palmolive Co., 109 N.J. 189 (1988); Salomon v. Eli Lilly & Co., 98 N.J. 58 (1984); Jackson v. Muhlenberg Hospital, 53 N.J. 138 (1969) (cautioning against the grant of a summary judgment motion on a meager record where the ruling sought on the motion would have “broad-reaching social and legal effect”). Where discovery on material issues is not yet complete, the respondent must, therefore, be given the opportunity to take discovery before disposition on the motion. Wilson v. Amerada Hess Corp., 168 N.J. 236, 253-54 (2001) (where a claim for relief is based on the allegation of the adverse party’s bad faith, discovery that would adduce facts giving

rise to an inference of bad faith must be permitted before the summary judgment motion is heard). However, a respondent on a summary judgment motion who resists the motion on the ground of incomplete discovery is obliged to specify the discovery still required. Trinity Church v. Lawson-Bell, 394 N.J. Super 159, 166 (App. Div. 2007). Mere conclusory statements are inadequate.

**C. FACTUAL FINDINGS**

For the purposes of this Motion, the Court finds the following uncontested facts to be part of the record:

(1) The Determinations In The Main Case

Solberg Airport was founded by Thor Solberg, Sr., a world-renowned aviator who contributed to pre-and post-aeronautical achievements, and who was designated by President Franklin D. Roosevelt as a “Great American” for his achievements and contributions to security in the United States. [Exh. E at 8]. In or around 1939, he began accumulating various contiguous parcels to comprise over 700 acres of land, separated only by public roads, to create Solberg Airport. [*Id.* at 9]. In 1941, the Township of Readington adopted a resolution granting permission for the operation of a “commercial airport” on the acreage that it now occupies. [*Id.*].

Well established as a general aviation facility, Solberg Airport is devoted to the needs of both recreational and business aircraft. Both the Federal Aviation Administration (“FAA”) and the NJDOT designated Solberg Airport as a “reliever airport” in 1990. [*Id.* at 10]. Reliever status arises from the federal and state recognition of the potential to utilize the airport to relieve congestion at major regional airports, and plays a role in making federal funding available, along with state funding, for improvements. [*Id.*]

The Solberg property is currently comprised of between 725-744 acres, more or less, which Plaintiff Solberg contends are dedicated, designed, and set aside for aviation uses. [Exh. G and Exh. H]. It includes three runways, which are described by reference to the direction each end of the particular runway faces. [Exhs. YY, ZZ]. It has a runway designated as 4-22, which is the main runway and is paved to 3000 feet. Plaintiff claims that the Solberg Airport also has two cross-wind runways, one designated as 10-28 and the other as 13-31.<sup>7</sup> [*Id.*]. Several buildings house various airport activities, including a rather modest main terminal with office space, and connected warehouse space for aircraft maintenance procedures.

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<sup>7</sup> The existence of 10-28 is disputed by the parties. That issue shall be addressed in the Court’s opinion.

In 1983, the New Jersey Legislature enacted the Airport Safety and Hazardous Zoning Act (“ASZA”), which authorized the Commissioner of Transportation to adopt rules and regulations to specify permitted and prohibited land uses within airport safety zones. N.J.S.A. 6:1-85 required each municipality that contained any part of an airport safety zone to enact an ordinance incorporating standards promulgated by the Commissioner. Shortly after the passage of the ASZA, Solberg applied for and received grant funding from the NJDOT to pave the entire licensed length of the runway, 3,735 feet. After approval for construction, the Township unilaterally issued a stop work order, stating that it would not permit paving the main runway beyond 3,000 feet. [Exh. E at 11]

It is fair to say that the Township opposed the ASZA legislation, petitioning the NJDOT to exempt the Township, as it believed the ASZA removed decisions better left for local officials regarding airport expansion (“Home Rule”). The Township describes its opposition as an exercise of “its legal and constitutional rights” to oppose ASZA or the application of the law to the Township. Despite its legal obligation, the Township failed to pass an ordinance that complied with N.J.S.A. 6:1-85, but rather lobbied and petitioned to have the ASZA declared unconstitutional. [*Id.*]

In the late 1980s, it appeared that the Linden Airport might close. A feasibility study prepared by representatives of the FAA, NJDOT and local officials determined that SHA was qualified as a potential replacement site. The Township opposed the position taken by the FAA. Despite the opposition, the Solbergs wrote to the Mayor of Linden on May 30, 1990, confirming their willingness to accept the transfer of aircraft from Linden Airport. The plan eventually fell through. The record reflects that thereafter ongoing tensions between the Solbergs and their detractors increased. [Exh. E at 11-12].

In August 1990, the first threat of condemnation occurred during a Township meeting involving Township officials Ron Monaco and Steve Mirota, Township attorney William Savo, and Thor Solberg Jr. During a heated exchange between officials and Thor Solberg Jr., the Township made it clear that the Township could condemn the airport and threatened the Solberg’s livelihood by putting them out of business, if they so desired. During the August 1990 meeting, the following recorded exchange took place:

[Solberg]: [Y]ou’re taking away my livelihood  
[Monaco]: No, we’re not  
[Mirota]: Not necessarily.  
[Solberg]: You know that’s what—you want to take the land.  
[Monaco]: We haven’t done that yet.

[Solberg]: It's our land.

[Savo]: Let me tell you what our options are. We could go down ther[e] tomorrow, right? And [take] just enough to put the airport out of business. I wouldn't say anything.

[D-600].

[Exh. E at 12].

In September 1990, the Solbergs requested, and were approved, for funding from the FAA to expand the main airport runway from 1,800 feet to 3,000 feet. In 1995, and against criticism from the NJDOT, the Township's Board of Education decided to site an elementary school directly adjacent to the airport. Subsequently, the Township Committee encouraged petitioning in opposition to runway length expansion and adopted several resolutions opposing any increase in SHA's runway length over the next several years. [Exh. E at 11-12].

In 1997, SHA released a Final Draft Master Plan and an Airport Layout Plan that provided detailed recommendations for airport development, estimated construction costs, and set forth a schedule of improvements over a twenty-year planning period. SHA recommended a new 4,890 foot long replacement runway, a full parallel taxiway, paving and extension of a crosswind runway, parking facility improvement, additional hangars, an automated weather observation station, a precision instrument approach and an approach lighting system. The Township challenged SHA and filed letters with the FAA, NJDOT as well as numerous government officials. The Township passed Resolution R-97-18, challenging the SHA Master Plan, arguing that the current state of the airport provided adequate safety for existing aircraft and that expansion would be highly inappropriate to create a commercial airport in a rural residential zone. [Exh. E at 12-13].

In March 1999, the FAA and NJDOT gave conditional approval to the Airport Layout Plan, pending the successful completion of the environmental assessment. Shortly thereafter, the Mayor of Readington wrote to the NJDOT to protest this decision and stated that the Township would "do everything in its power to maintain the status quo of the airport." In reaction to the scope of that plan, the Township elected to "draw a line in the sand" and "do whatever it takes right now legally to make sure that [SHA] never becomes a jetport." [Exh. E at 26]. In the following years, the Township commissioned environmental reports provided by experts and township committees. The Township amended its 1990 Master Plan, recommending that the most effective way to preserve the environmentally valuable land of SHA would be through acquisition by the Township. These amendments were the first time that the Township labeled the land that SHA occupied as a "critical environmental impact area." The property was also listed in the Readington Township

Open Space Inventory and Recommendations for Preservation, in its Greenways properties, and was identified as being environmentally vulnerable. SHA was never recommended for acquisition prior to these amendments. [Exh. E at 14].

Readington contends that the process to expand or alter an airport requires approval of both the federal government and the New Jersey Department of Transportation, and Solberg has never obtained such approvals. (See, e.g., N.J.A.C. 16:54-1.1 et seq.).

In 1998, Solberg submitted a proposed “Airport Master Plan” to the Federal Aviation Administration (“FAA”). (Derman Opposition Cert., Exhibit 6, A’Hara Dep. at 29:15-22; Exhibit 13, Solberg 1998 Airport Master Plan).

That proposal was just the initial step as part of a long-term application process to expand Solberg Airport. (Derman Opposition Cert., Exhibit 6, A’Hara Dep. at 52:21-54:5).

The proposed Airport Master Plan, which included a plan to lengthen the runways at Solberg Airport, was granted a “conditional approval” by the FAA and the State of New Jersey in 1998 and 1999 respectively, a status that does not include critical funding. (Derman Opposition Cert., Exhibit 6, A’Hara Dep. at 52:21-54:5).

The conditional approval was not an approval to build, only merely an acknowledgement that the proposed layout complied with FAA and DOT regulations. (Derman Opposition Cert., Exhibit 17, New Jersey Department of Transportation Letter dated March 25, 1999 at 9; Exhibit 18, FAA Letter dated October 22, 1998 at 5).

The FAA and New Jersey conditional approvals explicitly were not a finding of need or demand for airport expansion. (Id.) In fact, that conditional approval did not provide funding for any project, and was conditioned on several additional steps, not the least of which was an “environmental assessment” (a process which includes an analysis of purpose and need). (Id.; Derman Opposition Cert., Exhibit 6, A’Hara Dep. at 52:21-54:5; Exhibit 12, Solberg 1998 Airport Master Plan).

The State of New Jersey, working “on behalf of the Federal Aviation Administration,” began the environmental assessment process shortly thereafter. (Derman Opposition Cert., Exhibit 14, October 2002 Draft EA at cover; Exhibit 6, A’Hara Dep. at 52:21-54:5).

Although the State of New Jersey circulated drafts of the environmental assessment, the process was never completed. (Derman Opposition Cert., Exhibit 6, A’Hara Dep. at 52:21-54:5; Exhibit 14, October 2002 Draft EA at cover) (identifying document as “draft”).



Notably, not one of the options proposed by the most recent draft environmental assessment contemplated any expansion of airport operations beyond the 102 acres currently used for airport operations. (Derman Opposition Cert., Exhibit 14, October 2002 Draft EA at 2-8).

The most recent “draft,” dated October 2002, rejected any plan to expand any runway at Solberg Airport and envisioned a continuation of the current location of all airport operations. (Derman Opposition Cert., Exhibit 14, 2002 Draft EA at 2-8).

In the State’s October 2002 Draft Environmental Assessment, the State of New Jersey stated “the Master Plan recommendations are not being considered for implementation. Rather, a substantially scaled-back option was developed for analysis in this EA Study.” (Id.)

The last response from the State of New Jersey on Solberg’s request to expand the runways at Solberg Airport, was a rejection of the request. (Derman Opposition Cert., Exhibit 6, A’Hara Dep. at 53:23-54:5; Exhibit 14, 2002 Draft EA at 2-8 and § 3; see also Exhibit 19, Commissioner Letter Dated October 29, 2002). This rejection came in 2002, fully five (5) years before the Ordinance was adopted.

On April 11, 2002, the Solbergs entered into an Agreement with the NJDOT for the sale of SHA. The Agreement set a base price of \$22,000,000 subject to negotiation, and contingent upon obtaining a financing commitment from the FAA. The Agreement described the airport as comprising approximately 745 acres. [Exh. L]. The Township vehemently opposed any airport expansion, wrote to the Governor’s office, and continuously corresponded with NJDOT regarding their future plans after the purchase of SHA. The Agreement with NJDOT eventually fell through, and the Township continued to strategize as to how acquire SHA. [Exh. E at 14].

Judge Armstrong, in the Main Case, recognized that “general aviation airports, including Solberg Airport, serve a valuable public purpose.” [Exh. E at 36]. The Court went on to make the following additional findings with respect to State policy vis-à-vis Solberg Airport, its public purpose, and its role in general aviation:

Solberg-Hunterdon is a general aviation airport. The FAA defines general aviation (GA) as operations of aircraft not covered by rules that govern air carriers or charter aircraft. See, 49 U.S.C. 40101 *et. seq.* Our national system of airports, heliports, and seaplane bases was developed to provide communities with access to a safe and adequate public system of general aviation airports. General Aviation Airports: A National Asset, U.S. Dept. of Transportation Federal Aviation Administration, May 2012 at 4. The nation’s general aviation airports focus mainly on more specialized services that airlines cannot provide. In 2009, nonairline operators at these general aviation airports spent over \$12 billion, flying an estimated 27 million flights for emergency medical services, aerial firefighting, law enforcement, and border

control, agricultural functions, flight training, time-sensitive air cargo services, business travel, and scheduled services. *Id.* at 5.

Federal, state, and local governments have invested in a system of general aviation airports since the beginning of the 20<sup>th</sup> century. *Ibid.* This airport system is interconnected and interdependent and was included in the National Plan of Integrated Airport Systems because these locations were deemed important to the federal system and are open to the public. *Ibid.* Having such a well-developed system of general aviation airports throughout the country supports commerce while also providing a safety net of airports to support emergency aircraft diversions when necessary due to mechanical issues, medical emergencies, deteriorating weather conditions or other unforeseen circumstances. *Ibid.* Solberg-Hunterdon airport is one such example, and serves as one of only eleven reliever airports in the state.

[Exh. E at 37].

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The record substantiates the importance of general aviation and Solberg Airport's role in particular. The Defendant offered documentary and testimonial evidence, which this Court found persuasive in its determination of public purpose. The objective evidence demonstrated that general aviation generates over a billion dollars in revenue and creates thousands of jobs across the state. It has a substantial economic impact on communities and contributes directly to local business transportation capability. The evidence also demonstrated that New Jersey's general aviation infrastructure provides many health, welfare, and social benefits: emergency medical services, schools, fire and emergency services, law enforcement, tour operators, and traffic surveillance directly benefit from general aviation airports.

[Exh. E at 38].

Judge Armstrong also issued findings derived from other official documents, plans, and studies, in support of his conclusion that restraining Solberg Airport to 102 acres was contrary to public policy and New Jersey State aviation policy:

The New Jersey State Airport System Plan (NJSASP) was the subject of extensive testimony. [D-601]. The first plan was issued in 1992 and discussed the economic benefits of general aviation and aviation system planning, the development of a "core system" of airports and the "need to have sufficient land available when airport expansion or new facilities are required." *Id.* at I-1-8.

The most recent plan was released by the New Jersey Department of Transportation in 2008 and recommended that Solberg Airport be "considered" for an upgrade to an "advanced service airport" facility from a "general service" facility. [D-631 at 7-27]. The report further recommended that Solberg be immediately classified as a "priority service airport," which would open it up for development. *Id.* at 7-41. In the corresponding press release, the Transportation Commissioner stated that the

report's "key strategy is the preservation of the existing system of public use airports in New Jersey." These public use airports bring "extensive benefits to the State economy," including more than 18,000 aviation-related and aviation-dependent jobs with an estimated payroll of at least \$624.7 million. *Ibid.* This plan was consistent with the findings in New Jersey's Long-Range Transportation Plan and the Federal Aviation Administration's National Plan.

[Exh. E at 41-42].

Judge Armstrong went on to adopt the Appellate Division's observation that "limiting the airport's capacity to remain economically competitive is thus at cross purposes to the goal of airport preservation," and further found that the taking of all but 102 acres

is also at cross purposes with the important government and public purposes discussed. The evidence demonstrates that both the State of New Jersey and the United States incorporate the potential expansion of the airport as necessary to the aviation infrastructure of the region. To limit such through condemnation of the lands within the airport safety zone would be "contrary to express State purposes" and therefore be in conflict with higher authority. *Id.* at 320.

[Exh. E at 45].

In invalidating the taking by Readington of even those parcels "outside of the immediate airport zone", Judge Armstrong noted that:

The evidence presented by both parties shows that there is continued uncertainty about whether any particular block and lot falls outside the airport's zone of operations. Such specific determinations are contingent upon the final layout of the airport and the implementation of one of the proposed plans. As the Township has not established that any specific block and lot would fall outside this zone in the proposed alternative runway development plans, the Court must find that there is a conflict with the government's interest in keeping the airport viable.

[Exh. E at 47].

(2) **More Than Twenty Years After Being Mandated by State Law to Enact an ASZA Ordinance, and as an Adjunct to Its Eminent Domain Scheme, Readington Enacted the Subject Ordinance**

a. **The ASZA**

The Air Safety and Hazardous Zoning Act, passed in 1983, was later renamed the Air Safety and Zoning Act, N.J.S.A. 6:1-80. The ASZA required municipalities housing airports to adopt a zoning ordinance incorporating the standards promulgated by the Commissioner of NJDOT. N.J.S.A. 6:1-85. As set forth in detail below, through documents introduced in evidence

in the Main Case, Readington failed and refused to adopt an ordinance, as required by the ASZA, incorporating the standards promulgated by the Commissioner, for approximately 24 years, between the enactment of the ASZA in 1983 and the passage of the Subject Ordinance in 2007, after the related condemnation action had been filed and Readington had acquired fee title to all but 102 acres of the Solberg Airport property by its Declaration of Taking.

b. Readington Ignored NJDOT Directives to Enact an Air Safety Ordinance in the Years Following Passage of the ASZA

Instead of enacting a zoning ordinance that would be compliant with ASZA regulations, Solbert contends that Readington undertook a decades-long effort to stall, misdirect, and deceive the public and the NJDOT, all to avoid zoning Solberg Airport as a conforming, permitted use. Readington characterizes their resistance as, instead, an exercise of its legal and constitutional rights to oppose the law and its application to Readington Township.

Within a year of NJDOT enactment of regulations requiring the removal of Solberg Airport's status as a "non-conforming" use, Readington township attorney William B. Savo petitioned NJDOT for blanket exemption from the ASZA for Readington. [Exh. M]<sup>8</sup>. NJDOT denied Readington's requests. [Exhs. M, N]. Following those attempts, in 1986 NJDOT reiterated to Readington the need to adopt an ASZA ordinance. [Exh. P]. NJDOT made clear that the deadline for adopting an ordinance had passed, that ample time had been provided for its adoption, and that Readington was obligated to provide a copy of its proposed ordinance to the Division of Aeronautics. [*Id.*].

Responding to the NJDOT in November, 1986, Readington's Township Clerk sent a proposed ASZA ordinance to the Division of Aeronautics ("1986 ASZA Ordinance"). [Exhs. Q, R]. Despite the Clerk's assurance, the 1986 ASZA Ordinance was not adopted and no other ASZA ordinance was enacted at that time.

Readington's draft 1986 ASZA Ordinance submitted to NJDOT would have recognized that Solberg Airport was not restricted to 102 acres, but rather encompassed that land "within the lot boundaries occupied on the date of this ordinance." [Exh. Q at p. 2, § 13.3.1 "Uses permitted by right"]. The 1986 ASZA Ordinance would, further, have set up three runway subzones, recognizing the existence of the third runway, Runway 10-28. [Exh. Q at p. 3, § 13.3.3]. Even though NJDOT advised Readington that the ordinance that had been submitted was acceptable and

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<sup>8</sup> The exhibits reference trial exhibits in evidence from Judge Armstrong's Case.

compliant with the ASZA regulations, N.J.A.C. 16:62 [Exhs. S, T], it is not disputed that Readington did not adopt the 1986 Ordinance. [Exh. U].

c. Readington Fails or Refuses to Comply and Rejects the ASZA as an Impingement by the State on Local Control

Readington continued to maintain its opposition to the ASZA, and organized community opposition as well as political lobbying to that effect. [Exh. V]<sup>9</sup>. In a letter dated May 11, 1987, received by Solberg, but ostensibly sent to the entirety of the Township, the Mayor asserted that the Township Committee “has opposed the Airport Hazard Zone designation” and made clear that the Township had “refused to rezone the area for commercial use and [had] instructed our attorney to meet with other municipalities to coordinate legal action on the homeowner’s behalf.” [Exh. V].

In the years following Readington’s refusal in the 1980s to adopt an ordinance to comply with ASZA, NJDOT proposed revisions to the regulations promulgated pursuant to that Act. [Exh. X]. According to the Plaintiff, Readington opposed the proposed revisions and voiced its opposition to the Act in general, and opposed the new revisions also. [*Id.*] Readington offered several bases for its opposition to the ASZA, making clear that it was “opposed to defining all pre-existing structures within the clear zone as either nonconforming or conditional uses and objects to the implicit designation of an airport as a conditional or conforming use.” [Exh. X]. Readington very specifically grounded its opposition on the assertion that the regulations, and the statutes pursuant to which they were promulgated, were “an unconstitutional usurpation of municipal zoning powers” and further elaborated on its opposition at pages 2-3 of that letter. [*Id.*].

In September, 1989, NJDOT sent a follow-up letter directly to the Mayor of Readington “regarding the enforcement of the Air Safety and Hazardous Zoning rules and regulations which were amended May 15, 1989.” [Exh. Y]. The Assistant Commissioner of NJDOT, in that letter, wrote that “[s]ince we have not heard from your municipality, I want to remind you that land use ordinances implementing the standards of the amended regulations must be adopted by May 15, 1990.” [Exh. Y]. Readington did not adopt an ordinance in response.

About a month later, in October 1989, Readington’s attorney drafted a resolution once again requesting that Readington be exempted from the provisions of ASZA, and requested that the Clerk place the issue it on the Township agenda for public meeting. [Exh. Z]. The resolution

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<sup>9</sup> Readington’s opposition to the ASZA ordinance was apparently or purportedly grounded in its belief that it was improper for NJDOT to “usurp” Readington’s zoning powers and that Readington’s prerogatives should take precedence over those of the State. [Exh. W].

expressly acknowledged that townships such as Readington “were to implement [ordinances] pursuant to regulations set forth thereunder.” [Exh. Z at p. 2]. The stated purpose of the resolution included a position permitting Readington to “utilize its local zoning ordinances to assert jurisdiction over airports located within its boundaries” (presumably to the exclusion of the powers of NJDOT). [Exh. Z].

Shortly after the aforesaid meeting, the Clerk sent a copy of the resolution, which had been adopted by the Township Committee on October 16, 1989, to NJDOT requesting, **again**, exemption from the ASZA. [Exh. AA].

NJDOT, through its Office of Aviation, again denied Readington’s exemption request, noting that there were “no provisions in the regulations which provide for the exclusion of individual townships ... Land use ordinances implementing the standards of the amended regulations must be adopted by May 15, 1990. I again offer the assistance of this office...” [Exh. BB]. On or about April 9, 1990, NJDOT sent a follow-up letter to Readington, emphasizing that the deadline for adopting “a land-use ordinance implementing the standards of the air safety and hazardous zoning rules and regulations” was “rapidly approaching.” [Exh. CC].

Readington did not pass an ordinance before the May 1990 deadline.

In 1994, Readington contacted NJDOT requesting a sample ordinance upon which it could base an ASZA ordinance. NJDOT agreed to send an ordinance that adopted the regulations “by reference.” [Exh. DD]. On or about November 2, 1994, NJDOT responded to Readington’s request and transmitted a copy of the statute, regulations, a sample ordinance, and also a copy of the Air Safety and Zoning ordinance which it understood would be “proposed to the Readington Township committee at its regular meeting to be held November 3, ....” [Exh. EE].

In January, 1995, Readington received an estimate from its long time land surveyor, Thomas L. Yager and Associates, to prepare an ASZA map with metes and bounds descriptions at Solberg Airport. [Exh. FF].

In May, 1995, NJDOT wrote to Readington again seeking compliance with the ASZA by adoption of an ordinance compliant with that Act. [Exh. GG]. Readington responded to NJDOT’s request to adopt an ordinance, said it was working on the issue but had not yet introduced an ordinance, and announced its intention to do so in October of that year. [Exh. HH]. It did not do so.

d. Readington's Rejection of the ASZA Request for an Ordinance Was Purportedly Because It Considered Such an Ordinance to Place Control of Solberg Airport in the Hands of NJDOT

On or about May 30, 1996, Julia Allen, then an aspirant for the Township Committee, wrote a letter to the editor of the Hunterdon Democrat, warning citizens that "the threat of a major expansion of Solberg Airport is real and the plan is for a large airport." [Exh. II].

Ms. Allen's letter also expressed the need for Readington to reassert control over the airport, noting that the ASZA supposedly "took the decision of expansion out of the hands of elected officials of all levels of government and put it in the hands of the state Department of Transportation and the Federal Aviation Administration." [Exh. II].

On or about March 17, 1998, NJDOT once again wrote to Readington with respect to the ASZA ordinance adoption. The letter recounted that Neil Tully, who was an Air Safety and Zoning Specialist with NJDOT, had spoken to the Township attorney. [Exh. JJ]. Mr. Tully recounted that he had told the Township attorney in July, 1997, that the draft ordinance submitted to the NJDOT "complied with the requirements established in N.J.A.C. 16:61.1 *et seq*", and advised that NJDOT had reviewed and approved the delineation of the ASZA drawn by the town surveyor. The letter concluded with the following plea: "Please advise me of the status of this matter. I, again, offer my services to assist you with this endeavor. If you need additional information, please contact me at (609) 530-2900." [Exh. JJ].

At the Township Committee meeting on April 6, 1998, Committeeman Ronald Monaco announced he had received a letter from NJDOT concerning the ASZA and that it was their understanding that the "Township did not have an approved copy of the ordinance." [Exh. KK at p. 5]. The Committee at the time "discussed the possibility of placing the Hazard Zone ordinance on the agenda for the next meeting," but no such steps were taken.

At a Readington Township Committee meeting on June 1, 1998, the Mayor noted that "the committee felt that the ordinance in its present form might not provide the protection that we think we need from runway expansion. The appropriate language is being worked on and more information should be forthcoming shortly." [Exh. LL at p. 4; Exh. MM at p. 4].

On or about April 15, 1999, Neil Tully of NJDOT wrote to Mayor Allen, in furtherance of a telephone conversation they had that morning. Tully requested "a meeting with you to discuss the adoption of an Air Safety and Zoning ordinance by Readington Township." Mr. Tully noted that the Township had delineated the ASZA as required and "has drafted an acceptable ordinance

but never adopted it.” [Exh. NN]. Ms. Allen met with Mr. Tully in response to this letter, but the meeting did not result in the adoption of an ASZA ordinance by Readington. [Exh. OO].

NJDOT continued to follow up with Readington as it failed to adopt an ASZA ordinance. [Exh. PP]. On December 7, 1999 NJDOT sent “a follow-up to [its] letters of July 7 and August 11, 1999, concerning the adoption of an Air Safety and Zoning ordinance by Readington Township.” In that letter, Air Safety and Zoning Specialist Tully enclosed a newspaper article in which Mayor Allen was quoted as saying that the map delineating the Airport Safety Zone around Solberg is still in draft form because the Division of Aeronautics and Readington could not agree on details. This statement was false, and NJDOT called her on it. Mr. Tully wrote: “To end any question regarding this issue, enclosed is a copy of a letter dated April 28, 1997, from Mr. Yeager to Kristine Hadinger, Esq., which states that I approved the map created by Mr. Yeager.” [Exh. QQ].

It is not disputed that at no point in 1998, 1999, or 2000, did the Readington Township Committee take any action with regard to adopting an ASZA ordinance.

e. Readington States It Would Fight NJDOT Control of the Airport in Any Manner Available, Not Just by Condemnation, and Included Its Resistance to an ASZA Ordinance Within Its Efforts

At a May 3, 1999, Township Committee meeting, Readington officials discussed with residents NJDOT’s conditional approval of the Solberg Airport Layout Plan. At that meeting, a Resolution was introduced, R-99-48, and unanimously passed, which provided the following: state authorities had not appropriately responded to municipal concern, the plans in the master plan are unsubstantiated; the “Township of Readington is resolutely opposed to the establishment of a commercial airport in a totally residential zone”; and “the Township Committee of the Township of Readington remains resolutely opposed to the lengthening of the existing paved runway and will oppose the proposed expansion of Solberg Airport by all means possible.” [Exh. RR at pp. 7-9; Exh. SS]. A copy of the Resolution was sent by the Township Clerk to various state and federal officials. [Exh. TT].

As the May 3, 1999 minutes reflect, Township Committee members represented “that the Committee has been working in opposition to the proposed expansion since 1983 and there have been victories along the way. For example, the pavement on the runway would be longer than it is if it weren’t for the Committee’s efforts,”; that the “Committee will fight the expansion on every conceivable front”; and, according to Mayor Allen, that the only one who could stop the proposed



expansion was “James Weinstein, the Commission[er] of the Department of Transportation.” [Exh. RR at pp. 32-33].

f. Readington Continues Into 2006 To Link Its Position Regarding the ASZA With Its Continuing Opposition Against Airport Expansion

According to Solberg, the testimony and evidence before Judge Armstrong established Readington's pretextual plan to limit the expansion of Solberg Airport went into high gear in early 2006, by way of continuation of efforts by Readington in 2005 following the collapse of the Solberg-NJDOT Sale Agreement in 2004.

Solberg further contends that while, as found by Judge Armstrong, Readington with its public relations consultant decided to spotlight the "open space" pretext, it also continued to resist enactment of an ASZA Ordinance on the basis that such an Ordinance would enhance Solberg's ability to expand.

Solberg claims that its proposition is specifically illustrated and demonstrated by the statements of then-Mayor Gerard Shamey at a public meeting of the Readington Township Committee on January 17, 2006. Mayor Shamey told the public, *inter alia*, the following:

There was also a question with respect to local zoning control, already proposed expansion, and I think this is something we need to look at a little further, because **as of right now, the airport exists in the residential zone. It is a pre-existing non-conforming use. However, there is a State statute called the Airport Safety and Hazardous Zoning Act, which requires the municipality to pass an ordinance creating the airport safety zone around the airport and, thereby, making the airport a conforming use. We don't have such an ordinance, because I have spent quite a bit of time researching it, and I think the legislation, in my view, is flawed. It has been challenged legally, so that might be something that they may do some day.**

[Exh. O at 128:9-129:2]. The transcript of Mayor Shamey's remarks was placed in evidence before Judge Armstrong and he confirmed the accuracy of same in his trial testimony.

g. Only After The Condemnation Had Supposedly Permanently Constrained the Airport Facility to 102 Acres, Readington Enacted An ASZA Ordinance In The Form of The Subject Ordinance

Not until June 6, 2007 did Readington enact Ordinance # 18-2007 (“Subject Ordinance”). This enactment followed the condemnation of the airport property in the fall of 2006. The Subject Ordinance purports to regulate in two initial ways: (a) it makes airport use a conforming use on

only 102 acres of the airport; and (b) it defines zones around the runways at the airport and limits activities that can take place in those zones.

Plaintiff, Solberg, theorizes that the undisputed record shows that only after enactment of the condemnation ordinance in September, 2006, and filing of the Declaration of Taking in October, 2006, and faced with claims by Solberg regarding its 20-plus years of defiance, did Readington apparently feel secure enough and threatened enough to move forward with enactment of an ASZA ordinance. Plaintiff also claims that it did so, however, in close collaboration with its attorneys in the main case, and specifically tailored the Subject Ordinance in a fashion that would not only be consistent with the condemnation, but would also endeavor to utilize the Subject Ordinance to facilitate their opposition to any airport expansion.

The Township disputes the Plaintiff's version however and instead claims that it passed the ASZA Ordinance after Solberg commenced a mandamus action to require its passage. The Township claims that also, as a result of Solberg's lawsuit, it passed the ASZA Ordinance but that its action was not taken for the reasons suggested by Solberg.

In any event, Plaintiff Solberg offers several facts and circumstances which it offers to illustrate its point.

(a) The outside draftsman of the Ordinance, Thomas Thatcher, in preparing his work, was in consultation with, *inter alia*, Mayor Shamey, Committeeperson Julia Allen, and counsel in the condemnation action, James Rhatican, Esq. [Exh. K at 71:16-73:24]

(b) Mr. Thatcher received, as part of his review process, from Readington's eminent domain counsel a copy of the Verified Complaint in eminent domain, and the Declaration of Taking. [Exh. K at 97:24-98:19]

(c) Mrs. Julia Allen was deeply involved in Mr. Thatcher's work in drafting the Subject Ordinance, Mrs. Allen having been identified by Judge Armstrong as a principal leader in the pattern of abuse found to have taken place. [Exh. K at SAPW-32]

(d) Mr. Thatcher confirmed in writing that with respect to the Ordinance he (and others working on the Subject Ordinance) "are taking direction on these matters a step at a time from Mr. Rhatican," the attorney for Readington. [Exh. K at SAPW-37]

(e) Mr. Thatcher's initial draft of the Ordinance did not define the airport as being limited to the 102-acre area that was defined in the Declaration of Taking, but that definition found its way into a subsequent draft which followed Mr. Sullivan's review of the Ordinance with

counsel, possibly with Julia Allen, and possibly others. [Compare Exh. K at SAPW-35 with Exh. K at SAPW-40]

(f) Mr. Thatcher has testified in depositions, as he also testified at trial before Judge Armstrong, that representatives of Readington Township gave him the reference to the 102.23 acres as conditions that he should use in drafting the Subject Ordinance because that “is what the Township considered the airport to be.” [Exh. K at 109:10-112:5 and SAPW-35, SAPW-40]

(g) Mr. Thatcher considered that he was “dealing with” Mayor Shamey in particular, in connection with this Ordinance, and to some extent with Julia Allen. [Exh. K at 116:6-13]

(h) Mr. Thatcher was asked to insert the definition of airport in the draft ordinance between April 10, 2007 and April 17, 2007. [Exh. K at 117:14-119:7 and SAPW-35, SAPW-40]

(i) Various of the particular dimensions placed into the Subject Ordinance by Mr. Thatcher, including the 150,000 square foot area maximum, and the 35,000 square foot floor area maximum, were "base conditions" that he was instructed to insert into the Subject Ordinance, and the source appears to be the Declaration of Taking. [Exh. K at 126:11-132:18, and SAPW-45, SAPW-46]

(j) Michael Sullivan, Readington's Township planner, who also played a role in connection with the Subject Ordinance, confirmed both the involvement of the eminent domain advocates and proponents in the development of the Subject Ordinance and the effect (and purpose) of the Subject Ordinance in preventing and precluding the use of any areas outside of the 102 acres for airport purposes.

(k) With respect to the involvement of the eminent domain major players, Mr. Sullivan confirmed a telephone call regarding the Subject Ordinance early in the drafting process, on or about February 21, 2007, with Howard D. Cohen, Esq., who was then co-counsel in the eminent domain case, regarding “airport zoning” and discussing “acquisition.” [Exh. DDD at 24:10-25:11, and Exh. DDD at Sullivan-7 at p. 1705]

(l) Mr. Sullivan also spoke with Julia Allen regarding the proposed Ordinance in order to “go through the Ordinance with any concerns she had” in the form of “a collaboration of trying to get this Ordinance done.” [Exh. DDD at 26:13-28:9; and Exh. DDD at Sullivan-7 at p. 1703]. His notes also indicate a “100 acre-airport.” [Exh. DDD at Sullivan-7 at p. 1703].

(m) The Sullivan notes also refer to the survey which was utilized to define the airport at 102 acres, comprising the McEldowney survey, which was going to be provided by Julia Allen. [Exh. DDD at 32:8-33:5; Exh. DDD at Sullivan 7 at p. 1703].

(n) Mr. Sullivan confirmed that the Subject Ordinance went well beyond the ordinance requirements under the ASZA statute and regulations, including the various items delineating what the airport could consist of in terms of structures, floor area, etc. [Exh. DDD at 55:2-58:8]. Mr. Sullivan would defend those additional items as “protecting the existing character of the neighborhood in the district” [Exh. DDD at 58:24-59: 24], and he did understand that “some of the same bases for the Ordinance and the planning policies were also part of the eminent domain proceedings.” [Exh. DDD at 59:15-24].

(o) Finally, Mr. Sullivan confirmed that under the Subject Ordinance as written, expansion of the airport could only be allowed within the Historic Airport Sub-Area and that no airport use would be allowed -- except by use variance -- for any of the lands outside of that sub-area, even lands within the air safety zone created by the Subject Ordinance. In other words, according to Mr. Sullivan, the ordinance “limits development of the airport to the 102 acres of the HASA.” [Exh. DDD at 78:21-25]. Finally, Mr. Sullivan also confirmed that the proposed expansion of the airport as set forth in the 1997 Solberg Airport Master Plan could not be accomplished without violating the Subject Ordinance. [Exh. DDD at 80:24-82:19].

(p) Another of Readington's experts in this case, plannercon Paul Ricci, also acknowledged, after reading the Order entered on Judge Armstrong's Opinion [Exh. F at ¶¶ 2 and 3], that **if the Subject Ordinance were to remain in effect and be enforced, it would not permit Solberg Aviation Company to exercise the rights given to it by the Order.** [Exh. CCC at 56:15-61:14].

(q) Another of Readington's experts in this matter, Richard Golaszewski, confirmed that with respect to the proposed Master Plan and Layout Plan presented by Solberg Aviation Company in the late 1990s, contemplating a runway of 4,890 feet, that Plan could not be accommodated within the 102 acres of aviation use allowable in the Sub-Area under the Subject Ordinance. [Exh. WW at 25:7-26:7].

(r) Mr. Golaszewski further agreed that the effect of the Subject Ordinance is to limit the size of the runway at Solberg Airport to 3,735 feet. [Exh. WW at 37:13-22].

Suffice it to say that Readington disputes many of the facts and circumstances cited to by Solberg or contends that the cited statements cannot or should not attribute the meaning or significance of those facts and circumstances.

To some extent, the Subject Ordinance deals with straightforward geometric delineation of certain types of safety zones around the airport's current main runway. However, it is not disputed

that the relevant air safety regulations mandate that towns make airports within their boundaries “permitted uses”, by removing their “non-conforming use” status and making them a conforming use in their zoning and master plans at N.J.A.C. 16:62-2.1(e). Solberg contends that the boundaries of the airport should include its entire holdings (some 700 +/- acres) while Readington contends that the airport only encompasses the 102 acre parcel that is referenced in its Ordinance.

Toward that end [and what Plaintiff claims was clearly premised upon its condemnation of all but the 102 acres as to which it took only development rights], Readington included a provision in the Subject Ordinance limiting the “airport”-use area to 102 acres of the 744 acres that Solberg had set aside for that purpose.

The Subject Ordinance defines the airport in more than one section. In section A(1), the word “airport” is defined as follows:

“As used in this Ordinance, “airport” or “airports” shall mean and refer to Solberg-Hunterdon Airport, in Readington Township, Hunterdon County, New Jersey.”

[Exh. D]. (It is noteworthy that the NJDOT licenses Solberg-Hunterdon Airport as constituting 726+ acres).

In Section A(3) of the Subject Ordinance, however, a section of the Subject Ordinance entitled “Airport Defined” states the following:

“This Ordinance is based upon, and presumes, an airport layout for Solberg-Hunterdon Airport as described in the March 3, 2005 map prepared [by] H. Clay McEldowney, PE/LS, and identified as drawing number 5761-F. The Solberg Hunterdon Airport is depicted on this map as ‘Parcel 4’, with a gross area of 102.23 acres and a net area of 101.55 acres. The Airport has two bidirectional public use runways, runways 4/22 and runways 13/31.”

Solberg contends that the 700 +/- acres has been licensed as the airport by the NJDOT. The same McEldowney map (Drawing No. 5761-F) (updated to April 19, 2006), was utilized to designate the “Airport Facilities Area” that was taken as to development rights in the October, 2006 Declaration of Taking. [Exh. A at Exh. A-2].

The Subject Ordinance purports to make “airport use” a conforming use on the defined 102 acres described in the Ordinance. At Section C.2., the Subject Ordinance further denominates as a “Historic Airport Sub-Area” the same 102 acres, with reference to the same map. That section states the following:

2. Historic Airport Sub-Area: the Historic Airport Sub-area lies within the overall Air Safety and Historic Airport District. The boundaries of this sub- area encompassed the existing Solberg-Hunterdon Airport facilities and are coterminous with “Parcel 4”, as identified in the plan entitled “Map for Chambers Brook and Holland Brook Greenway”, dated March 3, 2005, prepared H. Clay McEldowney, PE/LS, and identified as drawing

number 5761-F. This area is created to provide for maintenance, development and redevelopment of airport facilities related to the existing Solberg-Hunterdon Airport use.

The Subject Ordinance thus permits airport use only within the same 102-acre Historic Airport Sub-Area that was delineated in connection with the condemnation action. Permitted uses outside of the Historic Airport Sub-Area, i.e. the other 624 acres of Solberg-Hunterdon Airport that Readington attempted to condemn in fee simple, are “subject to the underlying zoning district standards”, which does not include airport uses.

h. Readington Imposed Restraints to Control the Details of the Airport Operations Within The 102-Acre “Historic Sub-Area”

In addition to defining the Solberg Airport uses as only that 102-acres labeled as Historic Airport Sub-Area, Readington also used the Subject Ordinance to impose detailed restraints and controls on the operation of the airport. Within the 102-acre “Historic Airport Sub-Area”, the Subject Ordinance imposes the following zoning constraints:

Permitted Principal Uses:

41. Airport, provided that said airport is a licensed public use airport and has met the State and Federal regulatory requirements delineated in section B of this ordinance
42. Conservation
43. Agriculture
44. Passive recreation.

Permitted Accessory Uses:

45. Aircraft rental, charter, sales, leasing, storage and tiedown;
46. Sale of aircraft fuels, fluids, lubricants, parts, supplies and equipment;
47. Aircraft and aircraft component repair and maintenance;
48. Pilot flight schools and training;
49. Aircraft mechanic schools and training;
50. Equipment and appurtenances for aircraft communication, navigation and orientation;
51. Food and beverage vending machines, provided that any internally illuminated panels are not visible from a public right-of-way, public open space, residential use or residential property line;
52. Restaurant, not exceeding forty (40) seats;
53. Rental car, not exceeding five (5) on site rental vehicles;
54. Gift shop;
55. Sale of supplies and equipment for pilots and aircrew members, provided that there is no outdoor display of merchandise;
56. Airport museum;
57. Office, terminal, waiting room, weather briefing, and conference room facilities; and,

58. Conservation
59. Agriculture
60. Passive recreation.

[Exh. D at Sections E & G].

Those use-based categories of limitation imposed by the Subject Ordinance were not the only restrictions, over-and-above the requirements set forth in the ASZA and NJDOT regulations. The Subject Ordinance includes a section plainly entitled "Regulations for Airports", where Readington further purported to restrain and control Solberg Airport, notwithstanding that it is licensed under the control and supervision of NJDOT's Division of Aeronautics. The "Regulations for Airports" include the following:

I. Regulations for Airports

Airports shall be required to meet the following regulations for airports.

1. Conformance with State and Federal Requirements: Airports shall maintain conformance with all applicable rules, regulations and lawful orders, directives and requirements of the State of New Jersey and the United States Federal Government.
2. Ordinance Conformance: Airports shall maintain conformance with the substantive and procedural standards of the Air Safety and Historic District Ordinance and the Code of Readington Township and any deed restrictions which may apply to the airport property.
3. Landscaping and Maintenance: Areas of the Historic Airport Sub-Area not utilized by structures or paved surfaces shall be planted and maintained so as to promote a desirable visual environment and to promote good drainage and soil erosion management practices.
4. Setbacks: The minimum setback for airport buildings, structures, paving and aircraft parking shall be twenty-five (25) feet from the boundaries of the Historic Airport Sub Area; the minimum setback for airport buildings, structures, paving and aircraft parking from public rights-of-way shall be fifty (50) feet; the minimum setback from the longitudinal centerline of any runway from the boundaries of the Historic Airport Sub Area shall be one hundred twenty-five (125) feet.
5. Floor Area: The maximum permitted cumulative floor area for aircraft hangars and aircraft maintenance shall not exceed 150,000 square feet. The maximum permitted cumulative floor area for other permitted and accessory airport uses shall not exceed 35,000 square feet.
6. Airport Museum Incentive: The first 1,000 square feet of "airport museum" building usage at an airport shall not be counted against the maximum

permitted floor area of 35,000 square feet for "other permitted and accessory uses".

7. Historic Design Incentive: If the Planning Board or Zoning Board of Adjustment determines that a proposed new airport development or redevelopment application incorporates significant design, aesthetic, and architectural features that promote and recognize the historic heritage of the airport, 10% of the floor area of such development or redevelopment shall not be counted against the maximum permitted floor area of 150,000 square feet or 35,000 square feet specified herein.
8. Aircraft Hangar Incentive: The Township finds that fully enclosed lockable aircraft hangars designed and used to accommodate a single aircraft offer superior aircraft security, aircraft protection, and minimize aircraft related "attractive nuisance" problems. Proposals for the development of new fully enclosed lockable aircraft hangars designed and used to accommodate a single aircraft, shall be permitted to exclude 10% of the floor area of such development from the tabulation of the maximum permitted floor area of 150,000 square feet specified herein.
9. Automobile Parking: The airport shall have available a sufficient amount of on airport automobile parking to accommodate airport business demands:
  - a. Airport: 1 space/every 3 outdoor tiedowns; plus 1 space for every 2,000 sf of hanger space; plus 1 space for each employee on the greatest shift
  - b. Restaurant: 1 space / 3 seats
  - c. Retail: 1 space / 300 sf
  - d. Flight School: 1 space/ 1,000 sf
  - e. Museum: 1 space / 500 sf
- 1[0]. Vehicle and Pedestrian Supervision: The airport shall provide for such on-airport fencing, signage, and supervision of vehicles and pedestrians so as to provide for the general public safety.

[Exh. D at Section I].

**D. GENERAL STATEMENT OF THE LAW REGARDING A MUNICIPALITY'S POWER TO ZONE**

As a general rule, the power to zone and regulate land use has been delegated to municipalities by the Legislature through the MLUL. See Riggs v. Long Beach Township, 109 N.J. 601, 610-11 (1998) (citing Taxpayers Assn. of Weymouth Tp. v. Weymouth Tp., 80 N.J. 6,



20 (1976)). In enacting the MLUL, the Legislature intended to vest municipalities with control over the lands within their borders. Indeed, N.J.S.A. 40:55D-2 specifically notes that the MLUL's intent and purpose, among other things, is to "encourage municipal action to guide the appropriate use or development of all lands in this State, in a manner which will promote the public health, safety and welfare" and "to enable municipalities the flexibility to offer alternatives to traditional development . . . in order to concentrate development in areas where growth can be best accommodated and maximized while preserving agricultural lands, open spaces, and historic sites." N.J.S.A. 40:55D-2(a) and (p). Among the powers that the MLUL specifically reserves for the municipal governing body is the power to regulate the nature and extent of uses of land. See N.J.S.A. 40:55D-65. In determining whether a use is appropriate for a particular zone or particular tract of land, the governing body is vested with the power to consider all relevant planning and zoning factors associated with that use. See Lionel's Application Center, Inc. v. Citta, 156 N.J. Super. 257, 265 (Law Div. 1978).

Courts in New Jersey recognize a presumption in favor of the validity of local zoning regulations. See e.g. Gripenburg v. Township of Ocean, 220 N.J. 239, 253 (2015) (noting that the most fundamental principle in adjudicating a challenge to a zoning ordinance's validity is that the ordinance is "insulated from attack" by a presumption of validity); Rumson Estates, Inc. v. Mayor & Council of the Borough of Fair Haven, 177 N.J. 338, 350 (2003); Kirby v. Twp. of Bedminster, 341 N.J. Super. 276, 288 (App. Div. 2000); Lake Valley Associates, LLC v. Township of Pemberton, 411 N.J. Super. 501, 505 (App. Div. 2010), certif. denied, 202 N.J. 43 (2010). The party attacking a zoning ordinance bears the burden of overcoming the presumption of validity to which the zoning ordinance is entitled. See Gripenburg, 220 N.J. at 253; Riggs, 109 N.J. at 611; Rumson Estates, Inc., 177 N.J. at 350; Kirby, 341 N.J. Super. at 288 ("it is not the Township's burden to defend the new ordinance; rather, the new ordinance is presumed valid and it is the party attacking the ordinance that bears the burden of overcoming the presumption"); Gallo, 328 N.J. Super. at 127; Recchia Res. Const. v. Cedar Grove Zoning Bd. of Adjustment, 338 N.J. Super. 242, 249 (App. Div. 2001) (affirming denial of use variance and determining that ordinance was consistent with Town's master plan).

The reason for this deference that is provided in the general rule is rooted in the delegation of power by the Legislature to municipalities to regulate land uses within their borders. See e.g. Recchia Res. Const., 338 N.J. Super. at 249 ("The Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 et seq., delegates considerable power and discretion to municipalities to zone within the

statutory scheme. As such zoning ordinances are presumed to be valid...”). Also, a general proposition in order to succeed in invalidating a zoning ordinance, a party must demonstrate that the ordinance is “clearly arbitrary, capricious or unreasonable, or plainly contrary to the fundamental principles of zoning or the [zoning] statute.” See Riggs, 109 N.J. at 611 (quoting Bow & Arrow Manor v. Town of West Orange, 63 N.J. 335, 343 (1973)); see also CBS Outdoor, Inc. v. Borough of Lebanon, 414 N.J. Super. 563, 577 (App. Div. 2010) (“a local zoning determination will be set aside only when it is arbitrary, capricious, or unreasonable”) (quoting Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268, 296 (1965)); see also Taxpayers Ass’n of Weymouth Twp., Inc. v. Weymouth Twp., 80 N.J. 6, 20 (1976), certif. denied, 430 U.S. 977 (1977) (“Ordinances enacted under this grant of [zoning] power, like other municipal ordinances, are accorded a presumption of validity which can only be overcome by an affirmative showing that the ordinance is arbitrary or unreasonable”). Moreover, as a general proposition, the Court is mindful of the principles of the Home Rule Act, which provides that it is the State’s goal to give municipalities a measure of control over its own lands. See N.J.S.A. 40:42-4 (“In construing the provisions of this subtitle, all courts shall construe the same most favorably to municipalities, it being the intention to give all municipalities to which this subtitle applies the fullest and most complete powers possible over the internal affairs of such municipalities for local self-government”).

The law governing review of a challenged zoning ordinance is well settled. There is a “tightly circumscribed” judicial role in reviewing zoning regulations enacted by a municipality. Harvard Enterprises, Inc. v. Board of Adjustment of Township of Madison, 56 N.J. 362, 368 (1970); accord Pascack Assoc. v. Mayor of Washington, 74 N.J. 470, 481 (1977); Bow & Arrow Manor v. Town of West Orange, 63 N.J. 335, 343 (1973); Kozesnick v. Township of Montgomery, 24 N.J. 154, 167 (1957). Generally, a zoning ordinance is presumed valid and may only be overturned if the ordinance is “clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the statute.” Bow & Arrow Manor, 63 N.J. at 343; accord Rumson Estates, 177 N.J. at 350; Taxpayers Assoc. of Weymouth Township v. Weymouth Township, 80 N.J. at 20; Kramer v. Board of Adjustment of Sea Girt, 45 N.J. 268, 296-97 (1965). Certainly it is not an insignificant burden for an opponent to meet. Mt. Olive Complex v. Township of Mt. Olive, 340 N.J. Super. 511, 533 (App. Div. 2001). Reviewing courts are not to be concerned with the wisdom of or merits of an ordinance; if the ordinance is debatable, it should be upheld. Rumson Estates, 177 N.J. at 350-51; Bow & Arrow Manor, 63 N.J. at 343. The functions of the legislative bodies and the judicial forums are distinct. If the issue bores down to the wisdom of a

particular course that is chosen by a governing body, then the issue is one that is reviewable only at the polls:

It is commonplace in municipal planning and zoning that there is frequently, and certainly here, a variety of possible zoning plans, districts, boundaries, and use restriction classifications, any of which would represent a defensible exercise of the municipal legislative judgment. It is not the function of the court to rewrite or annul a particular zoning scheme duly adopted by a governing body merely because the court would have done it differently or because the preponderance of the weight of the expert testimony adduced at a trial is at variance with the local legislative judgment. If the latter is at least debatable, it is to be sustained.

Mt. Olive Complex, 340 N.J. Super. at 533 (quoting Bow & Arrow Manor, 63 N.J. at 343). Consequently, a court may not nullify an ordinance even where expert evidence at trial weighs against adoption of the ordinance. Rather, a challenging plaintiff must overcome the presumption of validity of the ordinance and prove at trial that the ordinance is arbitrary, capricious, or unreasonable, or plainly contrary to fundamental principles of zoning.

In its Motion for Summary Judgment, Readington argues that Solberg cannot satisfy this heavy burden, which requires it to make a “clear showing” that the Ordinance bears no rational relationship to the public health, morals, safety, or welfare. See Berk Cohen v. Borough of Clayton, 199 N.J. 432, 446 (2009). On that basis, the Township now moves for an order for summary judgment as to the Third Count of Plaintiff’s Complaint.

As a part of its opposition to Readington’s Motion and in support of its request for Summary Judgment, Solberg claims that there are several legal bases for invalidating the subject Ordinances, as a matter of law, including:

(i) Enforcement of the Subject Ordinance would be inconsistent with, and would literally violate the findings and conclusions of Judge Armstrong and the Order entered thereon with respect to Solberg’s rights to develop the airport property for aviation-related purposes;

(ii) The prevention of airport expansion by Readington, in whatever fashion, including the Subject Ordinance, is counter to the overriding state policy reposing control of aviation facilities in the NJDOT;

(iii) The Subject Ordinance violates the statutory and regulatory requirements that airports located within municipalities be deemed conforming uses; and

(iv) The Subject Ordinance was adopted for an improper purpose, does not further any legitimate legislative goal, and is therefore arbitrary and capricious.

(v) The Court should take notice that the Zoning Ordinance in question is not just a “garden variety” ASZA compliant Zoning Ordinance and that the Court must consider all of the

facts and circumstances that occurred before the passage of the Ordinance in order to understand the arbitrariness, capriciousness and unreasonableness of the context of the local legislation.

**E. SHOULD READINGTON'S LIMITATION OF SOLBERG AIRPORT TO ONLY THE 102-ACRE L-SHAPED HISTORIC AIRPORT SUB-AREA VIOLATE JUDGE ARMSTRONG'S ORDER OF MAY 20, 2015, WHICH TAKES PRECEDENCE?**

The parties presented their arguments in two separate, but simultaneously filed briefs. That procedure facilitated the presentation of separate arguments that were, like ships passing in the night, not addressed by the other party. Those issues were addressed in the reply briefs filed by each. As to this issue, the Court will document the arguments of each party for the record to be made for the trial in this case and any subsequent appeal.

**1. Solberg's Argument**

Solberg argues that the Opinion of Judge Armstrong and Order entered thereon on May 20, 2015, grants to Solberg the right to use all 726 acres for airport purposes, subject to regulatory approval of the State and Federal agencies dealing with aviation. Solberg asserts that the Subject Ordinance directly conflicts with the granting of these "use" rights by precluding airport uses on all but the L-shaped 102-acre plot in the middle of the airport property, designated in the Ordinance as the "Historic Airport Sub-Area." Solberg contends that because the Subject Ordinance conflicts with Judge Armstrong's Opinion and Order, it must fall.

Solberg offers that as a general proposition, valid orders of the court are binding on any person or entity subject to the order, including municipalities and other governmental entities. *See e.g., Loigman v. Twp. Comm. of Middletown*, 308 N.J. Super. 500, 503-504 (App. Div. 1998) (order requiring municipality to comply with Open Public Meetings Act was binding and enforceable); *Abbott v. Burke*, 170 N.J. 537 (2002 ("Abbott VIII") (State's failures relating to preschool programs in violation of binding and enforceable judgment); *Abbott v. Burke*, 206 N.J. 332 (2011 ("Abbott XXI") (order requiring State to fully fund school districts binding and enforceable). To promote order and respect for the judicial process, compliance with judicial orders is required, unless and until an individual is excused from the order's requirement. *State v. Gandhi*, 201 N.J. 161, 190 (2010). It is no defense, in failing to follow a court order, to argue that the order was erroneous. *See Matter of Mandell*, 250 N.J. Super. 125, 129 (App. Div. 1991).

On that basis, Solberg reasons that Readington's legislative power to enact ordinances does not alter its obligation to comply with orders of the court. "The judgment of a court of competent jurisdiction cannot be reversed, avoided, or set aside by the legislative power." *Doyle v. City of*

*Newark*, 34 N.J.L. 236 (1870); *Atl. City Casino Ass'n v. City of Atl. City*, 217 N.J. Super. 277, 283 (App. Div. 1984 (citing *Pennsylvania v. The Wheeling and Belmont Bridge Co.*, 59 U.S. 421, 422 (1855)); see also *Chrysler Group LLC v. Fox Hills Motor Sales, Inc.*, 776 F.3d 411, 431 (3d Cir. 2015) (“[T]he integrity of the ‘Judicial Power of the United States’ established in Article III of the Constitution forbids congressional or executive interference with the final judgments of courts.”) (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 223-24 (1995); *Rodriguez v. Cook County, Ill.*, 664 F.3d 627, 629 (7th Cir. 2011 (“An element of the judicial power under Article III is the authority to make a conclusive decision, one not subject to legislative revision.”). A governmental body cannot use its legislative powers to stymie rights granted by court decree as the power to legislate does not come with “a corresponding authority to suspend judicial decrees.” *Abbott XXI*, 206 N.J. at 363 (holding that legislature’s appropriations power cannot be used to avoid complying with court order).

Solberg postulates that Judge Armstrong’s Opinion and Order explicitly vested Solberg with the right to use all of the 726+ acres of property for aviation-related purposes, subject to the proper exercise of their authority by the FAA and the NJDOT. It argues that as long as a judicial order exists and a party has knowledge of it, it must follow the order, regardless of its supposed deficiencies. *Gandhi*, 201 N.J. at 190. Solberg points out that in this case, the opinion was also delivered in a related case involving the same partners. In fact, portions of Judge Armstrong’s case had been severed from the eminent domain case and then consolidated with this case. (See Procedural History, page 28 supra.) Also, Judge Ciccone stayed this case pending the outcome of Judge Armstrong’s eminent domain matter. Solberg postulates that these actions were taken by Judge Ciccone in the interest of judicial economy and in recognition that the findings in the eminent domain matter would be inextricably related to the findings in this case. Since Judge Armstrong’s opinion concerning the issue was clear. Solberg argues that it should be given full force and effect as it concerns the issues to be resolved in this case as well.

Solberg surmises that Readington knows exactly what Judge Armstrong’s Opinion and the May 20 Order meant, as it sought reconsideration of those very portions of his Opinion and Order because of their obvious adverse effect on Readington’s overlay zone. Readington’s Reconsideration Motion was denied.

Solberg also points out that, like Judge Armstrong, the Court must view the Zoning Ordinance that creates the 102 acre L-shaped airport area in the context of “what happened before

it". Once the context of how the 102 acre parcel was designated, Solberg argues that it becomes evident that Judge Armstrong's decision is validated and should take precedence.

## **2. Readington's Arguments**

Readington argues that the "law of the case doctrine" bars Solberg's argument that Judge Armstrong's opinion in the condemnation action governs this case.

In fact, the Township avers that this is Solberg's second attempt to have the Court determine that the decision in the Condemnation Action<sup>10</sup> somehow governs the outcome of this case. Under the law of the case doctrine, "where there is an unreversed decision of a question of law or fact made during the course of litigation, such decision settles that question for all subsequent stages of the suit." State v. Hale, 127 N.J. Super. 407, 410 (App. Div. 1974) (quoting Wilson v. Ohio River Company, 236 F. Supp. 96, 98 (S.D.W.Va. 1964), aff'd 375 F.2d 775 (4th Cir. 1967)); see, e.g., Little v. KIA Motors Am., Inc., 425 N.J. Super. 82 (App. Div. 2012) (applying law of the case doctrine). The law of the case doctrine generally bars a "second judge on the same level, in the absence of additional developments or proofs, from differing with an earlier ruling." Hart v. City of Jersey City, 308 N.J. Super. 487, 497 (App. Div. 1998) (emphasis added). The doctrine is designed to "prevent relitigation of a previously resolved issue." In re Estate of Stockdale, 196 N.J. 275, 311 (2008). In order for the doctrine to apply, the issue must have "been actually contested and decided." Slowinski v. Valley Nat. Bank, 264 N.J. Super. 172, 181 (App. Div. 1993).

On page 39 of its moving brief, in a section of its brief generally "introduce[ing]" its arguments, Solberg states "first and foremost, the Ordinance ... runs directly contrary to, and must give way to, Judge Armstrong's explicit holdings and the May 20, 2015 Order entered thereon." (Solberg Brief at 39). Readington avers that this argument was previously made before Judge Ciccone in this action and was rejected by her. Specifically, on May 18, 2015, Solberg filed a "motion for summary disposition" of this action. Specifically, it argues that the motion sought judgment in Solberg's favor that the "Ordinance ... is null and void and of no further force and effect, as a result of the Findings and Conclusions of Law dated May 4, 2015 of the Honorable Paul W. Armstrong in the related matter of Township of Readington v. Solberg Aviation Company, Docket No. HNT-L-468-06." (Derman Opp. Cert., Exhibit 24, Solberg May 18, 2015 Letter Memorandum at 1) (emphasis added). As Judge Ciccone described Solberg's argument, Solberg

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<sup>10</sup> The result in the Condemnation Action is the subject of a pending appeal.

claims that the facts at issue here arise “from the same cradle of objective facts that underpin” Judge Armstrong’s Opinion. (Derman Opp. Cert., Exhibit 1, June 10, 2015 Letter Opinion at 4). Judge Ciccone, however, held that the issues in the two actions are distinct and the outcome of one does not control the outcome of the other:

The issue to be precluded is not identical. The question here is whether an ordinance brought pursuant to the Air Safety and Zoning Act is collaterally estopped from litigation due to the Court’s decision in the condemnation action involving the same property. It is not. The condemnation action addressed a declaration of taking brought under the Eminent Domain Act. The circumstances may be entirely the same, but the legal issues are not. Given that this ordinance was never addressed that action, and the fact the municipal ordinances are presumptively valid, further litigation on the merits is necessary before this Court will declare it null and void.

(Derman Opp. Cert., Exhibit 1, June 10, 2015 Decision at 7).

Readington further argues that in an attempt to avoid the consequences of the law of the case doctrine, Solberg “studiously avoids” reference to the doctrine of collateral estoppel, the doctrine ordinarily cited by litigants claiming that a prior litigation among the parties resolves some aspect of a different litigation (and the legal argument advanced by Solberg in the prior motion).

However, Readington argues that none of the cases relied upon by Solberg involve a situation where, as here, the court overseeing the matter has already rejected application of the collateral estoppel doctrine to the very same order. For example, the Township contends that the cases relied upon by Solberg on page 41 of its moving brief for the proposition that “valid orders ... are binding” all involve litigants moving in aid of litigant’s right to enforce a prior order. See, e.g., Loigman v. Twp. of Middleton, 308 N.J. Super. 500, 503-04 (App. Div. 1998) (requiring township to comply with prior order regarding Open Public Meetings Act); Abbott v. Burke, 170 N.J. 537 (2002) (Supreme Court enforcing prior orders regarding school funding); Abbott v. Burke, 206 N.J. 332 (2011) (same). Further, Readington offers that the procedural posture of this case is dramatically different. This Court has already ruled that the collateral estoppel doctrine does not mandate a particular result here, and Solberg does not offer any argument to change that outcome.<sup>11</sup>

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<sup>11</sup> The Court notes that at oral argument Solberg did supplement its argument by indicating, inter alia, that this Court should consider the issue anew as Judge Ciccone did not have the entire record and the extreme briefing on the issue which has now been presented to this Court.

### **3. Court's Decision on the Issue**

Certainly a key issue before the Court is whether Judge Armstrong's decision in the related eminent domain matter is also determinative of the issues in this case as they relate to the validity of Ordinance #18-2007. Certainly it is fair to consider that when the eminent domain case was being litigated, Readington may claim that it could not have reasonably expected that it was also conclusively litigating the issues in this case as well. As a result, it is certainly possible to consider in the context of this Motion that Readington may not have produced the proofs and arguments that are related to the issues in this case at that time. It was not unreasonable for Readington to posit that the issues, proofs and standards in this case were different from those in the condemnation case so that the issues in the condemnation case may not have fully litigated the issues in this case as well. Thus, as a matter of fairness alone, the Court must consider whether Readington has offered any evidence or even any colorable indication that there is evidence that it did not present during the eminent domain trial, but it would present at this trial that could be offered in defense of their position in this matter. With that test in mind, the Court will consider the motions that are before the Court.

In that regard, the Court is tasked with analyzing whether Readington has offered any factual circumstances that would indicate that there are facts or evidence that materially bear upon the issues in this case or facts that create a question of material fact as to these issues. Self-serving assertions alone will not read a question of fact. Nor will a summary judgment motion be defeated by a response which is not fairly based on disclosed sources of information. Triffin v. American Intern, 372 N.J. Super. 517, 523-24 (App. Div. 2004), holding that the respondent must do more than allow that there is some metaphorical doubt as to the material facts. Further, it is the duty of the respondent to a summary judgment motion to come forward with facts to support a denial of the motion, as the respondent cannot rely upon bare conclusions or unsupported legal arguments that are based upon unsustainable facts, suppositions or hope.

Even though the parties to the eminent domain action and this action are identical, and while many of the proofs and issues either overlap or are related, those issues are not identical. An analysis must be performed to determine whether those findings are dispositive of this case, even while recognizing that the legal issues in Judge Armstrong's case are not identical to the issues presented to this Court. Certainly both parties recognize that Judge Armstrong's expansive findings and ruling cannot be ignored and thus those findings present Readington with difficulties in this case. Those rulings, when they are considered to be the baseline from which this Court must



begin its analysis of this matter, may be insurmountable burdens.<sup>12</sup> The issue then is whether Judge Armstrong's rulings can be said to be entirely dispositive of the issues in this case.

This Court recognizes that Judge Ciccone, in her opinion of June 10, 2015, already noted that the eminent domain case was "unequivocally severed" from the issues in this case as it was the intent of this Court, and the parties, to "litigate [these claims] another day." She also found that the doctrine of collateral estoppel did not automatically apply to the issues in this case since the issues in Judge Armstrong's case were not identical to the issues in this case. For those reasons, Judge Ciccone decided to deny Solberg's summary judgment application at that time. In fairness, Judge Ciccone did not have the full record before her which has now been produced as part of this Summary Judgment Motion.

A difficult question still remains as the trial court must address the impact that Judge Armstrong's decision made on this case and whether there are issues to be "tried".

Judge Armstrong determined that Solberg was to be entitled to "use" rights to "develop and otherwise utilize the airport property *for any use involved with or incidental to the ownership and operation of an airport*," including "[a]ny and all rights to operate an airport aviation enterprise, including uses ancillary to a principal airport use (and including specifically the annual balloon festival and other similar public events)." [Exhs. E at 53-54 and F at ¶3].

In addition to the broad "use" rights granted by Judge Armstrong's Opinion and Order, the Court ordered that the right to "use" the property included "[a]ny and all rights to improve, modernize, and expand the property for airport and aviation enterprise purposes, including but not limited to, construction or improvement of airport facilities and infrastructure including runways, taxiways, hangars, administration buildings, lighting, navigational aids, weather reporting equipment, and other facilities ancillary to airport use (e.g. restaurants with adequate seating, lounges, museum, gift shops, meeting or conference rooms . . . ." [Exhs. E and F]. Since the Subject Ordinance appears to clearly deny those rights as to 624 of the 726 acres, that issue and the effect of Judge Armstrong's decision on the issue, if any, must be addressed by the trial court.

Also, the Subject Ordinance purports to limit the aviation "use" rights to only the Historic Airport Sub-Area. In the Subject Ordinance's definition of various zones, it includes several zones that are mandated by regulation because they relate to the safety and prevention of hazards on public use airports: runway subzone, runway end subzone, and clear zones. [Exh. D at Section

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<sup>12</sup> At oral argument the parties appeared to concede that Judge Armstrong's findings cannot be modified by this Court as that task rests with the Appellate Division.

C(1)(a), (b), (c)]. Conspicuously, the Subject Ordinance also created a zone nowhere mandated by the regulation, the aforesaid Sub-Area. [Exh. D at Section C(2)]. To define the Sub-Area, the Subject Ordinance relies upon the same delineation of the 102 acres as appeared in, and was stricken by Judge Armstrong in, the condemnation action. The ramifications of Judge Armstrong's findings as they relate to that issue must also be addressed by this Court.

Thus, the Court will focus upon whether, when Judge Armstrong's findings are considered, the Court is able to determine, as a matter of law, to dispose of the issues before the Court on this zoning ordinance change, as well.

**4. Should Readington's Limitations On Solberg Airport in The Subject Ordinance Be Determined to be Preempted by State Law?**

(a) Introduction

The use of Solberg Airport for airport and aviation-related uses was limited in the Subject Ordinance to the 102 acres. Plaintiff Solberg contends that within that 102 acres, Readington used the Subject Ordinance to severely restrict Solberg Airport's ability to adapt, improve, and modernize to serve the public purpose of general aviation airports, recognized throughout New Jersey policy. As a result, Solberg argues that those restrictions cannot stand against Judge Armstrong's finding in the eminent domain action which provided that limiting Solberg Airport to only 102 acres is contrary to stated New Jersey public policy. Solberg also advocates that because any municipal action contrary to State and New Jersey policy vis-à-vis Solberg Airport is preempted, see *Garden State Farms, Inc. v. Bay*, 77 N.J. 439 (1978, *Tanis v. Twp. of Hamilton*, 306 N.J. Super. 588 (App. Div. 1997, and *Township of Readington v. Solberg Aviation Co.*, 409 N.J. Super. 282 (App. Div. 2009), all such restraints in the Subject Ordinance should be stricken and summary judgment should be entered on this ground also.

New Jersey recognizes that the laws and regulations of various levels of government are tiered, so that federal law may preempt state law, and state law may preempt municipal law. See, e.g., *Estate of Brust v. ACP Indus., LLC*, 443 N.J. Super. 103, 113 (App. Div. 2015) ("When a state statute conflicts with, or frustrates, federal law, the former must give way."); *Twp. of Franklin v. Hollander*, 338 N.J. Super. 373, 388 (App. Div. 2001) ("It is indisputable that the doctrine of preemption may apply to local zoning ordinances."). Preemption can take several forms and be either express or implied. *R.F. v. Abbott Lab.*, 162 N.J. 596, 618 (2000); see also, *Estate of Brust*, 443 N.J. Super. at 113.

Express preemption occurs when a legislative, regulatory, or other government body includes in some positive way a statement that the law contained therein is intended to, and does, supersede laws of inferior arms of government. *See In re Diet Drug Litig.*, 384 N.J. Super. 546, 556 (Law Div. 2005). Implied preemption, by contrast, occurs in the absence of a specific statement of intent to preempt, and arises instead by implication. The various forms of implied preemption have essentially been reduced to two: field preemption and conflict preemption. *Id.* at 556-57. Preemption is a question of law, to be decided by the Court, and is therefore peculiarly subject to summary judgment. *Township of Readington*, 409 N.J. Super at 304 (“inquiry into whether state or federal statutes and regulations preempt local land use control over airports presents a question of law”).

While express preemption is not implicated in this case, New Jersey law provides that certain municipal action is impliedly preempted by various federal and state laws and regulations relating to the regulations of airports.

(b) Does New Jersey Law Narrowly Circumscribe Readington’s Zoning Authority Within the Air Safety Zone and Preempt All Actions Inconsistent with State Policy?

Federal law preempts state and municipal law as they relate to the regulation of airspace. *Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 638 (1973); *Burbank-Glendale-Pasadena Airport Auth. v. Los Angeles*, 979 F.2d 1338, 1341 (9th Cir. 1992) (“municipality may not exercise its police power to prohibit, delay, or otherwise condition construction of runways and taxiways at a non-city-owned airport.”).<sup>13</sup> The Federal government has authority over issues that concern

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<sup>13</sup> In *Burbank Airport Authority*, the Ninth Circuit Court of Appeals applied those principles and invalidated a local ordinance that purported to require prior approval by the city for any and all development projects planned to be conducted at Burbank Airport, including the “construction or reconstruction of runways or taxiways”.

The problem with this Ordinance is that it conditions the construction and reconstruction of taxiways and runways on the prior approval of the City. This the City may not do. The proper placement of taxiways and runways is critical to the safety of takeoffs and landings and essential to the efficient management of the surrounding airspace. **The regulation of runways and taxiways is thus a direct interference with the movements and operations of aircraft, and is therefore preempted by federal law. Stated simply, a non-proprietor municipality may not exercise its police power to prohibit, delay, or otherwise condition the construction of runways and taxiways at a non-city-owned airport.**

*Id.* at 1341. Accordingly, the ordinance was found to be “invalid on its face.” *Id.*

the use of airspace, and related issues. *Burbank*, 411 U.S. at 638; *Gustafsen v. City of Lake Angelus*, 76 F.3d 778 (6th Cir.), *cert. denied*, 519 U.S. 823 (1996).

State preemption of municipal action occurs if the municipal action “stands as an obstacle to a state policy expressed in enactments of the legislature.” *Township of Readington*, 409 N.J. at 306; *Garden State Farms*, 77 N.J. 439, 450 (1978). Municipalities “may pass ordinances fixing particular land areas for airports or heliport, or even ban them altogether, [but] they must not exercise their zoning authority so as to collide with expressed policy goals of the state legislation, N.J.S.A. 6:1-20, or the final decision of the Commissioner.” *Id.* at 306 (quoting *Garden State Farms*, 77 N.J. at 454.). “[T]he ASZA expresses a clear intent that state policies concerning airport operations and development should prevail over local concerns . . . .” *Id.* That rationale for that public policy is aptly demonstrated in this case. And, therefore, preemption occurs when “the local regulation conflicts with the state statutes or stands as an obstacle to a state policy.” *Id.* at 307 (quoting *Garden State Farms*, 77 N.J. at 450).

That is not to say that neither FAA Regulations nor ASZA completely preempt to MLUL:

While the FAA has exclusive control of flight routes and schedules, decisions otherwise concerning the location and operation of airports have generally been left to the discretion of local governments. *Hoagland v. Town of Clear Lake*, 415 F.3d 693, 698 (7th Cir. 2005), *cert. denied*, 547 U.S. 1004, 126 S.Ct. 1476, 164 L.Ed.2d 249 (2006); *Faux–Burhans v. County Comm'rs of Frederick County*, 674 F. Supp. 1172, 1174 (D. Md. 1987), *aff'd*, 859 F.2d 149 (4th Cir. 1988), *cert. denied*, 488 U.S. 1042, 109 S.Ct. 869, 102 L.Ed.2d 992 (1989). In *Gustafson v. City of Lake Angelus*, 76 F.3d 778, 786–87 (6th Cir. 1996), the court held that FAA regulations do not preempt local land use control with regard to the location or expansion of airport facilities. It concluded that the fact that the FAA has authority to regulate the use of airspace “does not of necessity lead to the conclusion that localities are no longer free to regulate the use of land within their borders, even where land use regulations may have some tangential impact on the use of airspace.” *Id.* at 789–90 (quoting *City of Cleveland v. City of Brook Park*, 893 F. Supp. 742, 751 (N. D. Ohio 1995)). These federal decisions are consistent with New Jersey case law holding that federal regulations do not preempt state and local jurisdiction with regard to the placement of private aeronautical facilities. *Garden State Farms, Inc. v. Bay*, 77 N.J. 439, 449, 390 A.2d 1177 (1978).

*Township of Readington v. Solberg Aviation Co.*, 409 N.J. Super. 282, 305 (App. Div. 2009), *certif. denied*, 201 N.J. 154 (2010).

Although the ASZA expresses a clear intent that State policies concerning airport operations and development should prevail over local concerns, the regulations require the Commissioner to consider local zoning ordinances when acting on applications to alter an airport facility. Preemption is not complete but occurs only

when “the local regulation conflicts with the state statutes or stands as an obstacle to a state policy.” Garden State Farms, *supra*, 77 N.J. at 450, 390 A.2d 1177.

Township of Readington v. Solberg Aviation Co., 409 N.J. Super. at 307.

- (c) Is Readington’s Constriction of the Airport to 102 Acres in the Subject Ordinance Barred By Virtue of the Pre-Emption Doctrine?

It is Solberg’s position that the Subject Ordinance’s designation of the Historic Airport Sub-Area is preempted and must fall. In that regard, Solberg alleges that all of the pertinent facts and issues of law with respect to preemption have been adjudicated in the prior litigation between the parties. In the Appellate Division’s remand in the Main Case, it instructed that the remand trial should include the scope of the public purpose served by the airport, and the posture and substance of state -- and NJDOT -- policy toward the airport. The record confirms that throughout the course of the remand trial, the issue of the NJDOT policy vis-à-vis Solberg Airport was repeatedly the subject of testimony, documentary proofs, argument, and, ultimately, an adjudication by the Court as to New Jersey State policy regarding Solberg Airport.

This Court recognizes and accepts the proposition that Judge Armstrong’s conclusion that the constraints caused by the condemnation -- which are the same acreage constraints imposed by the Subject Ordinance -- followed extensive evidentiary presentation. Judge Armstrong’s findings of fact and conclusions of law on this subject included the following:

- ***The record substantiates the importance of general aviation and Solberg Airport’s role in particular.*** The Defendant offered documentary and testimonial evidence, which this Court found persuasive in its determination of public purpose. The objective evidence demonstrated that general aviation generates over a billion dollars in revenue and creates thousands of jobs across the state. It has a substantial economic impact on communities and contributes directly to local business transportation capability. The evidence also demonstrated that New Jersey’s general aviation infrastructure provides many health, welfare, and social benefits: emergency medical services, schools, fire and emergency services, law enforcement, tour operators, and traffic surveillance directly benefit from general aviation airports. [Exh. E at 38].
- This Court holds the legislative findings of the “Report of the New Jersey General Aviation Study Commission” (Public Law 93 ch. 336) to be especially persuasive. The report concluded that a community with a general aviation airport benefits far more from it than does the actual airport owner. P.L. 93 §336 at 23. “New Jersey’s airports provide benefits to communities without providing any economic reward to airport owners.” Ibid. “In the study of economics, these benefits are recognized as ‘public benefits’ or ‘public good’ for which a charge or fee is nearly impossible to collect.” Ibid. A general aviation airport contributes to the “quality of life and it improves the local economy for both its host and its

neighboring communities.” *The Commission report provided extensive testimony and analysis, which demonstrated that general aviation airports facilitate community services, including educational opportunities, preservation of open space, woodlands, wetlands, and help facilitate medical and fire emergency services.* *Id.* at 24. ***The Court incorporates those findings here.*** [Exh. E at 40]

- In particular, the report found that New Jersey has the highest number of people per airport in the nation as well as the second-largest percentage of privately owned public use airports in the United States. *Id.* at 1. The State’s airports “are of outdated design and are deteriorating after decades of State neglect.” *Ibid.* Moreover, “private owners of public use airports – many of whom are second generation – are fighting a losing battle, dealing with often-conflicting regulatory oversight of State agencies and hostile municipalities.” *Id.* at 2. [Exh. E at 40-41]

- The New Jersey State Airport System Plan (NJSASP) was the subject of extensive testimony. [D-601]. ***The first plan was issued in 1992 and discussed the economic benefits of general aviation and aviation system planning, the development of a “core system” of airports and the “need to have sufficient land available when airport expansion or new facilities are required.”*** *Id.* at I-1-8. [Exh. E at 40-41]

- ***The most recent plan was released by the New Jersey Department of Transportation in 2008 and recommended that Solberg Airport be “considered” for an upgrade to an “advanced service airport” facility from a “general service” facility.*** [D-631 at 7-27]. The report further recommended that Solberg be immediately classified as a “priority service airport,” which would open it up for development. *Id.* at 7-41. In the corresponding press release, ***the Transportation Commissioner stated that the report’s “key strategy is the preservation of the existing system of public use airports in New Jersey.”*** These public use airports bring “extensive benefits to the State economy,” including more than 18,000 aviation-related and aviation-dependent jobs with an estimated payroll of at least \$624.7 million. *Ibid.* This plan was consistent with the findings in New Jersey’s Long-Range Transportation Plan and the Federal Aviation Administration’s National Plan. [Exh. E at 41-42]

- ***As the Appellate Court stated, “limiting the airport’s capacity to remain economically competitive is thus at cross purposes to the goal of airport preservation.”*** *Id.* at 314. It is also at cross purposes with the important government and public purposes discussed. The evidence demonstrates that both the State of New Jersey and the United States incorporate the potential expansion of the airport as necessary to the aviation infrastructure of the region. To limit such through condemnation of the lands within the airport safety zone would be “contrary to express State purposes” and therefore be in conflict with higher authority. *Id.* at 320. [Exh. E at 45]

- The evidence presented by both parties shows that there is continued uncertainty about whether any particular block and lot falls outside the airport’s zone of operations. ***Such specific determinations are contingent upon the final layout of the airport and the implementation of one of the proposed plans. As the Township has not established that any specific block and lot would fall outside this zone in the proposed alternative runway development plans, the Court must find that there is a conflict with the government’s interest in keeping the airport viable.*** [Exh. E at 47]

After summarizing the pertinent documents representing State policy, some of which are excerpted above, Judge Armstrong concluded that constraining Solberg Airport to something less than the entirety of the currently licensed 700+ acres was in “conflict with the government’s interest in keeping the airport viable.” [*Id.* at 47] These holdings of Judge Armstrong were based upon his analysis of the extensive trial record that was created during 48 days of trial along with his review and consideration of some 115 items of evidence submitted by the Plaintiff and 733 items of evidence submitted by the Defendant. In order to prepare his opinion, he reviewed approximately 5600 pages of Court proceedings along with substantive briefing by both parties. Judge Armstrong’s findings establish that New Jersey public policy is violated by attempting to restrain Solberg Airport to the 102 acres delineated not only in the condemnation but also in the Subject Ordinance. Those findings are binding on Readington and this Court. *Lopez v. Patel*, 407 N.J. Super. 79, 93 (App. Div. 2009); *Monek v. Borough of S. River*, 354 N.J. Super. 442, 454 (App. Div. 2002).

The issue to be determined involves whether, as Solberg argues, the Subject Ordinance constitutes Readington’s attempt to achieve the same purposes as the condemnation -- to choke or constrict Solberg Airport down to only 102 acres. This Court must determine whether the findings of Judge Armstrong that such a restriction is untenably contrary to State public policy is binding on the Township here, and thus does that finding render the Subject Ordinance invalid.

In 1983, the New Jersey Legislature enacted the Airport Safety and Hazardous Zoning Act (“ASZA”), which authorized the Commissioner of Transportation to adopt rules and regulations to specify permitted and prohibited land uses within airport safety zones. N.J.A.C. 6:1-85 required each municipality that contained any part of an airport safety zone to enact an ordinance incorporating standards promulgated by the Commissioner. The ASZA and ASZA Regulations do not completely eviscerate zoning control from Municipalities.

Rather, the ASZA and the ASZA Regulations explicitly provide that subject to compliance with their mandates, municipalities hosting airports maintain a certain amount of authority to apply their zoning authority as set forth in the MLUL. The ASZA and the ASZA Regulations impose certain mandatory requirements that municipalities must incorporate in their respective ASZA ordinances. Subject to those mandatory requirements, they leave the MLUL and the zoning authority it provides to local municipalities otherwise intact.

The ASZA Regulations expressly contemplate that municipalities would have a role to play with regard to the ASZA and land use matters involving airports, providing that municipalities

may “adopt more rigorous standards for control of the areas and condition under the provisions of the Municipal Land Use Law.” N.J.A.C. 16:62-1.2.

However, in this case, it is not contradicted that the record is replete with evidence of Readington’s displeasure with the provisions of ASZA which diluted their local control which Solberg described as “defiance and inability to accept those portions of ASZA that provided for certain mandatory requirements.” Readington characterizes its opposition as part of its legal and constitutional right to oppose ASZA and its application to the Township. Instead, Solberg contends that Readington virtually ignored its responsibilities under ASZA by simply failing or refusing to pass an Ordinance that recognized Solberg Airport as a permitted use.

The Court has considered the record that has been provided through the Certifications of the parties, the proposed Statement of Uncontested Facts provided by the parties, and the responses thereto, and the documents and exhibits provided by the parties, as that record bears upon the preemption issue.

It should be noted that in Judge Armstrong’s view, Readington had ample opportunity to explore whether a particular block and lot, or portion thereof, fell outside of the airport’s zone of operation. He poignantly noted:

Such specific determinations are contingent upon the final layout of the airport and the implementation of one of the proposed plans. As the Township has not established that any specific block and lot would fall outside this zone in the proposed alternative runway development plans, the Court must find that there is a conflict with the government’s interest in keeping the airport viable.

The arbitrariness of Readington’s actions becomes even more evident when the pre-existing airport related uses are examined. Certain existing airport-related uses and facilities fall outside of the 102 +/- acre parcel that was identified by Readington. The Solberg aviation operations that are outside of the 102 acres include an entire turf runway designated as Runway 10-28<sup>14</sup>, parts of the main runway designated as Runway 4-22, hot air balloon take offs, blimp moorings, and a navigational aid installed on the airport by the FAA called a VORTAC.

Further, Solberg Airport hosts several blimps, which moor at the airport outside of the 102 acres zoned as airport. [Exhs. YY, EEE, FFF]. Each airship that moors at Solberg Airport requires, for safety reasons, several acres around which to moor because of wind speed and direction. [*Id.*].

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<sup>14</sup> The Court does recognize that there may be factual differences concerning the status of Runway 10-28 but that those differences are not material to the issue before the Court in that the Court need not resolve those factual differences in order to decide whether Readington’s Ordinance is valid.



Several blimps have traditionally used the airport -- one of the few in the area with sufficient land to permit the mooring -- at any given time during the spring and summer months as a base of operations, by mooring at the airport between trips. [Exhs. EEE, FFF].

Solberg also aver that the evidence also supports the proposition that the Solberg Airport also has historically had a third cross-wind runway, designated as Runway 10-28.<sup>15</sup> [Exh. ZZ at 24:4-10, 41:9-10, 44:18-45:5, 45:20-47:17; Exh. G]. Drawings prepared during planning for the airport in the 1990s show that Runway 10-28 existed on the airport property. Plaintiff contends that “it is plain from a comparison of maps that the entirety of Runway 10-28 falls outside of the 102 acres Historic Airport Sub-Area on which Readington has used its zoning power to permit airport uses.” [Compare Exh. YY with Exh. GGG]. Solberg explains that as part of the process of improving the airport, as contemplated in the conditionally approved 1997 Master Plan for the airport, Runway 10-28 was considered for elimination. Until that time, however, it is uncontradicted that for all of recent history, Runway 10-28 existed on Solberg Airport and its existence was recognized by the FAA and the NJDOT, as the cited Airport Layout Plans and Form 5010s demonstrate. [Exh. ZZ at 24:4-10, 41:9-10, 44:18-45:5; 45:20-47:17; Exh. G].

Solberg acknowledges that sometime in the mid-2000s, Runway 10-28 was dropped from the reporting forms for Solberg Airport, though no physical change removed the runway. [Exh. ZZ at 46:6-47:6]. During that period of time, Solberg Airport had been under contract of sale to the State of New Jersey. [Exh. L]. After the sale to the state fell through, Plaintiff’s version provides that Readington “almost immediately” re-commenced its condemnation efforts, and some of the reporting forms continued to omit Runway 10-28. Plaintiff also notes that the record will reflect that Solberg Airport commissioned a draft Airport Layout Plan in 2004 that depicted slightly repositioned Runway 10-28. [Exh. AAA].

Solberg Airport claims that it took steps, however, to place Runway 10-28 back on the appropriate forms as an available turf cross-wind runway. It also asserts that in December, 2015, the FAA concluded an airspace study for Runway 10-28. [Exh. BBB (FAA report)]. Additionally, Solberg claims that it, in turn, accommodated the FAA approval by commissioning a revised Existing Airport Layout Plan, which includes Runway 10-28, and also designates various areas of Solberg Airport that are set aside for different airport uses. [Exh. YY].

In any event, it is Solberg’s position that Readington’s zeal to constrict the airport to fit their vision and assuage their fears caused the Ordinance to be fatally non-compliant with and in

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<sup>15</sup> See Footnote 14 above.

contravention to ASZA. In fact, Plaintiff offers that the only significance of the size and configuration of the 102 +/- acre parcel that “permits” the airport use is that the parcel is the same one that was chosen by Readington to remain as part of the “constricted airport” after their unsuccessful attempt to condemn the remainder of Solberg’s properties.

Given Judge Armstrong’s finding, along with the evidence presented to the Court in this Motion, it is clear that the circumstances before the Court demonstrate that the Plaintiffs are entitled to a finding that the restrictions imposed in the Readington Ordinance impose restrictions that are untenably contrary to State public policy. Judge Armstrong has effectively determined that the Ordinance in question frustrates New Jersey State policy. That finding, along with the evidence before the Court, supports such a finding and renders the subject Ordinance invalid.

On that basis, the Court will GRANT Plaintiff’s Motion for Summary Judgment.

**(1) Does the Constrained Definition of the Historic Airport Sub-Area Violate the Applicable Statute and Regulations and Must Be Stricken**

a. Introduction

NJDOT regulations require Readington to zone Solberg Airport as a conforming use in its zoning regulations and master plans. N.J.A.C. 16:62-2(e). At the time of the enactment of the Subject Ordinance, Solberg only held fee title -- because of the condemnation -- to the 102-acre L-shaped parcel in the center of the airport. That condemnation has now been set aside, however, and Solberg now, as a result of Judge Armstrong’s decision, has resumed ownership in fee simple title to the entirety of the 700+ acres on which it operates Solberg Airport. As a result, Solberg argues that the Subject Ordinance cannot stand and the entirety of the Solberg Airport, i.e. 700+ acres licensed by the State of New Jersey for airport purposes, must be zoned to allow airport-related activity, subject to State and Federal regulation.

b. Is Readington’s Ordinance Consistent with State Law?

As a general proposition, there are four factors that have been identified by our Supreme Court for Courts to consider in determining whether a Zoning Ordinance is valid. Riggs v. Long Branch Township, 109 N.J. 601, 613 (1988).

First, the ordinance must advance one of the purposes of the Municipal Land Use Law as set forth in N.J.S.A. 40:55D-2. ...

Second, the ordinance must be “substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such plan elements,” N.J.S.A. 40:55D-62, unless the requirements of that statute are otherwise satisfied.

Third, the ordinance must comport with constitutional constraints on the zoning power, including those pertaining to due process; ... equal protection; and the prohibition against confiscation ....

Fourth, the ordinance must be adopted in accordance with statutory and municipal procedural requirements.

Notwithstanding those guidelines, it must be recognized that Municipalities have no inherent authority to enact zoning ordinances; such authority is limited to that given by statute. *J.D. Const. Corp. v. Board of Adjustment of Freehold Tp.*, 119 N.J. Super. 140, 144 (Law Div. 1972) While municipalities do enjoy a broad power to zone that was granted to them by State Statute, “there is an implied limitation upon this pervasive grant” of authority that such ordinances “may not be contrary to State law.” *Summer v. Teaneck Tp.*, 53 N.J. 548, 552-54 (1969). Municipalities may only pass ordinances that are “not contrary to the laws of this state.” N.J.S.A. 40:48-2

As our Supreme Court succinctly stated, putting impermissible or invalid matter “within the confines of [a] zoning ordinance does not *ipso facto* clothe it with validity which it would not otherwise have,” and “***calling something ‘zoning’ cannot cloak a municipality with power to act in a field in a way which is otherwise foreclosed to it by supervening state legislation or policy.***” *In re Public Service Elec. & Gas Co.*, 35 N.J. 358, 374-75 (1961). Thus, it is a general principal of law that a Municipality like Readington “must exercise its zoning power in conformity with state enabling legislation.” *Ianieri v. Zoning Bd. of Adjustments of East Brunswick Tp.*, 192 N.J. Super. 15, 22 (Law Div. 1983).

Even though Readington plausibly argues that several of the “Riggs” factors have been complied with, it is also a basic principle of our law that if a “zoning ordinance” is contrary to the laws of the State it cannot be sustained. For that matter, Solberg does not seriously contest Readington’s arguments that the subject Ordinance (1) finally makes a portion of Solberg’s airport as a permitted use and removes its non-conforming status as to that fraction of the Solberg property; (2) it arguably can be said to advance some general “broad brush” purposes of zoning that are found within N.J.S.A. 40:55D-2; (3) the Ordinance can be said to be consistent with the Township’s own Master Plan which, not unexpectedly, mirrors the Township’s vision for the Solberg property; and (4) the Ordinance was enacted in accordance with statutory and municipal procedural requirements.

However, Solberg’s challenge focuses more upon whether the Ordinance in question is consistent with State Law. Solberg urges the Court to consider Judge Armstrong’s findings of fact

and law when determining whether the Ordinance is valid. In that regard, Solberg contends that the Court must look beyond whether the Township has cloaked its Ordinance with a valid purpose only to disguise the true invalid public purpose that underlies the legislation. Solberg asserts that Readington's Ordinance is not a "garden variety" ASZA approved Ordinance and that if the court considers all of the surrounding facts and circumstances, that proposition is evident.

The Court finds that when the baseline findings established in Judge Armstrong's decision are considered, along with the overwhelming evidence that has been submitted to the Court as part of this Motion, it is clear that Readington's Ordinance is not consistent with State law. Even though the Ordinance arguably can be said to fulfill certain non-specific purposes of zoning, the insurmountable evidence indicates that the zoning ordinance was based upon an invalid purpose or purposes which have been described throughout this opinion.<sup>16</sup>

At oral argument Solberg poignantly posed the rhetorical question that "[G]iven the findings of Judge Armstrong and given the evidence before the Court, what is there to try?" This Court's analysis confirms that when all of the facts and circumstances are considered, there is nothing left to try. Given the insurmountable combination of precedent and evidence before the Court, no reasonable factfinder can come to any different conclusion.

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<sup>16</sup> It should be noted for the record that this Court did issue a preliminary opinion in that matter which was provided with the following caveat:

The Court finds that the issue of whether Readington's Ordinance is consistent with State Law remains an open issue to be decided by the Trial Court. The Trial Court must determine whether even if Readington shows that its Ordinance satisfies the "Rigg Factor", whether the Ordinance can still be considered "consistent with State Law". Also, the Trial Court must consider, when considering all of the facts and circumstances that underlie the passage of this Ordinance, that Readington's Ordinance is based upon an invalid purpose(s).

In the Court's preliminary opinion, the Court proposed to deny the Plaintiff's Motion in order to permit Readington to offer evidence at a limited trial on the issues (that is a trial that was not designed to duplicate the evidence that was presented and considered by Judge Armstrong). The Court issued its preliminary opinion with the avowed purpose that it intended to explore what additional evidence would or could be submitted at trial that was either not presented, considered and analyzed by Judge Armstrong or presented to this Court as part of this Motion.

At oral argument the Court became convinced that there was not any additional material evidence to present, so that this Court possessed the full record of what can and should be considered.

For the reasons expressed above, that “full record” when considered with Judge Armstrong’s findings, points to only one rational result. The Ordinance was based upon an invalid purpose.<sup>17</sup>

c. Does the Historic Airport Sub-Area Violate Readington’s Statutory Obligation Under The ASZA To Make Solberg Airport A Permitted Use And Remove Its Non-Conforming Use Status

(i) Solberg’s Position

Under the statutory directive of the ASZA, the New Jersey Department of Transportation adopted regulations. Those regulations are found at N.J.A.C. 16:62-1.1, *et seq.* Adoption of those regulations was in furtherance of the purposes of setting guidelines for controlling airport and aeronautical hazards, and to implement standards for land use. N.J.A.C. 16:62-1.2(a). The regulations include broad prohibitions on conduct as well as very detailed guidance for the delineation of various safety zones intended to bolster airport safety.

The ASZA regulations specify that they apply expressly to airports “licensed by the State of New Jersey” and among those, “*only those airports open to the public.*” N.J.A.C. 16:62-1.2(f). The regulations do not mandate similar municipal action for “special use” or “restricted use” airports. *Id.* Because Solberg Airport is licensed by the State of New Jersey as a “fixed wing aeronautical facility” under the category “Airport -- Public Use”, the regulations apply.

Consistent with the ASZA’s purpose of empowering NJDOT to control airport safety, the ASZA regulations mandate that “Municipalities of this State are required to implement and maintain land use ordinances in accordance with the provisions of this chapter.” N.J.A.C. 16:62-1.2(d).

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<sup>17</sup> The Court notes that at oral argument, counsel for Readington did propose (for the first time) that the Commissioner of Transportation and/or key personnel from the Division of Aeronautics could be deposed and that they may have relevant evidence to present on this case. While counsel’s suggestion is novel and clever, it does not present a sufficient showing at this stage of the case to defeat a summary judgment motion, or, for that matter, to change the invalid purpose which underlies the passage of this Ordinance.

Counsel also suggested that the Court enter a “stay” of this matter until the Appellate Division completes its review of the appeal of Judge Armstrong’s decision. Again, while the Court appreciates Readington’s (albeit belated) attempt to propose alternate solutions and approaches to this matter, it must be noted that Readington’s oral request made at the second oral argument conducted by the Court did not indicate how it satisfied the Crowe v. DeGioia, 90 N.J. 126 (1982) criteria.

Additionally, in rejecting the request the Court must balance the equities. The Solbergs have certainly waited an inordinate amount of time for Readington to properly address the zoning of its property. To introduce a stay which would further delay that process would clearly be inequitable for the Solbergs under the circumstances.

As part of NJDOT's legislative mandate to control the safety of airports under the ASZA through land use zoning, the NJDOT addressed zoning in and around airports. Among those NJDOT land use regulations, some of which address restraints on municipalities' designation of prohibited uses and permitted uses, the NJDOT included a directive that municipalities take action to make airport use a "permitted use" under their local laws. N.J.A.C. 16:62-2.1(e). That regulatory provision is crystal clear:

Municipalities which contain within their boundaries airports regulated by the provisions of this chapter, may not hereafter classify those airports as non-conforming land uses within the context of their ordinances or master plans of development. Those municipalities which may currently classify an airport as non-conforming land use within the context of their ordinances or master plans of development, ***shall amend those ordinances or plans to eliminate that nonconforming status.***

*Id.*

It is not contradicted that Readington has been subject to this provision for more than twenty years. During that twenty year period, Readington avers that it was exercising its legal and constitutional right to protect the law and its applicability to Readington Township. Now Readington purports to characterize the Subject Ordinance as its attempt to comply with the ASZA regulation, it is also indisputable that the Subject Ordinance was enacted at a time when Readington had taken fee simple title to all but the 102-acre Sub-Area, and thus had eliminated the balance of the Solberg holdings from consideration. Although the impetus of the Ordinance's passage is disputed by the parties in their legal arguments, the Subject Ordinance expressly notes at several places that it is "based upon, and presumes" an airport defined by the condemnation map prepared by Studer & McEldowney, the municipal mapper engaged by Readington to draw "Parcel 4", which became the 102-acre plot. It is also clear that inasmuch as the condemnation has been invalidated, fee title and the remaining acreage, some of which housed other airport uses were re-vested in Solberg Aviation by the Opinion and Order.

Solberg also argues that NJDOT regulations govern the licensing of airports. N.J.A.C. 16:54-1.1, *et seq.* (endowing "ultimate authority over the regulating and licensing of aeronautical activities and facilities in New Jersey ... with the Commissioner."). Pursuant to that power, Solberg Airport is licensed under the rubric "fixed wing aeronautical facility" and within that rubric as a "public use" airport. [Exh. H].

Dozens of other types of aeronautical facilities are also covered by Chapter 54. N.J.A.C. 16:54-1.2(a)(1)-(5) (describing different types of airports, heliports, helistops, etc.). Among those varying types of facilities, the regulations define three types of airports, described as "fixed wing" aeronautical facilities. Within the umbrella of "fixed wing" aeronautical facilities are:

1. Fixed wing aeronautical facility:
  - i. Airport - Public Use (land or water)
  - ii. Airport - Restricted Use (land or water)
  - iii. Airport - Special Use (land or water)

N.J.S.A. 16:54-1.2(a).

Different types of facilities appearing within the rubric of “fixed wing aeronautical facility” are defined in the regulations as well. Within the “fixed wing aeronautical facility” heading, the NJDOT defines airport (of which there are the three types discussed above) as any “designated area of land, water, or both, which is licensed for the landing and takeoff of airplanes and other aircraft, and which may provide facilities for shelter, security, and service of aircraft.” N.J.A.C. 16:54-1.3. Public use, restricted use, and special use describe airports or aeronautical facilities that are licensed for (a) use by the public at large (public use); (b) licensed for use by particular person or people (special use); or (c) use subject to any other type of restriction imposed by the NJDOT (restricted use). *Id.*

It is not disputed that Solberg Airport is licensed by the NJDOT as 700+ acres under the category of “fixed wing aeronautical facility” as “Airport - Public Use”. [See Plaintiff’s Exhs. G, H]. In fact, it has been licensed by the NJDOT as such an airport comprised of in excess of 700+ acres for decades. [Plaintiff’s Exh. G]. The NJDOT also recognized it as such when it contracted to acquire the airport in 2002, executing an Agreement which recited that “the Solberg Hunterdon Airport is comprised of several parcels of real property, which total approximately 745 acres located in Readington Township and Hunterdon County,” and further confirmed that “the Airport is and has been a vital aeronautical facility and a significant component in the New Jersey State Airport System Plan and the National Plan for Integrated Airport Systems for more than 60 years.” [Plaintiff’s Exh. L]. And in its press release announcing the Agreement, NJDOT reaffirmed that Solberg airport “is a 745 acre facility.” [Plaintiff’s Exh. XX].

Solberg argues that as described more particularly above, not only by virtue of official designation, but also in practical operational terms that have existed for many years, Solberg Airport is not limited to the 102 acres. [Plaintiff’s Exh. YY]. Plaintiff claims that Solberg Airport has operations and aviation-related activities that fall outside of the 102 acres, and that would presumably be considered non-conforming uses, contrary to the NJDOT regulations, if the Subject Ordinance was determined to be valid. Plaintiff also avers that Solberg Airport aviation operations

outside of the 102 acres include an entire turf runway designated as Runway 10-28, parts of the main runway designated as Runway 4-22, hot air balloon take offs, blimp moorings, and a navigational aid installed on the airport by the FAA called a VORTAC.

Solberg points out that Solberg Airport hosts several blimps, which moor at the airport outside of the 102 acres zoned as airport. [Plaintiff's Exhs. YY, EEE, FFF]. Plaintiff states that each airship that moors at Solberg Airport requires, for safety reasons, several acres around which to moor because of wind speed and direction. [*Id.*]. Several blimps have traditionally used the airport -- one of the few in the area with sufficient land to permit the mooring -- at any given time during the spring and summer months as a base of operations, by mooring at the airport between trips. [Plaintiff's Exhs. EEE, FFF].

Solberg also indicates that in its view the overwhelming evidence supports the proposition that the Solberg Airport also has historically had a third cross-wind runway, designated as Runway 10-28. [Exh. ZZ at 24:4-10, 41:9-10, 44:18-45:5, 45:20-47:17; Plaintiff's Exh. G]. Drawings prepared during planning for the airport in the 1990s show that Runway 10-28 existed on the airport property. It is plain from a comparison of maps that the entirety of Runway 10-28 falls outside of the 102 acres Historic Airport Sub-Area on which Readington has used its zoning power to permit airport uses. [Compare Plaintiff's Exh. YY with Exh. GGG]. As part of the process of improving the airport, as contemplated in the conditionally approved 1997 Master Plan for the airport, Runway 10-28 was considered for elimination. Until that time, however, and for all of recent history, Runway 10-28 existed on Solberg Airport and its existence was recognized by the FAA and the NJDOT, as the cited Airport Layout Plans and Form 5010s demonstrate. [Plaintiff's Exh. ZZ at 24:4-10, 41:9-10, 44:18-45:5; 45:20-47:17; Plaintiff's Exh. G].

Solberg acknowledges that sometime in the mid-2000s, Runway 10-28 was dropped from the reporting forms for Solberg Airport, though no physical change removed the runway. [Exh. ZZ at 46:6-47:6]. During that period of time, Solberg Airport had been under contract of sale to the State of New Jersey. [Plaintiff's Exh. L]. After the sale to the state fell through, Readington almost immediately re-commenced its condemnation efforts, and some of the reporting forms continued to omit Runway 10-28. Notably, Solberg Airport commissioned a draft Airport Layout Plan in 2004 that depicted slightly repositioned Runway 10-28. [Plaintiff's Exh. AAA].

Plaintiff indicates, however, that Solberg Airport took steps, however, to place Runway 10-28 back on the appropriate forms as an available turf cross-wind runway. In December, 2015, the FAA concluded an airspace study for Runway 10-28. [Plaintiff's Exh. BBB (FAA report)].



Solberg, in turn, accommodated the FAA approval by commissioning a revised Existing Airport Layout Plan, which includes Runway 10-28, and also designates various areas of Solberg Airport that are set aside for different airport uses. [Plaintiff's Exh. YY].

(ii) Readington's Counter Argument

Readington counters that Solberg's position relies on a definition of an airport not found in the ASZA. The Township offers that neither the ASZA nor the applicable regulations adopted pursuant to that statute require that a host municipality permit airport use on all property held by the owner of an airport. The Township advocates that the ASZA and the ASZA Regulations merely require that a host municipality identify airport use as a permitted use for "airports" within their jurisdiction, as the term "airport" is defined by the ASZA.

Readington also argues that ASZA only defines an airport to include land where fixed wing aircraft take-off and land. In support of its position, Readington points to the dysfunctional section of ASZA which provides:

a. "Airport" means any area of land or water, or both designed and set aside for the landing and taking-off of fixed wing aircraft, utilized or to be utilized by the public for such purposes, publicly or privately owned, and licensed by the commissioner as a public use airport or landing strip, or a proposed facility for which an application for a license has been submitted in complete form pursuant to N.J.A.C. 16:54-1.41 and which has been determined by the commissioner as likely to be so licensed within one year of such determination.

N.J.S.A. 6:1-82 (emphasis added). The applicable regulation, N.J.A.C. 16:62-1.1, contains the identical definition. N.J.A.C. 16:62-1.1. Readington argues that the Ordinance should be narrowly read so that the key words are "fixed wing aircraft" and "landing and taking-off." Thus, Readington advocates that the term airport for purposes of the ASZA and the ASZA Regulations requires that fixed wing aircraft take-off and land within the area of land at issue in order for that area to meet the definition of an airport. Readington argues that it follows that the ASZA Regulations provide that only land that meets this definition of an "airport" is subject to the mandate in the ASZA Regulations that a host municipality may not designate an airport use as a non-conforming land use:

(e) Municipalities which contain within their boundaries airports regulated by the provisions of this chapter, may not hereafter classify those airports as non-conforming land uses within the context of their ordinances or master plans of development. Those municipalities which may currently classify an airport as non-conforming land use within the context of their ordinances or master plans of development, shall amend those ordinances or plans to eliminate that non-conforming status.

N.J.A.C. 16:62-2.1(e) (emphasis added).

As such, Readington therefore claims that the Subject Ordinance properly permits airport use with that area defined as the “Historic Airport Sub-Area” (“HASA”) which is the 102-acre area defined as the Airport within the Ordinance. Readington claims that the HASA area is defined in the Ordinance to include the area where the Airport operations (as defined by N.J.S.A. 6:1-82 are contained and permitted).

As a result, Readington defends its decision to define the airport and the HASA as the 102 acres where airport operations currently occur, and have previously occurred, as entirely consistent with the ASZA and its regulations. Readington indicates that the applicable regulation, N.J.A.C. 16:62-2.1(e), provides that the areas where airport use cannot be “non-conforming” is limited to “airports” which, as set forth above, have an ASZA-specific definition limited to the location of take-offs and landings of fixed wing aircraft. N.J.A.C. 16:62-2.1(e). Thus, Readington reasons that because the definition of an airport is limited to areas where take-off and landings by fixed wing aircraft occur, the area where the ASZA Regulations effectively mandate that a host municipality must permit airport use is limited to those areas. As a result, Readington contends that the fact that the airport is defined to include only those 102 acres where such take-offs and landings occur, and have historically occurred, is proper.

Readington contends that the 102 acre area at issue was designated for airport use because that is where airport use actually occurs. The Township offers that the fact that this is the same 102 acres that Solberg would have retained even if the condemnation had not been invalidated merely means that when Readington condemned it left Solberg in possession of the property it was actually using as an airport. The Township avers that if anything, this fact demonstrates that Readington’s adoption of the Ordinance was designed to make actual uses permitted.

Readington’s position is that the undisputed evidence is that at that fixed point in time in 2007 when the Ordinance was adopted and up until today, all of the runways for Solberg Airport were within the 102 acre area defined as an airport (the HASA), and that all take-offs or landings involving fixed wing aircraft occurred within the 102-acre-area defined as an airport or the HASA. (Aslanian Cert., Exhibit C, Complaint, ¶ 13; Derman Opp. Cert., Exhibit 5, 2007 New Jersey Airport Master Record Inspection Report; Exhibit 6, A’Hara Dep. at 86:14-87:13; Exhibit 10, Golaszewski Report at 2-3; Exhibit 8, Ritter Dep. 79:12-82:12). Solberg, of course, disputes that proposition.

Readington argues that Solberg, in order to support its claim that all property it owns must be designated for airport use, asks the Court to rely upon other “inapplicable” Department of Transportation regulations that use a broader definition of airport. (See Solberg Brief at 56-58). Readington surmises that Solberg makes this argument because it knows that (a) the definition of airport for purposes of where airport use must be permitted pursuant to ASZA is limited to locations where fixed winged aircraft take off and land, and (b) the only location where such activities occur is the 102 acre HASA. Readington, however, claims that it properly relies upon the definition of airport set forth in ASZA. In support of their position, Readington cites to the proposition that New Jersey courts routinely hold that “where the Legislature has clearly and explicitly defined a term within a statute, we must assume it did so intentionally and with the intent that its stated definition be applied to that term throughout the statute.” Ciesla v. Dept. of Health and Senior Services, 429 N.J. Super. 127 (App. Div. 2012) (quoting Commerce Bancorp, Inc. v. InterArch, Inc., 417 N.J. Super. 329, 336–37 (App. Div. 2010) and Simpkins v. Saiani, 356 N.J. Super. 26, 32–33 (App. Div. 2002)), certif. denied, 205 N.J. 519 (2011); see also Febbi v. Bd. of Review, 35 N.J. 601, 606 (1961) (“When the Legislature has clearly defined a term, the courts are bound by that definition.”); Nebinger v. Md. Cas. Co., 312 N.J. Super. 400, 406, (App. Div. 1998) (“When the Legislature has specifically defined a term, that definition governs”). Thus, Readington argues that it was well within its authority to limit airport use to the areas which meet the ASZA definition of an airport and Readington’s decision to do so does not violate the ASZA or any other statute or regulation.

Readington notes that Solberg also claims that blimp operations or balloon events occur within the 725 acres held by Solberg, but outside the 102-acre area HASA where airport use is permitted, claiming that such activities are “airport use” pursuant to other regulations, Readington argues that those definitions do not apply to the Ordinance at issue because those other definitions are used for purposes other than compliance with the ASZA. For example, Readington argues that the regulations regarding the application process to license or alter an “aeronautical facility” (which includes an “airport”) define an “airport” as “a designated area of land, water, or both, which is licensed for the landing and takeoff of airplanes *and other aircraft*, and which may provide facilities for shelter, security, and service of aircraft.” N.J.A.C. 16:54-1.3 (emphasis added). Readington avers that the failure to include the phrase “and other aircraft” in the definition of airport within the ASZA or the ASZA Regulations means that the definition of airport for

purposes of the ASZA is narrower than other definitions and is limited to a place where fixed winged aircraft takeoff and land.

With regards to Paragraph 24 of Solberg's Complaint, Readington acknowledges that "the Ordinance fails to designate appropriate zones with respect to Runway 10-28." (Aslanian Cert., Exhibit C, Complaint, ¶ 24). Readington indicates that the reason for that omission is that is, in its view, Runway 10-28 does not exist now and did not exist in 2007. (See Derman Opp. Cert., Exhibit 5, 2007 State Inspection Report). Readington claims that the Ordinance designates safety zones for runways identified as "04-22" and "13-31," but not 10-28 because such a runway is not in use presently and was not in use at the time the Ordinance was adopted. Further, the Township asserts that in 2007, the year the Ordinance was adopted, the State of New Jersey published an inspection report for Solberg Airport, and it identified only two runways, and Mr. Solberg admitted at his deposition that runway 10-28 was not among them. (Derman Opp. Cert., Exhibit 9, T. Solberg Dep. at 43:17-22). Additionally, Solberg's own expert has conceded that the Ordinance properly describes the delineation of the Runway Subzones, Runway End Zones, and Clear Zones for the runways addressed in the Ordinance. (Derman Opp. Cert., Exhibit 26, Ritter Report at 5; see also Derman Opp. Cert., Exhibit 8, Ritter Dep. 39:23-41:8). To the extent Solberg has attempted to "revive" runway 10-28 in recent years, this should be seen as what it is – an obvious litigation tactic. Thus, there is no dispute that for the runways that actually exist (or at least the runways that existed in 2007), the safety zones are properly delineated in the Ordinance.

For those reasons, Readington argues that its decision to permit airport use in in the 102 acres where airport operations currently occur, and have previously occurred, is entirely consistent with the ASZA and the ASZA Regulations. Again, the applicable regulation, N.J.A.C. 16:62-2.1(e), provides that the areas where airport use cannot be "non-conforming" is limited to "airports" which, as set forth above, have an ASZA-specific definition limited to the location of take-offs and landings of fixed wing aircraft. N.J.A.C. 16:62-2.1(e).

### (iii) Court's Decision

The Court finds that the baseline findings of Judge Armstrong and the overwhelming evidence before the Court requires that the Court find in favor of Solberg's position in this Motion.

Consistent with the ASZA's purpose of empowering NJDOT to control airport safety, the ASZA regulations mandate that "Municipalities of this State are required to implement and maintain land use ordinances in accordance with the provisions of this chapter." N.J.A.C. 16:62-1.2(d).

As part of NJDOT's legislative mandate to control the safety of airports under the ASZA through land use zoning, the NJDOT addressed zoning in and around airports. Among those NJDOT land use regulations, some of which address restraints on municipalities' designation of prohibited uses and permitted uses, the NJDOT included a directive that municipalities take action to make airport use a "permitted use" under their local laws. N.J.A.C. 16:62-2.1(e). That regulatory provision is crystal clear:

Municipalities which contain within their boundaries airports regulated by the provisions of this chapter, may not hereafter classify those airports as non-conforming land uses within the context of their ordinances or master plans of development. Those municipalities which may currently classify an airport as non-conforming land use within the context of their ordinances or master plans of development, *shall amend those ordinances or plans to eliminate that nonconforming status.*

*Id.*

It is not contradicted that Readington has been subject to this provision for more than twenty years.

While Readington posits that its Legislative action was simply an attempt to comply with ASZA and the regulations promulgated thereto, it is clear that the purpose of their Ordinance was simply not as laudatory. The Subject Ordinance expressly notes at several places that it is "based upon, and presumes" an airport defined by the condemnation map prepared by Studer & McEldowney, the municipal mapper engaged by Readington to draw "Parcel 4", which became the 102-acre plot. It is also clear that inasmuch as the condemnation has been invalidated, fee title and the remaining acreage, some of which housed other airport uses were re-vested in Solberg Aviation by the Opinion and Order.

It is not disputed that Solberg Airport is licensed by the NJDOT as 700+ acres under the category of "fixed wing aeronautical facility" as "Airport - Public Use". [See Plaintiff's Exhs. G, H]. In fact, it has been licensed by the NJDOT as such an airport comprised of in excess of 700+ acres for decades. [Plaintiff's Exh. G]. The NJDOT also recognized it as such when it contracted to acquire the airport in 2002, executing an Agreement which recited that "the Solberg Hunterdon Airport is comprised of several parcels of real property, which total approximately 745 acres located in Readington Township and Hunterdon County," and further confirmed that "the Airport is and has been a vital aeronautical facility and a significant component in the New Jersey State Airport System Plan and the National Plan for Integrated Airport Systems for more than 60 years." [Plaintiff's Exh. L]. And in its press release announcing the Agreement, NJDOT reaffirmed that Solberg airport "is a 745 acre facility." [Plaintiff's Exh. XX].

It is also uncontradicted that not only by virtue of official designation, but by virtue of practical operational terms that have existed for many years, Solberg Airport is not limited to 102 acres. The effect of the Ordinance was to legislate Readington's long-term avowed purpose to restrict, constrict and to "choke" the operational airport with a confined space – which as it turns out is the 102 acre parcel that would have remained in Solberg's possession had not Judge Armstrong overturned Readington's proposed taking of the vast majority of the Solberg property.

By so doing, Solberg has been placed in a situation where many of its operations and aviation related activities fall outside of the 102 acres and would presumably be considered non-conforming uses. Such a circumstance is contrary to NJDOT regulations.

The Court notes that one of the Solberg aviation operations that exists outside of the 102 acres includes the entire turf runway designated 10-28. At oral argument, the Court acknowledged that the status of runway 10-28 is the subject of confused or disputed facts. The Court's finding as it relates to the invalidity of the Ordinance is not reliant upon factfinding regarding the past or present status of the runway.<sup>18</sup> Notably, parts of Runway 4-22, the hot air balloon takes off, blimp moorings and a navigational and (VORTAC) are all outside the area that would be permitted airport uses. Those circumstances, as well, cause the Court to invalidate the Ordinance.

The Court notes that by invalidating the Ordinance as currently written, this Court does not purport to rewrite Readington's Ordinance in a manner that the Court believes would be ASZA compliant. Now that Readington's Ordinance has been invalidated by this Court, that task is again placed with the Township.

For instance, Readington's Brief attempts to re-frame Solberg's position by indicating that Solberg claims that ASZA requires the Township to identify airport use as a permitted use throughout the entirety of Solberg's property. In fact, the Court does not read Solberg's position to espouse such a blanket claim that ASZA requires such a bold, broad brush result. Solberg acknowledged at oral argument that its 700 acres of "what is available" for development but that any airport related development would be subject to the approval of the Division of Aeronautics.<sup>19</sup> Certainly there are circumstances in which all of the holdings of an airport owners may not be considered as necessarily or even practically part of the Airport Use. Certainly, with regards to that issue, there are endless possibilities for airport configuration. However, it appears that

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<sup>18</sup> Which has been described in this opinion.

<sup>19</sup> By invalidating Readington's Ordinance as it is currently written, the Court has not ruled on the issue of whether the ASZA compliant ordinance can be crafted to include less than Solberg's entire holdings. That issue is simply not before the Court.

Plaintiff's argument is not so broad. Solberg does not argue that in every case that an Airport Use Ordinance must encompass the entirety of the airport owner's holdings. Nor is this Court even required to reach the issue that Readington has framed.

In this case, Judge Armstrong has previously made findings concerning Readington's proposed taking of all but 102 acres that serve as a baseline for this Court's decision:

is also at cross purposes with the important government and public purposes discussed. The evidence demonstrates that both the State of New Jersey and the United States incorporate the potential expansion of the airport as necessary to the aviation infrastructure of the region. To limit such through condemnation of the lands within the airport safety zone would be "contrary to express State purposes" and therefore be in conflict with higher authority. *Id.* at 320. (Emphasis provided)

In indicating the taking by Readington of even those parcels that were "outside of the immediate airport zone" that was created by the Readington Township Ordinance, Judge Armstrong found that:

The evidence presented by both parties shows that there is continued uncertainty about whether any particular block and lot falls outside the airport's zone of operations. Such specific determinations are contingent upon the final layout of the airport and the implementation of one of the proposed plans. As the Township has not established that any specific block and lot would fall outside this zone in the proposed alternative runway development plans, the Court must find that there is a conflict with the government's interest in keeping the airport viable.

In effect, Judge Armstrong found that the creation of the 102-acre zone which permitted Airport Uses was (1) simply part of the unsupportable eminent domain action; (2) was contrary to the letter and spirit of ASZA; and (3) was for various reasons an arbitrary, capricious and unreasonable action. These findings are contained within Judge Armstrong's opinion in the related eminent domain matter. His ruling was memorialized in an Order of "this Court" in this matter.<sup>20</sup> Those findings are binding upon Readington and this Court.

For those reasons the Court will invalidate Readington's Zoning Ordinance in issue as being violative of ASZA.

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<sup>20</sup> The findings are memorialized in an order signed by Judge Ciccone on behalf of Judge Armstrong who retired shortly after his opinion was filed.

(2) **Is the Subject Ordinance An Extension And Continuation Of Readington's Pretextual Efforts To Preclude Airport Expansion And Therefore Not For A Proper Purpose?**

a. Introduction

Solberg argues that the subject Ordinance must also fail inasmuch as it is but a further attempt to improperly support and shield Readington's concerted and illegal effort to prevent the expansion of Solberg Airport, commenced with the condemnation. Solberg contends that the Ordinance is tainted by the "same constellation of operative facts as doomed the condemnation, which has already been set aside, as thus it must fail as well."

b. Is the Designation of the Historic Airport Sub-Area Arbitrary and Capricious as a Matter of Law?

Any ordinance passed by a municipality must serve a "valid purpose," and if it fails to do so, the ordinance must be stricken because it is "arbitrary, capricious or unreasonable." *Riggs v. Long Beach Twp.*, 109 N.J. 601, 611 (1988). Thus, if an ordinance does not serve the stated purpose for which it was enacted, or was enacted for an improper purpose other than that stated in the ordinance, then it must be stricken. *See Twp. of Readington*, 409 N.J. Super. at 312-20. Here, Solberg contends that the Subject Ordinance -- even though clothed in the garb of "Air Safety Act" legislation -- does not achieve the purposes for which it was enacted but rather serves to, and was plainly designed to advance the limitation of the airport to the 102 acres created by the Declaration of Taking, and nothing more. Thus, Solberg urges that any claim by Readington that the Ordinance has a legitimate purpose, is compromised by indisputable evidence demonstrating the true and improper purpose for passing the Ordinance: usurpation of Solberg's right, subject primarily to NJDOT regulation, to control the airport.

When a party asserts that an ordinance was adopted for an improper purpose, *i.e.*, an improper "goal," the Court should seek to ascertain the municipality's true purpose in enacting the ordinance. *Riggs*, 109 N.J. at 613. This determination is based "on objective factors, such as the terms of the ordinance and its operation and effect, as well as the context in which the ordinance was adopted." *Id.* In other words, the court should evaluate "the objective facts surrounding the adoption of the ordinance." *Id.* at 614. Context is particularly important, and the court must examine the history between the municipality and the property/property owners. *Id.*; *see also*, *Twp. of Readington*, 409 N.J. Super. at 314-17. In *Riggs*, the court noted that the township had a long-



standing interest in taking the property by condemnation, and through public referenda, as well as condemnation, had continuously sought to acquire the property for the lowest possible price. *Riggs*, 109 N.J. at 614-15.

In support of its position, Solberg contends that the objective evidence indisputably demonstrates that the Sub-Area was designed to secure Readington's control over the airport. Solberg avers that the goal here, just as it was when the Township passed the eminent domain ordinance and filed the Declaration of Taking was to control the future growth and expansion of the airport even to the point where certain existing airport uses and facilities were excluded from the small portion of the entire site that permitted airport-related uses. Solberg offers that this ulterior purpose compromises any assertions by Readington that the Subject Ordinance serves a legitimate purpose. *Township of Readington*, 409 N.J. Super. at 316.

In determining whether a zoning ordinance serves the stated purpose for which it was enacted, the court reviews the relationship between the means and ends of the ordinance. *Pheasant Bridge Corp. v. Twp. of Warren*, 69 N.J. 282, 290 (2001). In context of challenging an ordinance:

the means selected must have a real and substantial relation to the object sought to be attained, and the regulation or proscription must be reasonably calculated to meet the evil and no exceed the public need or substantially affect uses which do not partake of the offensive character of those which cause the problem to be ameliorated.

*Id.* The zoning must be reasonably designed to resolve the problem without imposing “unnecessary and excessive restrictions on the use of private property.” *Berger v. State*, 71 N.J. 206, 223-24 (1976); *Pheasant Bridge Corp.*, 169 N.J. at 289-90.

The Court finds, as a matter of law, that based upon Judge Armstrong's findings and the record before it, that the Subject Ordinance's restraint of Solberg Airport to the “Historic Sub-Area”, along with its detailed restrictions on development even within that Sub-Area, serves only Readington's improper purposes, and not the generic reasons espoused by Readington. The determination of whether Ordinance 18-2007 included the Sub-Area and other provisions for the “improper purpose of thwarting the NJDOT and aggrandizing Readington's control over the airport to the detriment of the State and Federal governments” is mandated by Judge Armstrong's findings that are binding on this Court. Such a finding is also supported by the overwhelming evidence presented to the Court. Certainly a significant part of this Court's finding is based upon the “pre-textual purposes” that Judge Armstrong found Readington had in enacting the Ordinance. *Riggs*, 109 N.J. at 613. The extensive testimony and documentary evidence adduced at the condemnation trial the findings and conclusions drawn by Judge Armstrong from that evidence,

as well as other evidence presented by Solberg in this motion. Those circumstances present such overwhelming evidence that to require the matter to be “tried” would be futile for the Township and a wasteful use of already diminished judicial resources.

e. Readington’s Claims About Certain Other Specific Restrictions

Readington argues that one of Solberg’s chief complaints is about certain restrictions imposed on newly permitted uses (e.g. the number of restaurant seats permitted, the number of car rental slots permitted, and the amount of hanger space allowed). However, Readington argues that the limitations placed upon the size and scope of structures on land owned by Solberg are nothing more than ordinary zoning limitations which are explicitly permitted by the ASZA and the MLUL. In fact, Readington points out that the Ordinance is more permissive in the sense that such uses were generally not permitted under the zoning in existence prior to the adoption of the Ordinance.

Solberg does not address the argument in its brief however. Since the issue has not been raised or addressed by Solberg in this Motion, the Court need not make any ruling upon the issue.

F. READINGTON’S ARGUMENTS REGARDING THE EFFECT OF THE FARMLAND ASSESSMENT OF THE PROPERTY

Readington argues that Solberg owns approximately 725 acres that are either part of Solberg Airport, or adjacent to it. (Aslanian Cert., Exhibit C, Complaint, ¶ 13; Derman Opp. Cert., Exhibit 9, T. Solberg Dep. at 11:18-24). Solberg Airport has been operating since 1939, and its size has remained unchanged for several decades. (Derman Opp. Cert., Exhibit 13, Solberg Airport Master Plan at § 1-1; Exhibit 14, October 2002 Draft Environmental Assessment (“Draft EA”) at § 2; Exhibit 5, 2007 State Inspection Report, Exhibit 15, 2016 FAA Airport Master Record). As set forth in Solberg’s Complaint in this action, of the 725 acres owned by Solberg, *only 102 are actually “used for active airport operations.”* (Aslanian Cert. at Exhibit C, Complaint, ¶ 13; Exhibit 5, 2007 State Aviation Inspection Report; Exhibit 6, A’Hara Dep. at 86:14-87:13; Exhibit 7, Habitat Evaluation and Impact Assessment dated March 11, 2010 (submitted by Solberg to Readington and identifying 102 acres as the location of airport operations); Exhibit 8, Ritter Dep. 79:12 - 82: 12; Exhibit 9, T. Solberg Dep. at 40:13-41:13 (acknowledging that both runways in operation in 2007 were within the 102 acre airport area) and 48:3-8 (runways 04/22 and 3/31 are within that 102 area); Exhibit 10, Golaszewski Report at 2-3; Exhibit 11, 2006 and 2007 Farmland Assessment Application (statements under oath that no commercial activity takes place on most of the 725 acres held by Solberg); see also Derman Opp. Cert., Exhibit 12, Letter dated March 28, 2001 from S. Nagle to the Hon. C. Louis Bassano (noting that only 10 percent of the over 700

acres owned by Solberg is used as an airport)).<sup>21</sup> Readington asserts that at the time the Ordinance was adopted, Solberg Airport had two runways, Runway 04-22 and Runway 13-31, which are 3,735 and 3,440 feet long, respectively, and both of which are located within the 102 acre area. (See Derman Opp. Cert., Exhibit 5, 2007 Inspection State Report). Those runways remain in place today. (Derman Opp. Cert., Exhibit 15, 2016 FAA Airport Master Record).

In furtherance of its position, Readington argues that contrary to the implication Solberg tries to create in its moving papers, Solberg is far from being able to expand its airport and none of its efforts have come close to reaching final approval or obtaining critical funding. In fact, all Solberg has is an 18 year old “conditional” approval of its “Airport Master Plan,” which even Solberg’s own aviation expert concedes is no longer operative. The process to expand or alter an airport requires approval of both the federal government and the New Jersey Department of Transportation, and Solberg has never obtained such approvals. (See, e.g., N.J.A.C. 16:54-1.1 et seq.). Although Solberg did obtain conditional approval for a proposed Airport Master Plan, none of the conditions to that approval – which included an “environmental assessment” – have been met. (Derman Opp. Cert., Exhibit 6, A’Hara Dep. at 29:15-22, 52:21-54:5; Exhibit 13, Solberg 1998 Airport Master Plan; Exhibit 17, New Jersey Department of Transportation Letter dated March 25, 1999 at 9; Exhibit 18, FAA Letter dated October 22, 1998 at 5).

Readington states that notably, although the environment assessment process was not completed, not one of the options proposed by the most recent draft environmental assessment report – referred to by the parties as the “October 2002 Draft EA” – contemplated any expansion of airport operations beyond the 102 acres currently used for airport operations. (Derman Opp. Cert., Exhibit 14, October 2002 Draft EA at 2-8). In fact, Readington asserts that the most recent “draft,” dated October 2002, rejected any plan to expand any runway at Solberg Airport and envisioned a continuation of the current location of all airport operations. (Derman Opp. Cert., Exhibit 14, 2002 Draft EA at 2-8). In the State’s October 2002 Draft Environmental Assessment, the State of New Jersey stated “the Master Plan recommendations are not being considered for implementation. Rather, a substantially scaled-back option was developed for analysis in this EA

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<sup>21</sup> The vast majority of the Solberg land is farmland assessed, and undeveloped. (See Derman Opp. Cert., Exhibit 16, Sullivan Report at 17 (Map Depicting “Existing Land Use”)). Indeed, Solberg applies for farmland assessments each year, and states under penalty of perjury that no commercial activity takes place on the land that is farmland assessed. (See Derman Opp. Cert., Exhibit 9, T. Solberg Dep. at 57:16-59:14 (all but the 60 acres of the total Solberg land is farmland assessed); Exhibit 11, Farmland Assessment Applications for 2006 and 2007). Approximately 690 acres is, and has been, farmland assessed for many years as a result of these sworn applications. (Id.)

Study.” (*Id.*) In other words, the last word from the State of New Jersey on Solberg’s request to expand the runways at Solberg Airport, was a rejection of the request. (Derman Opp. Cert., Exhibit 6, A’Hara Dep. at 53:23-54:5; Exhibit 14, 2002 Draft EA at 2-8 and § 3; see also Exhibit 19, Commissioner Letter Dated October 29, 2002). ***And this last word came fully five (5) years before the Ordinance at issue was adopted.***

Further, Readington contends that Solberg’s own aviation expert, who drafted not only Solberg’s Airport Master Plan but also Master Plans for several other general aviation airports in New Jersey, admitted that the 1998 conditional approval is out of date and no longer effective, and that if Solberg wanted to expand Solberg Airport, it would have to start the process from the beginning. (Derman Opp. Cert., Exhibit 6, A’Hara Dep. at 55:9-56:10; Exhibit 13, Solberg 1998 Airport Master Plan). In fact, Mr. A’Hara admitted during his deposition that all of the economic models and predictions upon which the Airport Master Plan was premised did not come to fruition, and that there is no current study or forecast showing a need to expand Solberg Airport. (Derman Opp. Cert., Exhibit 6, A’Hara Dep. at 56:22-67:21). Thus, according to Readington, the suggestion by Solberg that it has all of the necessary approvals to expand Solberg Airport – or that this Ordinance stands in the way of inevitable expansion – is far from reality, and is not in any way relevant to the validity of the Ordinance adopted in 2007. The facts and circumstances offered by Readington apparently are offered to demonstrate that Solberg’s use of the remaining acreage as farmland that qualifies for farmland assessment constitutes its real use as opposed to the more unrealistic and unperfected “wish list” proposal for uses that are contained within longstanding and unfulfilled master plans.

The issue before the Court in this Motion, however, is not as heavily dependent upon Readington’s factual offerings. Does the fact that Solberg has applied for and received farmland assessment for much of its property holdings in some way preclude it from asserting that the Readington Township Zoning Ordinance that limits its airport use to the 102 acre portion of the property is arbitrary, capricious and unreasonable and/or is otherwise violative of the law for the reasons that Solberg has espoused in this case?

Notably, applications for Farmland Assessment, and the statutes and case law interpreting farmland assessment, do not require sole and exclusive agricultural use of the property. *E.g. Green Pond Corp. v. Rockaway Twp.*, 2 N.J. Tax 273, 289, 289 n.4 (N.J. Tax 1981) (observing that the exclusivity test was rejected in *City of E. Orange v. Livingston Twp.*, 102 N.J. Super. 512 (Law Div. 1968) (Handler, J.S.C.), *aff’d o.b.*, 54 N.J. 96 (1969) (certifying and affirming before

argument in the Appellate Division). The farmland assessment does not create an inconsistency between the use of portions of Solberg Airport for crop harvesting and adjacent woodland while also accommodating airport operations.

Additionally, the Solberg Certification that was attached to the Plaintiff's Motion supports the proposition that the property is being properly and legally used for something other than farming. Readington's position that no commercial use of the property could take place at any time is simply without authority and is not a basis for Readington's Summary Judgment in this matter. That portion of Readington's Motion for Summary Judgment is DENIED.

### **CONCLUSION**

For the reasons expressed in this opinion, the Court will GRANT Plaintiff Solberg's Motion for Summary Judgment. The Court will DENY Readington Township's Cross Motion for Summary Judgment.